

BRB No. 10-0334 BLA

EDITH L. FREE)	
(Widow of WILLIAM E. FREE))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PITTSBURG & MIDWAY COAL MINING)	
COMPANY)	DATE ISSUED: 02/23/2011
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

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

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

John C. Morton and Keith A. Utley (Morton Law LLC), Henderson, 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:

Claimant¹ appeals the Decision and Order (08-BLA-5059) of Administrative Law Judge Daniel F. Solomon denying benefits on a claim filed 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). This case involves a survivor's claim filed on December 18, 2006. After crediting the miner at least thirty-eight years of coal mine employment,² the administrative law judge found that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge also found that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant further argues that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a substantive response brief regarding the merits of this case.

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

By Order dated April 26, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. In pertinent part, the amendments reinstated Section 411(c)(4) of the Act, 30

¹ Claimant is the surviving spouse of the deceased miner, who died on October 18, 2006. Director's Exhibit 13.

² The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

U.S.C. §921(c)(4), which provides, *inter alia*, a rebuttable presumption that a miner died due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

The Director contends that the new amendments are applicable in this case, as the survivor's claim was filed after January 1, 2005, and the miner was credited with at least thirty-eight years of coal mine employment. *See* 30 U.S.C. §921(c)(4). The Director, therefore, requests that this case be remanded to the administrative law judge to consider claimant's entitlement to the presumption, set forth in Section 411(c)(4), that the miner's death was due to pneumoconiosis. The Director further states 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, consistent with the evidentiary limitations at 20 C.F.R. §725.414. Claimant agrees with the Director that the amendments are applicable to this claim. Employer contends that the amendments should not affect this claim due to the absence of any evidence of a totally disabling respiratory or pulmonary impairment.

After review of the parties' responses, we are persuaded that the Director is correct in maintaining that the administrative law judge's findings, and the denial of benefits, must be vacated and the case remanded to the administrative law judge. The Section 411(c)(4) presumption requires a determination of whether the miner was totally disabled due to a pulmonary or respiratory impairment, an issue that was not relevant to this survivor's claim before the recent amendments. Thus, we vacate the administrative law judge's findings under 20 C.F.R. §§718.202(a), 718.203(b) and 718.205(c), and remand the case to the administrative law judge for further consideration.

On remand, the administrative law judge must consider whether claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).³ If the administrative law judge, on remand, finds that claimant is entitled to the presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether the medical evidence rebuts the presumption. If the administrative law judge determines that the presumption is applicable to this claim, he must allow all parties the opportunity to submit evidence in compliance with the evidentiary limitations at 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).

³ Section 1556 of Public Law No. 111-148 also amended Section 422(l) of the Act, 30 U.S.C §932(l), to provide that a survivor is automatically entitled to benefits if the miner filed a successful claim and was receiving benefits at the time of his death. However, claimant cannot benefit from this provision, as the miner's previous claim for benefits was denied. Unmarked Exhibit.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge