

BRB No. 11-0331 BLA

ROBERT C. THOMPSON)
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 Claimant-Respondent)
)
 v.)
)
 CONSOLIDATION COAL COMPANY)
)
 and)
)
 WELLS FARGO DISABILITY) DATE ISSUED: 01/20/2012
 MANAGEMENT, SELF-INSURED)
 THROUGH CONSOL ENERGY)
)
 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 Awarding Living Miner's Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet), Denver, Colorado, for claimant.

Cheryl L. Intravaia (Fierich/Mager/Green/Ryan), Carbondale, Illinois, for employer/carrier.

Michelle S. Gerdano (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 Awarding Living Miner's Benefits (09-BLA-05197) of Administrative Law Judge Richard K. Malamphy (the administrative law judge) rendered on a claim filed on February 14, 2008, 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). The administrative law judge found that employer stipulated to seventeen years of coal mine employment, based on claimant's Social Security employment record. Additionally, the administrative law judge found that these seventeen years were in underground coal mining or mining in conditions substantially similar to those of underground coal mining. Decision and Order at 6. The administrative law judge further found that the evidence established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Therefore, based on his determination that claimant had more than fifteen years of qualifying coal mine employment and that claimant had a totally disabling respiratory impairment, the administrative law judge found that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).¹ Further, the administrative law judge found that employer failed to rebut the presumption, as employer failed to establish that claimant does not have clinical or legal pneumoconiosis, or that claimant's total disability is not due to pneumoconiosis. 30 U.S.C. §921(c)(4). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in refusing to admit into the record Employer's Exhibit 12, Dr. Cohen's report, which addresses claimant's blood gas studies. Further, employer asserts that the administrative law judge erred in refusing to remand the case to the district director for further development of the evidence, in light of the change in law created by the new amendments, namely the

¹ On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. In pertinent part, 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, 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. 30 U.S.C. §921(c)(4). In order to rebut the Section 411(c)(4) presumption, it must be shown that the miner did not have pneumoconiosis or that the miner's respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4).

reinstatement of the Section 411(c)(4) presumption. Employer also asserts that the administrative law judge erred in finding the Section 411(c)(4) presumption invoked and erred in finding that, even if invoked, it was not rebutted. Additionally, employer argues that the new amendments are unconstitutional. Claimant responds, arguing that the administrative law judge properly refused to admit into evidence Employer's Exhibit 12, Dr. Cohen's report. Claimant further contends that the administrative law judge properly found that the Section 411(c)(4) presumption was invoked and not rebutted and, therefore, properly found claimant entitled to benefits.² The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with employer that the administrative law judge erred in refusing to admit into evidence, Employer's Exhibit 12, Dr. Cohen's report, addressing claimant's blood gas studies. The Director also agrees with employer that the administrative law judge erred in denying employer's request that the case be remanded for further development of the evidence, in light of the change in law created by the new amendments. However, the Director contends that the new amendments are constitutional. Employer replies, reiterating its arguments.

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 303 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

**Section 411(c)(4) Invocation
Total Disability
Exclusion of Employer's Exhibit 12,
Dr. Cohen's Report**

In addressing the allowable evidence pursuant to 20 C.F.R. §725.414, the administrative law judge excluded Dr. Cohen's report as exceeding the evidentiary limitations, because employer had already submitted two affirmative reports by Dr.

² Claimant also alleges that the Board's April 4, 2011 Show Cause Order, directing employer to show cause as to why its appeal should not be dismissed for failure to file a Petition for Review and brief, has not been resolved. By Order dated June 14, 2011, however, the Board noted that it mistakenly issued the April 4, 2011 Show Cause Order, as the Board received employer's Petition for Review and brief on March 23, 2011.

³ The record reflects that claimant's coal mine employment was in Utah. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Repsher, dated December 22, 2008 and October 28, 2009, Employer's Exhibits 4 and 6, as well as two rehabilitative reports by Dr. Repsher, dated November 11, 2009 and November 18, 2009, Employer's Exhibit 11.

Employer contends, however, that the administrative law judge erred in refusing to admit Employer's Exhibit 12, Dr. Cohen's report. The Director agrees. Specifically, the Director contends that, because both of Dr. Repsher's affirmative reports were based on a single examination, performed on November 13, 2008, Dr. Repsher's October 28, 2009 report only constituted a supplemental report, Employer's Exhibit 6, which was part of Dr. Repsher's original December 22, 2008 report, and did not constitute a second report.

We agree with the Director. Consequently, we vacate the administrative law judge's award of benefits and remand this case for the administrative law judge to reconsider whether the employer was provided with the opportunity to submit its permissible allotment of evidence under Section 725.414. The administrative law judge may allow the parties to withdraw evidence and re-designate additional evidence, if necessary, in order to conform to the evidentiary limitations. The administrative law judge must then reconsider whether the evidence establishes a totally disabling respiratory impairment, a requisite finding for invocation of the Section 411(c)(4) presumption.

20 C.F.R. §725.456
Good Cause

In the alternative, the administrative law judge found that employer failed to establish "good cause" for the admission of evidence, namely Dr. Cohen's report, in excess of the evidentiary limitations pursuant to 20 C.F.R. §725.456. The administrative law judge found that, because the effect of the new amendments was unknown, he would follow the current case law on the issue of good cause. He found, therefore, that because employer did not timely submit its evidence, as instructed, or provide a "good cause" reason for the untimely submission of Dr. Cohen's report, the report was not admissible pursuant to Section 725.456.

Employer asserts, however, that Dr. Cohen's report should have been admitted for "good cause," in light of the change in law created by the new amendments, namely the reinstatement of Section 411(c)(4), which provides a presumption of totally disabling pneumoconiosis if, in part, a totally disabling respiratory impairment is established. Employer asserts that because Dr. Cohen's report addresses claimant's blood gas studies, which were qualifying, and the administrative law judge found that claimant's blood gas studies, along with the medical opinion evidence, established a totally disabling

respiratory impairment, Dr. Cohen's report addressing the blood gas study evidence is particularly relevant.⁴

"While an administrative law judge is generally afforded broad discretion in dealing with procedural matters, [he] is obliged to insure a full and fair hearing on all the issues presented." *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-200 (1986), *aff'd on reconsideration*, 9 BLR 1-236 (1987)(*en banc*); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). Where a party would be denied the opportunity to fully present its case because it is unable to develop evidence relevant to a change in the law, due process requires that the party be afforded the opportunity to develop such evidence. *See North Am. Coal Co. v. Miller*, 870 F.2d 948, 951-52, 12 BLR 2-222, 2-228-29 (3d Cir. 1989); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); *Shedlock*, 9 BLR at 1-200; *see Administrative Procedure Act*, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Therefore, we conclude that the administrative law judge should determine whether the change in law created by the new amendments, namely the reinstatement of the Section 411(c)(4) presumption, establishes "good cause" for the admission of Dr. Cohen's report pursuant to Section 725.456. *See Miller*, 870 F.2d at 951-52, 12 BLR at 2-228-29; *see also* 30 U.S.C. §921(c)(4). If he so finds, the administrative law judge must reconsider whether the evidence establishes a totally disabling respiratory impairment and, therefore, a basis for invoking the Section 411(c)(4) presumption.

Section 411(c)(4) Invocation Length of Qualifying Coal Mine Employment

Employer also contends that the record should be reopened to allow it an opportunity to present evidence on the issue of whether claimant had at least fifteen years of "qualifying" coal mine employment, for purposes of Section 411(c)(4), namely underground coal mine employment or coal mine employment that was performed in conditions substantially similar to those of underground coal mine employment. Employer contends that it was not aware at the time of hearing, which was conducted prior to the enactment of the new amendments, that the length of "qualifying" coal mine employment would be crucial to a finding of entitlement in this case.

⁴ Employer also asserts that the fact that the hearing in this case was held on November 17, 2009, approximately four months prior to the enactment of the new amendments, lends further support for its good cause argument.

We agree. Consequently, we remand this case for the administrative law judge to reopen the record to allow the parties the opportunity to address whether claimant had at least fifteen years of underground coal mine employment or coal mine employment in conditions substantially similar to those of underground coal mine employment. *See* 30 U.S.C. §921(c)(4); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988).

Section 411(c)(4) Rebuttal

Additionally, employer contends that the administrative law judge's Decision and Order must be vacated and the case remanded to reopen the record on the issue of Section 411(c)(4) rebuttal. We agree. The administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption is vacated and the case is remanded for reconsideration of that issue, if reached. On remand, the administrative law judge must provide employer the opportunity to submit additional evidence relevant to rebuttal of the Section 411(c)(4) presumption. *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).

Constitutionality of New Amendments

Finally, employer contends that retroactive application of the new amendments violates the due process and takings clauses of the Fifth and Fourteenth Amendments of the United States Constitution. Employer's Brief at 13-15. The Director disagrees, noting that employer's arguments are similar to those rejected by the Board in *Matthews v. Pocahontas Coal Co.*, 24 BLR 1-193 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order)(unpub.), appeal docketed, No. 11-1620 (4th Cir., June 13, 2011). We agree with the Director. We, therefore, reject employer's arguments concerning the constitutionality of the new amendments. *See Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *aff'd per curiam*, No. 11-1620, 2011 WL 6062116 (4th Cir., Dec. 7, 2011).

Accordingly, the administrative law judge's Decision and Order Awarding Living Miner's Benefits is vacated and the case is remanded 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