BRB No. 11-0517 BLA

MICHAEL D. HAYES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
REDDY COAL COMPANY, INCORPORATED	)	DATE ISSUED: 04/27/2012
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for the miner.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-05341) of Administrative Law Judge Theresa C. Timlin, rendered on a claim filed on April 2, 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). Subsequent to the December 9, 2009 hearing held in this case, amendments to the Act, contained in Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010), were enacted. They apply to claims such as this one, filed after January 1, 2005, that were pending on or after March 23, 2010, the effective date of the amendments.[1] By Order dated September 22, 2010, the administrative law judge directed the parties to provide argument and supporting evidence regarding whether claimant was entitled to the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). After receiving the parties' responses, the administrative law judge issued her Decision and Order Awarding Benefits on March 21, 2011. Because the administrative law judge accepted the parties' stipulation that claimant established twenty-seven years of underground coal mine employment and she also determined that claimant has a totally disabling respiratory or pulmonary impairment, she found that claimant invoked the amended Section 411(c)(4) presumption. The administrative law judge further determined that employer failed to rebut the presumption. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in failing to consider an examination report by Dr. Forehand, dated January 12, 2010, which was submitted as Employer's Exhibit 6. Employer also argues that the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption is inconsistent with her specific determination that claimant failed to affirmatively establish the existence of either clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a). Employer also challenges the weight accorded the opinions of Drs.

[1] Relevant to this living miner's claim, Section 1556 reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and 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. If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 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)).

Rosenberg and Vuskovich. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter brief, urging the Board to reject employer's argument that the administrative law judge's rebuttal finding is internally inconsistent.[2]

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).

Initially, we address employer's contention that the administrative law judge erred in failing to consider Dr. Forehand's January 12, 2010 examination report. Prior to the hearing scheduled for December 9, 2009, claimant filed a motion for a continuance because he wanted to obtain a pulmonary examination. Hearing Transcript at 7. Although the administrative law judge denied claimant's motion, the administrative law judge agreed at the hearing to give claimant until January 15, 2010, to schedule a pulmonary examination or otherwise the record would be closed. *Id*. at 12; *see* Order Denying Claimant's Motion for Continuance (Nov. 24, 2009). The administrative law judge further ruled that, following submission of claimant's examination report, employer had forty-five days to submit rebuttal evidence. Hearing Transcript at 12. Thereafter, the parties were given thirty days to submit closing briefs. *Id*. at 24.

After the hearing, claimant's counsel provided the administrative law judge with a copy of a January 12, 2010 examination report by Dr. Forehand, but stated in his cover letter that "[c]laimant does not intend to rely on this report" as evidence. Claimant's counsel indicated that a copy of the report was also being forwarded to employer. On February 12, 2010, employer submitted a revised evidence summary form that identified Dr. Forehand's objective testing and medical opinion as affirmative evidence.[4] On

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant established twenty-seven years of underground coal mine employment. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Decision and Order at 6.

[4] Dr. Forehand initially performed the examination sponsored by the Department of Labor on May 31, 2007, at which time he diagnosed that claimant suffered from coal workers' pneumoconiosis and was totally disabled from performing his usual coal mine work due to a severe impairment caused by coal dust exposure. Director's Exhibit 10.

February 18, 2010, employer submitted a Notice of Filing and enclosed a copy of Dr. Forehand's January 12, 2010 report, asking the administrative law judge to admit the report as "Employer's Exhibit No. 6." On February 23, 2010, the administrative law judge ordered the parties to submit closing argument briefs within thirty days. Claimant and employer submitted briefs and both referred to Dr. Forehand's 2010 medical report in their respective arguments.[5] In her Decision and Order, however, the administrative law judge did not consider Dr. Forehand's 2010 opinion.

Employer asserts that the administrative law judge erred in failing to address its post-hearing submission of Dr. Forehand's 2010 examination report and the revised evidence summary form. Employer states, "if [c]laimant exercised his post-hearing proof time in obtaining [Dr. Forehand's 2010] examination but instead of relying on same forwarded the report to opposing counsel who in turn files it within open post-hearing proof time then it was incumbent upon the [a]dministrative [l]aw [j]udge to consider that piece of evidence or, at least, its admissibility in adjudicating the case. Failure to do so was error." Employer's Brief at 13. Claimant argues, however, that employer was not entitled to submit Dr. Forehand's 2010 examination report, since the record was held open for the sole purpose of allowing *claimant* to submit additional affirmative evidence, and employer's post-hearing submission was not accompanied by a motion to re-open the record or for [e]mployer's evidence to be accepted post-hearing."[6] Claimant's Brief

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On July 1, 2008, Dr. Forehand clarified his understanding of claimant's smoking history, but reiterated that claimant was totally disabled due to pneumoconiosis. Director's Exhibit 44. In his January 12, 2010 examination report, Dr. Forehand stated that claimant "appears to have a non-disabling, respiratory impairment causing shortness of breath on exertion and requiring daily inhaled anti[-]inflammatory agents and bronchodilator for relief of symptoms." Employer's Exhibit 6. He opined that claimant's coal mine employment, "as well as a smaller contribution from smoking cigarettes, and possibly asthma have all contributed to his impairment and complaints of shortness of breath on exertion." *Id*.

[5] Employer also referenced Dr. Forehand's opinion in its response to the administrative law judge's September 22, 2010 Order, asserting that Dr. Forehand's opinion, finding that claimant is not totally disabled, precluded invocation of the amended Section 411(c)(4) presumption.

[6] In employer's initial evidence summary form, a record review by Dr. Rosenberg, dated May 14, 2008, and a record review by Dr. Vuskovich, dated February 24, 2009, were listed as employer's two affirmative medical reports. Employer's revised evidence summary form, included Dr. Forehand's 2010 examination report as a third affirmative medical report.

at 14-15. *Id*. Thus, claimant contends that the administrative law judge did not err in failing to consider employer's post-hearing submission of evidence.

Based on our review of the administrative law judge's Decision and Order, the briefs of the parties and the record evidence, we are compelled to vacate the award of benefits. We agree with employer that the administrative law judge erred by not specifically ruling on the admissibility of Dr. Forehand's 2010 examination report as Employer's Exhibit 6, and that the case must remanded to the administrative law judge for resolution of this evidentiary issue. *See* Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Owens v. Jewell Smokeless Coal Corp*., 14 BLR 1-47, 1-49 (1990); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195, 1-200 (1986), *aff'd on reconsideration*, 9 BLR 1-236 (1987)(en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(en banc). Furthermore, although employer did not file a motion with the administrative law judge requesting the opportunity to redesignate its evidence, because the recent amendments to the Act alter the burden of proof, the administrative law judge should address whether employer is entitled to submit Dr. Forehand's 2010 examination report in response to the amendments. *See Harlan Bell Coal Co. v. Lamar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990). Where a party would be denied the opportunity to fully present its case because it is unable to develop evidence relevant to a change in the law, due process requires that the party be afforded the opportunity to develop such evidence. *Id*.; *see also Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Because the administrative law judge specifically authorized the parties to provide "additional evidence" supporting their positions regarding the applicability of the presumptions in the PPACA to this claim, the administrative law judge must resolve the admissibility of Dr. Forehand's 2010 examination report. *See* Order dated September 22, 2010. Thus, we vacate the administrative law judge's finding that claimant is entitled to the presumption at amended Section 411(c)(4) and further vacate the award of benefits, as the evidentiary record in this case may not be complete.

In the interest of judicial economy, we will address one of employer's additional arguments regarding the sufficiency of the evidence and the burden of proof.[7] In finding that employer failed to rebut the amended Section 411(c)(4) presumption, the administrative law judge stated that, while "there is insufficient evidence to show that [c]laimant affirmatively *does* suffer from legal pneumoconiosis, . . . [e]mployer has not shown, by a preponderance of the evidence, that he does *not* suffer from a respiratory or pulmonary impairment significantly related to, or substantially aggravated by, his dust

[7] We decline to address employer's arguments with respect to the credibility of the medical opinions, as the content of the evidentiary record is unclear and may change on remand.

exposure as a coal miner." Decision and Order at 17. She concluded, therefore, that employer failed to rebut the presumption by disproving the existence of legal pneumoconiosis or that claimant's respiratory disability arose out of, or in connection with, his coal mine employment. *Id*.

Employer argues that the administrative law judge's analysis is inconsistent. Employer maintains that if claimant is unable to affirmatively establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), then employer necessarily rebutted the amended Section 411(c)(4) presumption. Employer's argument is without merit. Where claimant has introduced sufficient evidence to qualify for a presumption under the Act or regulations, and the presumption is one that provides for rebuttal by establishing particular facts, the burden of persuasion generally shifts to the party opposing entitlement. *See Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). If the party opposing entitlement has failed to carry its burden of proof, claimant must prevail. *See Gilson v. Price River Coal Co.*, 6 BLR 1-96 (1983). In this case, if claimant invokes the presumption at amended Section 411(c)(4), employer bears the burden to provide affirmative and persuasive evidence to rebut that presumption. *See Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 480, BLR (6th Cir. 2011). Therefore, contrary to employer's argument, the sufficiency of claimant's evidence, which is at issue at 20 C.F.R. §718.202(a), is not relevant to the question of whether employer has satisfied its burden to establish rebuttal of the Section 411(c)(4) presumption.[8] *Id*.

To summarize, on remand, the administrative law judge must determine whether Dr. Forehand's 2010 medical report should be admitted into evidence pursuant to 20 C.F.R. §725.414, based on the recent changes in the law. After the content of the record is determined then the administrative law judge must reconsider claimant's entitlement to benefits pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

[8] The Director, Office of Workers' Compensation Programs, correctly states that the presumption at amended Section 411(c)(4), provides claimant with "an avenue for establishing entitlement that is different and separate from affirmatively establishing the presence of pneumoconiosis. Under the regulatory framework, establishing entitlement by means of a presumption is neither inconsistent with, nor rendered void by, claimant's inability to establish entitlement without the benefit of a presumption." Director's Brief at 3.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge