

BRB No. 11-0177 BLA

MAXINE HUDSON )  
(Widow of CHARLES W. HUDSON) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
PEABODY COAL COMPANY ) DATE ISSUED: 10/11/2011  
 )  
and )  
 )  
PEABODY INVESTMENTS, )  
INCORPORATED )  
 )  
Employer/Carrier- )  
Respondents )  
 )  
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 Richard A. Morgan,  
Administrative Law Judge, United States Department of Labor.

Roger D. Forman (The Law Office of Roger D. Forman, L.C.), Charleston,  
West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for  
employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and  
HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order Denying Benefits (2009-BLA-05493) of Administrative Law Judge Richard A. Morgan on a survivor's claim filed on July 10, 2008, 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). The administrative law judge found that the miner had over forty-four years of underground coal mine employment. Noting that the 2010 amendments to the Act, which became effective on March 23, 2010, and which affected claims filed on or after January 1, 2005, reinstated the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis,<sup>2</sup> 30 U.S.C. §921(c)(4), the administrative law judge considered whether claimant was entitled to benefits thereunder. The administrative law judge found that claimant was not entitled to invocation of the Section 411(c)(4) presumption. The administrative law judge then found that, although claimant established that the miner had pneumoconiosis and that it arose out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), she failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in finding that the evidence was insufficient to establish invocation of the Section 411(c)(4) presumption. In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has

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<sup>1</sup> Claimant is the widow of a miner, who died on June 3, 2008. Director's Exhibit 2. The miner filed an initial claim for benefits on February 23, 1970. That claim was denied because the miner failed to establish any of the elements of entitlement. Director's Exhibit 1. The miner filed a subsequent claim for benefits on January 24, 2001. That claim was denied by Administrative Law Judge Janice K. Bullard, on April 25, 2005, because, while the miner established the existence of simple pneumoconiosis, he failed to establish the existence of total disability pursuant to 20 C.F.R. §718.204(b). Judge Bullard also found that the miner was not entitled to the irrebuttable presumption of totally disabling pneumoconiosis pursuant to 20 C.F.R. §718.304, 30 U.S.C. §921(c)(3), because he failed to establish the existence of complicated pneumoconiosis. Director's Exhibit 1. The Board affirmed Judge Bullard's Decision and Order. *Hudson v. Peabody Coal Co.*, BRB No. 05-0988 BLA (Aug. 30, 2006)(unpub.).

<sup>2</sup> Section 411(c)(4) provides in pertinent part, a rebuttable presumption that a miner's death is due to pneumoconiosis if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c); *see* 20 C.F.R. §718.204(b).

declined to file a substantive brief in response to the appeal.<sup>3</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 rational, supported by substantial evidence, and in accordance with applicable law.<sup>4</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).

After review of the administrative law judge's Decision and Order and the arguments on appeal, we agree that the denial of benefits must be vacated and the case remanded to the administrative law judge. In considering whether the medical opinion evidence was sufficient to establish total disability, *see* Section 718.204(b)(2)(iv), the administrative law judge considered the relevant medical opinions in terms of whether they were sufficient to establish total disability *due to pneumoconiosis*, and not solely whether they were sufficient to establish total disability.<sup>5</sup> Decision and Order at 26. Contrary to the administrative law judge's finding, claimant is not required to prove that the miner's disability is *due to pneumoconiosis* in order to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). Because the administrative law judge conflated his findings regarding disability and disability causation, he did not provide a proper evaluation of the evidence at invocation under Section 411(c)(4). Consequently, we vacate the administrative law judge's finding that the evidence is insufficient to invoke the Section 411(c)(4) presumption and remand this case for the administrative law judge to consider whether the medical opinion evidence,<sup>6</sup> is sufficient to establish total

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<sup>3</sup> The administrative law judge's finding that the miner had over forty-four years of underground coal mine employment is affirmed, as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>4</sup> 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. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 4.

<sup>5</sup> The administrative law judge found that, of the three pulmonologists of record, only one found that the miner was totally disabled by coal worker's pneumoconiosis. Decision and Order at 26. The administrative law judge further found that, "[w]hile, at the end, the miner may have suffered respiratory failure[,] its etiology is disputed in light of his heart diseases...." Decision and Order at 27.

<sup>6</sup> The administrative law judge's finding that the pulmonary function study and blood gas study evidence is non-qualifying and, therefore, insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii) is affirmed, as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

disability pursuant to Section 718.204(b)(2)(iv), and, if necessary, to weigh it against the contrary probative evidence at Section 718.204(b), overall. *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987). If the administrative law judge finds that total disability is established, since the administrative law judge's finding that the miner had over forty-four years of underground coal mine employment is unchallenged, claimant would be entitled to invocation of the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4). The burden would then shift to employer to prove that the miner did not have pneumoconiosis or that the miner's respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, 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