BRB No. 09-0739 BLA

DONALD E. MORGAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 07/30/2010
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 - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for claimant.

Lindsey M. Sbrolla (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2008-BLA-5072) of Administrative Law Judge Michael P. Lesniak, rendered on a subsequent claim filed pursuant to 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).[1] In a Decision and Order dated June 30, 2009, the administrative law judge accepted the parties' stipulation that claimant worked at least thirteen years in coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found, based on his review of the evidence submitted with the subsequent claim, that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203, and that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis. Employer asserts that the administrative law judge erred in failing to consider evidence from claimant's prior claim, erred in determining the length of claimant's smoking history, erred in relying on the preamble to the regulations when evaluating the medical opinions, mischaracterized the opinions of Drs. Fino and Renn, and failed to explain, in accordance with the Administrative Procedure Act (APA),[2] why he credited the opinions of Drs. Jaworski, Celko and Rasmussen, as establishing that claimant's chronic obstructive pulmonary disease (COPD) was due, in part, to coal dust exposure. Employer further asserts that the administrative law judge erred in applying his credibility determinations at 20 C.F.R. §718.202(a)(4), in finding that claimant established disability causation under 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response brief, asserting that the administrative law judge reasonably considered the preamble in

[1] Claimant filed a prior claim for benefits on October 23, 2003, which was denied by the district director on August 17, 2004, on the grounds that the evidence failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant took no action with regard to the denial of his claim until he filed the current subsequent claim on November 13, 2006. Director's Exhibit 3.

[2] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a);

resolving the conflict in the medical opinion evidence.[3] Employer has filed a reply brief, reiterating its argument that the administrative law judge erred in weighing the opinions of Drs. Fino and Renn.[4]

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.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that

[3] By Order dated May 4, 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. *Morgan v. Consolidation Coal Co.*, BRB No. 09-0739 BLA (May 4, 2010) (unpub. Order). 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). The parties have responded. Claimant and the Director, Office of Workers' Compensation Programs (the Director), assert that, while Section 1556 is applicable to this claim, because it was filed after January 1, 2005, the case need not be remanded to the administrative law judge for further consideration, unless the Board vacates the administrative law judge's award of benefits. Employer states that, while Section 1556 is applicable to this claim, claimant is not entitled to the Section 411(c)(4) presumption of total disability due to pneumoconiosis, based on the administrative law judge's length of coal mine employment finding.

[4] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant established total disability under 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibits 1, 7.

his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Employer first contends on appeal that the administrative law judge erred in failing to weigh all of the relevant evidence of record, prior to awarding benefits. Specifically, employer asserts that the administrative law judge did not consider medical evidence contained in claimant's first black lung claim, including a report by Dr. Basheda, relevant to the issues of the existence of legal pneumoconiosis, disability causation and the length of claimant's smoking history.[6] Employer's assertion of error has merit.

The regulation at 20 C.F.R. §725.309(d)(1) requires that "[a]ny evidence submitted in conjunction with any prior claim shall be made part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim." 20 C.F.R. §725.309(d)(1). Furthermore, pursuant to 20 C.F.R. §725.309(d), once claimant has established a change in an applicable condition of entitlement in a subsequent claim, the administrative law judge must consider all of the record evidence relevant to claimant's entitlement, including the evidence submitted with any prior claim. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Because the administrative law judge's Decision and Order does not reflect his consideration of the prior claim evidence, we must vacate the award of benefits and remand the case for further consideration. *Id*.

Employer's next argument is that the administrative law judge erred in finding that claimant's smoking history is "about" fifty pack years. Employer's Brief in Support of Petition for Review at 14; *see* Decision and Order at 4. In determining the length of claimant's smoking history, the administrative law judge considered claimant's hearing testimony, the five newly submitted medical reports of Drs. Jaworski, Celko, Rasmussen,

[6] Dr. Basheda examined claimant on March 3, 2004, at the request of the Department of Labor. Director's Exhibit 1. He recorded severe obstruction and hyperinflation with bronchodilator response on pulmonary function study. *Id*. He diagnosed severe chronic obstructive pulmonary disease and asthma. *Id*. He concluded that claimant had no x-ray evidence of pneumoconiosis. *Id*. He opined that the miner's respiratory condition was related to ongoing smoking and not coal dust exposure. *Id*.

Fino and Renn, along with claimant's treatment records.[7] The administrative law judge concluded:

> In its closing brief, [e]mployer meticulously reviewed every treatment record mention of a smoking history and "submits the miner's smoking history is [eighty] to [one hundred] pack years." While the treatment records may indeed record a smoking history up to 100 pack years, I find that the most persuasive evidence of [c]laimant's smoking history is from the examining physician[]s in this case, Drs. Jaworski, Rasmussen, Celko and Fino. It is reasonable to conclude that the examining physicians, who were conducting their exams for the express purpose of establishing the extent of [c]laimant's respiratory disease as well as its etiology, would have emphasized the importance of obtaining an accurate smoking history. Therefore, I find the most reasonable evidence establishes that [c]laimant['s] smoking history is about [fifty] pack years.

Decision and Order at 4-5.

Employer argues that the administrative law judge has "substituted his own personal view in concluding that the physicians who examined [c]laimant as part of the present litigation would have emphasized the importance of obtaining an accurate smoking history" as "[t]here is nothing in the record to support this conclusion. . . ." Employer's Brief is Support of Petition for Review at 14. Based on the administrative law judge's analysis, we agree with employer that the administrative law judge has failed to explain why the pulmonologists who examined claimant during his hospitalizations,[8] for the purpose of either diagnosing or treating his lung condition, would not also have emphasized the importance of obtaining an accurate smoking history from claimant.

[7] At the hearing, claimant testified that he smoked between "[one-half] pack to [a] pack and a half, possibly even two packs" since age eighteen, and continues to smoke "about four cigarettes a day." Hearing Transcript at 15-18. Dr. Jaworski noted a smoking history of one pack per day from age nineteen until 2006, totaling about fifty-one pack years. Director's Exhibit 15. Dr. Celko noted a smoking history of fifty plus years. Director's Exhibit 16. Dr. Rasmussen noted a smoking history of fifty-four pack years and Dr. Fino noted a smoking history of one pack per day "for about" fifty years. Claimant's Exhibit 4; Employer's Exhibit 1. Dr. Renn noted a smoking history of between twenty to one-hundred pack years. Employer's Exhibit 2.

[8] As discussed *infra*, the administrative law judge should address the smoking histories identified in the hospitalization records contained in both the prior and subsequent claims.

Consequently, the administrative law judge's credibility determination is not rational. Additionally, the administrative law judge erred in failing to consider the medical report of Dr. Basheda, who also examined claimant in relation to his black lung claim, and reported a smoking history of two packs of cigarettes a day from age eighteen to sixty-seven, resulting in a one-hundred pack year history of smoking. Director's Exhibit 1. Therefore, on remand, the administrative law judge is instructed to reconsider the length of claimant's smoking history, in light of the smoking history recorded by Dr. Basheda.

Pursuant to 20 C.F.R. §718.202(a)(4), employer also argues that the administrative law judge erred in weighing the conflicting medical opinions of Drs. Jaworski, Celko, Fino, Renn and Rasmussen, as to whether claimant established the existence of legal pneumoconiosis.[9] As noted by the administrative law judge, "[a]ll five physicians diagnosed [COPD] and found [c]laimant totally disabled due to pulmonary impairment." Decision and Order at 16. Drs. Jaworski, Celko and Rasmussen attributed claimant's COPD/emphysema to both smoking and coal dust exposure, while Drs. Fino and Renn opined that coal dust exposure did not significantly contribute to his lung disease. The administrative law judge determined that Drs. Fino and Renn expressed opinions that conflicted with the definition of legal pneumoconiosis, as set forth in the preamble to the revised regulations. He gave greater weight to the opinions of Drs. Jaworski, Celko and Rasmussen, and explained:

> All three physician[]s considered both [c]laimant's smoking and coal dust history, explained that both smoking and coal dust causes COPD independently and additively, acknowledged that [c]laimant's smoking history was substantial enough to be the predominate cause of [c]laimant's lung disease and resulting impairment.

Id. at 17. The administrative law judge then considered the qualifications of the physicians, and stated that "their qualifications have not affected my findings as to the reasoning, documentation and credibility of their individual findings." *Id*. at 18 n.16.

Employer contends that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis, insofar as he mischaracterized the opinions of Drs. Fino and Renn and failed to fully consider their explanations as to why claimant's COPD is unrelated to coal dust exposure. We disagree.

Dr. Fino examined claimant on August 23, 2007. Employer's Exhibit 1. Dr. Fino opined that claimant does not suffer from clinical or legal pneumoconiosis. *Id*. Dr. Fino

[9] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

diagnosed "[COPD]-reversible bronchospasm consistent with asthma plus emphysema." *Id*. He noted that the substantially reversible portion of claimant's COPD "is not characteristic of, or expected in, coal mine dust related conditions," and is most consistent with asthma. *Id*. He specifically opined that emphysema is a significant contributing factor in claimant's disability, but that it was unrelated to coal dust exposure because "the amount of obstruction due to coal mine dust exposure induced emphysema is directly related to the amount of coal mine dust retained in the lung tissue, which is directly proportional to the abnormality on the chest x-ray." *Id*. In a deposition conducted on August 12, 2008, Dr. Fino testified that both cigarette smoking and coal dust exposure can cause obstructive lung disease, including emphysema. Employer's Exhibit 12 at 19. When asked how he distinguished the effects of cigarette smoking and coal mine dust in reaching his opinion in this case, Dr. Fino replied:

> The common sense approach, [claimant] stopped working in [1983], had normal lung function following bronchodilators in 2006 in terms of the FEV-1[,] [a]nd that goes down precipitously over [the] next two years when [claimant] admits to continuing to smoke, but hadn't been exposed to coal dust for over [twenty-four] years.

Id. at 20.[10]

Dr. Renn reviewed the medical record and prepared a consultative report dated April 29, 2008. Employer's Exhibit 2. Dr. Renn diagnosed pulmonary emphysema caused by tobacco smoking and asthma, and opined that claimant does not have pneumoconiosis. *Id*. In a deposition conducted on August 14, 2008, Dr. Renn testified that he excluded coal dust exposure as a cause of claimant's emphysema because:

> [T]here is focal emphysema[,] which is seen as coal workers' pneumoconiosis. Focal emphysema is distinguished from centrilobular emphysema, such as tobacco smoking, by the presence of the coal macule. Then there's centrilobular emphysema which is associated most often with tobacco smoking and is unassociated with the coal macule, otherwise it would appear the same as the focal emphysema. *Id*.

Employer's Exhibit 13 at 23.

[10] When asked whether this was a case of progressive pneumoconiosis, Dr. Fino stated, "The studies on pure obstruction, which is what we're pretty much dealing with here, really don't show significant progression unless you meet the other criteria. And those criteria are things like you've worked thirty or forty years in the mines. You have an x-ray that has worsened." Employer's Exhibit 12 at 24.

The administrative law judge reasonably assigned less weight to Dr. Fino's opinion that claimant's COPD/emphysema was unrelated to coal dust exposure because he found that it was based, in part, on "the lack of x-ray evidence showing clinical pneumoconiosis." Decision and Order at 17. As noted by the administrative law judge, the Department of Labor (DOL) has specifically concluded, that "coal dust induced COPD can occur regardless of the presence of clinical pneumoconiosis." *Id*. at 17-18; *see* 65 Fed. Reg. 79,939-41 (Dec. 20, 2000); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1328-29, 10 BLR 2-220, 2-238 (3d Cir. 1987). Similarly, the administrative law judge found that Dr. Renn's opinion was less credible because, "like Dr. Fino, Dr. Renn relies on the lack of x-ray evidence to support his conclusion regarding the etiology of [c]laimant's emphysema." Decision and Order at 18. As noted by the administrative law judge, Dr. Renn specifically opined that "claimant's [centrilobular] emphysema was unrelated to coal dust exposure because coal dust causes focal emphysema, which requires the presence of a coal macule" on x-ray. *Id*. at 17-18. However, DOL has not made a distinction between focal and centrilobular emphysema, and has stated that medical literature "supports the theory that coal dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms." *Id*. at 18, quoting 65 Fed. Reg. at 79,943.

Contrary to employer's assertions, the administrative law judge did not treat the preamble to the regulations as evidence, or as a presumption that all obstructive lung disease is pneumoconiosis; rather, he permissibly consulted the preamble as an authoritative statement of medical principles accepted by DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment.[11] *See Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009). Thus, because the administrative law judge reasonably found the opinions of Drs. Fino and Renn to be less credible, based on his consideration of the preamble to the regulations, we affirm his decision to accord their opinions less weight at 20 C.F.R. §718.202(a)(4). *See Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

Employer also contends that because "Drs. Jaworski, Celko and Rasmussen did not cite to anything specific in the medical evidence to support or logically explain their

[11] In addition, contrary to employer's suggestion, the preamble does not constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990).

conclusion that claimant's coal mine dust exposure is significantly contributing to his COPD," the administrative law judge erred in concluding that their opinions were sufficient to satisfy claimant's burden of proving legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). Employer's Brief in Support of Petition for Review at 23. There is merit to employer's argument, in part.

The administrative law judge stated that he gave greatest weight to the opinions of Drs. Jaworski, Celko and Rasmussen, because he found that they considered claimant's smoking and coal dust history, acknowledged that smoking and coal dust may cause COPD, independently and additively, and concluded that coal dust exposure was at least a significant contributor to claimant's pulmonary disease. After noting that DOL has taken the position that "a claim will not be denied simply because a physician reasonably may be unwilling or unable to account, as a percentage or otherwise, for the exact degree of impairment" the administrative law judge determined that the opinions of Drs. Jaworski, Celko and Rasmussen were sufficient to establish the existence of legal pneumoconiosis. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003). However, when assessing the probative value of the medical opinions, the administrative law judge must determine whether a physician has provided a reasoned and documented diagnosis of a pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see Lango v. Director, OWCP*, 104 F.3d 573, 578, 21 BLR 2-12, 2-20 (3d Cir. 1997); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Insofar as the administrative law judge has not made a specific finding as to whether the opinions of Drs. Jaworski, Celko and Rasmussen are reasoned and documented, the administrative law judge has failed to comply with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Therefore we instruct the administrative law judge, on remand, to make a specific determination as whether the opinions of Drs. Jaworski, Celko and Rasmussen are reasoned and documented, and to determine, based on his review of all of the relevant evidence of record, whether claimant has established the existence of legal pneumoconiosis. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *Clark*, 12 BLR at 1-151.

Employer also contends that the administrative law judge erred in finding that claimant established total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). Because we vacated the administrative law judge's findings at 20 C.F.R. §718.202(a)(4), which may have influenced his findings on the issue of disability causation, we also vacate the administrative law judge's findings at 20 C.F.R. §718.204(c).

We reject, however, employer's assertion that the administrative law judge failed to properly reconcile his disability causation finding with the "[d]istrict [d]irector's finding that [c]laimant was totally disabled due to cigarette smoking-induced COPD and asthma in 2004" and that he "should have applied collateral estoppel to prevent

[c]laimant from challenging that he is totally disabled due to cigarette smoking-induced COPD and asthma." Employer's Brief in Support of Petition for Review at 26. Collateral estoppel, or issue preclusion, forecloses relitigation, in a subsequent action, of an issue that was decided in a prior action. Collateral estoppel is properly applied when the following criteria are met: (1) the precise issue raised in the present case was raised and actually litigated in the prior proceeding;(2) determination of the issue was necessary to the outcome of the prior proceeding; (3) the prior proceeding resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. *See Burlington Northern Railroad Co. v. Hyundai Merchant Marine Co., Ltd.*, 63 F.3d 1227 (3d Cir. 1995); *O'Leary v. Liberty Mutual Insurance Co.*, 923 F.2d 1062 (3d Cir. 1991); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999) (*en banc*). In this case, the miner's prior claim, filed on October 23, 2003, was denied by the district director on the ground that the evidence was insufficient to establish any of the requisite elements of entitlement, and he did not make a finding that claimant was totally disabled due to COPD caused by smoking. Director's Exhibit 1. Thus, there is no merit to employer's contention that claimant may only establish his entitlement if he shows that his "legal pneumoconiosis 'materially' worsen[ed]' his totally disabling cigarette smoking-induced COPD." Employer's Brief in Support of Petition for Review at 27; *see Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Sellards v. Director, OWCP*, 17 BLR 1-77 (1993) (the doctrine of res judicata generally has no application in the context of a duplicate claim).

To summarize, we instruct the administrative law judge, on remand, to consider all the medical evidence in the record in determining whether claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[12] Thereafter, the administrative law judge must consider whether claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In rendering his decision on remand, the administrative law judge must set forth his findings of fact and the bases for his credibility determinations, in detail, as required by APA, taking into account the quality of the reasoning provided by each of the physicians. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Muscar v. Director, OWCP*, 18 BLR 1-7 (1993); *Wojtowicz*, 12 BLR at 1-165.

[12] Because the administrative law judge found that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis, the administrative law judge was not required to separately determine the etiology thereof at 20 C.F.R. §718.203(b), as his finding at 20 C.F.R. §718.202(a)(4) necessarily subsumed that inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

Finally, we note that because this case was filed after January 1, 2005 and was pending after March 23, 2010, and because we have vacated the award of benefits, the administrative law judge must also consider the impact of the recent amendments to the Act, which became effective on March 23, 2010, on this case, including whether claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). If the administrative law judge, on remand, finds that claimant is entitled to the presumption that he is totally disabled due to pneumoconiosis at Section 411 (c)(4), the administrative law judge must then determine whether the medical evidence rebuts 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, should also 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).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed in part and vacated in part, 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