

BRB No. 09-0595 BLA

ETHEL TURNER	)	
(Widow of HOBERT TURNER)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 05/24/2010
	)	
CHANEY CREEK COAL CORPORATION	)	
	)	
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 Denying Survivor's Benefits of Administrative Law Judge Kenneth A. Krantz, 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.

Jeffrey S. Goldberg (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: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Survivor's Benefits (2008-BLA-05128) of Administrative Law Judge Kenneth A. Krantz with respect to a claim filed on December 18, 2006, 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).<sup>1</sup> The administrative law judge credited the miner with twenty-five years of coal mine employment, based on the stipulation of the parties, and adjudicated this claim pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that claimant did not establish that the miner was suffering from pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Therefore, the administrative law judge found that the claimant did not establish that the miner's pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203 or that the pneumoconiosis caused, contributed to, or hastened the miner's death at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

Claimant argues on appeal that the administrative law judge did not properly weigh the evidence relevant to 20 C.F.R. §718.202(a)(1), (4). Employer responds urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a letter indicating that he would not submit a substantive response, unless requested to do by the Board.<sup>2</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.<sup>3</sup> 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).

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<sup>1</sup> Claimant is the surviving spouse of the miner, Hobert Turner, who died on May 5, 2006. Director's Exhibits 2, 8.

<sup>2</sup> We affirm, as unchallenged on appeal, the administrative law judge's determination that the miner had twenty-five years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>3</sup> The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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. *Hobert v. Chaney Creek Coal Corp.*, BRB No. 09-0595 BLA (Mar. 30, 2010)(unpub. Order). This provision amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and remained pending as of March 23, 2010, the effective date of the amendments. The Director and employer have responded.

The Director states that, because claimant filed the present claim after January 1, 2005 and it was pending on March 23, 2010, the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), applies to this claim.<sup>4</sup> Further, the Director notes that the administrative law judge accepted the parties' stipulation to twenty-five years of coal mine employment. The Director concludes, therefore, that the administrative law judge's findings, pursuant to 20 C.F.R. §§718.202(a), 718.203 and 718.205(c), must be vacated and the case remanded for 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.

In contrast, employer argues that, based on the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), the Section 411(c)(4) presumption has been rebutted.<sup>5</sup> As a result, employer argues that the Board can affirm the administrative law judge's denial of benefits because the evidence in this claim does not establish that the miner had coal workers' pneumoconiosis.

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<sup>4</sup> 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 death 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) and 932(l)).

<sup>5</sup> The Section 411(c)(4) presumption can be rebutted by establishing that the miner did not have pneumoconiosis or that his pulmonary or respiratory impairment did not arise out of, or in connection with, coal mine employment. 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) and 932(l)).

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 previously relevant to this survivor's claim prior to the recent amendments. In addition, if the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis or that the miner's totally disabling pulmonary or respiratory impairment arose out of his coal mine employment. Contrary to employer's assertion, therefore, we cannot affirm the denial of benefits because claimant did not establish the existence of pneumoconiosis. Thus, we vacate the administrative law judge's findings under 20 C.F.R. §§718.202(a), 718.203(b) and 718.205(c) and remand this case to the administrative law judge.

On remand, the administrative law judge must initially consider whether claimant is entitled to invocation of the presumption at Section 411(c)(4).<sup>6</sup> 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.

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<sup>6</sup> Section 1556 of Public Law No. 111-148 also amended Section 422(l) of the Act 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 claim for benefits was denied. Director's Exhibit 1.

Accordingly, the administrative law judge's Decision and Order Denying Survivor's 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.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge