

BRB No. 10-0355 BLA

DANA JO VAUGHN	)	
(Widow of VIRGIL VAUGHN)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 02/18/2011
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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

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

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

Maia S. Fisher (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:

Claimant<sup>1</sup> appeals the Decision and Order (08-BLA-5666) of Administrative Law Judge Jeffrey Tureck 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 July 9, 2007. After crediting the miner with twenty-eight years of coal mine employment,<sup>2</sup> the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). 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 pneumoconiosis. Neither employer nor the Director, Office of Workers' Compensation Programs (the Director), has 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

By Order dated July 1, 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 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 twenty-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

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<sup>1</sup> Claimant is the surviving spouse of the deceased miner, who died on February 15, 1999. Director's Exhibit 11.

<sup>2</sup> The record reflects that the miner's coal mine employment occurred in Kentucky. Director's Exhibit 3. 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 (1989) (*en banc*).

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 argues that Section 1556 does not affect this case. Employer specifically contends that, even if claimant is entitled to the rebuttable presumption that was reinstated by Section 1556, the evidence establishes rebuttal of the presumption, because claimant failed to establish the existence of pneumoconiosis. Alternatively, employer contends that retroactive application of the amendments is unconstitutional, as it violates employer's right to due process and constitutes a taking of private property.<sup>3</sup>

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. In addition, if the presumption is invoked, the burden of proof shifts to employer to establish rebuttal of the presumption. Therefore, contrary to employer's assertion, we cannot affirm the denial of benefits on the basis that claimant did not establish the existence of pneumoconiosis. Thus, we vacate the administrative law judge's findings under 20 C.F.R. §718.202(a), 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).<sup>4</sup> 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,

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<sup>3</sup> We deny employer's request to hold this case in abeyance until such time as the Department of Labor issues guidelines or promulgates new regulations implementing the statutory amendments. We also deny employer's request to hold the case in abeyance because the constitutionality of the new amendments has been challenged.

<sup>4</sup> 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 claim for benefits was denied. Unmarked Exhibit.

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.<sup>5</sup> 20 C.F.R. §725.456(b)(1).

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.

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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

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<sup>5</sup> Because the administrative law judge has not yet considered the applicability of the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) to this claim, we decline to address, as premature, employer's argument that the retroactive application of the amendment to this claim is unconstitutional.