

BRB No. 12-0252 BLA

BETTY GREATHOUSE, on behalf of )  
GARY GREATHOUSE (Deceased Miner) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
OLD BEN COAL COMPANY ) DATE ISSUED: 02/19/2013  
 )  
and )  
 )  
TRAVELERS CASUALTY & SURETY )  
 )  
Employer/Carrier- )  
Respondents )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Stephen M. Reilly,  
Administrative Law Judge, United States Department of Labor.

Darrell Dunham (Darrell Dunham & Associates), Carbondale, Illinois, for  
claimant.

Helen H. Cox (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.

Claimant<sup>1</sup> appeals the Decision and Order Denying Benefits (2009-BLA-05725) of Administrative Law Judge Stephen M. Reilly rendered on a subsequent claim filed on April 17, 2007, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).<sup>2</sup> The relevant procedural history of this claim is as follows. A hearing was held on March 17, 2010, before Administrative Law Judge Jeffrey Tureck. On April 7, 2010, Judge Tureck issued an Order directing the parties to file position statements regarding the applicability of amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).<sup>3</sup> Judge Tureck also gave the parties until April 30, 2010 to advise him as to whether they intended to submit additional evidence due to the changes in the law. Claimant, employer and the Director, Office of Workers' Compensation Programs (the Director), timely responded to the Order, stating that amended Section 411(c)(4) was potentially applicable based on the filing date of the claim. Following the closure of the record, the case was reassigned to Judge Reilly (the administrative law judge) on April 22, 2011.

In a Decision and Order dated February 1, 2012, which is the subject of this appeal, the administrative law judge credited the miner with twenty-five years of coal mine employment, as stipulated by the parties, and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that claimant was unable to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, because the newly submitted evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

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<sup>1</sup> The miner died on November 14, 2007, and his claim is being pursued by his widow (claimant).

<sup>2</sup> The miner filed a claim for benefits on December 11, 2000, which was denied by the district director on May 29, 2001, because the evidence did not establish any of the requisite elements of entitlement. Director's Exhibit 1. The miner took no further action with regard to the denial until he filed the current subsequent claim. Director's Exhibit 2.

<sup>3</sup> Subsequent to the March 17, 2010 hearing in this case, on March 23, 2010, amendments to the Act, contained in Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010), were enacted. They affect claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to the miner's subsequent claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the miner worked at least fifteen years in underground coal mine employment, or in surface mines in conditions substantially similar to those of an underground mine, and also has a totally disabling respiratory impairment.

On appeal, claimant argues that the administrative law judge erred in failing to consider whether the miner was entitled to benefits pursuant to amended Section 411(c)(4). Employer has not filed a response brief.<sup>4</sup> The Director responds, urging the Board to vacate the denial of benefits and remand the case for the administrative law judge to determine whether claimant is entitled to the rebuttable presumption that the miner was totally disabled due to pneumoconiosis under amended Section 411(c)(4).

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.<sup>5</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we vacate the administrative law judge's denial of benefits because he erred in requiring claimant to establish the existence of pneumoconiosis in order to satisfy the requirements of 20 C.F.R. §725.309. The regulations provide that if a miner files an application for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based."<sup>6</sup> 20 C.F.R. §725.309(d)(2). The record reflects that the miner's prior claim was denied because he failed to establish any of the requisite elements of entitlement. Therefore, contrary to

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<sup>4</sup> Employer was granted an extension of time to file a response brief in this appeal, but did not do so. *See Greathouse v. Old Ben Coal Co.*, BRB No. 12-0252 BLA (unpub. Order) (Jan. 8, 2013). On February 6, 2013, the Board received employer's Motion to Remand this case for consideration pursuant to amended Section 411(c)(4).

<sup>5</sup> Because the record indicates that the miner's last coal mine employment was in Colorado, the Board will apply the law of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 3.

<sup>6</sup> In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must prove that the miner suffered from pneumoconiosis arising out of coal employment and that the miner was totally disabled due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

administrative law judge's analysis, claimant may satisfy the requirements of 20 C.F.R. §725.309 by proving, based on the newly submitted evidence, either the existence of pneumoconiosis or total disability,<sup>7</sup> which would entitle her to a review of all of the record evidence, relevant to the merits of the miner's claim. 20 C.F.R. §725.309(d)(2), (3). We, therefore, vacate the administrative law judge's findings at 20 C.F.R. §725.309 and the denial of benefits.

Furthermore, we agree with claimant and the Director that the administrative law judge erred in not considering whether claimant is entitled to the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).<sup>8</sup> Because the miner filed his subsequent claim after January 1, 2005, and the claim was pending on March 23, 2010, amended Section 411(c)(4) potentially applies to this subsequent claim. On remand, the administrative law judge must determine whether claimant is entitled to invocation of the rebuttable presumption at amended Section 411(c)(4) by proving that the miner had fifteen years of qualifying coal mine employment and that he suffered from a totally disabling respiratory or pulmonary impairment.<sup>9</sup> If the amended Section 411(c)(4) presumption is invoked, the administrative law judge must determine whether employer has satisfied its burden to establish rebuttal of that presumption by affirmatively establishing either that the miner did not have pneumoconiosis or that his disability did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal*

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<sup>7</sup> If claimant is unable to establish the first two elements of entitlement, the existence of pneumoconiosis and total disability, she likewise is unable to prove the third element of entitlement, disability causation.

<sup>8</sup> The Director, Office of Workers' Compensation Programs, maintains that claimant is entitled to the amended Section 411(c)(4) presumption, based on the filing date of the subsequent claim, the parties' stipulation of twenty-five years of coal mine employment, and the administrative law judge's reference to the fact that the miner was totally disabled, based on the medical opinion evidence, "including employer's experts," who diagnosed that the miner had a totally disabling respiratory or pulmonary impairment. *See* Director's Letter Brief at 2. Although there is evidence in the record to support a finding of total disability, we instruct the administrative law judge to make a specific determination on remand as to whether the miner was totally disabled for invocation of the amended Section 411(c)(4) presumption.

<sup>9</sup> Because Judge Tureck gave the parties the opportunity to submit additional evidence in light of the change in law, it is not necessary for the administrative law judge, on remand, to reopen the record for submission of additional evidence relevant to amended Section 411(c)(4).

*Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011). Alternatively, if claimant is unable to invoke the presumption, the administrative law judge must reconsider whether the miner was entitled to benefits pursuant to 20 C.F.R. Part 718, in accordance with the Board's instruction with regard to 20 C.F.R. §725.309.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge