

BRB No. 09-0541 BLA

HAROLD DANNY HALL)
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 Claimant-Petitioner)
)
 v.) DATE ISSUED: 05/20/2010
)
 PERRY COUNTY COAL CORPORATION)
)
 and)
)
 GATLIFF COAL COMPANY)
)
 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 Denying Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank 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 appeals the Decision and Order Denying Benefits (07-BLA-5792) of Administrative Law Judge William S. Colwell rendered on a claim filed on April 18, 2005 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). The administrative law judge credited claimant with thirty-three years of coal mine employment, based on the parties' stipulation,¹ and found that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a), based on employer's stipulation that the disease was present. The administrative law judge further found, however, that claimant did not establish that his chronic obstructive pulmonary disease constitutes legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Additionally, the administrative law judge found that claimant's clinical pneumoconiosis arose out of his coal mine employment, pursuant to 20 C.F.R. §718.203(b), and he found that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, however, found that claimant did not establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he did not establish legal pneumoconiosis pursuant to Section 718.202(a)(4), or that his total disability is due to pneumoconiosis pursuant to Section 718.204(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief.

By order dated March 30, 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. The parties have responded.

Claimant and the Director agree that Section 1556 affects this case. They request that this case be remanded to the administrative law judge so that he may consider the claim in light of the amendments to the Act. Employer also agrees that Section 1556 affects this case, but employer requests that the case be remanded to the district director "for proper development of the record under the amended statutory provisions." Employer's Supplemental Brief at 7.

¹ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Decision and Order at 4; Director's Exhibit 3; Hearing Transcript at 11.

Based upon the parties' responses, and our review, we agree that this case is affected by Section 1556. Relevant to this living miner's claim, Section 1556 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. 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). In this case, claimant filed his claim after January 1, 2005, he was credited with thirty-three years of coal mine employment, and he established a totally disabling respiratory or pulmonary impairment.² Accordingly, we must remand this case for the administrative law judge to consider whether claimant can establish invocation of the Section 411(c)(4) presumption.

Therefore, we vacate the administrative law judge's determination that claimant is not entitled to benefits. If the administrative law judge finds that claimant is entitled to the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether the medical evidence rebuts the presumption by showing that claimant does not have pneumoconiosis or that his total disability "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

Although employer requests a remand to the district director for the parties to develop additional evidence, we agree with the Director that a remand to the administrative law judge is appropriate. *See Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990)(holding that the employer should be allowed to present additional evidence to the administrative law judge after a change in law); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986)(holding that a remand to the administrative law judge was necessary for the claimant to present additional evidence after a change in law). Finally, because the administrative law judge has not yet considered this claim under the amendments to the Act, we reject employer's argument that those amendments have so prejudiced employer that liability for benefits must transfer to the Black Lung Disability Trust Fund.

² Employer has not challenged the finding of total disability, nor has it withdrawn its stipulation to thirty-three years of coal mine employment. Employer states only that, on remand, claimant will bear the burden to demonstrate that at least fifteen of those years were qualifying, underground coal mine employment. Employer's Supplemental Brief at 4.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated in part, and the case is remanded to the administrative law judge for further proceedings 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