

BRB No. 10-0202 BLA

ELIZABETH SALYERS)
(o/b/o the Estate of JOE SALYERS))
)
 Claimant-Petitioner)
)
 v.)
)
 ADAM LOGAN CORPORATION)
)
 and)
) DATE ISSUED: 10/29/2010
 EVERGREEN NATIONAL INDEMNITY)
 AND CENTURY WORKERS)
 COMPENSATION)
)
 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 Paul C. Johnson, Jr.,
Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg,
Kentucky, for claimant.

Sarah M. Hurley (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (2008-BLA-5470) of Administrative Law Judge Paul C. Johnson, Jr., with respect to a claim filed on December 1, 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). The administrative law judge accepted the parties' stipulation that the miner had at least twenty-eight years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), and that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), but further found that the evidence was insufficient to establish total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

Claimant appeals, asserting that the administrative law judge erred in finding that claimant did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and erred in finding that she failed to prove disability causation under 20 C.F.R. §718.204(c). Employer and the Director, Office of Workers' Compensation Programs (the Director), have declined to file response briefs in this appeal.

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.² *Salyers v. Adam Logan Corp.*, BRB No. 10-0202 BLA (Sept. 13, 2010)(unpub. Order). Claimant and the Director have responded.

¹ The miner, Joe Salyers, died on October 25, 2007, while the current claim was pending. Hearing Transcript at 12. Claimant is the surviving spouse of the deceased miner and is pursuing this claim on his behalf. Director's Exhibit 62.

² Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), reinstated the "15-year 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 is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis.

Claimant states that the recent amendments to the Act affect this case, as the present claim was filed after January 1, 2005; claimant established that the miner had over fifteen years of coal mine employment; and claimant established that the miner had 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).

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).

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After review of the parties' responses, we conclude that the administrative law judge's denial of benefits must be vacated and the case remanded to the administrative law judge for consideration under the amended version of Section 411(c)(4) of the Act. If the administrative law judge finds that claimant has established invocation of the presumption at Section 411(c)(4), he should then consider whether employer has satisfied its burden to rebut the presumption. On remand, the administrative law judge should 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, 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, 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).

³ The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 3. 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*).

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

JUDITH S. BOGGS
Administrative Appeals Judge