

BRB No. 09-0577 BLA

JULIA JANOWSKI	)	
(Widow of JOSEPH JANOWSKI)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
READING ANTHRACITE COMPANY	)	
	)	DATE ISSUED: 05/27/2010
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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Julia Janowski, Mar Lin, Pennsylvania, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig), Washington, D.C., for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (08-BLA-5075) of Administrative Law Judge Ralph A. Romano

rendered on a survivor's 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 credited the miner with thirty years of coal mine employment.<sup>2</sup> The administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally asserts that she is entitled to benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a letter, asserting that the administrative law judge erred in his analysis of the medical opinions.<sup>3</sup>

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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. 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).

By Order dated March 31, 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.

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<sup>1</sup> Claimant is the widow of the miner, who died on February 18, 2007. Director's Exhibit 7. The miner filed an application for benefits on January 26, 1973, which was denied on December 13, 1979 by the claims examiner. Unmarked Exhibit.

<sup>2</sup> The record indicates that the miner's coal mine employment was in Pennsylvania. Director's Exhibits 3, 4, 20. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

<sup>3</sup> We affirm the administrative law judge's finding of thirty years of coal mine employment, as this finding is not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant responds, generally asserting that she is entitled to benefits. The Director contends that Section 1556 affects this case and that it provides additional grounds for the Board to vacate the denial of benefits and remand the case. The Director states that because claimant filed her survivor's claim after January 1, 2005 and it was pending on March 23, 2010, the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), applies to this claim.<sup>4</sup> The Director requests that this case be remanded to the administrative law judge to consider claimant's entitlement to the presumption, set forth in Section 411(c)(4), that the miner's death was due to pneumoconiosis. 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, consistent with the evidentiary limitations at 20 C.F.R. §725.414.

Employer states that Section 1556 may affect this case, but argues that, based on the administrative law judge's finding that claimant failed to establish either the existence of pneumoconiosis at Section 718.202(a), or that the miner's death was due to pneumoconiosis at Section 718.205(c), the Section 411(c)(4) presumption has been rebutted. Employer also requests that, if the denial of benefits is not affirmed, the case be remanded to the district director "so that the parties can respond to the changes in the law with proof." Employer's Letter, May 3, 2010, at 1.

After review of the parties' responses, we are persuaded that the Director is correct in maintaining that the administrative law judge's findings, 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 was not relevant to this survivor's claim before the recent amendments. Contrary to employer's assertion, therefore, we cannot affirm the denial of benefits on the basis that claimant did not establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis. Thus, 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 this case to the administrative law judge.

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<sup>4</sup> 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 presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis and/or that the miner's 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)).

On remand, the administrative law judge must initially consider whether claimant is entitled to invocation of the rebuttable presumption at Section 411(c)(4).<sup>5</sup> If the administrative law judge determines that the presumption is applicable to the survivor's claim, he must allow both parties the opportunity to submit additional evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414.

Accordingly, the administrative law judge's Decision and Order Denying Survivor's Benefits is affirmed in part, and vacated in part, 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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JUDITH S. BOGGS  
Administrative Appeals Judge

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<sup>5</sup> 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. However, claimant cannot benefit from this provision, as the miner's claim for benefits was denied. Unmarked Exhibit.