BRB No. 10-0238 BLA

DRAXIE KENNEDY (Widow of JOHN W. KENNEDY)	)	
Claimant-Respondent	)	
v.	)	
PITTSON COMPANY c/o WELLS FARGO DISABILITY MANAGEMENT	)	DATE ISSUED: 12/11/2010
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Paul L. Edenfield (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (2007-BLA-06065) of Administrative Law Judge Daniel F. Solomon, with respect to a survivor's claim filed on December 27, 2006, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)

(to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] The administrative law judge credited the miner with at least twenty-six years of coal mine employment, based on the stipulation of the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that claimant established that the miner had clinical and legal pneumoconiosis arising from his coal mine employment at 20 C.F.R. §§718.202(a)(2), (4), 718.203(b), and that pneumoconiosis was a substantially contributing cause of the miner's death at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing that the administrative law judge erred in finding that claimant established that the miner had legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Claimant and the Director, Office of Workers' Compensation Programs (the Director), have not filed briefs in response to employer's appeal of the award of benefits.[2]

The Director and employer have submitted briefs addressing the impact on this case of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.[3] The Director states that Section 1556 will not affect this case if the Board affirms the administrative law judge's award of benefits. However, the Director further asserts that, if the Board does not affirm the administrative law judge's findings, remand for consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4), and for the possible submission of additional evidence, would be required, as

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[1] Claimant is the widow of a miner, John W. Kennedy, who died on September 6, 2006. Director's Exhibit 10.

[2] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Relevant to this survivor's claim, Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4)), reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under Section 411(c)(4), if a claimant establishes that the miner had at least fifteen years of qualifying coal mine employment, and that the miner had a totally disabling respiratory impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. Section 422(*l*) of the Act, as amended, which permits a qualified survivor of a miner who filed a successful claim for benefits to be automatically entitled to survivor's benefits, without the burden of reestablishing entitlement, is not applicable in the current claim as there is no evidence that the miner was previously awarded benefits.

the present claim was filed after January 1, 2005 and the administrative law judge credited the miner with more than fifteen years of coal mine employment.[4] Employer indicates that the recent amendments may affect this case, based on the filing date of the claim and claimant's coal mine employment history. Therefore, employer indicates that due process requires the case to be remanded for the development of evidence addressing the new standards created. Additionally, employer argues that retroactive application of the amendments is unconstitutional because it denies the operator due process and constitutes an unconstitutional taking of private property. In the alternative, employer moves that the Board hold the case in abeyance pending promulgation of regulations implementing the amendments or until resolution of the legal challenges to the Act.

To determine whether this case must be remanded for consideration of the rebuttable presumption of total disability due to pneumoconiosis, we will first address employer's allegations of error regarding the administrative law judge's findings at 20 C.F.R. §§718.202(a) and 718.205(c).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or if claimant establishes invocation of the irrebuttable presumption of death due to pneumoconiosis. 20 C.F.R. §§718.205(c)(2), (4), 718.304.

[4] The Director, Office of Workers' Compensation Programs, notes that it is unclear from the administrative law judge's finding how many of the miner's twenty-six years were spent in underground mines or to what extent any surface mining exposed the miner to conditions substantially similar to those of underground mining.

[5] The record reflects that the miner's coal mine employment was in Virginia. Director's Exhibit 3; Hearing Transcript at 17. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

I. <u>20 C.F.R. §718.202(a)</u>

A. The Administrative Law Judge's Findings

The administrative law judge initially noted that the autopsy evidence, and the reports based upon a review of this evidence, contained diagnoses consistent with a finding of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 4. The administrative law judge then summarized the medical opinion evidence relevant to 20 C.F.R. §718.202(a)(4) and stated that all of the physicians found at least simple clinical pneumoconiosis. *Id*. Regarding the presence of legal pneumoconiosis, the administrative law judge indicated that Dr. Thakkar attributed the miner's chronic obstructive pulmonary disease (COPD) to coal workers' pneumoconiosis and Dr. Perper found that the miner's emphysema was due to a combination of his smoking and mining histories. *Id*. at 4. The administrative law judge stated that Dr. Perper cited "reliable scientific literature" to substantiate his determination that centrilobular emphysema can also be a direct result of coal dust exposure and coal workers' pneumoconiosis. *Id*. at 4-5. In addition, the administrative law judge noted that, while Dr. Rosenberg, a Board-certified pulmonologist, determined that the miner had a degree of focal emphysema, likely related to coal dust exposure, Dr. Castle, also a Board-certified pulmonologist, did not make a similar finding. *Id*. at 5.

The administrative law judge then indicated that he was required to weigh all of the evidence relevant to the existence of pneumoconiosis together, in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Decision and Order at 5. The administrative law judge determined that "the autopsy evidence as to clinical pneumoconiosis is dispositive," as all of the physicians agreed that simple pneumoconiosis was present, and autopsy evidence is the most reliable evidence of pneumoconiosis. *Id*. However, the administrative law judge did not "accept" that claimant established complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *Id*.

The administrative law judge set forth the definition of legal pneumoconiosis and indicated that every physician had agreed that the miner had totally disabling COPD and recorded lengthy mining and smoking histories. Decision and Order at 5. The administrative law judge stated that he did not give "elevated weight" to Dr. Thakkar's

opinion, based upon his status as a treating physician, but noted that his treatment records support a diagnosis of COPD. *Id.* at 5-6. The administrative law judge determined that Dr. Perper's opinion, that the miner had legal pneumoconiosis, was entitled to greater weight, "because it is more consistent with the regulations and because I accept that the pathology evidence is positive." *Id.* at 6. In addition, the administrative law judge found that Dr. Perper considered the miner's twenty-six year coal mine employment history, while Dr. Castle did not. *Id.* The administrative law judge noted that Dr. Rosenberg diagnosed clinical and legal pneumoconiosis. *Id.*

The administrative law judge concluded that claimant established that the miner's "obstruction arose out of coal mine employment through Dr. Perper's well[-]reasoned opinion as to emphysema." Decision and Order at 6. The administrative law judge stated that, given the objective testing, the miner's twenty-six years of coal mine employment and at least a fifteen year smoking history, and the reliance on scientific journal articles, Dr. Perper's rationale "is better reasoned and is more consistent with the regulations." *Id.*

B. Arguments on Appeal

Employer asserts that the administrative law judge did not adequately explain his crediting of Dr. Perper's opinion, that the miner's emphysema was caused by smoking and coal dust exposure. Therefore, employer maintains that, in giving great weight to Dr. Perper's opinion, the administrative law judge erred in applying a presumption that all individuals with COPD and coal dust exposure have legal pneumoconiosis.[6]

In according greater weight to Dr. Perper's opinion, the administrative law judge indicated that Dr. Perper's diagnosis of legal pneumoconiosis is supported by the positive pathology evidence and is more consistent with the regulations. Decision and Order at 6. The administrative law judge did not provide, however, any explanation of how the pathology evidence supported Dr. Perper's opinion or how Dr. Perper's opinion is more consistent with the regulations than the opinions of the other physicians of record. Thus, this portion of the administrative law judge's Decision and Order does not satisfy the Administrative Procedure Act (APA), which requires that every adjudicatory decision be

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[6] Employer also notes that, in referring to Dr. Repsher's opinion, when rendering his findings under 20 C.F.R. §718.202(a), the administrative law judge either made a typographical error or reviewed inadmissible evidence, as Dr. Repsher did not submit a report concerning this claim. *See* Decision and Order at 5. Because there is no indication elsewhere in the Decision and Order that the administrative law judge considered an opinion by Dr. Repsher in making his findings, this isolated reference constitutes harmless error. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §432(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Mays*, 176 F.3d at 762 n.10, 21 BLR at 2-603 n.10; *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803, 21 BLR 2-302, 2-311 (4th Cir. 1998); *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989).

We vacate the administrative law judge's determination that Dr. Perper's opinion is sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), therefore, and remand the case to the administrative law judge for reconsideration of the medical opinion evidence on this issue. In rendering his findings at 20 C.F.R. §718.202(a)(4), the administrative law judge must clearly set forth his rationale for crediting or discrediting the medical opinion evidence, in compliance with the APA.[7] *Consolidation Coal Co. v. Held*, 314 F.3d 184, 187 n.2, 22 BLR 2-564, 2-571 n.2 (4th Cir. 2002)(Gregory, J., dissenting); *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 625, 21 BLR 2-654, 2-661 (4th Cir. 1999); *Wojtowicz*, 12 BLR at 1-165.

II. 20 C.F.R. §718.205(c)

Because we have vacated the administrative law judge's weighing of Dr. Perper's opinion under 20 C.F.R. §718.202(a)(4), we must also vacate his finding that Dr. Perper's opinion was sufficient to establish that the miner's death due was due to pneumoconiosis at 20 C.F.R. §718.205(c). To promote judicial efficiency, however, we will address employer's specific allegations of error regarding the administrative law judge's consideration of the evidence relevant to death causation at 20 C.F.R. §718.205(c).

A. The Administrative Law Judge's Findings

In determining whether claimant established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), the administrative law considered the death certificate, hospital and treatment records, the autopsy reports of Drs. Oesterling and Bush, and the medical opinion of Dr. Perper. The administrative law judge initially

[7] If the administrative law judge finds, on remand, that Dr. Perper's diagnosis of legal pneumoconiosis is supported by the pathology evidence, he must address the validity of employer's argument, that the credibility of Dr. Perper's interpretation of the autopsy slides is diminished by his diagnosis of complicated pneumoconiosis, which is contrary to the administrative law judge's finding that claimant did not prove that the large nodules observed by Dr. Perper would appear as larger than one centimeter in size on an x-ray. *See* Decision and Order at 5.

determined that the death certificate, completed by Dr. Thakkar, could not independently establish entitlement at 20 C.F.R. §718.205(c).[8] Decision and Order at 10.

With respect to the autopsy reports and medical opinions, the administrative law judge stated, "I accept that there may be more than one cause of death and although [the miner] had a 'sudden death' and had a cardiac condition that led to his demise, I also accept that pneumoconiosis played a role in this scenario." Decision and Order at 11. The administrative law judge did not credit the opinions of Drs. Oesterling and Bush, that the miner's pneumoconiosis was too mild to have contributed to his death, because they minimized the miner's worsening pulmonary condition in the last years of his life. *Id.* The administrative law judge noted that, while he did not find that the miner had complicated pneumoconiosis, he "accept[ed] that Dr. Oesterling did not consider 'the importance of a pneumoconiotic multi-nodular coalescing mass which he himself notes to be 1 cm x 0.4cm, under the pretext that it is built [of] several micronodules and measures only 0.4 cm in width.'" *Id.* at 11 n.5, *quoting* Claimant's Exhibit 1. In addition, the administrative law judge indicated that Drs. Oesterling and Bush did not consider the possibility of a secondary cause of death and did not address the miner's twenty-six year coal mine employment history as a possible contributing factor to his respiratory impairment. *Id.* at 11. Further, the administrative law judge discredited Dr. Bush's opinion because he concluded that the miner had a mild degree of pneumoconiosis, contrary to the administrative law judge's finding that there was at least a moderate amount of coal dust deposited in the miner's lungs.

Regarding Dr. Perper's opinion, the administrative law judge stated that he could not rely on Dr. Perper's diagnosis of complicated pneumoconiosis, or "his opinion as to a direct cause under 20 [C.F.R.] §718.205(c)(1)," because there was insufficient evidence to establish that the miner's death was due to pneumoconiosis. Decision and Order at 10. However, the administrative law judge credited Dr. Perper's opinion, that the miner's COPD, due to coal dust exposure, aggravated, or triggered, a lethal arrhythmia, based on the miner's chronic heart disease. *Id.* The administrative law judge stated that:

> In *Richardson v. Director, OWCP*, 94 F.3d 164[, 23 BLR 2-373] (4th Cir. 1996), the Fourth Circuit held that, in a survivor's claim under Part 718, the claimant must demonstrate that the pneumoconiosis "hastened" the miner's death "in any way." I accept that pneumoconiosis was a contributing cause

[8] Dr. Thakkar noted on the death certificate that the miner died a sudden cardiac death caused by chronic systolic congestive heart failure and arteriosclerotic heart disease. Director's Exhibit 10. He further identified coal workers' pneumoconiosis, diabetes and diabetic nephropathy as other significant conditions contributing to the miner's death. *Id.*

> of death. 20 C.F.R. §718.205(c)(5) (2008). I find that this scenario supports Dr. Perper's opinion. I find that this scenario considers the effects from [twenty-six] years of exposure and a smoking history and a history of hospitalizations for respiratory complaints as a background for the cardiac problems. I find that the [e]mployer's physicians are overly concerned with the[m]iner's final demise rather than the impairments and medical complications that led to his demise. [*See*] 65 Fed. Reg. 79,920, 79,950 (Dec. 20, 2000).

Id. at 11-12, *quoting Richardson*, 94 F.3d at 170, 23 BLR at 2-375. Therefore, the administrative law judge concluded that claimant had established that pneumoconiosis "was a contributing cause of death."[9] *Id*. at 12, *citing* 20 C.F.R. §718.205(c)(5).

B. Arguments on Appeal

Employer asserts that the administrative law judge erred in failing to address the medical opinions of Drs. Castle and Rosenberg regarding death causation. In addition, employer argues that the administrative law judge erred by crediting Dr. Perper's opinion and by engaging in a selective analysis of the evidence. Specifically, employer contends that the administrative law judge should have applied the holding of the United States Court of Appeals for the Sixth Circuit in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), in which the court stated that pneumoconiosis must hasten the miner's death through a specifically defined process and reduce the miner's life by an estimable time period. *Id.*, 338 F.3d at 518, 22 BLR at 655. Employer states that, as Dr. Perper's report does not satisfy the Sixth Circuit standard, his opinion was insufficient to establish that pneumoconiosis hastened the miner's death. In addition, employer argues that the administrative law judge did not explain how Dr. Perper's mistaken diagnosis of complicated pneumoconiosis affected the weight given to his opinion regarding death causation. Further, employer asserts that the administrative law judge selectively analyzed the medical evidence when he discredited Dr. Bush's opinion, because he found that Dr. Bush underestimated the extent of the miner's pneumoconiosis.

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[9] Pursuant to 20 C.F.R. §718.205(c)(2), pneumoconiosis is considered to have caused a miner's death if "pneumoconiosis was a substantially contributing cause or factor leading to the miner's death." 20 C.F.R. §§718.205(c)(2). Under 20 C.F.R. §718.205(c)(5), "pneumoconiosis is a 'substantially contributing cause' of the miner's death if it hastens the miner's death." 20 C.F.R. §718.205(c)(5), *quoting* 20 C.F.R. §718.205(c)(2); *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Shuff v. Cedar Coal Co*., 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

C. Analysis

As an initial matter, we reject employer's assertion that the administrative law judge should have applied the Sixth Circuit's standard in determining whether pneumoconiosis hastened the miner's death, because this case arises within the jurisdiction of the Fourth Circuit. Unlike the Sixth Circuit, which has adopted a standard that explicitly identifies the conditions under which pneumoconiosis can be held to have hastened death, i.e., through a specifically defined process that reduces the miner's life by an estimable period of time, *Williams*, 338 F.3d at 518, 22 BLR at 2-655, the Fourth Circuit, has not adopted this standard. Rather, the Fourth Circuit has indicated that a condition that actually hastens the miner's death in any way is a substantially contributing cause of death for purposes of 20 C.F.R. §718.205. *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Richardson*, 94 F.3d at 170, 23 BLR at 2-375; *Shuff*, 967 F.2d at 979-80, 16 BLR at 2-92-93. Accordingly, the administrative law judge did not err in applying the hastening death standard adopted by the Fourth Circuit when considering the issue of death causation in this case.

We further hold, however, that employer's remaining allegations of error have merit. Although the administrative law judge summarized the opinions of Drs. Castle and Rosenberg, that pneumoconiosis did not play a role in the miner's death, the administrative law judge did not render a finding as to the weight, if any, he gave to these opinions. *See* Decision and Order at 10. Accordingly, because the administrative law judge did not weigh all relevant evidence as is required by the APA, we must vacate his determination that claimant met her burden of proof under 20 C.F.R. §718.205(c). *See Mays*, 176 F.3d at 762 n.10, 21 BLR at 2-603 n.10; *Lockhart*, 137 F.3d at 803, 21 BLR at 2-311; *Wojtowicz*, 12 BLR at 1-165.

In addition, employer is correct in asserting that the administrative law judge selectively analyzed the medical opinions of Drs. Perper, Bush and Oesterling. When weighing the opinions of Drs. Bush and Oesterling regarding the cause of the miner's death, the administrative law judge rationally determined that their view, that the miner's pneumoconiosis was too mild to have contributed to his death, detracted from the credibility of their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). When weighing Dr. Perper's opinion, however, the administrative law judge stated, "I can not rely" on Dr. Perper's erroneous diagnosis of complicated pneumoconiosis, but he did not consider whether this detracted from the credibility of Dr. Perper's opinion on the issue of death causation. Because the administrative law judge did not apply the type of scrutiny to Dr. Perper's opinion that he applied to the opinions of Drs. Bush and Oesterling, we must vacate his decision to credit Dr. Perper's opinion under 20 C.F.R. §718.205(c). *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(en

banc); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984).

If reached on remand, the administrative law judge must reconsider the evidence relevant to 20 C.F.R. §718.205(c) and ensure that his findings are consistent with his weighing of the evidence at 20 C.F.R. §718.202(a). In addition, the administrative law judge must be careful to distinguish between clinical and legal pneumoconiosis when assessing the credibility of the physicians' opinions regarding whether pneumoconiosis was a substantially contributing cause of the miner's death. The administrative law judge must clearly set forth all of his findings, including the underlying rationale, in compliance with the APA. *Held*, 314 F.3d at 187 n.2, 22 BLR at 2-571 n.2; *Fuller*, 180 F.3d at 625, 21 BLR at 2-661; *Wojtowicz*, 12 BLR at 1-165.

III. Applicability of the Amendments to the Act

In light of our decision to vacate the award of benefits and in view of the filing date of the survivor's claim, we direct the administrative law judge to initially determine, on remand, whether claimant is entitled to invocation of the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge should allow for the submission of evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lamar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1). If the administrative law judge finds that claimant has established invocation of the presumption at Section 411(c)(4), he should then consider whether employer has satisfied its burden to rebut the presumption.

Because the administrative law judge has not yet considered this claim under the amended version of Section 411(c)(4) of the Act, we decline to address, as premature, employer's argument that the retroactive application of that amendment to this claim is unconstitutional. We also decline to grant employer's request to hold this case in abeyance pending the resolution of a lawsuit filed in United States District Courts in Florida and Virginia, as employer does not indicate that any court has yet enjoined the application, or ruled on the validity, of the recent amendments to the Act. In addition, contrary to employer's suggestion, the mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing, and, therefore, there is no need to hold this case in abeyance, pending the promulgation of new regulations. *See*, *e.g.*, *Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 1141-42 (9th Cir. 2002); *Alabama Power Co. v. FERC*, 160 F.3d 7, 12-14 (D.C. Cir. 1998); *Gholston v. Housing Authority of Montgomery*, 818 F.2d 776, 784-87 (11th Cir. 1987).

Accordingly, the administrative law judge's Decision and Order Award of Benefits is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge