BRB No. 11-0672 BLA

DANNY RAY HUDSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GOLDEN OAK MINING COMPANY	)	DATE ISSUED: 07/17/2012
	)	
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 on Remand of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2008-BLA-05252) of Administrative Law Judge Kenneth A. Krantz awarding benefits on a claim filed on March 26, 2007, 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). This case is before the Board for the second time.

In his first Decision and Order, the administrative law judge credited claimant with at least sixteen years of qualifying 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 the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), and that the

evidence established a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to an appeal by employer, the Board noted that employer challenged the administrative law judge's findings of pneumoconiosis pursuant to 20 C.F.R §718.202(a)(1) and (4), total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv), and disability causation pursuant to 20 C.F.R. §718.204(c). However, because the case was filed after January 1, 2005 and the parties stipulated to sixteen years of qualifying coal mine employment, the Board held that the administrative law judge must initially consider the impact of the recent amendments to the Act, which became effective on March 23, 2010. Specifically, the Board held that the administrative law judge must consider whether claimant is entitled to the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1]

Turning to the merits of the case, the Board affirmed the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). However, the Board held that, because the administrative law judge failed to consider whether the March 10, 2008 pulmonary function study[2] was in substantial compliance with the quality standards set forth at 20 C.F.R. §718.103, the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i) must be reweighed.[3] Additionally, because the administrative law judge conflated the

[1] Under amended Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. If the presumption is successfully invoked, the burden of proof shifts to employer to rebut the presumption by affirmatively proving that the miner did not have pneumoconiosis, or that the miner's respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Section 1556 of Public Law No. 111-148 of the Patient Protection and Affordable Care Act (PPACA), reinstating the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010); *Morrison v. Tennessee Consol. Coal Co*., 644 F.3d 473, 479-80, 25 BLR 2-1 (6th Cir. 2011).

[2] The administrative law judge observed that the Board inaccurately referred to Dr. Alam's pulmonary function study of March 10, 2008 as being dated April 10, 2008. *See* Decision and Order at 2 n.2, 5; Claimant's Exhibit 2 at 7.

[3] The Board affirmed the administrative law judge's consideration of the pulmonary function studies of February 9, 2007, April 20, 2007, and May 25, 2007.

issues of disability and disability causation, the Board vacated his findings pursuant to 20 C.F.R. §§718.204(b)(2)(i), (iv) and 718.202(a)(4). Thus, the Board remanded the case for the administrative law judge to further consider the issue of total respiratory disability,[4] and, if reached, to consider the issue of disability causation and to provide findings in accordance with the requirements of the Administrative Procedure Act (APA), 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). *Hudson v. Golden Oak Mining Co.*, BRB No. 09-0521 BLA, slip op. at 5 n.1, 6 (Apr. 4, 2010) (unpub.).

On remand, the administrative law judge credited claimant with at least sixteen years of underground coal mine employment, and found that the evidence established total respiratory disability pursuant to Section 718.204(b)(2)(i) and (iv). Consequently, the administrative law judge found that the Section 411(c)(4) presumption of total disability due to pneumoconiosis was invoked. 30 U.S.C. §921(c)(4). The administrative law judge also determined that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in failing to allow employer to respond to the changes in the law precipitated by the enactment of the Patient Protection and Affordable Care Act (PPACA). Specifically, employer argues that the change in law due to the enactment of Section 1556 of Public Law No. 111-148 of the PPACA constituted a denial of due process. Employer also contends that:

Hudson v. Golden Oak Mining Co., BRB No. 09-0521 BLA, slip op. at 5 n.1, 6 (Apr. 4, 2010)(unpub.).

[4] Specifically, the Board instructed the administrative law judge to address the accuracy of the various medical opinions respecting the miner's length of coal mine employment and smoking history. The Board further instructed the administrative law judge that, if, on remand, he should find that the medical evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i) or (iv), he must weigh all the relevant evidence together, both like and unlike, to determine whether the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b) overall. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(en banc). The administrative law judge was also instructed to consider whether the medical opinion evidence established the existence of clinical pneumoconiosis and/or legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and to consider the opinion of Dr. Alam, claimant's treating physician, pursuant to the "treating physician" criteria set forth at 20 C.F.R. §718.104(d).

> the revival of the [S]ection 411(c)(4) presumption raised issues that were not relevant to a claimant's entitlement prior to the enactment of [the] PPACA. Without the presumption, it was not necessary to determine whether [claimant] actually worked as a miner for fifteen or more years.[5] And, if invoked, the revival of the [S]ection 411(c)(4) presumption results in a shift of the burden of proof to the employer.

Employer's Brief at 10. Consequently, employer stated that he should have been provided with an opportunity to address the "changed standard with proof." Employer's Brief at 10.

On the merits, employer asserts that the administrative law judge, in finding that the evidence established total respiratory disability pursuant to Section 718.204(b)(2)(i), mischaracterized the pulmonary function study evidence and failed to comply with the APA in his consideration of the evidence. Additionally, employer argues that the administrative law judge erred in assigning greater weight to the opinion of Dr. Alam as a treating physician pursuant to Section 718.204(b)(2)(iv) and Section 718.202(a)(4). Neither claimant, nor the Director, Office of Workers' Compensation Programs (the Director), has filed a brief in this appeal.

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.[6] 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 address employer's contention that it should have been provided the opportunity to "address the changed standard [caused by the implementation of the PPACA] with proof." Employer's Brief at 10. The record reflects the following. On March 30, 2010, the Board allowed the parties to address the impact, if any, of Section

[5] When the case was first before the administrative law judge, the parties stipulated to at least sixteen years of qualifying coal mine employment. *See Hudson*, BRB No. 09-0521 BLA, slip op. at 1; *see* Employer's Brief at 4 n.2; Hearing Transcript of May 28, 2008 at 5; Decision and Order at 3, 10, 17. On remand, the administrative law judge found that all of this coal mine employment was underground. Decision and Order on Remand at 4, 10-11, 17.

[6] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

1556 of Public Law No. 111-148 on this case. Order Allowing Supplemental Briefing dated March 30, 2010. Responding to that Order, the Director stated that, in the event that the award is not affirmed by the Board and the case is remanded for evaluation of the issue of total respiratory disability under the Section 411(c)(4) presumption, "successful invocation of the presumption will alter the parties' burdens of proof and impose on the employer the obligation to defeat entitlement." Director's Response of April 20, 2010 at 2. Therefore, the Director asserted that the administrative law judge "should allow for submission of additional evidence" in accordance with case law allowing for the presentation of additional evidence after a change in law. *Id*.

Following the issuance of the Board's decision of April 14, 2010, remanding the case for consideration, *inter alia*, of the Section 411(c)(4) presumption, employer requested "additional briefing or such other action as the employer considers necessary," and an opportunity to "request whatever proceedings any party considers necessary to a fair and complete opportunity to be heard." Employer's Letter of April 30, 2010. On July 19, 2010, the administrative law judge issued an Order allowing the parties, "as a result of the Board's Remand Order," to submit briefs by September 30, 2010 or, alternatively, "to stand on [their] earlier briefs." Order on Remand dated July 19, 2010. Employer filed a brief asserting that, should the administrative law judge find total respiratory disability established on remand, due process requires that "the record must be reopened for the parties to respond to the change of law as a result of the PPACA." Employer's Brief on Remand at 11-12.

Subsequently, the administrative law judge issued the decision now before us. In the decision, the administrative law judge adjudicated the case in the context of the Section 411(c)(4) presumption, and observed that employer, in its Brief on Remand, "raised constitutional issues with the PPACA revival of the presumption …[which] are beyond the scope of this forum and are preserved to be raised in the appropriate forum on appeal."[7] *See* Decision and Order at 2, 17 n.6. The administrative law judge did not make specific reference to, or ruling on, employer's request to respond to the changed standard caused by the implementation of the PPACA with proof.

Based on the facts of this case, employer's contention has merit. Employer correctly submits that, in a case such as this one, where there has been a change in law prior to the full adjudication of the case, general principles of due process support the contention that an administrative law judge must provide the parties with the opportunity to submit additional evidence relevant to the change of law, *e.g.*, the amended Section

[7] Subsequent to the administrative law judge's Decision and Order and employer's appeal, the United States Supreme Court has upheld the constitutionality of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

411(c)(4) presumption. *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*, 800 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986); *accord Taylor v. AL Hamilton Contracting Co.*, BRB Nos. 11-0641 BLA and 11-0869 BLA (June 20, 2010)(unpub.); Employer's Brief on Remand at 14-15. Consequently, we conclude that the administrative law judge's allowance of additional briefing in this matter was insufficient, absent an opportunity for the parties to also submit additional evidence in order to fully develop their respective positions *vis a vis* the change in law occasioned by the revival of the Section 411(c)(4) presumption. *See Lemar*, 904 F.2d at 1047-50, 14 BLR at 2-7-11; *Tackett*, 806 F.2d at 642, 10 BLR at 2-95. We, therefore, hold that the administrative law judge did not adequately address employer's request to respond to the "change in law with proof." Because the administrative law judge did not adequately resolve this matter prior to adjudicating the claim, we vacate his Decision and Order on Remand awarding benefits, and remand the case for the administrative law judge to address employer's request, particularly in light of the change in law that reallocated the burdens of proof.[8] *See Lemar*, 904 F.2d at 1047-50, 14 BLR at 2-7-11; *Tackett*, 806 F.2d at 642, 10 BLR at 2-95.

[8] 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).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is vacated and this case is remanded to the administrative law judge for further consideration and proceedings consistent with this opinion.[9]

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[9] In view of our disposition herein, we need not address employer's further arguments with respect to the merits of the administrative law judge's decision.