

BRB No. 09-0787 BLA

BENNY S. ELKINS)
)
 Claimant-Petitioner)
)
 v.)
)
 SOUTHLAND ENTERPRISES,) DATE ISSUED: 07/29/2010
 INCORPORATED)
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
) DECISION and ORDER
 Party-in-Interest

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

Benny S. Elkins, Clintwood, Virginia, *pro se*.

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

Helen H. Cox (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: SMITH, McGRANERY and BOGGS, Administrative Appeals
Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,¹ the Decision and Order Denying Benefits (2008-BLA-5146) of Administrative Law Judge Linda S. Chapman rendered on a subsequent 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).² Adjudicating the claim pursuant to the regulations at 20 C.F.R. Part 718, the administrative law judge found that the record established thirty-three years of coal mine employment. The administrative law judge determined that the newly submitted medical opinions established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. However, based on her 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) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response unless specifically requested to do so by the Board.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational,

¹ Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

² Claimant has filed three previous claims for benefits. Director's Exhibits 1-3. Claimant first filed a claim on November 8, 1982, which was denied by Administrative Law Judge Giles J. McCarthy on November 24, 1987, because claimant failed to establish any of the elements of entitlement. Director's Exhibit 1. Claimant filed duplicate claims on January 4, 1991 and April 27, 1999, which were denied by the district director on March 22, 1991 and September 10, 1999, respectively, because the newly submitted evidence did not establish any of the elements of entitlement. Director's Exhibits 2-3. Claimant took no action with regard to the denials until he filed his current subsequent claim on November 6, 2006. Director's Exhibit 4.

supported by substantial evidence, and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

By Order dated May 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 and became effective on March 23, 2010. *Elkins v. Southland Enterprises, Inc.*, BRB No. 09-0787 BLA (May 10, 2010)(unpub. Order). Employer and the Director responded to this Order. Both employer 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 thirty-three years of coal mine employment. Both employer and the Director 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. They also maintain 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.

Based upon the parties’ responses, and our review, we conclude that this case is affected by Section 1556. In pertinent part, 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 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). In this case, claimant filed his claim after January 1, 2005, the administrative law judge credited him with thirty-three years of coal mine employment, and determined that the newly submitted evidence established that claimant has a totally disabling respiratory impairment.

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

³ Because claimant’s last coal mine employment was in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director’s Exhibits 1, 2, 3.

disability due to pneumoconiosis, the administrative law judge must then determine 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).

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.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge