

BRB No. 09-0807 BLA

BOB REED)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
KEN LICK COAL COMPANY, INCORPORATED)	DATE ISSUED: 08/19/2010
)	
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 Living Miner's Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Bob Reed, Salyersville, Kentucky, *pro se*.

Johanna F. Ellison (Ferreri & Fogle), Lexington, Kentucky, for employer.

Ann Marie Scarpino (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, without the assistance of counsel, appeals the Decision and Order Denying Living Miner's Benefits (2008-BLA-05925) of Administrative Law Judge Richard K. Malamphy (the administrative law judge) on a subsequent claim filed on July

24, 2007,¹ 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 to "at least" thirteen years of coal mine employment. The administrative law judge found that claimant established total disability at 20 C.F.R. §718.204(b) based on the new evidence and, therefore, established a requisite change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Turning to the merits, however, the administrative law judge found that claimant failed to establish pneumoconiosis at 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the administrative law judge's decision should be vacated and the case remanded to the administrative law judge because he failed to properly evaluate the medical evidence.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee*

¹ Claimant's first claim, filed on November 12, 1986, was denied for failure to establish any element of entitlement. Director's Exhibit 1.

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

v. W.G. Moore and Sons, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, *inter alia*, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that, at the time of death, he was totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

By Order issued on May 10, 2010, the Board permitted supplemental briefing in this case to address the impact, if any, of the 2010 amendments on this claim. The Director responds, contending that the case must be reconsidered because the 2010 amendments apply to this claim and could affect the outcome. The Director contends that because the administrative law judge found that claimant established total disability and claimant alleged twenty years of coal mine employment, claimant could be entitled to the Section 411(c)(4) presumption, and “the case should be remanded so that the [administrative law judge] can precisely determine the number of years the [c]laimant worked in coal mining and whether that number is sufficient to invoke that presumption.” Director’s Brief at 2. On remand, the Director states that the administrative law judge should allow the parties the opportunity to submit additional evidence consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414, or upon a showing of good cause under 20 C.F.R. §725.456.

The administrative law judge credited claimant with “at least” thirteen years of coal mine employment, based on the parties’ stipulation. Decision and Order at 5. However, because claimant alleged that he had at least twenty years of coal mine employment at the hearing, and further alleges that a claims examiner found “13 plus years” of coal mine employment, Hr. Tr. at 8, we conclude that the administrative law judge must determine if the requisite fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption, are established. Consequently, the administrative law judge must consider this claim pursuant to Section 411(c)(4). If claimant can establish fifteen years of qualifying coal mine employment, he would be entitled to invocation of the Section 411(c)(4) presumption,³ since the administrative law judge found that claimant has established total disability.

³ To invoke the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), claimant must initially establish that he worked at least fifteen years in an underground coal mine or in a surface coal mine in conditions substantially similar to those in an underground mine. *Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512 (7th Cir. 1988).

Consequently, in light of the 2010 amendments, we cannot affirm the denial of benefits in this case, but must vacate the administrative law judge's decision denying benefits and remand the case to the administrative law judge for consideration under Section 411(c)(4). If the administrative law judge finds that claimant is entitled to invocation of the Section 411(c)(4) presumption, the administrative law judge must determine whether employer has met its burden of rebutting the presumption by showing that claimant does not have pneumoconiosis or that his total disability "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). The administrative law judge, on remand, must allow for the submission of evidence by the parties to address the change in law. *See* 20 C.F.R. §§410.414, 725.456.

Accordingly, the administrative law judge's Decision and Order Denying Living Miner's 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