BRB Nos. 09-0671 BLA
and 09-0671 BLA-A

HARMON MAYNARD	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
LAUREL RUN MINING COMPANY	)	
	)	DATE ISSUED: 07/29/2010
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals and employer cross-appeals the Decision and Order Denying Benefits (2008-BLA-5204) of Administrative Law Judge Richard A. Morgan rendered on a subsequent claim[2] 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). Adjudicating the claim pursuant to the regulations at 20 C.F.R. Part 718, the administrative law judge found that the record established at least thirty-four years of coal mine employment. The administrative law judge determined that the three newly submitted medical opinions, along with the qualifying arterial blood gas evidence, established total disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. However, based on his consideration of the claim on the merits, the administrative law judge found that claimant failed to prove the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues, *inter alia*, that the administrative law judge erred in finding that he failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer responds, urging affirmance of the denial of benefits. Employer has also filed a cross-appeal, asserting that the administrative law judge erred in weighing the x-ray evidence and in finding that Dr. Zaldivar's opinion was hostile to the Act. The

[1] Claimant is a deceased miner, who died on December 28, 2007. Because we have not received a specific request from the parties to change the caption of the case to reflect that the claim is being pursued by the miner's widow, we continue to refer to the deceased miner as "claimant" for purposes of this decision.

[2] Claimant filed his first claim for benefits on October 23, 2000. Director's Exhibit 1. The district director denied benefits on January 26, 2001, finding that claimant was not "totally disabled by the disease." *Id.* Claimant filed a second claim on March 12, 2002. Director's Exhibit 2. In a Proposed Decision and Order dated April 28, 2003, the district director denied benefits, finding that claimant established the existence of pneumoconiosis arising out of coal mine employment, but failed to establish total disability and total disability due to pneumoconiosis. *Id.* Claimant took no action until he filed this subsequent claim on February 27, 2007. Director's Exhibit 4. In a Proposed Decision and Order dated September 17, 2007, the district director awarded benefits, and employer requested a hearing. Director's Exhibit 18. Claimant subsequently died on December 28, 2007. Hearing Transcript (Dec. 18, 2008) at 8. The administrative law judge issued a Decision and Order Denying Benefits on May 28, 2009, which is the subject of this appeal.

Director, Office of Workers' Compensation Programs (the Director), filed a letter indicating that he would not submit a substantive response to claimant's appeal, unless 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. 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 April 8, 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 and became effective on March 23, 2010.[3] *Maynard v. Laurel Run Mining Co.*, BRB Nos. 09-0671 BLA and 09-0671-A (Apr. 8, 2010)(unpub. Order). All of the parties have responded to this Order. Both claimant and the Director agree that the recent amendments to the Act are applicable in this case, as the present claim was filed after January 1, 2005, and claimant established at least thirty-four years of coal mine employment. Claimant and the Director also agree that the denial of benefits must be vacated and the case remanded to the administrative law judge to address whether claimant is entitled to the Section 411(c)(4) presumption. The Director maintains that because the presumption alters the required findings of fact and the allocation of the burden of proof, the administrative law judge must allow the parties the opportunity to submit additional, relevant evidence, in compliance with the evidentiary limitations at 20 C.F.R. §725.414. Claimant also contends that it is appropriate that the parties be given leave to submit additional evidence. Employer asserts that, although Section 1556 "may affect" this case, a remand is not necessary, because it has "effectively rebutted" the Section 411(c)(4) presumption based on the administrative law judge's determination that claimant does not have pneumoconiosis. Employer's Supplemental Brief at 4-5. Thus, employer urges affirmance of the administrative law judge's denial of benefits Alternatively, employer contends that if the Board remands this case, the administrative law judge should be instructed to allow employer to develop, without limitation, evidence necessary to satisfy its new burden of proof imposed by the recent amendments. Employer also contends that retroactive application of the amendments is

[3] Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010.

unconstitutional, as it violates employer's right to due process and constitutes a taking of private property.[4]

Based upon the parties' responses, and our review, we conclude that this case is affected by Section 1556. 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 were 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 totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). In this case, claimant filed his claim after January 1, 2005, the administrative law judge credited him with at least thirty-four years of coal mine employment, and determined that claimant has a totally disabling respiratory impairment.[5] In addition, if the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Contrary to employer's assertion, therefore, we cannot hold that remand is unnecessary, under the facts of this case, based on the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis.

Accordingly, we vacate the administrative law judge's denial of benefits pursuant to 20 C.F.R. Part 718, and remand this case to the administrative law judge for consideration of whether claimant is entitled to invocation of the rebuttable presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). If the administrative law judge finds that claimant is entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, that administrative law judge must then determine

[4] We deny employer's request to hold this case in abeyance until such time as the Department of Labor issues guidelines or promulgates new regulations implementing the statutory amendments. We also deny employer's request to hold the case in abeyance because the constitutionality of Public Law No. 111-148 has been challenged in a lawsuit filed in the United States District Court for the Northern District of Florida. Despite that filing, employer does not indicate that any court has yet enjoined the application or ruled on the validity of the recent amendments to the Act.

[5] Employer concedes that the recent amendments "may apply" to this claim, based on the administrative law judge's findings of at least thirty-four years of coal mine employment and total disability. Employer's Supplemental Brief at 3, 4. Employer does not raise error with these findings. Accordingly, we affirm, as unchallenged by the parties on appeal, the administrative law judge's determination of at least thirty-four years of coal mine employment and his findings that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

whether employer has rebutted the presumption by establishing that claimant does not have pneumoconiosis or that his "respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." 30 U.S.C. §921(c)(4).

On remand, 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). Further, 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. 20 C.F.R. §725.456(b)(1). Because the administrative law judge has not yet considered this claim under the amended version of Section 411(c)(4) of the Act, however, we decline to address, as premature, employer's argument that the retroactive application of the amendment to this claim is unconstitutional.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed, in part, and vacated, in part, 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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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge