BRB No. 11-0405 BLA

JUDY K. NOYES (Widow of JAMES S. NOYES)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 02/27/2012
CONSOLIDATION COAL COMPANY	)	
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 Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

Maia S. Fisher and Richard A. Seid (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[1] appeals the Decision and Order (10-BLA-5042) of Administrative Law Judge Richard K. Malamphy 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 December 17, 2008.

Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this survivor's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a survivor establishes that the miner had at least fifteen years of qualifying coal mine employment, and that he had a totally disabling respiratory impairment, there will be a rebuttable presumption that his 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)). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption.[2] 30 U.S.C. §921(c)(4).

By Order dated May 20, 2010, the administrative law judge notified the parties that once a hearing was scheduled, they would be permitted to submit additional evidence to respond to the change in law. At the August 16, 2010 hearing, the parties submitted their medical evidence. In addition, the administrative law judge left the record open for the parties to submit supplemental medical reports, which the administrative law judge admitted into evidence. Claimant and employer also submitted post-hearing briefs. Claimant argued that she was entitled to invocation of the Section 411(c)(4) presumption, and that employer did not rebut the presumption. Employer argued that it rebutted the 411(c)(4) presumption by demonstrating that the miner's death was not due to pneumoconiosis.

In a Decision and Order dated February 1, 2011, the administrative law judge credited the miner with twenty-two years of coal mine employment,[3] and found that the

[1] Claimant is the surviving spouse of the miner, who died on February 11, 2008. Director's Exhibits 8, 9.

[2] 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 never filed a claim for benefits.

[3] The record reflects that the miner's coal mine employment was in Utah. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United

autopsy evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). However, the administrative law judge further found that claimant 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 argues that the administrative law judge erred in failing to apply the recent amendments to the Act, which reinstated the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4). Claimant further asserts that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds, arguing that amended Section 411(c)(4) does not apply to this case, and urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, arguing that the administrative law judge's Decision and Order must be vacated, and the case remanded to the administrative law judge for consideration under amended Section 411(c)(4). In a reply brief, employer asserts that amended Section 411(c)(4) is inapplicable, because the record contains no negative x-ray readings.

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Upon review of the Decision and Order, the arguments on appeal, and the evidence of record, we agree with claimant and the Director that the administrative law judge erred in not considering whether claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Because claimant filed her claim after January 1, 2005, and the claim was pending on March 23, 2010, amended Section 411(c)(4) potentially applies to this claim.[4] Accordingly, we vacate the administrative

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States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

[4] Employer mistakenly asserts that the absence of a negative x-ray interpretation from the record of this claim precludes application of the Section 411(c)(4) presumption. Employer relies on the portion of Section 411(c)(4) providing that the rebuttable presumption is available "if there is a chest [x-ray] submitted in connection with . . . [the] widow's . . . claim and it is interpreted as negative with respect to the requirements of [the Section 411(c)(3) presumption]," *i.e.*, as negative for complicated pneumoconiosis. 30 U.S.C. §921(c)(4). Employer argues that no such x-ray evidence was submitted here,

law judge's finding pursuant to 20 C.F.R. §718.205(c) and remand this case to the administrative law judge for consideration of whether claimant is entitled to invocation of the rebuttable presumption at amended Section 411(c)(4). If so, the administrative law judge must then determine whether employer has rebutted the presumption.

In the interest of judicial economy, we will also address claimant's contention that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). In considering whether the evidence established that the miner's death was due to pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Perper and Oesterling. Dr. Perper opined that the miner's death was due to "pulmonary failure on the background of coal workers' pneumoconiosis and associated pulmonary cancer and [chronic obstructive pulmonary disease]." Claimant's Exhibit 1. Dr. Perper further opined that the miner's "coal workers' pneumoconiosis was a substantial cause of his death." *Id.* Although Dr. Oesterling also attributed the miner's death to lung cancer, he opined that the miner's "very modest . . . coal workers' pneumoconiosis" did not "in any way contribute to his death." Employer's Exhibit 7.

In evaluating the conflicting evidence, the administrative law judge found that "Dr. Oesterling's reports [were] much easier to follow and understand than the reports of Dr. Perper." Decision and Order at 8. The administrative law judge also stated that "Dr. Oesterling's findings were much more consistent with those of the prosector." *Id.* The administrative law judge therefore found that the evidence did not establish that the miner's death was due to pneumoconiosis. *Id.*

We agree with claimant that the administrative law judge's conclusory analysis that the medical evidence was insufficient to establish that the miner's death was due to pneumoconiosis does not comply with the Administrative Procedure Act (APA), which provides that every adjudicatory decision must be accompanied by a statement of

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as the only x-ray readings in evidence appear in the miner's treatment records, and those x-rays were not ILO classified for either the presence or absence of pneumoconiosis. Contrary to employer's analysis, the language upon which employer relies means that if the miner's widow "is able, *despite the absence of clinical evidence of complicated pneumoconiosis*, to demonstrate a totally disabling respiratory or pulmonary impairment, the Act rebuttably presumes that . . . the miner's death was due to pneumoconiosis." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 11, 3 BLR 2-36, 2-41 (1975) (emphasis added). Therefore, we reject employer's argument that the lack of a negative x-ray reading in the record for complicated pneumoconiosis precludes the application of amended Section 411(c)(4).

findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, we vacate the administrative law judge's finding that the medical evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

On remand, when weighing the evidence under either amended Section 411(c)(4) or 20 C.F.R. §718.205, the administrative law judge must explain his findings in accordance with the requirements of the APA, 5 U.S.C. §557(c)(3)(A).

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded to the administrative law judge 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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REGINA C. McGRANERY
Administrative Appeals Judge