BRB No. 10-0135 BLA

REBECCA A. MAYNOR (Widow of DANNY W. MAYNOR)	)	
Claimant-Petitioner	)	
v.	)	
MAPLE MEADOW MINING COMPANY	)	DATE ISSUED: 10/22/2010
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 – Denial of Survivor Claim of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Rebecca A. Maynor, Mt. Hope, West Virginia, *pro se*.[1]

Seth P. Hayes and Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jonathan P. 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.

[1] In a letter dated March 12, 2010, Carol Ann Blankenship, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, advised the Board that claimant remarried, subsequent to filing this appeal, that she has assumed the name of Rebecca A. Wayne and that she now resides in Summerville, West Virginia. Although Ms. Blankenship appeared at the hearing on behalf of claimant, she is not representing claimant in this appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order – Denial of Survivor Claim (2006-BLA-6028) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a survivor's claim, filed on November 2, 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). Based on a stipulation by the parties, the administrative law judge credited the miner[2] with seventeen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that claimant failed to establish that the miner's death was due to coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, asserting that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), filed a letter indicating that he would not submit a substantive response to claimant's appeal, unless requested to do so by the Board.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 consistent with applicable law.[3] 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).

By Order dated June 18, 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.

[2] Danny W. Maynor, the miner, died on December 1, 1998. Director's Exhibit 12.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the miner's coal mine employment was in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

Maynor v. Maple Meadow Mining Co., BRB No. 10-0135 BLA (June 18, 2010)(unpub. Order). That provision amends 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 maintains that claimant may be entitled to the rebuttable presumption of death due to pneumoconiosis, set forth in the amended version of Section 411(c)(4) of the Act, *see* 30 U.S.C. §921(c)(4).[4] 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 or, relevant to a survivor's claim, 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)). The Director asserts that because the present claim was filed after January 1, 2005, and the parties stipulated to seventeen years of coal mine employment, it is necessary for the administrative law judge to specifically determine whether the miner was totally disabled due to a pulmonary or respiratory impairment, an issue that, prior to the recent amendments, was not relevant in this survivor's claim. 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, in compliance with the evidentiary limitations at 20 C.F.R. §725.414.

Employer argues that the retroactive application of the amended version of Section 411(c)(4) to this claim is unconstitutional, as it violates employer's right to due process and constitutes a taking of private property. Alternatively, employer maintains that if the amendments are applicable, based on the filing date of the claim, a remand of the case is not necessary because, based on the administrative law judge's findings that the miner did not have coal workers' pneumoconiosis and that his death was not due to pneumoconiosis, it is reasonable to conclude that employer has rebutted the Section 411(c)(4) presumption, even if applicable. Employer also argues that, if the Board remands this case for consideration under Section 411(c)(4), due process requires that the administrative law judge allow the parties the opportunity to submit additional, relevant evidence to address the change in law. In the alternative, employer requests that the Board hold the case in abeyance until sixty days after the Department of Labor issues guidelines or promulgates new regulations implementing the recent amendments.

[4] The Director, Office of Workers' Compensation Programs, notes that because the deceased miner in this case was not awarded benefits during his lifetime, claimant is not eligible for derivative benefits, based on the Section 1556(b) amendment to Act, to be codified at 30 U.S.C. § 932(*l*).

After review of the parties' responses, we conclude that the administrative law judge's denial of benefits must be vacated and the case remanded to the administrative law judge for consideration under the amended version of Section 411(c)(4) of the Act. If the administrative law judge finds that claimant has established invocation of the presumption at Section 411(c)(4), he should then consider whether employer has satisfied its burden to rebut the presumption. On remand, the administrative law judge should 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). Further, 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.[5] 20 C.F.R. §725.456(b)(1).

[5] 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 amended Section 411(c)(4) is unconstitutional. Additionally, 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. Employer's Supplemental Brief at 18.

Accordingly, the administrative law judge's Decision and Order - Denial of Survivor Claim is vacated and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge