

BRB No. 10-0252 BLA

CHERI D. HATFIELD)	
(Widow of CECIL E. HATFIELD))	
)	
Claimant-Respondent)	
)	
v.)	
)	
EASTERN COAL CORPORATION)	DATE ISSUED: 12/17/2010
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Petitioner)	DECISION and ORDER

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

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Emily Goldberg-Kraft (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Denial of Benefits (2008-BLA-05384) of Administrative Law Judge Daniel F. Solomon rendered on a survivor's claim filed on October 31, 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 Adjudicating the claim under 20 C.F.R. Part 718, the administrative law judge found that the evidence supports the parties' stipulation to thirty-two years of coal mine employment. The administrative law judge further found that claimant did not establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, the Director contends that because claimant filed the present claim after January 1, 2005, and it was pending on March 23, 2010, the enactment date of the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) applies to this claim.² The Director maintains, therefore, that the denial of benefits must be vacated and the case remanded to the administrative law judge for consideration of whether claimant is entitled to the rebuttable presumption of death due to pneumoconiosis, set forth in the amended version of Section 411(c)(4). The Director further asserts that, because the presumption alters the required findings of fact and the allocation of the burden of proof, the administrative law judge must allow the parties the opportunity to submit additional, relevant evidence, in compliance with the evidentiary limitations at 20 C.F.R. §725.414.

Employer concedes that the new amendments may affect this case, but argues that, in light of the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c), the presumption of death due to pneumoconiosis has already been rebutted. Employer contends that, because it prevailed on the merits, retroactive application of the amendments would constitute a significant violation of its right to due process. Employer also argues that it will suffer substantial and irreparable prejudice, should the Board vacate and remand the case for consideration under the amended version of Section 411(c)(4). Employer requests that the Board affirm the administrative law judge's findings under 20 C.F.R. §718.205(c), as unchallenged on appeal, or transfer any potential liability to the Black Lung Disability Trust Fund. The Director reiterated his arguments in a letter dated June 23, 2010. Claimant has not responded.

¹ Cecil E. Hatfield, the miner, died on June 30, 2006. Director's Exhibits 2, 11. There is no indication in the record that the miner filed a claim for benefits on his own behalf.

² Relevant to this survivor's claim, the amended version of Section 411(c)(4) provides that, if a miner had at least fifteen years of qualifying coal mine employment, and the evidence establishes that the miner had a totally disabling respiratory impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *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 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.³ 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).

After considering the parties' arguments, we are persuaded that the Director is correct in maintaining that, based on the October 31, 2006, filing date of this claim, the recent amendment to the Act at Section 411(c)(4) applies in this case. The Section 411(c)(4) presumption requires, as employer concedes, a determination of whether the miner was totally disabled due to a pulmonary or respiratory impairment, an issue that was not relevant previously in a survivor's claim. We therefore remand this case to the administrative law judge for consideration of whether claimant has invoked the rebuttable presumption of death due to pneumoconiosis set forth in the amended version of Section 411(c)(4). In addition, if the administrative law judge determines that claimant has invoked the presumption, he must determine whether employer has established rebuttal.

On remand, the administrative law judge must allow for the submission of additional evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lemar*, 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). The submission of any additional evidence must be in compliance with the evidentiary limitations set forth in 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). Additionally, we hold that employer has not met its burden to establish that the retroactive application of the recent amendment to the Act at Section 411(c)(4) violates employer's right to due process. *See Mathews v. United Pocahontas Coal Co.*, BLR , BRB No. 09-0666 BLA (Sept. 22, 2010). We, therefore, deny employer's request to transfer liability to the Black Lung Disability Trust Fund, as premature.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

Accordingly, the administrative law judge's Decision and Order Denial of Benefits is vacated and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge