BRB No. 09-0672 BLA

CARL EPLING, JR.,	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOBET MINING, INCORPORATED	)	
	)	DATE ISSUED: 06/28/2010
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 Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (08-BLA-5203) of Administrative Law Judge Richard A. Morgan rendered on a claim filed on January 24, 2007 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 credited

claimant with at least twenty-one years of coal mine employment,[1] based on his Social Security records, and found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), but did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a), or total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find pneumoconiosis and total disability due to pneumoconiosis established pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief.

By Order dated April 7, 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. The parties have responded.

The Director states, and claimant agrees, that the recent amendments to the Act are applicable in this case, as the present claim was filed after January 1, 2005; claimant was credited with at least twenty-one years of coal mine employment; and, the administrative law judge found that claimant had established total respiratory disability pursuant to Section 718.204(b). Thus, the Director maintains 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 total disability due to pneumoconiosis set forth in the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2]

[1] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

[2] Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Director's Brief at 1. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled 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)).

Employer contends that remand to the administrative law judge for consideration of the claim in light of the amendments to the Act is not warranted. Employer asserts that, based on the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), and disability causation at 20 C.F.R. §718.204(c), the Section 411(c)(4) presumption of total disability due to pneumoconiosis has been rebutted. Accordingly, employer urges the Board to affirm the administrative law judge's decision denying benefits.[3]

After review of the parties' responses, we are persuaded that the Director is correct in maintaining that the administrative law judge's denial of benefits must be vacated and the case remanded to the administrative law judge for consideration of whether claimant is entitled to invocation of the Section 411(c)(4) presumption. If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). Contrary to employer's assertion, therefore, we cannot affirm the denial of benefits on the ground that claimant did not establish the existence of pneumoconiosis. Thus, we vacate the administrative law judge's findings under Sections 718.202(a), 718.204(c), and remand this case to the administrative law judge.

If the administrative law judge finds that claimant is entitled to the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether the medical evidence rebuts the presumption. The administrative law judge, on remand, should allow for the submission of evidence by the parties 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). Further, as the Director states, any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1). Further, because the administrative law judge has not yet considered this claim under the amendment to Section 411(c)(4) of the Act, we decline to address, as premature, employer's argument

[3] Employer also notes that the constitutionality of the recent amendments to the Act has been challenged in a lawsuit filed in the United States District Court for the Northern District of Florida. Employer therefore requests that "[p]otentially affected federal black lung claims . . . be held in abeyance until resolution of this legal challenge . . . ." Employer's Supplemental Brief at 13. Employer does not indicate that any court has yet enjoined the application, or ruled on the validity of, the recent amendments to the Act. Employer's request to hold this case in abeyance is denied.

that the retroactive application of that amendment to this claim is unconstitutional. Employer's Brief at 10-12.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded to the administrative law judge for further proceedings 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