

BRB No. 09-0827 BLA

MABEL LAYNE)
(Widow of GENE J. LAYNE))
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 09/30/2010
)
 CHISHOLM COAL COMPANY)
)
 and)
)
 PIKEVILLE COAL COMPANY, C/O)
 UNDERWRITERS SAFETY & CLAIMS)
)
 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 in the Survivor's Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Rita Roppolo (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits in the Survivor's Claim (2008-BLA-5497) of Administrative Law Judge Larry S. Merck with respect to a claim filed on April 10, 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 Adjudicating the claim under 20 C.F.R. Part 718, the administrative law judge accepted the parties' stipulation to twenty-four years of coal mine employment and found that claimant established that the miner suffered from clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge further found, however, that claimant did not establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response to claimant's appeal.²

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.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).

¹ Gene J. Layne, the miner, died on December 25, 2000. Director's Exhibit 9. There is no indication in the record that the miner filed a claim for benefits on his own behalf.

² We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant established twenty-four years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last years of coal mine employment were in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

By Order dated June 7, 2010, the Board gave the parties the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. *Layne v. Pikeville Coal Co.*, BRB No. 09-0827 BLA (June 07, 2010)(unpub. Order). Claimant and the Director agree that Section 1556 affects this case. The Director contends that the recent amendments to the Act are applicable, as the present claim was filed after January 1, 2005, and the miner was credited with twenty-four years of coal mine employment. The Director maintains, therefore, that the denial of benefits must be vacated and the case remanded to the administrative law judge for consideration of whether claimant is entitled to the rebuttable presumption of death due to pneumoconiosis, set forth in the amended version of Section 411(c)(4), 30 U.S.C. §921(c)(4).⁴ The Director further asserts 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. Claimant adopts the Director's position and requests that the denial of benefits be vacated and the case remanded to the administrative law judge for application of Section 411(c)(4).

Employer concedes that, given the filing date of the survivor's claim, the amendments may affect this case, but argues that, in light of the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis, the presumption of death due to pneumoconiosis has already been rebutted. Employer contends that, because it prevailed on the merits, retroactive application of the amendments would constitute a significant violation of its right to due process. Employer also argues that it will suffer substantial and irreparable prejudice should the Board vacate and remand the case for consideration under Section 411(c)(4). Employer requests that the Board affirm the administrative law judge's findings under 20 C.F.R. §718.205(c) or transfer liability to the Black Lung Disability Trust Fund.

After review of the parties' responses, we are persuaded that the Director and claimant are correct in maintaining that the administrative law judge's denial of benefits must be vacated and the case remanded to the administrative law judge. The Section 411(c)(4) presumption requires a determination of 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 a survivor's claim. In addition, if the presumption is

⁴ Relevant to this survivor's claim, Section 411(c)(4) provides that, if a miner had at least fifteen years of qualifying coal mine employment, and the evidence establishes that the miner had a totally disabling respiratory impairment, there is a rebuttable presumption 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) and 932(l)).

invoked, the burden of proof shifts to employer to disprove that the miner's death was due to pneumoconiosis. Contrary to employer's assertion, therefore, we cannot affirm the denial of benefits on the ground that claimant did not establish that the miner's death was due to pneumoconiosis.

Thus, we vacate the administrative law judge's findings under 20 C.F.R. §718.205(c), and the denial of benefits, and remand the case to the administrative law judge for consideration of whether claimant has established invocation of the rebuttable presumption of death due to pneumoconiosis. On remand, the administrative law judge must allow for the submission of additional evidence by the parties to address the change in law. See *Harlan Bell Coal Co. v. Lemar*, 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). The submission of any additional evidence must be in compliance with the evidentiary limitations set forth in 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). Additionally, because the administrative law judge has not yet considered this claim under the amendments to Section 411(c)(4), we decline to address, as premature, employer's argument that the retroactive application of Section 411(c)(4) to this claim would result in a due process violation and that liability should be transferred to the Black Lung Disability Trust Fund.

Accordingly, the administrative law judge's Decision and Order Denying of Benefits in the Survivor's claim is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge