BRB No. 10-0403 BLA

GARRETT W. TAYLOR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MANALAPAN MINING COMPANY	)	DATE ISSUED: 03/11/2011
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	
	)	
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 Denying Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Garrett W. Taylor, Coldiron, Kentucky, *pro se*.

William Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer.

Ann Marie Scarpino (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:

Claimant, without assistance of counsel,[1] appeals the Decision and Order Denying Benefits (2008-BLA-5939) of Administrative Law Judge Paul C. Johnson, Jr., with respect to 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 20 C.F.R. Part 718, and considering the newly submitted evidence, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, therefore, failed to establish that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that the denial of benefits must be vacated because the administrative law judge did not consider the claim under the recent amendments to the Act. Additionally, the Director contends that the administrative law judge failed to adequately consider whether the credited medical opinion of Dr. Rosenberg was consistent with the preamble to the regulations.[3]

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[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] In a Proposed Decision and Order dated March 6, 2002, the district director denied claimant's prior claim, filed on April 18, 2001, on the ground that claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 1 at 213, 441. On October 3, 2003, Administrative Law Judge Thomas F. Phalen, Jr., denied benefits because, although claimant established total disability, the evidence failed to establish that he suffered from pneumoconiosis. *Id.* at 63-77. The Board affirmed the denial on August 26, 2004. *Taylor v. RB Coal Co.*, BRB No. 04-0139 BLA (Aug. 26, 2004) (unpub.); Director's Exhibit 1 at 1-8. Claimant took no further action until he filed the instant, subsequent claim for benefits on November 7, 2007. Director's Exhibit 3. The district director issued a proposed decision awarding benefits on June 2, 2008. Director's Exhibit 28. Employer requested a formal administrative hearing, which was held on July 13, 2009. Subsequently, on March 3, 2010, Administrative Law Judge Paul C. Johnson, Jr., issued a decision denying benefits, which is the subject of the instant appeal.

[3] We affirm the administrative law judge's finding of approximately twenty-five years of coal mine employment, as it is not adverse to claimant and is not challenged by employer. Decision and Order at 3; s*ee Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

By Order dated September 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 filed after January 1, 2005, that were pending on or after March 23, 2010.[4] *Taylor v. Manalapan Mining Co.*, BRB No. 10-0403 BLA (Sept. 10, 2010)(unpub. Order). Employer responds that if the denial of benefits is not upheld, the recent amendments require remand of the case to the district director for further proceedings in accordance with the requirements of the changes in the applicable law. The Director asserts that, based on the filing date and the length of claimant's coal mine employment, the amended version of Section 411(c)(4), 30 U.S.C. §921(c)(4), applies, and the case must be remanded for the administrative law judge to consider the claim pursuant to Section 411(c)(4), and, further, to allow for the submission of additional evidence.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and consistent with applicable law.[5] 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Pursuant to Section 725.309(d), if a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied

[4] Relevant to this living miner's claim, Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), reinstated the "15-year presumption" of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Pursuant to the amended version of Section 411(c)(4), the presumption is invoked when a miner is credited with at least fifteen years of qualifying coal mine employment and establishes that he or she is suffering from a totally disabling respiratory or pulmonary impairment.

[5] Because claimant's last coal mine employment was in Kentucky, the law of the United States Court of Appeals for the Sixth Circuit is applicable. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 1, 4.

unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis. Director's Exhibit 1 at 212-214. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis in order to proceed with his claim. *See* 20 C.F.R. §725.309(d)(2); *White*, 23 BLR at 1-3.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge reviewed the ten readings of the four newly-submitted x-rays. He found that the earliest x-ray, dated September 26, 2007, was interpreted by two dually-qualified physicians, namely Dr. Alexander, who read it as positive for the existence of pneumoconiosis, and Dr. Poulos, who read it as negative for the existence of pneumoconiosis. Decision and Order at 4, 8; Director's Exhibit 14; Employer's Exhibit 2. Comparing the qualifications of the two physicians, the administrative law judge found that, while Dr. Alexander has lectured three times on the radiological interpretation of pneumoconiosis, Dr. Poulos has published a journal article on radiological interpretations of lung conditions. Further, the administrative law judge found that, although Dr. Alexander has been certified as a B reader for a longer period of time, Dr. Poulos has greater overall experience in radiology. Decision and Order at 8. The administrative law judge, therefore, rationally determined that, because there is no basis on which to distinguish between the relative expertise of the two interpreting physicians, their conflicting interpretations indicate that the readings of the September 26, 2007 x-ray were in equipoise on the issue of pneumoconiosis. *Id*. In *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), the United States Supreme Court held that when evidence is equally balanced, claimant has failed to carry his burden of proof on the issue. In the instant case, therefore, the administrative law judge rationally determined that the September 26, 2007 x-ray failed to establish the existence of pneumoconiosis.

The x-ray of January 4, 2008, was interpreted by Drs. Wiot, Miller and Forehand. Employer's Exhibit 1; Director's Exhibits 12, 14. The administrative law judge accurately noted that all three physicians are B readers, while Drs. Wiot and Miller are also Board-certified radiologists. The administrative law judge noted that Drs. Miller and Forehand read the x-ray as positive for pneumoconiosis, while Dr. Wiot read it as negative. Decision and Order at 4, 8. The administrative law judge concluded that the credentials of Drs. Forehand and Miller, although "impressive," are outweighed by those of Dr. Wiot. In so finding, the administrative law judge reviewed Dr. Wiot's involvement with the radiological interpretation of pneumoconiosis since the inception of the Black Lung Program, noting that Dr. Wiot was "instrumental in the development of

the radiological criteria," has served as president of the "American College of Radiology and the American Roentgen Ray Society," and, finally, that he represented the United States at international conferences developing the "International Labour Organization (ILO) standards for [the] classification of pneumoconiosis." Decision and Order at 8. Based on the foregoing, the administrative law judge acted within his discretion in finding that Dr. Wiot's qualifications were superior to those of Drs. Forehand and Miller. *See generally Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006)(*en banc*) (McGranery and Hall, JJ., concurring and dissenting)(administrative law judge may assign greater probative weight based on a reader's academic qualifications in radiology and his involvement in the B reader program); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Ally v. Riley Hall Coal Co.*, 6 BLR 1-376 (1983). The administrative law judge, therefore, permissibly credited Dr. Wiot's negative interpretation of the January 4, 2008 x-ray because the doctor's professional credentials were superior to the qualifications of the other interpreting physicians. Decision and Order at 8; *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Consequently, we conclude that the administrative law judge properly exercised his discretion to assign determinative weight to Dr. Wiot's negative interpretation, and rationally concluded that the January 4, 2008 x-ray was negative for the existence of pneumoconiosis.

Next, the administrative law judge found that the x-ray of July 29, 2008 was interpreted as negative for the existence of pneumoconiosis by Drs. Halbert and Wiot, both dually-qualified, and as positive for the existence of pneumoconiosis by Dr. Alexander, a dually-qualified physician. Employer's Exhibits 3, 7; Claimant's Exhibit 2; Decision and Order at 4. Based on the relative qualifications of the interpreting physicians, and the additional credence accorded Dr. Wiot, *see* discussion, *supra*, the administrative law judge reasonably determined that the July 29, 2008 x-ray was negative for the existence of pneumoconiosis. Decision and Order at 8; *Harris*, 23 BLR at 1-114.

Finally, the administrative law judge found that the x-ray of May 27, 2009 was interpreted as positive for the existence of pneumoconiosis by Dr. Miller, and as negative for the existence of pneumoconiosis by Dr. Wiot. Claimant's Exhibit 1; Employer's Exhibit 11; Decision and Order at 4. The administrative law judge noted that both physicians are dually-qualified, but "given the superior qualifications of Dr. Wiot," the administrative law judge rationally found that the May 27, 2009 x-ray was negative for the existence of pneumoconiosis, based on Dr. Wiot's negative reading. Decision and Order at 8; *Staton*, 65 F.3d at 55, 19 BLR at 2-271. The administrative law judge, therefore, rationally concluded that the new x-ray evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(1).

Additionally, the administrative law judge accurately found that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), as the record contained no newly-submitted biopsy evidence. The

administrative law judge also properly found that the presumptions listed at 20 C.F.R. §718.202(a)(3) were not applicable in this case. Decision and Order at 4. The administrative law judge, therefore, properly concluded that the existence of pneumoconiosis was not established at Section 718.202(a)(2) and (3).

Turning to 20 C.F.R. §718.202(a)(4), the administrative law judge addressed the newly-submitted medical opinion evidence, namely the opinions of Drs. Forehand, Vuskovich, and Rosenberg. He noted the following: Dr. Forehand diagnosed pneumoconiosis, based on the miner's examination of January 4, 2008, his coal mine employment history, x-ray, shortness of breath, abnormal breath sounds, and pulmonary function study. Decision and Order at 4-5; Director's Exhibit 12. Dr. Rosenberg concluded that the miner was not suffering from clinical or legal pneumoconiosis, based on his July 29, 2008 examination and testing, and a review of the report of Dr. Forehand and the x-rays of January 4, 2008 and September 26, 2007. Decision and Order at 5; Employer's Exhibit 4. Dr. Vuskovich reviewed medical records pre-dating and post-dating claimant's initial claim, and concluded that he did not have pneumoconiosis, but suffered from the condition of non-disabling asthma, unrelated to coal mine employment. Decision and Order at 8; Employer's Exhibit 8.

The administrative law judge found that Dr. Forehand's diagnosis of pneumoconiosis was adequately documented, but concluded that it was not reasoned. In particular, the administrative law judge found that Dr. Forehand's reliance on the January 4, 2008 x-ray, that was determined to be negative for the presence of pneumoconiosis, "weakened" his diagnosis of pneumoconiosis. The administrative law judge also discounted Dr. Forehand's opinion as "conclusory" because the doctor failed to "explain the connection between coal dust exposure and the symptoms he noted (shortness of breath and abnormal breath sounds) and pneumoconiosis." Decision and Order at 9. Similarly, the administrative law judge determined that, although the opinion by Dr. Vuskovich was documented, it was insufficiently reasoned because the doctor did "not adequately explain how he arrived at a diagnosis of asthma." *Id*. at 6, 9.

It is for the administrative law judge to decide whether a medical report is sufficiently documented and reasoned because such a determination is essentially a credibility matter within the purview of the administrative law judge. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); s*ee generally Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*). A reasoned opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). The administrative law judge's permissible assignment of dispositive weight to the negative reading of the January 4, 2008 x-ray by Dr. Wiot, therefore, constituted a rational basis for finding Dr. Forehand's

opinion unreasoned, because he relied on his positive reading of that x-ray. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n. 4 (1984); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Moreover, medical opinions that are equivocal or vague may rationally be discounted, *see Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 188, 19 BLR 2-111, 2-117 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988), and the administrative law judge is obligated to examine the validity and reliability of the reasoning of a physician's opinion in light of the studies conducted and the objective indications upon which the medical opinion is based. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *see also Cornett v. Benham Coal Co.*, 227 F.3d 569. 22 BLR 2-107 (6th Cir. 2000). The administrative law judge, therefore, rationally discounted Dr. Forehand's opinion as "conclusory," and Dr. Vuskovich's opinion as "inadequately explained," for failure to satisfactorily address the relationship between their observations and resultant medical conclusions. *See* 20 C.F.R. §718.202(a)(4); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

Finally, the administrative law judge evaluated the medical reports provided by Dr. Rosenberg, and concluded that his opinion was supported by the objective medical evidence and was "the best reasoned" of record. Decision and Order at 5-6, 9. In particular, the administrative law judge found:

> Dr. Rosenberg explains why [c]laimant's obstructive defect is more likely caused by smoking than by coal-dust exposure; he persuasively links the objective medical data to the medical literature to show that [c]laimant's reduction in FEV_1/FVC ratio is more consistent with a smoking-induced impairment than with a coal-dust-induced impairment.[6]

Id. at 9.

In this case, we agree with the Director that the administrative law judge should have considered whether Dr. Rosenberg's view of the significance of the FEV_1/FVC ratio coincides with the view adopted by the Department of Labor (DOL). The Director

[6] Specifically, Dr. Rosenberg stated that "a reduced FEV_1 can be associated with coal-dust exposure, but in those cases, the FEV_1/FVC ratio is preserved; when smoking-related obstructive lung disease, the FEV_1/FVC ratio is decreased." Employer's Exhibit 9. Dr. Rosenberg concluded that, "[c]laimant's markedly reduced FEV_1/FVC ratio, associated with a decreased FEV_1, is consistent with a smoking-induced form of COPD." *Id*.

asserts that "the administrative law judge failed to consider whether [Dr. Rosenberg's] opinion that a reduction in the FEV_1/FVC ratio cannot be caused by coal dust is contrary [to] the premises that underlie the [DOL] regulations." Director's Response at 3. In particular, the Director argues that "Dr. Rosenberg's conclusion appears to be inconsistent with statements in the regulatory preamble indicating that a reduction in the FEV_1/FVC ratio is a marker for obstructive lung disease including that cause[d] by coal mine employment." *Id*. at 3-4, referencing 65 Fed. Reg. 79943 (Dec. 20, 2000).

The record reflects that, in opining that the characteristics of claimant's respiratory impairment were inconsistent with coal dust exposure, Dr. Rosenberg relied on the studies conducted by Soutar and Hurley, and Attfield and Houdos. Based on his interpretation of these studies, he concluded that the reduction in claimant's FEV_1 is solely related to age and cigarette smoking. Employer's Exhibit 9 at 1-2. Specifically, Dr. Rosenberg found that claimant's actual FEV_1/FVC ratio is reduced to "around 52%," and he then utilized the Attfield and Houdos "prediction equation," based on claimant's length of coal mine employment, to opine that "any reduction in the FEV_1 of between 46 and 69cc" is minimal in degree and of no clinical significance. *Id*. at 2-3. However, as the Director maintains, the preamble to the revised regulation[7] indicates that the Attfield and Houdos study analyzed pulmonary function data (in particular, the FEV_1, FVC and FEV_1/FVC ratio) and found a clear relationship between dust exposure and a decline in pulmonary function. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-04 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co*., 24 BLR 117, 125-26 (2009).

The administrative law judge's role encompasses a determination of whether medical opinions are supported by the medical literature they cite, and whether they are consistent with the DOL's comments to the regulations. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Groves*, 277 F.3d at 836, 22 BLR at 2-330. Significantly, the administrative law judge found that Dr. Rosenberg's medical opinion was supported by the "medical literature" he referenced in his report. Therefore, while we are mindful that an administrative law judge may validly credit a medical

[7] The preamble states: "Attfield and Houdos analyzed pulmonary function data (specifically, FEV_1, FVC, and FEV_1/FVC ratio) drawn from Round 1 of the National Study of Coal Workers' Pneumoconiosis, along with job specific cumulative dust exposure estimates for U.S. underground coal miners, to determine whether there was an exposure-response relationship. Allowing for decrements due to age and smoking history, Attfield and Hodous demonstrated a clear relationship between dust exposure and a decline in pulmonary function of about 5 to 9 milliliters per year, even in miners with no radiographic evidence of clinical coal workers' pneumoconiosis." 65 Fed. Reg. 79940 (Dec. 20, 2000).

opinion despite its flaws, *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999), his role as fact-finder requires him to recognize and evaluate the strengths and weaknesses of a medical opinion in order to rationally assess credibility and assign probative weight. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Because the regulations recognize that coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV_1/FVC ratio, we conclude that the administrative law judge must reconsider Dr. Rosenberg's opinion. *See Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 999, 23 BLR 2-302, 2-318 (7th Cir. 2005)(administrative law judge may discount a medical opinion that is influenced by the physician's 'subjective personal opinions about pneumoconiosis which are contrary to the congressional determinations implicit in the Act's provisions.').

Accordingly, while we find no error with respect to the administrative law judge's evaluation of the medical evidence at 20 C.F.R. §718.202(a)(1)-(a)(3), we agree with the Director that the administrative law judge erred in evaluating Dr. Rosenberg's medical opinion at Section 718.202(a)(4). Therefore, the administrative law judge's weighing of the newly submitted evidence pursuant to 20 C.F.R. §718.202(a)(4), discussed *supra*, cannot be affirmed. Consequently, we are unable to affirm the administrative law judge's finding that the newly-submitted evidence failed to establish a change in an applicable condition of entitlement under 20 C.F.R. §718.309(d). Accordingly, we must vacate the administrative law judge's denial of benefits and remand the case for further consideration in accordance with the foregoing. On remand, the administrative law judge must determine, as a threshold issue, whether the new evidence establishes a change in an applicable condition of entitlement at Section 725.309(d). If the administrative law judge finds that a change in an applicable condition of entitlement under Section 725.309(d) is established, he must then determine whether, based on consideration of all the evidence, both old and new, entitlement pursuant to Part 718 is established. *See Ross*, 42 F.3d at 998, 19 BLR at 2-18-19.

Additionally, because this claim was filed after January 1, 2005, and was pending on March 23, 2010, the 2010 amendments to the Act are applicable. *See* Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010). Because claimant established approximately twenty-five years of coal mine employment,[8] and total disability was previously established, the administrative law judge must first consider the claim under Section 411(c)(4), 30 U.S.C. §921(c)(4), in determining whether a change in conditions is established at Section 725.309(d), and, if reached, whether entitlement on the merits is

[8] The administrative law judge must determine whether claimant had at least fifteen years of underground coal mine employment or whether the conditions of his coal mine employment were substantially similar to those in an underground mine. *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988). *See* 30 U.S.C. §921(c)(4).

established. *See Ross*, 42 F.3d at 998, 19 BLR at 2-18-19; *White*, 23 BLR at 1-3. If the administrative law judge determines that claimant is entitled to the Section 411(c)(4) presumption of totally disabling pneumoconiosis, he must then determine whether the medical evidence rebuts the presumption. On remand, the administrative law judge should 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).[9]

Accordingly, the Decision and Order Denying Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[9] Because the administrative law judge has not yet considered this claim under the amendment to Section 411(c)(4), 30 U.S.C. §921(c)(4), we decline to address, as premature, employer's challenge to the application of that amendment to this claim or to its argument that the Section 411(c)(4) limitations on rebuttal evidence do not apply to responsible operators. Employer's Brief at 16, 17 n. 4 and 5.