BRB No. 11-0194 BLA

FARLEY J. WRISTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 10/27/2011
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 K. Malamphy, Administrative Law Judge, United States Department of Labor.

Farley Wriston, Tilden, Illinois, *pro se*.

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

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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2007-BLA-05103) of Administrative Law Judge Richard K. Malamphy, rendered on a claim filed on August 29, 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). Adjudicating this claim under the regulations contained in 20 C.F.R. Part 718, the administrative law judge credited claimant with at least twenty-five years and nine months of underground coal mine employment, based on the parties' stipulation and as supported by the record. The administrative law judge further found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. Employer also argues that application of amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), would not alter the outcome of this case, as there is no evidence establishing that claimant has a totally disabling respiratory or pulmonary impairment.[1] Employer further argues that, based on the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis, it has rebutted the Section 411(c)(4) presumption. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief in which he argues that the administrative law judge's Decision and Order Denying Benefits must be vacated and the case remanded so that the administrative law judge may consider entitlement under the recent amendments to the Act.

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,

[1] The recent amendments to the Act apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated Section 411(c)(4) of the Act, which provides, in relevant part, that if a miner has 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. 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)).

and consistent 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).

After review of the parties' arguments, we are persuaded that the Director is correct in maintaining that the administrative law judge's findings under 20 C.F.R. §718.202(a), and the denial of benefits, must be vacated and the case remanded to the administrative law judge. Amended Section 411(c)(4) is potentially applicable in this case, as claimant filed his claim after January 1, 2005, it was pending as of March 23, 2010, and the administrative law judge has credited claimant with more than fifteen years of underground coal mine employment. 30 U.S.C. §921(c)(4); *Keene v. Consolidation Coal Co*., 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); Decision and Order at 2-3; Director's Exhibit 2. However, the administrative law judge did not address amended Section 411(c)(4) in any manner in his Decision and Order.

Employer maintains that the administrative law judge's omission is harmless, as claimant cannot prove that he is totally disabled under 20 C.F.R. §718.204(b)(2) and the administrative law judge's finding, that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a), is tantamount to a determination that employer rebutted the Section 411(c)(4) presumption. Regarding the issue of total disability, there is conflicting evidence in the record, which the administrative law judge is required to weigh in his role as fact-finder.[3] *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989) The Board cannot, therefore, do as employer suggests and hold, as a matter of law, that claimant has failed to establish total disability at 20 C.F.R. §718.204(b)(2) and, therefore, has failed to invoke the Section 411(c)(4) presumption. *See Anderson*, 12 BLR at 1-113. In addition, if claimant invokes the presumption, the

[2] The record indicates that claimant's last coal mine employment was in Illinois. Director's Exhibit 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] The pulmonary function tests and blood gas studies did not produce qualifying values pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), and there is no evidence that claimant is suffering from cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R. §718.204(b)(2)(iii). Director's Exhibits 12, 14; Employer's Exhibit 3. However, the medical opinion evidence relevant to 20 C.F.R. §718.204(b)(2)(iv) is conflicting, as Dr. Istanbouly indicated that, from a respiratory standpoint, claimant is unable to perform his usual coal mine employment, while Drs. Repsher and Tuteur reached the opposite conclusion. Director's Exhibit 12; Employer's Exhibits 3, 4, 8, 11. Dr. Sanjabi noted that claimant reported that he is unable to walk more than 100 feet, but Dr. Sanjabi did not offer an opinion as to whether claimant is totally disabled from a respiratory or pulmonary standpoint. Director's Exhibit 14.

burden of proof shifts to employer to establish rebuttal of the presumption. Thus, contrary to employer's assertion, we cannot affirm the denial of benefits on the basis that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a).

We must vacate, therefore, the administrative law judge's findings under 20 C.F.R. §718.202(a), and the denial of benefits, and remand this case to the administrative law judge. On remand, the administrative law judge must determine whether the presumption at amended Section 411(c)(4) is applicable to this claim. If the administrative law judge determines that the presumption is applicable, he must allow the parties the opportunity to submit additional evidence in compliance with the evidentiary limitations at 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 invoked the presumption, the administrative law judge must then determine whether employer has established rebuttal of the presumption.

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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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge