BRB Nos. 09-0790 BLA
and 09-0790 BLA-A

PAUL R. JONES	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	DATE ISSUED: 10/19/2010
	)	
QUAIL RIDGE CONSTRUCTION	)	
COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS'	)	
PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	
	)	
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.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

William S. Mattingly and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Helen H. Cox (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer/carrier (employer) cross-appeals the Decision and Order Denying Benefits (2008-BLA-05487) of Administrative Law Judge Richard A. Morgan, rendered on a subsequent claim filed on January 3, 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).[1] The administrative law judge noted that claimant worked in the coal mines "approximately" twenty-five years, that his last position was "surface utility man" at a coal preparation plant and, prior to that, claimant worked underground for "approximately" twenty-two years as a general laborer, miner helper, continuous miner operator and roof bolter. Decision and Order at 5. The administrative law judge initially determined that the newly submitted evidence was sufficient to establish a totally disabling respiratory or pulmonary impairment and, therefore, found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Based on his consideration of the claim on the merits, the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), but failed to establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

Before the parties submitted their Petitions for Review, by Order dated May 14, 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

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[1] Claimant filed his first application for black lung benefits on September 26, 2001. Director's Exhibit 1. In a Proposed Decision and Order dated June 27, 2003, the district director found that claimant established twenty-three years of coal mine employment, and the existence of pneumoconiosis, but denied benefits because claimant did not establish total disability. *Id.* Claimant filed his second claim for benefits on October 13, 2004, which was denied by the district director on June 6, 2005 because claimant did not establish total disability. Director's Exhibit 2. Claimant took no further action until he filed the current subsequent claim. Director's Exhibit 3. After the district director issued a Proposed Decision and Order awarding benefits, employer requested a formal hearing and the case was referred to the Office of Administrative Law Judges. Director's Exhibit 21. Administrative Law Judge Richard A. Morgan conducted a hearing on December 16, 2008, and issued his Decision and Order Denying Benefits on July 28, 2009, which is the subject of this appeal.

respect to the entitlement criteria for certain claims and became effective on March 23, 2010.[2] *Jones v. Quail Ridge Construction Co.*, BRB Nos. 09-0790 BLA and 09-0790 BLA-A (Mar. 14, 2010) (unpub. Order). Claimant, employer and the Director, Office of Workers' Compensation Programs (the Director), have responded.

Claimant states that the recent amendments to the Act affect this case, as the present claim was filed after January 1, 2005; claimant established over fifteen years of coal mine employment; and claimant has a totally disabling pulmonary impairment. Thus, claimant asserts that the case must be remanded to the administrative law judge for consideration under the amended version of Section 411(c)(4) of the Act. *See* 30 U.S.C. §921(c)(4).

Employer responds that, although the administrative law judge found that claimant established over fifteen years of coal mine employment, the record fails to establish fifteen years of underground coal mine employment or that the conditions of claimant's surface employment were similar to conditions in underground coal mines. Employer further argues that the retroactive application of the amended version of Section 411(c)(4) to this claim is unconstitutional, as it violates employer's right to due process and constitutes a taking of private property. Alternatively, employer contends that, if the Board remands this case for consideration of claimant's entitlement to the Section 411(c)(4) presumption, due process requires that the administrative law judge allow the parties the opportunity to submit additional, relevant evidence to address the change in law.

The Director asserts that the recent amendments to the Act may affect this case, as the present claim was filed after January 1, 2005. Thus, the Director maintains that the case must be remanded to the administrative law judge to determine whether claimant is entitled to the Section 411(c)(4) presumption. 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, on remand, must allow the parties the opportunity to submit additional, relevant evidence, consistent with the evidentiary limitations at 20 C.F.R. §725.414, or to establish good cause for exceeding those limitations under 20 C.F.R. §725.456(b)(1).

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[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 were pending on or after March 23, 2010. 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.SC. §921(c)(4)).

Claimant's request to remand this case to the administrative law judge for consideration under the amended version of Section 411(c)(4) of the Act was accepted as his brief in this case. *Jones v. Quail Ridge Construction Co.*, BRB Nos. 09-0790 BLA and 09-07902 BLA-A, (Aug. 6, 2010) (unpub. Order). Employer filed a consolidated response and cross-appeal brief arguing that claimant raises no challenge to the administrative law judge's denial of benefits. Employer further asserts that the administrative law judge erred in his weighing of the medical opinion evidence in determining the presence or absence of legal pneumoconiosis. The Director has not filed a brief on the merits.

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.[3] 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).

Based upon the parties' responses, and our review, we agree that this case is affected by Section 1556 of Public Law No. 111-148, and 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. Under Section 411(c)(4), if claimant establishes at least fifteen years of qualifying underground coal mine employment, or work at a surface mine in substantially similar conditions, and also proves that he has a totally disabling respiratory impairment, he is entitled to a rebuttable presumption that his total disability is due to pneumoconiosis. 30 U.S.C. §921(c)(4). In this case, claimant filed his claim after January 1, 2005, but employer now challenges the administrative law judge's length of coal mine employment finding and alleges that the record fails to establish fifteen years of qualifying coal mine employment. Thus, we vacate the administrative law judge's Decision and Order Denying Benefits and remand this case to the administrative law judge for consideration of whether claimant is entitled to the benefit of the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). 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).

On remand, the administrative law judge must allow for the submission of additional 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.*

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[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 5.

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. 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). Because the administrative law judge has not yet considered this claim under the amended version of Section 411(c)(4) of the Act, however, we decline to address, as premature, employer's argument that the retroactive application of the amendment is unconstitutional.

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

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge