

BRB No. 10-0448 BLA

DORIS SLOAN	)	
(Widow of GURSTLE L. SLOAN)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY,	)	
INCORPORATED	)	DATE ISSUED: 04/28/2011
	)	
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 Denying Benefits and Order Denying Claim, on Reconsideration of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Joan B. Singleton, Bessemer, Alabama, for claimant.

Katherine A. Collier, Katie E. Loggins and Will A. Smith (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Paul L. Edenfield (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, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and Order Denying Claim, on Reconsideration (2007-BLA-06077) of Administrative Law Judge Adele

Higgins Odegard rendered on a survivor's claim filed on November 13, 2006,<sup>1</sup> 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). In a Decision and Order issued on October 27, 2009, the administrative law judge found that claimant failed to establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge further found that claimant was not entitled to invocation of the irrebuttable presumption that the miner's death was death to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, benefits were denied. On November 7, 2009, claimant filed a Motion to Reconsider and submitted a copy of an x-ray reading that was already contained in the record at Director's Exhibit 16. The administrative law judge denied claimant's motion on March 22, 2010.

On appeal, claimant argues that the administrative law judge erred in finding that the miner's claim was not before her for consideration. Claimant contends that, in weighing the evidence in the survivor's claim, the administrative law judge erred in failing to consider a positive x-ray reading for pneumoconiosis. Claimant also argues that the evidence is sufficient to establish the existence of simple and complicated pneumoconiosis and that the miner's death was due to pneumoconiosis. Additionally, claimant maintains that she is entitled to benefits based on recent amendments to the Act. Employer responds, urging affirmance of the denial of benefits in the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief with regard to the recent amendments to the Act, but has declined to address claimant's remaining arguments unless specifically requested to do so by the Board.

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>2</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).

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<sup>1</sup> Claimant is the widow of the deceased miner, Gurstle L. Sloan. Director's Exhibit 1.

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

## I. The Miner's Claim

Initially, we address claimant's assertion that the miner's claim should be reopened for consideration. Prior to his death, the miner filed three claims, all of which were denied. The miner first filed a claim for benefits on September 14, 1976, which was denied by Administrative Law Judge Ronald T. Osborn on December 5, 1985, because the evidence failed to establish any of the requisite elements of entitlement. Miner's Claim (MC) Director's Exhibit 1. The miner filed a duplicate claim on April 11, 1994, which was denied by Administrative Law Judge Christine M. Moore on September 26, 1995 and that denial was affirmed by the Board in *Sloan v. Drummond Coal Co. Inc.*, BRB No. 96-0134 BLA (June 26, 1996) (unpub.). *Id.* The miner filed a third claim for benefits on July 15, 2005; he later died on June 5, 2006. MC Director's Exhibit 3; Director's Exhibit 12. Administrative Law Judge Robert D. Kaplan issued a Decision and Order denying benefits in the miner's claim on April 9, 2007. There is no indication in the record that claimant, on behalf of the miner, appealed that denial.

At the hearing held on February 25, 2009, with regard to the survivor's claim, claimant's counsel indicated that it was her understanding that both the miner's and the survivor's claims were to be considered. On March 5, 2009, the administrative law judge issued an Order Informing Parties of the Status of the Miner's Claim for Benefits, wherein she noted that, because there was no evidence of an appeal from Judge Kaplan's April 9, 2007 Decision and Order denying the miner's third claim for benefits, the only claim before her was the survivor's claim.

Claimant argues that the Board has discretion to consolidate the miner's denied claim with her survivor's claim. Claimant's Brief at 14, *citing* 20 C.F.R. §802.104. She also notes that, pursuant to 20 C.F.R. §725.310, a claim may be reconsidered due to a mistake in fact. According to claimant, a mistake occurred in the miner's claim because she thought that case was still under consideration and had no idea that her lay representative, because of serious illness or confusion about legal procedures, or both, had failed to perfect an appeal in the miner's claim. Claimant notes that she was confused by the use of initials by the district director to identify the miner's claim and the fact that some correspondence was addressed to her as "Doris Sloan o/b/o Gurstle Sloan," while other correspondence identified her as the claimant. Claimant's Brief at 14. Claimant, however, does not indicate in this appeal that she did not receive a copy of Judge Kaplan's Decision and Order, issued in the miner's claim, or that improper service of that decision tolled the time for filing an appeal.

Claimant is mistaken in believing that the Board has discretion to review Judge Kaplan's decision in the miner's claim; we do not have jurisdiction to consider Judge Kaplan's denial of benefits in the miner's claim, as no appeal of Judge Kaplan's Decision and Order was filed with the Board. *See* 20 C.F.R. §802.205(a). Claimant is likewise

mistaken in believing that relief is available through modification procedures. As claimant did not timely file a request for modification with the district director, within one year of the denial of the miner's claim, on April 9, 2007, it is too late to petition for modification. *See* 20 C.F.R. §725.310. Therefore, based on the facts of this case, we affirm the administrative law judge's finding that the only claim before her was the survivor's claim.

## **II. The Survivor's Claim**

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 the miner had fifteen or more years of qualifying coal mine employment and the evidence establishes a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b).

Claimant and the Director maintain that, based on the filing date of the survivor's claim, the amendments are applicable. Further, the Director contends that, inasmuch as fifteen years of coal mine employment were established, the case must be remanded for consideration of whether the miner was totally disabled under Section 718.204(b), in order to determine if claimant is entitled to the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). The Director also contends that consideration under Section 411(c)(4) requires the administrative law judge to allow the parties the opportunity to submit additional evidence, consistent with the evidentiary limitations to address the change in law. *See* 20 C.F.R. §§725.414, 725.456. Employer, however, argues that because the record does not establish that the miner had fifteen years of qualifying underground coal mine employment, or work in a surface mine in conditions substantially similar to those of an underground mine, and because the administrative law judge specifically found that the miner did not have pneumoconiosis, the amendments do not affect the outcome of case and the denial of benefits should be affirmed.

After consideration of the arguments of the parties, we conclude that the rebuttable presumption of death due to pneumoconiosis set forth in Section 411(c)(4) may be available to claimant, as the miner was credited with at least fifteen years of coal mine employment, claimant filed her claim after January 1, 2005, and the claim was pending on March 23, 2010. Accordingly, we must vacate the administrative law judge's denial

of benefits and remand this case to the administrative law judge for consideration under Section 411(c)(4) of the Act.<sup>3</sup>

On remand, the administrative law judge must determine whether claimant is entitled to invocation of the rebuttable presumption that the miner's death was due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). In order to find that claimant has invoked the presumption, the administrative law judge must determine whether the miner worked at least fifteen years in an underground coal mine or in a surface coal mine in conditions substantially similar to those in an underground mine. *See Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509 (7th Cir. 1988). The administrative law judge must also determine whether claimant has established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b). The administrative law judge must allow for the submission of evidence by the parties to address the change in law. *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). Further, any additional evidence submitted must be consistent 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 pursuant to 20 C.F.R. §725.456(b)(1). If the administrative law judge finds that claimant is entitled to invocation of the Section 411(c)(4) presumption, he must then determine whether employer has rebutted the presumption. As necessary, the administrative law judge must also consider claimant's entitlement to benefits, based on the record evidence, pursuant to 20 C.F.R. §§718.205(c), 718.304.<sup>4</sup>

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<sup>3</sup> We decline to address, as premature, claimant's contentions that the administrative law judge erred in failing to find that the miner had complicated pneumoconiosis and that his death was due to pneumoconiosis.

<sup>4</sup> At the February 25, 2009 hearing, the administrative law judge gave claimant sixty days post-hearing to obtain and submit a reading of an x-ray dated February 21, 2005. Hearing Transcript at 6-7. By Order dated April 30, 2009, the administrative law judge indicated that she had not received any additional evidence from claimant. On August 31, 2009, claimant's counsel submitted a post-hearing brief and attached to that brief was a positive reading for pneumoconiosis by Dr. Loveless of the February 21, 2005 x-ray, marked as Exhibit F to the brief. Claimant asserts that the administrative law judge failed to consider Dr. Loveless's x-ray reading, even though the reading was specifically mentioned in the Motion to Reconsider. We instruct the administrative law judge on remand to address claimant's allegations regarding this evidence.

Accordingly, the administrative law judge's Decision and Order Denying Benefits and the Order Denying Claim, on Reconsideration are 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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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge