

BRB No. 11-0107 BLA

KATHRYN BERNARD	)	
(Widow of LEO BERNARD)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 08/25/2011
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order on Remand - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (2007-BLA-06086) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) on a survivor's claim<sup>1</sup> filed on December 22, 2006, pursuant to the provisions of

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<sup>1</sup> Claimant is the widow of the miner, who died on November 15, 2006. Director's Exhibit 8.

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). This case is on appeal before the Board for the second time. In a Decision and Order on October 2, 2008, the administrative law judge awarded benefits by finding that the miner had clinical pneumoconiosis at Section 718.202(a)(1), that the miner's pneumoconiosis arose out of coal mine employment at Section 718.203(b), and that the miner's death was due to pneumoconiosis at Section 718.205(c). Pursuant to employer's appeal, in a Decision and Order on October 26, 2009, the Board affirmed the administrative law judge's finding of thirty-six years of coal mine employment and the findings of clinical pneumoconiosis at Section 718.202(a)(1) and that the clinical pneumoconiosis arose out of coal mine employment at Section 718.203(b), as unchallenged on appeal. The Board, however, vacated the award of benefits and remanded the case for the administrative law judge to address the evidence relevant to the existence of legal pneumoconiosis at Section 718.202(a)(4) and to reconsider the evidence relevant to death causation at Section 718.205(c). *K.B. [Bernard] v. Consolidation Coal Co.*, BRB No. 09-0135 BLA (Oct. 26, 2009)(unpub.). On remand, in a Decision and Order on September 14, 2010, the administrative law judge found that claimant established that the miner had legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), but that claimant failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Nonetheless, the administrative law judge awarded benefits on the claim, because he found that claimant was entitled to the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, as she established that the miner was totally disabled at 20 C.F.R. §718.204(b), and that the miner had at least fifteen years of qualifying coal mine employment.<sup>2</sup> *See* 30 U.S.C. §921(c)(4). The administrative law judge found that employer failed to rebut the presumption.

On appeal, employer contends that it was denied due process when the administrative law judge refused to reopen the record and allow employer to submit additional evidence to address the change in law created by the reinstatement of the Section 411(c)(4) presumption. Employer further contends that, in light of the change in

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<sup>2</sup> On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides that, if a miner has at least fifteen years of qualifying coal mine employment, and has a totally disabling respiratory impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. The administrative law judge must then consider whether employer satisfied its burden to rebut the presumption by showing that the miner did not have pneumoconiosis or that his respiratory or pulmonary condition did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4).

the law, the evidentiary limitations at 20 C.F.R. §725.414 are no longer applicable. Additionally, employer contends that the administrative law judge erred in finding total respiratory disability established at Section 718.204(b) and contends that death causation cannot be established at Section 718.205(c). Finally, employer requests that this case be reassigned to a different administrative law judge on remand. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with employer that the administrative law judge violated its due process rights when he refused to reopen the record and allow employer to address the change in law created by the reinstatement of the Section 411(c)(4) presumption. The Director contends, therefore, that the administrative law judge's award of benefits must be vacated and the case remanded for the administrative law judge to reopen the record and allow for the submission of additional evidence. The Director contends, however, that any additional evidence submitted must comply with the evidentiary limitations imposed by Section 725.414.

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>3</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

At the outset, we address employer's assertion that the administrative law judge erred in refusing to reopen the record and allow employer to develop additional evidence in response to the reinstatement of the Section 411(c)(4) presumption.<sup>4</sup> The Director notes that the administrative law judge's summary refusal of employer's request to reopen the record in this case is especially troubling, since the administrative law judge originally found claimant's evidence insufficient to establish entitlement "under the applicable standard in place at [the] time the evidentiary record was created." Director's Brief at 3. The Director contends, therefore, that benefits have only been awarded pursuant to the change in the law, *i.e.*, the reinstatement of the Section 411(c)(4)

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<sup>3</sup> The record reflects that the miner's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>4</sup> In refusing employer's request that the case be reopened for sixty days or that the claim be remanded to the district director to allow employer to develop and submit additional evidence, the administrative law judge stated that "reopening the record or remanding the claim would unnecessarily delay [c]laimant's case." Decision and Order on Remand at 2.

presumption, which changed the burden of proof for establishing entitlement. Director's Brief at 3.

“While an administrative law judge is generally afforded broad discretion in dealing with procedural matters, [he] is obliged to insure a full and fair hearing on all the issues presented.” *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-200 (1986), *aff'd on reconsideration*, 9 BLR 1-236 (1987)(*en banc*); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). Where a party would be denied the opportunity to fully present its case because it is unable to develop evidence relevant to a change in the law, due process requires that the party be afforded the opportunity to develop such evidence. *See North Am. Coal Co. v. Miller*, 870 F.2d 948, 951-52, 12 BLR 2-222, 2-228-29 (3d Cir. 1989); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); *Shedlock*, 9 BLR at 1-200; *see Administrative Procedure Act*, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

The administrative law judge erred in not reopening the record to allow employer the opportunity to submit additional evidence addressing the change in the law. This error violated employer's due process rights. *See Miller*, 870 F.2d at 951-52, 12 BLR at 2-228-29. On remand, the administrative law judge must provide employer the opportunity to submit additional evidence relevant to invocation and rebuttal of the Section 411(c)(4) presumption. *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). However, we disagree with employer that it should not be limited in the evidence it submits pursuant to Section 725.414. 20 C.F.R. §725.414; *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, BLR (6th Cir. 2011). If evidence exceeding the limitations at Section 725.414 is offered, it must be justified by a showing of good cause. 20 C.F.R. §§725.414, 725.456. As the Director notes, the administrative law judge may allow the parties to withdraw evidence and re-designate additional evidence, if necessary, in order to conform to the evidentiary limitations.

We, therefore, vacate the administrative law judge's award of benefits, and remand the case for the administrative law judge to reopen the record in light of the reinstatement of the Section 411(c) presumption. He must allow additional evidence to be submitted, if it is consistent with the evidentiary limitations. 20 C.F.R. §725.414. As the evidence that the administrative law judge considers on remand may differ substantially from that which was considered previously, employer's arguments regarding the administrative law judge's disposition of the existing evidence may not be

relevant on remand. We, therefore, decline to address employer's other contentions.<sup>5</sup> Also, because this case must be remanded to the administrative law judge to reopen the record and to allow employer to submit additional evidence in light of a change in the law, we decline to remand this case to a different administrative law judge. *See Milburn Colliery Coal Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

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<sup>5</sup> We decline to address employer's other contentions because the parties may submit, withdraw, or redesignate evidence on remand. However, in order to avoid the repetition of error on remand, we note the following: In weighing the evidence on the issue of total disability at 20 C.F.R. §718.204(b), the administrative law judge must consider all of the relevant evidence, including evidence showing that the miner's qualifying pulmonary function study values for his age do not, in fact, demonstrate a totally disabling respiratory or pulmonary impairment, but are normal for that age. *See K.J.M. [Meade] v. Clinchfield Coal Co.*, 24 BLR 1-41 (2008). Further, the administrative law judge must consider the entirety of any evidence addressing the validity or invalidity of the miner's pulmonary function studies. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Additionally, in weighing the medical opinion evidence, the administrative law judge must consider the opinions of any treating physicians in light of the factors set forth in 20 C.F.R. §718.104(d). *See Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). The administrative law judge must also consider the physicians' pulmonary expertise in weighing their opinions. *See Milburn Colliery Coal Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Further, if reached, the administrative law judge must consider any evidence showing that the miner's respiratory or pulmonary impairment did not arise out of, or in connection with his coal mine employment. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is vacated and the case is remanded 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