BRB No. 10-0640 BLA

ARVIS R. TOLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 07/28/2011
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order - Denial of Motion to Reconsider of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order, and the Decision and Order - Denial of Motion to Reconsider (09-BLA-5255), of Administrative Law Judge Daniel F. Solomon awarding benefits on a subsequent claim[1] 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). Subsequent to the hearing in this case, Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005, and were pending on or after March 23, 2010, the effective date of the amendments. Relevant to this claim, Section 1556 reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). 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).

By Order dated April 16, 2010, the administrative law judge directed the parties to address the impact of the amendments on this case by May 20, 2010, and to file any reply briefs by May 31, 2010. Claimant responded by filing two briefs, dated April 19, 2010 and May 20, 2010. Employer requested additional time to file a brief after employer's receipt of the hearing transcript. On June 15, 2010, the administrative law judge issued his Decision and Order without ruling on employer's motion, noting that employer "has had sufficient time to file the brief due before May 31, and has not responded to Claimant's brief." Decision and Order at 2. The administrative law judge accepted employer's stipulations that claimant was totally disabled and had twenty-seven years of coal mine employment. Because claimant filed his claim after January 1, 2005, his claim was pending on March 23, 2010, and the administrative law judge determined that claimant worked at least sixteen years as an underground miner, the administrative law judge found that claimant was entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and that the evidence of record was insufficient to establish rebuttal of the presumption. On July 23, 2010, the administrative law judge denied the motions for reconsideration filed by employer and the Director, Office of Workers' Compensation Programs (the Director). While employer argued that the record should be reopened to permit the development of evidence responding to the change in law, the administrative law judge found that employer "provided no proffer as to what evidence it might have provided. . . .[i]f it has such evidence, it has other options." Decision and Order – Denial of Motion to Reconsider at 2. Noting that the hearing

[1] Claimant's previous claim, filed on February 4, 1993, was denied for failure to establish the existence of pneumoconiosis. *Toler v. Eastern Assoc. Coal Corp.*, BRB No. 96-1499 BLA (July 29, 1997)(unpub.), *aff'd*, *Toler v. Eastern Assoc. Coal Corp.*, No. 97-2148 (4th Cir. Aug. 19, 1998)(unpub). Claimant filed his subsequent claim on February 26, 2008. Director's Exhibit 3.

transcript was served on May 3, 2010, the administrative law judge indicated that employer had sufficient time to file its brief before May 31, 2010.[2]

Employer appeals, arguing that the administrative law judge erred in disallowing employer an opportunity to respond to the change in the law, thereby depriving employer of due process. Employer argues that the record must be reopened to allow for the submission of evidence responsive to the changes in the law resulting from the amendments to the Act. Additionally, employer assigns error to the administrative law judge's weighing of the medical opinions with references to the scientific views and commentary adopted by the Department of Labor in the preamble to the revised regulations. Employer urges the Board to vacate the award of benefits and direct reassignment of this case to a different administrative law judge on remand. Claimant has not responded to the appeal. The Director has indicated that he will not respond to the 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.[3] 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).

Initially, we hold that the administrative law judge appropriately considered this claim under the amended version of Section 411(c)(4) of the Act, based on his finding that employer stipulated, and the record established, that claimant had at least fifteen years of qualifying coal mine employment and suffered a totally disabling respiratory impairment. However, our practice in cases affected by the amendments to the Act has

[2] The motion for reconsideration filed by the Director, Office of Workers' Compensation Programs (the Director), on July 2, 2010, requested the administrative law judge to amend the Decision and Order of June 15, 2010, to specify an onset date for payment of benefits, in accordance with 20 C.F.R. §725.503(b). In response to employer's motion for reconsideration, however, the Director averred that the motion should be granted to the extent that employer requested to be allowed an opportunity to respond to the change in the law at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), with evidence related to the change in the law. *See* Director's Response of July 14, 2010 at 2-3.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 3, 4, 5; Hearing Transcript at 43.

been to require the administrative law judge to 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). Additionally, the administrative law judge issued his Decision and Order without ruling on employer's motion for an enlargement of time to respond. Accordingly, we conclude that employer's failure to respond by May 31, 2010 to the administrative law judge's Order of April 16, 2010, or to reply to claimant's briefs, did not constitute a waiver of employer's due process right to respond with evidence relevant to its burden to rebut the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Consequently, we vacate the administrative law judge's Decision and Order, and his Decision and Order - Denial of Motion to Reconsider, and remand this case to the administrative law judge for further findings.[4] On remand, the administrative law judge must allow for the submission of evidence by the parties to address the change in law. *See Morrison v. Tenn. Consol. Coal Co.*, F.3d , 2011 WL 2739770 (6th Cir. 2011); *Lemar*, 904 F.2d at 1047-50, 14 BLR at 2-7-11; *Tackett*, 806 F.2d at 642, 10 BLR at 2-95. 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). On remand, if the administrative law judge finds that claimant has established invocation of the presumption at amended Section 411(c)(4), 30 U.S.C. §921(c)(4), he should then consider whether employer has satisfied its burden to rebut the presumption.

Finally, we turn to employer's allegations of bias on the part of the administrative law judge. Employer contends that the administrative law judge's various rulings and comments "raise questions as to [his] impartiality or ability to provide 'just' proceedings." Employer's Brief at 8. We disagree. Adverse, or even erroneous, rulings in a proceeding are not, by themselves, sufficient to show bias on the part of the

[4] Because of our disposition herein, we would ordinarily decline to address any specific arguments as to the merits of the case. We reject as a matter of law, however, employer's argument that an administrative law judge must render pre-judgment rulings with respect to the preamble to the regulations. The Board has held that, in considering medical opinion evidence on the issues of legal pneumoconiosis and disability causation, an administrative law judge permissibly examines whether the medical rationales expressed were consistent with the conclusions contained in the medical literature and scientific studies relied upon by the Department of Labor (DOL) in drafting the definition of legal pneumoconiosis. *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. 79940-45 (Dec. 20, 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001).

administrative law judge. *See Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986); *see also Liteky v. United States*, 510 U.S. 540, 555 (1994); *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-23 (1999); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992). As our review of the hearing transcript and the administrative law judge's decisions in this matter does not reveal evidence of partiality, bias or prejudice against employer, we deny employer's request that the case be reassigned to a different administrative law judge on remand.

Accordingly, the administrative law judge's Decision and Order and his Decision and Order - Denial of Motion to Reconsider are vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge