

BRB No. 10-0237 BLA

IRENE MELTON)
(Widow of GEORGE MELTON))
)
 Claimant-Petitioner)
)
 v.)
)
 WHITAKER COAL CORPORATION)
) DATE ISSUED: 12/22/2010
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Irene Melton, Wootton, Kentucky, *pro se*.

Ronald E. Gilbertson (K&L Gates LLP), Washington D.C., for employer.

Before: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Decision and Order (08-BLA-5644) of Administrative Law Judge Thomas F. Phalen, Jr., denying benefits on a claim filed 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). This case involves a survivor's claim filed on July 2, 2007. After crediting the miner with twenty-two years of coal mine

¹ Claimant is the surviving spouse of the deceased miner, who died on January 19, 2007. Director's Exhibit 9.

employment,² the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence did not establish 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 generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief. In a supplemental brief, employer reiterates its contention that the administrative law judge's denial of benefits should be affirmed.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Impact of the Recent Amendments to the Act

After the issuance of the administrative law judge's Decision and Order, Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. Relevant to this survivor's claim, Section 1556 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a claimant establishes that a miner had at least fifteen years of qualifying coal mine employment, and that he had a totally disabling respiratory impairment, there is a rebuttable presumption that his death was due to pneumoconiosis. 30 U.S.C. §921(c)(4).

Employer argues that Section 1556 does not affect this case. Employer specifically contends that claimant is not entitled to the Section 411(c)(4) rebuttable presumption, because the evidence does not establish the presence of a totally disabling respiratory impairment. Moreover, employer contends that, even if claimant is entitled to the rebuttable presumption that was reinstated by Section 1556, the evidence establishes

² The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

rebuttal of the presumption, because claimant failed to establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis. Neither claimant nor the Director has addressed the impact of Section 1556 on this case.

After a review of the record, we hold that Section 1556 may affect this case. Claimant filed her survivor's claim after January 1, 2005, and the miner was credited with twenty-two years of coal mine employment. 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 was not relevant to this survivor's claim before the recent amendments. In addition, if the presumption is invoked, the burden of proof shifts to employer to establish rebuttal of the presumption. Therefore, contrary to employer's assertion, we cannot affirm the denial of benefits on the basis that claimant did not establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis.

Consequently, we vacate the administrative law judge's findings, and his denial of benefits, and remand this case to the administrative law judge. On remand, the administrative law judge must consider whether claimant is entitled to invocation of the presumption at Section 411(c)(4).³ If the administrative law judge determines that the presumption is applicable to this claim, he must allow all parties the opportunity to submit 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).

³ Section 1556 of Public Law No. 111-148 also amended Section 422(l) of the Act, 30 U.S.C. §932(l), to provide that a survivor is automatically entitled to benefits if the miner filed a successful claim and was receiving benefits at the time of his death. However, claimant cannot benefit from this provision, as the miner was not receiving benefits at the time of his death. Director's Exhibit 2; Employer's Supplemental Brief, unnumbered attachments.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge