

BRB No. 10-0174 BLA

RICKY GEARHEART)
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 Claimant-Petitioner)
)
 v.)
)
 MARSHALL MINING, INCORPORATED)
)
 and)
)
 NATIONAL UNION FIRE INSURANCE)
 COMPANY) DATE ISSUED: 10/13/2010
)
 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 of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

John C. Collins (Collins & Allen), Salyersville, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (08-BLA-5258) of Administrative Law Judge Paul C. Johnson, Jr., denying benefits on a 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). This case involves a claim filed on January 16, 2007. After crediting claimant with at least twenty years of coal mine employment,¹ the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). 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 to claimant's appeal.

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Impact of the Recent Amendments

By Order dated September 13, 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. Claimant, employer, and the Director have responded.

¹ The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

The Director contends that Section 1556 affects this case and that a remand is required. The Director states that, because claimant filed his claim after January 1, 2005, and it was still 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.² The Director requests that this case be remanded to the administrative law judge to consider whether claimant has established entitlement pursuant to the Section 411(c)(4) presumption. 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. Claimant agrees that Section 1556 affects this case and that a remand is required.

Although employer agrees that Section 1556 is applicable to this claim, based on its filing date, employer argues that claimant is not entitled to the rebuttable presumption, because the evidence does not establish the presence of a totally disabling respiratory impairment. Moreover, employer contends that, even if claimant is entitled to the rebuttable presumption that was reinstated by Section 1556, the evidence is sufficient to establish rebuttal because claimant failed to establish the existence of pneumoconiosis. Employer further asserts that, if the case is remanded for further consideration, the administrative law judge must allow employer to develop any evidence that it considers relevant to the new standards created by Section 1556.

After review of the parties' responses, we are persuaded that the recent amendments affect this case, and that the denial of benefits must be vacated and the case remanded to the administrative law judge for further consideration. Relevant to this living miner's claim, Section 1556 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. Under Section 411(c)(4), if a claimant establishes at least fifteen years of qualifying coal mine employment, and that he has a totally disabling respiratory impairment, there is a rebuttable presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). In this case, claimant filed his claim after January 1, 2005, and was credited with over twenty years of coal mine employment.³

² 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)).

³ The Director, Office of Workers' Compensation Programs, notes that the administrative law judge did not render explicit findings of fact regarding the length or

Although the administrative law judge did not address whether the evidence establishes a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), the Director notes that there is evidence in the record supportive of such a finding. Director's Supplemental Brief at 2. Section 411(c)(4) further provides that, if the presumption is invoked, the burden of proof shifts to employer to establish that claimant does not have pneumoconiosis or that claimant's "respiratory or pulmonary impairment did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4). Accordingly, we must vacate the administrative law judge's findings under 20 C.F.R. §718.202(a), and remand this case to the administrative law judge. Therefore, we decline to address, as premature, claimant's arguments regarding the administrative law judge's findings under 20 C.F.R. §718.202(a)(4).

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

nature of claimant's coal mine employment. Director's Supplemental Brief at 2 n.4. Because these findings are necessary in order for claimant to invoke the Section 411(c)(4) presumption, the administrative law judge should address these issues on remand.

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

BETTY JEAN HALL
Administrative Appeals Judge