

BRB No. 10-0218 BLA

ROSA W. WOLFE)
(Widow of GEORGE C. WOLFE))
)
 Claimant-Petitioner)
)
 v.)
)
 EASTERN COAL CORPORATION) DATE ISSUED: 12/21/2010
)
 and)
)
 THE PITTSSTON 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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2006-BLA-5768) of Administrative Law Judge Alice M. Craft with respect to a survivor's claim filed on August 9, 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(I))(the Act).¹ Adjudicating the claim under 20 C.F.R. Part 718, the administrative law judge accepted the parties' stipulation to at least twenty-two years of coal mine employment. Turning to the merits of the case, the administrative law found that the evidence failed to establish that the miner had either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or 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 contends that the administrative law judge erred in finding that the evidence failed to establish the existence of pneumoconiosis at Section 718.202(a) and that the miner's death was due to pneumoconiosis at Section 718.205(c). In response, employer urges affirmance of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response to claimant's appeal.

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. In pertinent part, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption in a survivor's claim that a miner died due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

By Order dated October 14, 2010, the Board gave the parties the opportunity to address the impact on this case, if any, of the amendments. *Wolfe v. Eastern Coal Corp.*, BRB No. 10-0218 BLA (Oct. 14, 2010)(unpub. Order). Claimant and employer agree that the amendments affect this case. Claimant contends that, because the miner was credited with twenty-two years of coal mine employment, the case should be remanded for consideration under Section 411(c)(4), and that claimant should be allowed to present proof that the miner suffered from a totally disabling respiratory impairment under Section 718.204(b). Employer concedes that, based on the filing date of the survivor's claim and the miner's length of coal mine employment, the amendments affect this case. Employer argues, however, that, in light of the administrative law judge's finding that claimant failed to establish the existence of either clinical or legal pneumoconiosis, the Section 411(c)(4) presumption would be rebutted. 30 U.S.C. §921(c)(4). Employer, therefore, contends that the Board should affirm the administrative law judge's decision denying benefits.

¹ The miner filed a claim for benefits on March 9, 1994, which was denied by the district director on February 6, 1995. The miner did not pursue his claim any further. Director's Exhibit 1; Decision and Order at 2. The miner died on February 2, 2005. Director's Exhibit 12.

Claimant is correct that the administrative law judge's denial of benefits must be vacated and the case remanded to the administrative law judge in light of the recent amendments, which provide, in pertinent part, a presumption that the miner died due to pneumoconiosis. 30 U.S.C. §921(c)(4). Section 411(c)(4), however, requires, in addition to a finding of fifteen years of qualifying coal mine employment, a determination that the miner was totally disabled due to a pulmonary or respiratory impairment. Prior to the recent amendments, this issue was not relevant in a survivor's claim. On remand, therefore, the parties must be allowed to submit evidence addressing the issue of total disability at Section 718.204(b) and the administrative law judge must make a determination thereunder. In addition, if the Section 411(c)(4) presumption is invoked, the burden is on employer to rebut the presumption. 30 U.S.C. §921(c)(4). Contrary to employer's assertion, therefore, we cannot affirm the denial of benefits in this survivor's claim.

Thus, we vacate the administrative law judge's decision denying benefits, and remand the case to the administrative law judge for consideration under Section 411(c)(4).² 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 limits 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).

² Because we vacate the administrative law judge's denial of benefits and remand the case for consideration under the recent amendments, we will not consider claimant's other arguments on appeal.

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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge