BRB No. 10-0642 BLA

EDGAR A. HAMPTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 08/17/2011
	)	
ANR COAL COMPANY, LLC	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order on Reconsideration of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Maia S. Fisher (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 and the Decision and Order on Reconsideration (08-BLA-5389) of Administrative Law Judge Daniel F. Solomon

awarding 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 subsequent claim filed on March 12, 2007.[1] After crediting claimant with at least thirty years of coal mine employment,[2] the administrative law judge found that the new evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and thus, established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d). Considering the claim on its merits, the administrative law judge properly noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. 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). 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.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). Applying amended Section 411(c)(4),[3] the administrative law judge found invocation of the rebuttable presumption

[1] Claimant's previous claim for benefits, filed on August 2, 1993, was denied by an administrative law judge on June 15, 1995, because claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 1. The Board subsequently affirmed the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and therefore, affirmed the administrative law judge's denial of benefits. *Hampton v. Enterprise Coal Co.*, BRB No. 95-1738 BLA (Sept. 19, 1995) (unpub.). There is no indication that claimant took any further action in regard to his 1993 claim.

[2] The record indicates 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, 1-202 (1989) (*en banc*).

[3] In a March 31, 2010 Order, the administrative law judge provided the parties with notice of amended Section 411(c)(4), and of its potential applicability to this case. The administrative law judge also set a schedule for the parties to submit comments regarding the effect of amended Section 411(c)(4) on the pending claim. Claimant, employer, and the Director, Office of Workers' Compensation Programs (the Director),

established. The administrative law judge also found that employer failed to meet its burden to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits. The administrative law judge subsequently denied employer's motion for reconsideration.

On appeal, employer contends that the administrative law judge erred in not providing employer with an opportunity to develop evidence relevant to the change in the law resulting from the amendments to the Act. Additionally, employer argues that the administrative law judge committed numerous errors in finding that claimant was entitled to invocation of the Section 411(c)(4) presumption, and that employer failed to rebut the presumption. Employer also requests that that the Board reassign the case to a different administrative law judge on remand. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a motion to remand, arguing that the case should be remanded so that the parties may be provided an opportunity to submit additional evidence relevant to the change in the law. In a reply brief, employer reiterates its previous contentions.

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. 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).

Employer and the Director contend that the administrative law judge erred in not allowing the parties an opportunity to submit additional evidence relevant to the change in the law. In its response to the administrative law judge's March 31, 2010 Order, employer requested an opportunity to submit additional evidence relevant to amended Section 411(c)(4). The administrative law judge rejected employer's request, explaining that:

> Shortly after the new law was signed, I afforded the parties ample opportunity to address its effects on this claim. Employer made no discovery request within that time and now generally argues that it needs more time to develop evidence in regard to Claimant's coal mine employment. Employer does not specifically identify what needs further development. Claimant has been fully deposed and there are multiple records that establish his coal mining experience. Therefore, absent a

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submitted position statements regarding the potential applicability of amended Section 411(c)(4).

> specific discovery request, I find that Employer has had ample opportunity to inquire.

Decision and Order at 18.

The Board's practice in cases affected by changes in the law has been to require the administrative law judge to allow for the submission of additional evidence by the parties to address them. *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. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). In this case, as the Director accurately notes, the administrative law judge's March 31, 2010 Order "reopened the record for briefing purposes only." Director's Brief at 8. Moreover, employer, in response to that Order, requested the "opportunity to fully develop medical evidence to support rebuttal of the new Section 411(c)(4) presumption, if invoked." Employer's Response to Order at 4. The administrative law judge failed to provide any legitimate basis for denying employer's request. We, therefore, hold that the administrative law judge erred in not providing employer with an opportunity to submit additional evidence in regard to amended Section 411(c)(4). 30 U.S.C. §921(c)(4). Consequently, we remand this case to the administrative law judge to allow for the development and consideration of additional evidence relevant to the Section 411(c)(4) presumption. *See Morrison v. Tenn. Consol. Coal Co.*, F.3d , 2011 WL 2739770 (6th Cir. 2011); *Lemar*, 904 F.2d at 1047-50, 14 BLR at 2-7-11; *Tackett*, 806 F.2d at 642, 10 BLR at 2-95. Any additional evidence submitted by the parties 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).

On remand, if the administrative law judge finds that claimant has established invocation of the presumption at amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[4] he should then consider whether employer has satisfied its burden to rebut the presumption.[5]

[4] Employer contends that claimant is not entitled to invocation of the Section 411(c)(4) presumption because claimant has not established the requisite fifteen years of qualifying coal mine employment. We agree with employer that the administrative law judge's current finding, as to whether claimant established the requisite fifteen years of qualifying coal mine employment, is inadequate. *See* Decision and Order at 19. The administrative law judge must provide the parties with an opportunity to submit additional evidence relevant to this requirement. On remand, the administrative law judge must render a finding as to whether claimant has established the requisite fifteen years of qualifying employment, providing a basis for his determination.

[5] Because of our disposition herein, we would ordinarily decline to address any specific arguments as to the merits of the case. We reject as a matter of law, however,

Finally, we turn to employer's allegations of bias on the part of the administrative law judge. Employer contends that the administrative law judge's actions "raise questions as to [his] impartiality or ability to provide 'just' proceedings." Employer's Brief at 26. We disagree. Adverse, or even erroneous, rulings in a proceeding are not, by themselves, sufficient to show bias on the part of the administrative law judge. *See Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986); *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992). Our review of the hearing transcript and the administrative law judge's decisions in this matter does not reveal evidence of partiality, bias, or prejudice against employer. We, therefore, deny employer's request that this case be assigned to a different administrative law judge on remand.

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employer's argument that an administrative law judge may not consider whether a physician's opinion is consistent with the preamble to the regulations. In considering medical opinion evidence on the issues of legal pneumoconiosis and disability causation, an administrative law judge may permissibly examine whether the medical rationales expressed are consistent with the conclusions contained in the medical literature, and scientific studies relied upon by the Department of Labor in drafting the definition of legal pneumoconiosis. *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. 79940-45 (Dec. 20, 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001).

Accordingly, the administrative law judge's Decision and Order and his Decision and Order on Reconsideration are vacated, and the case is remanded to the administrative law judge 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