BRB No. 11-0223 BLA

BILLY R. HARRIS, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 11/29/2011
	)	
HOLSTON MINING COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Lois A. Kitts (Baird and Baird), Pikeville, 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:

Employer appeals the Decision and Order on Remand (07-BLA-05814) of Administrative Law Judge Daniel F. Solomon awarding 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 miner's claim filed on August 1, 2006, and is before the Board for the second time. In the prior decision, the administrative law judge credited claimant with at least twenty-eight years of coal mine

employment and found that the evidence established the existence of legal pneumoconiosis[1] in the form of an obstructive ventilatory impairment due to both smoking and coal mine dust exposure.[2] *See* 20 C.F.R. §§718.202(a)(4), 718.201(a), 718.203(b). The administrative law judge further found that claimant is totally disabled by a respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, in a Decision and Order dated September 3, 2009, the Board affirmed the administrative law judge's finding that total disability was established pursuant to 20 C.F.R. §718.204(b)(2), as unchallenged on appeal. *B.H.* [*Harris*] *v. Holston Mining Co.*, BRB No. 09-0106 BLA, slip op. at 2 n.5. (Sep. 3, 2009)(unpub.). The Board vacated, however, the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.* at 8. Consequently, the Board also vacated the administrative law judge's finding that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and remanded the case for further consideration. *Id.* at 8.

On remand, in a Decision and Order dated November 9, 2010, the administrative law judge properly noted that, subsequent to the Board's decision, Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C.

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[1] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[2] While the administrative law judge also found that claimant did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), he did not make a specific finding as to the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 5-7.

§921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled 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)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). Applying amended Section 411(c)(4),[3] the administrative law judge found that claimant's twenty-eight years of coal dust exposure equated to fifteen years of underground mining, and that claimant has a totally disabling respiratory impairment. Decision and Order on Remand at 2, 5. The administrative law judge therefore found invocation of the rebuttable presumption established. Decision and Order on Remand at 5. The administrative law judge also found that employer failed to meet its burden to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in not providing employer with an opportunity to develop evidence relevant to the change in the law resulting from the amendments to the Act. Additionally, employer argues that the administrative law judge erred in his evaluation of the medical evidence in finding claimant entitled to benefits pursuant to amended Section 411(c)(4). Thus, employer requests that the administrative law judge's award of benefits be vacated, and that the case be remanded for further consideration. In the alternative, employer asserts that this case should be held in abeyance pending resolution of the constitutional challenges to Public Law No. 111-148 in federal court. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's request to hold this case in abeyance. The Director declines to address employer's additional allegations of error. In a reply brief, employer reiterates its previous contentions.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

[3] In a March 29, 2010 Order, the administrative law judge provided the parties with notice of amended Section 411(c)(4), and of its potential applicability to this case. The administrative law judge also set a schedule for the parties to submit comments regarding the effect of amended Section 411(c)(4) on the pending claim. Claimant, employer, and the Director, Office of Workers' Compensation Programs, submitted position statements regarding the potential applicability of amended Section 411(c)(4).

and in accordance with applicable law.[4] 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).

Initially, we deny employer's request that this case be held in abeyance pending resolution of the constitutional challenges to Public Law No. 111-148 in federal court. Employer's Brief at 21-23; Employer's Reply Brief at 2-4. Moreover, we affirm the administrative law judge's determination that Section 1556 is applicable to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010.

We next address employer's contention that the administrative law judge erred in not allowing the parties an opportunity to submit additional evidence relevant to the change in the law. In its response to the administrative law judge's March 29, 2010 Order, employer requested an opportunity to submit additional evidence relevant to amended Section 411(c)(4). The administrative law judge rejected employer's request, explaining that:

> [T]his is not a new claim; it comes on remand and the record for both parties closed more than two years ago. . . . Normally, if there are new facts or a miscarriage of justice is alleged, a party will submit affidavits to proffer new evidence. Employer submitted argument and does not allege that there are new facts. 20 C.F.R. §18.54(a), (c) directs that no additional evidence shall be admitted into the record after the record is closed. Therefore equity will not permit a reopening as there is no factual basis alleged to do so.

Decision and Order on Remand at 3.

The Board's practice in cases affected by changes in the law has been to require the administrative law judge to allow for the submission of additional evidence by the parties to address them. *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). In this case, the administrative law judge's March 29, 2010 Order notified the parties of the change in law, and established a briefing schedule allowing the parties to submit comments. Director's Brief at 8. In response to that Order, employer requested the "opportunity to fully develop medical evidence to support

[4] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 4, 6; Hearing Tr. at 14. 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*).

rebuttal of the new Section 411(c)(4) presumption, if invoked." Employer's Response to Order at 4. The administrative law judge denied employer's request stating that the record had been closed for two years. We hold that it was error for the administrative law judge not to provide employer with an opportunity to submit additional evidence in regard to amended Section 411(c)(4). 30 U.S.C. §921(c)(4). Consequently, we remand this case to the administrative law judge to allow for the development and consideration of additional evidence relevant to the Section 411(c)(4) presumption. *See Morrison v. Tenn. Consol. Coal Co.,* F.3d , 2011 WL 2739770 (6th Cir. 2011); *Lemar,* 904 F.2d at 1047-50, 14 BLR at 2-7-11; *Tackett,* 806 F.2d at 642, 10 BLR at 2-95. Any additional evidence submitted by the parties must be in compliance 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).

On remand, if the administrative law judge finds that claimant has established invocation of the presumption at amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[5] he should then consider whether employer has satisfied its burden to rebut the presumption.

Finally, on December 22, 2010, claimant's counsel filed an attorney fee application, requesting a fee for services performed during his previous appeal to the Board pursuant to 20 C.F.R. §802.203. Claimant's counsel's request for legal fees is premature. Claimant's counsel is entitled to fees for services rendered while the case was pending before the Board only if there has been a successful prosecution of the claim. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993). In light of our decision to vacate the administrative law judge's award of benefits, there has not yet been a successful prosecution of this claim. If, on remand, the administrative law judge again awards benefits, claimant may submit a revised fee petition for attorney's fees for work performed before the Board in both appeals. 20 C.F.R. §802.203(c).

[5] Employer has not challenged the administrative law judge's findings that claimant established the requisite fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge