

BRB No. 09-0680 BLA

BERTHA WEST)
(Widow of JAMES WEST))
)
 Claimant-Petitioner)
)
 v.)
)
 QUICK SILVER MINING,)
 INCORPORATED)
)
 and)
) DATE ISSUED: 06/14/2010
 KENTUCKY COAL PRODUCERS SELF-)
 INSURANCE FUND)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Rodney E. Buttermore, Jr. (Buttermore & Boggs), Harlan, Kentucky, for employer/carrier.

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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (07-BLA-5714) of Administrative Law Judge Donald W. Mosser denying benefits on a 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). This case involves a survivor's claim filed on June 29, 2006. The administrative law judge credited the miner with seventeen years of coal mine employment, as conceded by employer.² The administrative law judge found that the evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). The administrative law judge also found that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a response brief relevant to the merits of entitlement.³

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

¹ Claimant is the surviving spouse of the deceased miner, who died on April 26, 2006. Director's Exhibit 11.

² The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

³ We affirm the administrative law judge's finding of seventeen years of coal mine employment, as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. Claimant, employer and the Director have responded.

The Director contends that Section 1556 affects this case and that a remand is required. The Director states that because claimant filed her survivor's claim after January 1, 2005, the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), applies to this claim.⁴ The Director requests that this case be remanded to the administrative law judge to consider claimant's entitlement to the presumption, set forth in Section 411(c)(4), that the miner's death was due to pneumoconiosis. The Director further states 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, consistent with the evidentiary limitations at 20 C.F.R. §725.414.

Claimant also contends that this case should be remanded for consideration of whether she is entitled to the presumption.

Employer contends that the Section 411(c)(4) presumption applies only "if there is negative x-ray evidence." Employer's Brief at 3. Because the record does not contain any negative x-ray readings, employer argues that it is unnecessary to remand this case for the administrative law judge to consider whether claimant has established invocation of the rebuttable presumption at Section 411(c)(4).

After review of the parties' responses, we are persuaded that the Director is correct in maintaining that the administrative law judge's findings, and the denial of benefits, must be vacated and the case remanded to the administrative law judge. The Section 411(c)(4) presumption requires a determination of whether the miner was totally disabled due to a pulmonary or respiratory impairment, an issue that was not relevant to this survivor's claim before the recent amendments. Thus, we vacate the administrative

⁴ Section 411(c)(4) provides that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis and/or that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

law judge's findings under 20 C.F.R. §§718.202(a), 718.205(c), and remand this case to the administrative law judge.⁵

On remand, the administrative law judge must initially consider whether claimant is entitled to invocation of the rebuttable presumption at Section 411(c)(4).⁶ If the administrative law judge determines that the presumption is applicable to the survivor's claim, he must allow both parties the opportunity to submit additional evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414.

⁵ Employer mistakenly asserts that the absence of a negative x-ray interpretation for simple pneumoconiosis precludes invocation of the Section 411(c)(4) presumption. The reference to a negative x-ray interpretation in Section 411(c)(4) is to an x-ray "that is interpreted as negative with respect to the requirements of [the Section 411(c)(3) presumption]," *i.e.*, as negative for complicated pneumoconiosis. 30 U.S.C. §921(c)(4). In this case, the miner's x-rays were interpreted as positive for simple pneumoconiosis, but negative for complicated pneumoconiosis. Claimant's Exhibits 2, 4. Accordingly, the administrative law judge found that the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) "was not applicable." Decision and Order at 7 n.6.

⁶ Section 1556 of Public Law No. 111-148 also amended Section 422(l) of the Act, 30 U.S.C §932(l), to provide that a survivor is automatically entitled to benefits if the miner filed a successful claim and was receiving benefits at the time of his death. However, claimant cannot benefit from this provision, as the miner's previous claims for benefits were denied. Director's Exhibit 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

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge