BRB No. 10-0431 BLA

JAMES ARTHUR CUNDIFF	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
J W & L COMPANY, INCORPORATED	)	DATE ISSUED: 02/23/2011
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Mary Beth Chapman (Pullin Fowler Flanagan Brown & Poe PLLC), Beckley, West Virginia, for employer.

Jonathan P. Rolfe (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:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Denying Benefits (2009-BLA-5525) of Administrative Law Judge Linda S. Chapman on a claim filed on May 1, 2008, 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). Director's Exhibit 2. Crediting claimant with seventeen years of coal mine employment, the administrative law judge found that the evidence of record failed to

establish the existence of either clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). Benefits were, accordingly, denied.

On appeal, the Director contends that the administrative law judge's decision denying benefits must be vacated and the case must be remanded for consideration pursuant to the 2010 amendments to the Act, namely Section 411(c)(4), 30 U.S.C. §921(c)(1).[1] The Director further contends that the administrative law judge erred in finding that Dr. Forehand's opinion failed to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). Employer responds, arguing that the 2010 amendments do not apply to this claim because it was not pending on March 23, 2010, the date that the new amendments were enacted. Employer also contends that the Section 411(c)(4) presumption is not applicable because claimant did not have fifteen years of qualifying coal mine employment. Additionally, employer contends that the administrative law judge properly discredited the opinion of Dr. Forehand on the issue of legal pneumoconiosis. Employer contends, therefore, that the administrative law judge's decision denying benefits should be affirmed. In reply, the Director again asserts that the 2010 amendments are applicable, and that the administrative law judge's decision denying benefits must be vacated and the case must be remanded for consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4). The Director further contends, in reply to employer's argument, that whether claimant had fifteen years of underground or substantially similar coal mine employment is a question of fact that must be decided by the administrative law judge under Section 411(c)(4). Additionally, the Director reiterates his argument that the administrative law judge erred in finding that Dr. Forehand's opinion was insufficient to establish the existence of legal pneumoconiosis. Claimant has not filed a brief in this appeal.

We agree with the Director that the 2010 amendments apply to this case. The administrative law judge's decision denying benefits must, therefore, be vacated and the case must be remanded for consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4). As the Director asserts, and contrary to employer's argument, an administrative law judge's decision does not become final until thirty days after it is filed in the office of the district director. 20 C.F.R. §§725.478, 725.479; *see Mecca v. Kemmerer Coal Co.*, 14 BLR 1-101 (1990); *Harris v. Nacco Mining Co.*, 12 BLR 1-115 (1989). Any party dissatisfied with an administrative law judge's decision may, before the decision becomes

[1] On March 23, 2010, amendments to the Black Lung Benefits Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is 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.

final, appeal it to the Board. 20 C.F.R. §725.481. The administrative law judge's February 25, 2010 decision denying benefits was date-stamped as received in the office of the district director on March 4, 2010. The Director filed a Notice of Appeal with the Board on March 29, 2010, within the thirty-day period afforded the parties to appeal the administrative law judge's decision. 20 C.F.R. §§725.479, 725.481. Consequently, the administrative law judge's February 25, 2010 decision was not final. Moreover, the claim was pending on or after March 23, 2010, the date that the new amendments were enacted.

On remand, the administrative law judge must determine whether claimant is entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. In order to establish invocation of the presumption, the administrative law judge must consider whether claimant is totally disabled pursuant to 20 C.F.R. §718.204(b). The administrative law judge must also determine whether claimant 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. *See Director, OWCP v. Midland Coal Co*. [*Leachman*], 855 F.2d 509 (7th Cir. 1988). If the administrative law judge determines that the Section 411(c)(4) presumption is invoked, she must then consider whether employer has satisfied its burden to rebut the presumption. 30 U.S.C. §921(c)(4). On remand, the administrative law judge must allow for the submission of evidence by the parties to address the change in law.[2] *See Harlan Bell Coal Co. v. Lamar*, 904 F.2d 1042, 11047-50, 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 at 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause, pursuant to 20 C.F.R. §725.456(b)(1).

[2] We will not address the administrative law judge's finding that Dr. Forehand's opinion is insufficient to establish legal pneumoconiosis. If the administrative law judge finds claimant entitled to invocation of the Section 411(c)(4) presumption of totally disabling pneumoconiosis, the burden shifts to employer to show that claimant does not have pneumoconiosis, or that his totally disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded to the administrative law judge for 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