BRB No. 10-0259 BLA

BOBBY JOE HALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MELISSA COAL COMPANY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 01/31/2011
	)	
EMPLOYERS' INSURANCE OF WASSAU	)	
	)	
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 – Denial of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery Law Office), Prestonsburg, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

Jeffrey S. Goldberg (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:

Claimant appeals the Decision and Order – Denial of Benefits (2007-BLA-05851) of Administrative Law Judge Joseph E. Kane rendered on a claim filed on November 3, 2005, 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 credited claimant with at least fourteen years of coal mine employment and adjudicated this claim pursuant to the regulatory provisions set forth at 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), but insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response to claimant's appeal unless specifically requested to do so by the Board.

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.[1] 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).

By Order dated September 10, 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] Employer and the Director have responded.

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

[2] Relevant to this living miner's claim, Section 1556 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a claimant establishes at least fifteen years of qualifying coal mine employment, and that he has a totally disabling respiratory impairment, there is a rebuttable presumption that he is

The Director contends that, because claimant filed his claim after January 1, 2005, and it was still pending on March 23, 2010, the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), applies to this case. The Director notes that the administrative law judge determined that claimant is totally disabled by a respiratory or pulmonary impairment. Although the administrative law judge accepted the parties' stipulation to "at least" fourteen years of coal mine employment, he did not render specific findings as to the length and nature of claimant's coal mine work. Thus, the Director maintains that the administrative law judge's denial of benefits must be vacated and the case remanded for a determination as to whether claimant has fifteen years of qualifying coal mine employment and is thereby entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis.[3]

Employer acknowledges that Section 1556 is applicable to this case, based on the filing date of the claim. Employer, however, contends that remand is unnecessary, as the evidence of record fails to establish that claimant has fifteen years of qualifying coal mine employment.

After review of the parties' responses, we agree with the Director that the administrative law judge's denial of benefits must be vacated and the case remanded to the administrative law judge for a specific finding as to the length and nature of claimant's coal mine employment, relevant to invocation of the Section 411(c)(4) presumption. In addressing claimant's coal mine employment, the administrative law judge noted, in pertinent part:

> On his application for benefits, the Claimant alleged 15 to 18 years of coal mine employment. [Director's Exhibits 2, 50]. He testified that he worked in the following jobs: cutter operator, bolter, scoop operator, shot coal, and continuous miner operator. [Director's Exhibit 4, Hearing Transcript at 10]. The Director determined that Claimant has at least [fourteen] years of

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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)).

[3] The Director, Office of Workers' Compensation Programs (the Director), states that, insofar as the recent amendments alter the parties' respective burdens of proof, "it would be unjust not to allow the parties the opportunity to submit additional evidence." Director's Letter Brief at 2. The Director further suggests that the Board instruct the administrative law judge "to reopen the record on remand for the parties to submit additional evidence or testimony addressing the exact length of claimant's coal mine employment." *Id.*

> coal mine employment, a finding which . . . Employer is no longer contesting and to which counsel for Claimant also stipulated. [Hearing Transcript at 8-9, Director's Exhibit 50.] This stipulation is supported by the Social Security Administration records. [Director's Exhibit 6.]. I find that the Claimant has established at least fourteen years of coal mine employment. [Director's Exhibit 3; *see also* Hearing Transcript at 26-27, 29.]

Decision and Order at 3. Because a finding of "at least fourteen years" of coal mine employment does not preclude the possibility that the claimant had fifteen years of qualifying coal mine employment, the administrative law judge must make a more specific finding regarding the length of the claimant's coal mine employment and whether he worked underground or in surface mining in conditions substantially similar to those in an underground mine. Thus, we vacate the administrative law judge's Decision and Order and remand the case for further consideration of whether claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4). As necessary, the administrative law judge must also determine whether employer has submitted evidence sufficient to rebut the presumption. Additionally, the administrative law judge must allow for the submission of additional evidence by the parties to address the change in law. *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). Furthermore, 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.[4] 20 C.F.R. §725.456(b)(1).

[4] Because the administrative law judge has not yet considered this claim under the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), we decline to address, as premature, claimant's argument with regard to the administrative law judge's findings at 20 C.F.R. §718.202(a)(4).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is vacated, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge