

BRB No. 10-0436 BLA

MARY L. BROTHERS)	
(Widow of EARL BROTHERS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PITTSBURGH & MIDWAY COAL)	DATE ISSUED: 03/15/2011
MINING)	
)	
Employer-Respondent)	
)	
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 - Denial of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

John C. Morton (Morton Law LLC), Henderson, Kentucky, for employer.

Emily Goldberg-Kraft (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denial of Benefits (06-BLA-5678) of Administrative Law Judge Joseph E. Kane on a survivor's claim¹ 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, §1556,² 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case is on appeal to the Board for the second time. In his original Decision and Order, Administrative Law Judge Thomas F. Phalen, Jr., credited the miner with at least thirty-three years of coal mine employment, but found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, the Board affirmed Judge Phalen's finding that the evidence was insufficient to establish legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), but vacated his finding that the x-ray evidence and the medical opinion evidence were insufficient to establish clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and remanded the case for further consideration. *M.L.B. [Brothers] v. Pittsburg & Midway Coal Mining*, BRB No. 08-0702 BLA (May 27, 2009)(unpub.).

On remand, the case was assigned to Administrative Law Judge Joseph E. Kane (the administrative law judge), who found that claimant failed to establish clinical pneumoconiosis under Section 718.202(a)(1), (4), and denied benefits.

In the present appeal, claimant contends that the amended version of Section 411(c)(4) of the Act,³ 30 U.S.C. §921(c)(4), is applicable to this case because her claim was filed after January 1, 2005 and remains pending; the miner was credited with at least thirty-three years of coal mine employment; and the opinion of the miner's treating physician, Dr. Taylor, establishes entitlement. Employer responds, urging affirmance of

¹ Claimant, Mary L. Brothers, is the widow of the miner, who died on May 9, 2005. Director's Exhibit 18. Claimant filed a survivor's claim for benefits on June 13, 2005. Director's Exhibit 2.

² This provision 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.

³ Section 411(c)(4) provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption 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)).

the administrative law judge's denial of benefits, and asserting that the amended version of Section 411(c)(4) is inapplicable. Employer argues that because the survivor's claim was decided by the administrative law judge on March 22, 2010, the claim was not pending when the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §1556 (2010), was enacted on March 23, 2010. Employer also maintains that invocation of the Section 411(c)(4) rebuttable presumption of death due to pneumoconiosis is precluded because claimant has not submitted evidence that demonstrates that the miner was totally disabled by a respiratory or pulmonary impairment under the criteria contained in 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.204, at the time of his death. Finally, employer avers that the record contains sufficient evidence to rebut the Section 411(c)(4) presumption, if invoked. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response in this appeal, but agrees with claimant that the recent amendments to the Act are applicable because claimant meets the Section 1556 filing requirements; it is undisputed that the miner worked at least thirty-three years in underground coal mine employment; and "the evidence [of record] suggests that the miner was totally disabled by a respiratory or pulmonary impairment under the criteria contained in 20 C.F.R. §718.204." Director's Brief at 3. The Director thus maintains that the denial of benefits must be vacated and the case remanded to the administrative law judge for consideration of the rebuttable presumption of death due to pneumoconiosis set forth in the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). In addition, the Director requests that the Board direct the administrative law judge to afford the parties the opportunity to submit additional evidence in view of the change in law and resultant change in the allocation of burdens of proof.

We are persuaded that claimant and the Director are correct in maintaining that this case must be remanded to the administrative law judge for further consideration. As an initial matter, because claimant filed an appeal with the Board on April 9, 2010, within thirty days after the administrative law judge's Decision and Order was filed in the office of the district director on March 22, 2010, the denial of her claim was not final and her claim was pending on March 23, 2010, the effective date of the amendments to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See* 20 C.F.R. §§725.478, 725.479. Consequently, we reject employer's argument to the contrary. Further, entitlement to the Section 411(c)(4) presumption requires a determination that the miner was totally disabled due to a pulmonary or respiratory impairment at the time of his death. This is an issue that, prior to the recent amendments, was not relevant in this survivor's claim. In addition, if the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. Thus, the finding that claimant failed to prove the miner had either clinical or legal pneumoconiosis no longer provides a basis for affirming the denial of benefits. Consequently, we vacate the denial of benefits, and remand the case to the administrative law judge for consideration under Section 411(c)(4) of the Act, 30 U.S.C.

§921(c)(4).⁴ The administrative law judge must also allow the parties the opportunity to submit additional evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414, or upon a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1). If, on remand, the administrative law judge determines that claimant is entitled to invocation of the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), the administrative law judge must then determine whether employer has established rebuttal.

Accordingly, the administrative law judge's Decision and Order on Remand - Denial of Benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁴ 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 was receiving benefits under a final award at the time of his death. However, claimant cannot benefit from this provision, as the miner's claim, filed on February 25, 1981, was deemed abandoned on February 25, 1983, and the miner took no further action before his death. *See* Director's Exhibit 1.