BRB No. 10-0164 BLA

DELILAH BAILEY (Widow of LARRY BAILEY)	)	
Claimant-Petitioner	)	
v.	)	
PANTHER BRANCH COAL COMPANY	)	DATE ISSUED: 10/27/2010
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 – Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

John C. Blair (Blair Law Offices, PLLC), Logan, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, 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.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2008-BLA-5020) of Administrative Law Judge Daniel L. Leland rendered on a survivor's claim, filed on January 9, 2007, 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).[1] The administrative law judge credited the miner with twenty-five 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 then found that the evidence was insufficient to establish the existence of simple or complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.304, and that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings at Sections 718.202(a)(2), (3) and 718.205(c). Employer responds, urging affirmance of the 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 so by the Board.

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, and in accordance with applicable law.[2] 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 September 10, 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. *Bailey v. Panther Branch Coal Co.*, BRB No. 10-0164 BLA (Sept. 10, 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 to the Order.

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), if certain conditions are met. Section 411(c)(4)

[1] Larry Bailey, the miner, died on September 21, 2006. Director's Exhibits 2, 8.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as 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.

provides that if a miner had at least fifteen years of qualifying coal mine employment, and 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 this survivor's claim, that the miner's death was 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, remand of the case is unnecessary, because the administrative law judge did not make a finding that the miner was totally disabled from a pulmonary standpoint prior to his death. 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 new regulations implementing the recent amendments, or pending the resolution of lawsuits challenging Public Law 111-148.

Based on our review, 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.[3] We deny, therefore, 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 until the resolution of a lawsuit filed in the United States District Court for the Northern District of Florida challenging the constitutionality of Public Law No. 111-148, as employer does

[3] There is no indication in the record that the miner was awarded benefits on a federal claim for benefits during his lifetime, or that he had a federal claim pending at the time of his death. Thus, claimant is not eligible for derivative benefits pursuant to 30 U.S.C. § 932(*l*).

not indicate that any court has yet enjoined the application, or ruled on the validity, of the recent amendments to the Act.

We also hold that there is no merit in employer's contention that the presumption at Section 411(c)(4) cannot be applied in this case, because the administrative law judge did not determine that the miner had a totally disabling respiratory or pulmonary impairment. As the Director has noted, prior to the enactment of Section 1556 of Public Law No. 111-148, total disability was not a relevant issue in a survivor's claim, such as the present one, filed after January 1, 1982. Thus, the absence of a finding of total disability by the administrative law judge does not preclude consideration of whether claimant is entitled to the presumption set forth in Section 411(c)(4).

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. 20 C.F.R. §725.456(b)(1). 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. Finally, because the administrative law judge has not yet considered this claim under the amendment to Section 411(c)(4) of the Act, we decline to address, as premature, employer's argument that the retroactive application of that amendment to this claim is unconstitutional.

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 proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge