

BRB No. 10-0369 BLA

LINDA NICKLAS	)	
(Widow of JIMMIE NICKLAS)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BATTLE RIDGE COMPANIES	)	DATE ISSUED: 03/17/2011
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKER'S	)	
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.

Linda Nicklas, Beaver, West Virginia, *pro se*.

Ashley M. Harman and Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Maia S. Fisher (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, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2007-BLA-5497) of Administrative Law Judge Richard A. Morgan rendered on a survivor's claim, filed on April 24, 2006, 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).<sup>1</sup> The administrative law judge credited the miner with at least twenty-four years of coal mine employment and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), but did not establish that the miner's death was due to coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, asserting that the denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has not submitted a substantive response to claimant's appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and consistent with applicable law.<sup>2</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims filed after January 1, 2005 and pending on or after March 23, 2010, the effective date of the amendments. Relevant to this survivor's claim, the amended version of Section 411(c)(4) provides that, if a miner had at least fifteen years of qualifying coal mine employment and the evidence establishes the presence of a totally disabling respiratory or pulmonary impairment, there is a rebuttable presumption

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<sup>1</sup> Claimant is the widow of Jimmie Nicklas, who died on February 15, 2006. Director's Exhibit 2. Mr. Nicklas filed a claim on August 13, 2002, but withdrew it on September 10, 2004. Director's Exhibit 1.

<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the miner's coal mine employment was in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

of death due to pneumoconiosis.<sup>3</sup> 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)). By Order dated April 22, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556. *Nicklas v. Battle Ridge Companies*, BRB No. 10-0369 BLA (Apr. 22, 2010)(unpub. Order). The Director and employer have responded.

The Director maintains that this case must be remanded to the administrative law judge for consideration of whether claimant is entitled to the rebuttable presumption of death due to pneumoconiosis, set forth in the amended version of Section 411(c)(4) of the Act, *see* 30 U.S.C. §921(c)(4). The Director further states that, because the presumption alters the required findings of fact and the allocation of the burden of proof, the administrative law judge must allow the parties the opportunity to submit additional, relevant evidence, in compliance with the evidentiary limitations at 20 C.F.R. §725.414. Employer concedes that the amended version of Section 411(c)(4) may apply in this case, but argues that its retroactive application is unconstitutional, as it violates employer's right to due process and constitutes a taking of private property.

After review of the parties' responses, we conclude that the rebuttable presumption of death due to pneumoconiosis set forth in the amended version of Section 411(c)(4) may be available to claimant, as the miner was credited with twenty-nine years of coal mine employment, claimant filed her claim after January 1, 2005, and the claim was pending on March 23, 2010. Accordingly, we must vacate the administrative law judge's denial of benefits and remand this case to the administrative law judge for consideration under the amended version of Section 411(c)(4) of the Act.

On remand, the administrative law judge must determine whether claimant is entitled to invocation of the rebuttable presumption that the miner's death was due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). In order to find that claimant has invoked the presumption, the administrative law judge must determine whether the miner 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 (7th Cir. 1988). The administrative law judge must also find that claimant has established that the miner was totally disabled at 20 C.F.R. §718.204(b). The administrative law judge must allow for the submission of evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lamar*, 904 F.2d 1042, 11047-50, 14 BLR 2-1, 2-7-11 (6th Cir.

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<sup>3</sup> Because the deceased miner in this case was not awarded benefits during his lifetime, claimant is not eligible for derivative benefits, based on amended Section 422(l). 30 U.S.C. §932(l), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(l)).

1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Further, any additional evidence submitted must be consistent with the evidentiary limitations at 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1).

If the administrative law judge finds that claimant has established invocation of the presumption of death due to pneumoconiosis at Section 411(c)(4), he must then consider whether employer has rebutted the presumption. Finally, because the administrative law judge has not yet considered this claim under the amendments to Section 411(c)(4) of the Act, we decline to address, as premature, employer's contention that the retroactive application of amended Section 411(c)(4) is unconstitutional.<sup>4</sup>

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

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<sup>4</sup> Because this case must be remanded for consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4), we do not review the administrative law judge's findings at 20 C.F.R. §718.205(c).