BRB Nos. 10-0111 BLA
and 10-0111 BLA-A

PATRICIA SCOTT (o/b/o EARL E. SCOTT, SR., deceased) Claimant-Petitioner Cross-Respondent v. WESTMORELAND COAL COMPANY and WELLS FARGO DISABILITY MANAGEMENT Employer/Carrier-Respondents Cross-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/26/2010 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Patricia Scott, Jonesville, Virginia, *pro se*.[1]

Douglas A. Smoot, Seth P. Hayes and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

[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).

Jonathan Rolfe (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,[2] without the assistance of counsel, appeals and employer cross-appeals the Decision and Order Denying Benefits (2008-BLA-5998) of Administrative Law Judge Paul C. Johnson, Jr., with respect to a subsequent miner's claim filed on June 6, 2007,[3] 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). Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the miner with between eighteen and nineteen years of coal mine employment. Noting the denial of the prior claim, the administrative law judge found that the new evidence was sufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Consequently, the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, the administrative law judge found the evidence sufficient to establish the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). In addition, the administrative law judge found the evidence sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). However, the administrative law judge found the evidence insufficient to establish that the miner's total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

[2] Claimant is the widow of the miner, who died on August 19, 2007, while the case was pending before the administrative law judge. Decision and Order at 1; Director's Exhibit 11. She is pursuing this claim on behalf of the miner. Decision and Order at 1.

[3] The miner filed his initial claim on June 14, 1994. Director's Exhibit 1. It was finally denied by the district director on November 22, 1994, because the miner failed to establish any of the requisite elements of entitlement under 20 C.F.R. Part 718. *Id*. The miner filed the current claim on June 6, 2007. Director's Exhibit 3.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. Employer has also filed a cross-appeal, contending that the administrative law judge erred in weighing the medical opinion evidence at Section 718.202(a)(4). Specifically, employer argues that the administrative law judge erred in failing to consider the medical opinions of Drs. Rosenberg, Hippensteel, Oesterling and Caffrey with regard to the issue of legal pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter, stating that he will not submit a formal response to claimant's appeal, unless requested to do so by the Board.[4]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *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 in accordance with law.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

By Order dated June 18, 2010, the Board provided the parties with the opportunity to address the impact, if any, of the 2010 amendments on this case. *Scott v. Westmoreland Coal Co*., BRB Nos. 10-0111 BLA and 10-0111 BLA-A (June 18, 2010)

[4] The parties have not challenged the administrative law judge's length of coal mine employment finding or his finding that the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). We, therefore, affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 4.

(unpub. Order). The Director and employer have responded.

The Director contends that the recent amendment to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), is applicable in this case because the miner filed his claim after January 1, 2005 and it was pending on March 23, 2010. Director's Supplemental Letter Brief at 2. In addition, the Director contends that, because the 2010 amendments change the parties' respective burdens of proof, the administrative law judge must allow the parties the opportunity to proffer additional evidence consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414, or upon a showing of good cause under 20 C.F.R. §725.456. *Id*. at 3.

Employer contends that, although the amendments may affect this case,[6] due process requires that the case be remanded to the administrative law judge for reconsideration in order to allow it to develop, without limitation, any evidence necessary to satisfy the new burden of proof imposed by the recent amendments. Employer's Supplemental Brief at 4-6. Employer also contends that the retroactive application of the amendments is unconstitutional, as it violates employer's right to due process and constitutes a taking of private property.[7]

After review of the parties' responses, we are persuaded that the administrative law judge's denial of benefits must be vacated and the case remanded to the administrative law judge for consideration under Section 411(c)(4). 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 a totally disabling respiratory impairment, there is a rebuttable presumption that the miner was totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). In this case, the miner filed his claim after January 1, 2005, *see* Director's

[6] Employer concedes that the recent amendments "may apply" to this case because the instant miner's claim was filed on June 6, 2007, the miner was credited with more than fifteen years of coal mine employment, and he was found to be totally disabled by a respiratory impairment. Employer's Supplemental Brief at 3-4.

[7] We deny employer's request to hold this case in abeyance until such time as the Department of Labor issues guidelines or promulgates new regulations implementing the statutory amendments. We also deny employer's request to hold the case in abeyance because the constitutionality of Public Law No. 111-148 has been challenged in a lawsuit filed in the United States District Court for the Northern District of Florida. Despite that filing, employer does not indicate that any court has yet enjoined the application, or ruled on the validity, of the recent amendments to the Act.

Exhibit 3, and the administrative law judge credited him with between eighteen and nineteen years of coal mine employment and found that a totally disabling respiratory or pulmonary impairment was established, Decision and Order at 3, 22. Accordingly, we must vacate the administrative law judge's finding that the evidence was insufficient to establish a total respiratory disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and remand this case for the administrative law judge to consider whether claimant has established invocation of the Section 411(c)(4) presumption.

On remand, the administrative law judge must initially determine whether at least fifteen years of the miner's coal mine employment, that the administrative law judge found established in this case, occurred in an underground coal mine or in a surface coal mine in conditions substantially similar to those in an underground mine. *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988). The administrative law judge must then determine whether claimant has established invocation of the presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

If the administrative law judge finds that claimant is entitled to the presumption at Section 411(c)(4), then the administrative law judge must determine whether the medical evidence rebuts the presumption by showing that the miner did 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).

On remand, the administrative law judge must allow for the submission of evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lamar*, 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). As the Director states, 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). Further, because the administrative law judge has not yet considered this claim under the amended version of Section 411(c)(4) of the Act, we decline to address, as premature, employer's argument that the retroactive application of the amendment to this claim is unconstitutional.[8]

[8] We also decline to address, as premature, employer's contention, on cross-appeal, regarding the administrative law judge's legal pneumoconiosis finding at 20 C.F.R. §718.202(a)(4), as the administrative law judge has not yet considered this claim under the amended Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated 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