

BRB No. 09-0712 BLA

VELLA A. THOMPSON)
(Widow of WILLIAM THOMPSON))
)
Claimant-Petitioner)
)
v.)
)
MOUNTAINEER COAL DEVELOPMENT)
COMPANY)
)
and)
)
WEST VIRGINIA COAL WORKERS') DATE ISSUED: 06/30/2010
PNEUMOCONIOSIS FUND)
)
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 Richard A. Morgan,
Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Mark J. Grigoraci (Robinson & McElwee PLLC), Charleston, West
Virginia, for employer/carrier.

Emily Goldberg-Kraft (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (08-BLA-5844) of Administrative Law Judge Richard A. Morgan on a survivor's claim 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 credited the parties' stipulation that the miner worked in qualifying coal mine employment for at least twenty-two years. Adjudicating the survivor's claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), but failed to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find that pneumoconiosis substantially contributed to the miner's death pursuant to Section 718.205(c). In response to claimant's appeal, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has 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. *Thompson v. Mountaineer Coal Development Co.*, BRB No. 09-0712 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. All parties have filed supplemental briefs addressing the impact of the amendments on this case.

Claimant 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-two years of coal mine employment. Claimant asserts, 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

¹ Claimant is the widow of the miner, who died on April 18, 2007. Director's Exhibit 9. Claimant filed a survivor's claim for benefits on September 20, 2007. Director's Exhibit 2.

set forth in the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).² Employer agrees with claimant that the case should be remanded for the administrative law judge to consider it under the amended version of Section 411(c)(4). Employer asserts that there is no dispute that the requisite fifteen years of coal mine employment were established; hence, the issue of whether the evidence demonstrates the existence of a totally disabling respiratory impairment needs to be addressed on remand. In addition, employer avers that the parties should be afforded an opportunity to develop evidence relevant to invocation and rebuttal of the presumption.³ Citing the same reasons as those articulated by claimant and employer, the Director has filed a Motion to Remand and asserts that this case must be 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, 30 U.S.C. §921(c)(4).

The parties are 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, 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 and remand the case to the administrative law judge.

On remand, the administrative law judge must consider this claim under Section 411(c)(4).⁴ The administrative law judge must allow both parties the opportunity to submit additional evidence to address the change in law. *See Harlan Bell Coal Co. v.*

² Section 411(c)(4) provides, *inter alia*, that "if a miner was employed for fifteen years or more in one or more underground coal mines, and ... if other evidence demonstrates the existence of a totally disabling respiratory impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by 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)).

³ Employer reserves the right to challenge "the constitutionality or validity" of the recent amendments. Employer's Brief at 2.

⁴ Section 1556 of Public Law No. 111-148 also amended Section 422(l) of the Act 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. There is no evidence in this record that a claim was filed by the miner.

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 must be submitted in accordance 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).

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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge