

BRB No. 09-0660 BLA

SUSAN CHANDLER)
(Widow of CHARLES CHANDLER))
)
 Claimant-Petitioner)
)
 v.)
)
 HOBET MINING LLC)
)
 and)
)
 ARCH COAL, INCORPORATED) DATE ISSUED: 07/23/2010
)
 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 Survivor Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Susan Chandler, Richwood, West Virginia, *pro se*.

Ashley M. Harman, Seth P. Hayes, and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Barry H. Joyner (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, without the assistance of counsel, appeals the Decision and Order Denying Survivor Benefits (07-BLA-5986) of Administrative Law Judge Richard A. Morgan on a claim¹ 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)), as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited the parties' stipulation that the miner² worked in qualifying coal mine employment for at least twenty-one years. Adjudicating the survivor's claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response to claimant's appeal.

By Order dated April 9, 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. *Chandler v. Hobet Mining LLC*, BRB No. 09-0660 BLA (Apr. 9, 2010) (unpub. Order). This provision amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and remained pending as of March 23, 2010, the effective date of the amendments. The Director and employer have responded.

The Director states that the recent amendments to the Act are applicable as the present claim was filed after January 1, 2005 and the miner was credited with at least twenty-one years of coal mine employment. The Director also maintains, therefore, that the denial of benefits must be vacated and the case remanded to the administrative law judge for consideration of claimant's entitlement to the rebuttable presumption of death due to pneumoconiosis set forth in the amended version of Section 411(c)(4) of the Act,

¹ Claimant, Susan Chandler, is the widow of the miner, who died on February 26, 2006. Director's Exhibit 8. Claimant filed a survivor's claim for benefits on June 12, 2006. Director's Exhibit 2.

² The miner filed an application for benefits on August 15, 2001. His claim was denied by Administrative Law Judge Daniel L. Leland on October 12, 2005, based on the miner's failure to establish the existence of pneumoconiosis or total respiratory disability. The denial was affirmed by the Board on July 27, 2006. *Chandler v. Hobet Mining, Inc.*, BRB No. 06-0175 BLA (July 27, 2006) (unpub.).

30 U.S.C. §921(c)(4).³ Employer argues that the Section 411(c)(4) presumption is not available in this case because there is no evidence that fifteen, out of the twenty-one, years of the miner's coal mine employment were underground or in substantially similar conditions. Employer also contends that the Section 411(c)(4) presumption is not available, as evidence obtained during the miner's lifetime is insufficient to establish a totally disabling respiratory impairment at 20 C.F.R. §718.204(b). *See* 30 U.S.C. §921(c)(4). In addition, employer argues that retroactive application of the amendments is unconstitutional. However, employer contends that, if the Board finds the amendments applicable, the case must be remanded to the administrative law judge to allow the record to be reopened to provide employer the opportunity to develop relevant evidence.

Based upon the parties' responses, we are persuaded that the Director is correct in maintaining that the administrative law judge's findings on the merits of the survivor's claim, 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, if the miner has fifteen years of qualifying coal mine employment. This is an issue that, prior to the recent amendments, was not relevant in this survivor's claim. In addition, if the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. Hence, 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 consideration under Section 411(c)(4).⁴ The administrative law judge must allow both parties the opportunity to open the record, submit evidence, or substitute evidence 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). Because the administrative law judge has not yet considered this claim under the amended version of Section 411(c)(4)

³ Section 411(c)(4) provides that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the existence of a totally disabling respiratory impairment, there is a rebuttable presumption that the miner was totally disabled due to pneumoconiosis or that his 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)).

⁴ Section 1556 of the 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. *See Chandler*, BRB No. 06-0175 BLA, *slip op.* at 3-4.

of the Act, we decline to address, as premature, employer's argument that the retroactive application of that amendment to this claim is unconstitutional.

Accordingly, the administrative law judge's Decision and Order Denying Survivor Benefits is vacated, and the 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