

BRB No. 10-0663 BLA

KENNIE H. CHAPMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN COAL CORPORATION	)	DATE ISSUED: 07/28/2011
	)	
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 - Denial of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan, P.S.C.), South Williamson, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Sarah M. Hurley (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 appeals the Decision and Order - Denial of Benefits (08-BLA-5576) of

Administrative Law Judge Daniel F. Solomon rendered on a subsequent claim<sup>1</sup> 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). The administrative law judge adjudicated the claim, filed on April 16, 2007, pursuant to the provisions set forth in 20 C.F.R. Parts 718 and 725, and credited the parties' stipulation that claimant worked at least eleven years in coal mine employment. The administrative law judge found that the newly submitted evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the entire record, the administrative law judge determined that the weight of the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

Subsequent to the issuance of the administrative law judge's decision, Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005, and were pending on or after March 23, 2010, the effective date of the amendments. Relevant to this claim, Section 1556 reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a claimant establishes at least fifteen years of qualifying coal mine employment, and that he has a totally disabling respiratory impairment, there is a rebuttable presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

On appeal, claimant challenges the administrative law judge's determination that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). In addition, claimant asserts that the case must be remanded for the administrative law judge to consider the applicability of the amendments to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits, and argues that the amendments do not apply to this subsequent claim. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, agreeing with claimant's argument that the rebuttable presumption under amended Section 411(c)(4) may be applicable to this claim. Because the claim was filed on April 16, 2007; the claim was pending on March 23, 2010; claimant alleged an employment history of seventeen

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<sup>1</sup> Claimant filed his first application for benefits on August 16, 2001, which was denied by Administrative Law Judge Daniel F. Solomon, in a Decision and Order issued on August 13, 2004, for failure to establish any element of entitlement. Director's Exhibit 1. The record does not reveal any further action taken on this claim. On April 16, 2007, claimant filed the instant application for benefits. Director's Exhibit 3.

years of coal mine work; and the administrative law judge found that claimant established total respiratory disability pursuant to Section 718.204(b), the Director avers that the administrative law judge's denial of benefits must be vacated and the case remanded for further consideration. In addition, the Director requests that the Board direct the administrative law judge to afford the parties the opportunity to submit additional evidence in view of the change in law and resultant change in the allocation of burdens of proof.

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>2</sup> 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).

We are persuaded that claimant and the Director are correct in maintaining that this case must be remanded to the administrative law judge for further consideration. Consequently, we vacate the administrative law judge's denial of benefits and his reliance on the parties' stipulation to at least eleven years of coal mine employment, and remand this case for the administrative law judge to consider the claim under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge must initially determine whether claimant worked at least fifteen years in an underground coal mine or in a surface coal mine in conditions substantially similar to those in an underground mine. *See Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512 (7th Cir. 1988). The administrative law judge must also allow the parties the opportunity to submit additional evidence to address the change in law, *see Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990), in compliance with the evidentiary limitations at 20 C.F.R. §725.414, or upon a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1). If, on remand, the administrative law judge determines that claimant is entitled to invocation of the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), the administrative law judge must then determine whether employer has established rebuttal. *See Morrison v. Tenn. Consol. Coal Co.*, F.3d , 2011 WL 2739770 (6th Cir. 2011).

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<sup>2</sup> The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1999)(*en banc*).

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is vacated, and the case is remanded for further consideration 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