

BRB No. 09-0554 BLA

SHIRLEY COMPTON)
(Widow of SHERMAN H. COMPTON))
)
Claimant/Petitioner)
)
v.)
)
STAR LEASING COMPANY,)
INCORPORATED)
)
and)
)
KENTUCKY EMPLOYERS' MUTUAL)
INSURANCE)
)
Employer/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest)

DATE ISSUED: 06/30/2010

DECISION and ORDER

Appeal of the Decision and Order Denying Survivor Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky for claimant.

Todd P. Kennedy, Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton), Pikeville, Kentucky, for employer.

Barry H. Joyner (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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Survivor Benefits (2006-BLA-06066) of Administrative Law Judge Kenneth A. Krantz issued on a claim, filed on May 11, 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(l)) (the Act). The administrative law judge credited the miner with thirty-seven years of coal mine employment and adjudicated this claim under the regulations at 20 C.F.R. Part 718. He found that while the miner had coal workers' pneumoconiosis, the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge found that claimant failed to satisfy her burden of proof and denied benefits.

On appeal, claimant generally asserts that she is entitled benefits.² Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), indicated that he would not file a substantive response, unless specifically requested to do so by the Board.

By Order dated March 30, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.³ *Compton v. Star Leasing Co.*, BRB No., 09-0554 BLA (Mar. 30, 2010) (unpub.

¹ Claimant, Shirley Compton, is the widow of the deceased miner, Sherman H. Compton, who died on February 8, 2005. Director's Exhibit 2.

² On April 23, 2010, claimant submitted additional medical evidence for consideration in her case. By Order dated April 30, 2010, the Board returned claimant's evidence because we are without authority to consider any new or additional evidence that was not submitted below. *See* 20 C.F.R. §802.301; *Compton v. Star Leasing Co.*, BRB No., 09-0554 BLA (Apr. 30, 2010) (unpub. Order). In light of the Board's Order, it is not necessary that we address employer's motion to strike claimant's evidence, filed with the Board on May 4, 2010.

³ On March 23, 2010, amendments to the Black Lung Benefits Act, affecting claims filed after January 1, 2005, were enacted. Relevant to this survivor's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4)

Order). Claimant contends that the recent amendments should be interpreted as applying to the facts of this case, and that she should be found entitled to benefits. Employer, however, asserts that the recent amendments do not affect this case because the miner was not receiving benefits at the time of his death. Employer alternatively argues that if the Board remands this case for consideration under Section 411(c)(4), due process dictates that employer be given “an opportunity to respond to changes in [the] law.” Employer’s Supplemental Brief at 2. The Director responds, asserting that the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), applies to this survivor’s claim as it was filed after January 1, 2005. The Director specifically states that “[i]f the Board either affirms or vacates the [administrative law judge’s] finding of no death due to pneumoconiosis” under [20 C.F.R. §]718.205(c), then this case must be remanded for the [administrative law judge] to consider entitlement under the Section 411(c) presumption.” Director’s Letter Brief at 3. The Director maintains that, because the presumption alters the required findings of fact and the allocation of the burden of proof, the administrative law judge, on remand, must allow the parties the opportunity to submit additional, relevant evidence, consistent with the evidentiary limitations at 20 C.F.R. §725.414. *Id.*

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.⁴ 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).

In order to establish entitlement to survivor’s benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to

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 it is established that a miner was employed for fifteen years or more in an underground coal mine or in a surface mine in conditions substantially similar to those in an underground mine, and has or had, in the case of a deceased miner, a totally disabling respiratory or pulmonary impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, or that the miner was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis. 30 U.S.C. §921(c)(4).

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant’s coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director’s Exhibits 6, 7.

pneumoconiosis. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or if death was caused by complications of pneumoconiosis. Death will also be considered due to pneumoconiosis if the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable.⁵ 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003).

The administrative law judge determined that the autopsy evidence was insufficient to establish that the miner had complicated pneumoconiosis. Decision and Order at 15-16. He also determined that the evidence was insufficient to establish that simple pneumoconiosis caused, substantially contributed to, or hastened the miner's death pursuant to 20 C.F.R. §718.205(c). *Id.* at 15-17. In this appeal, claimant summarizes the medical evidence and asks the Board "to make a finding that [the miner] suffered from coal workers' pneumoconiosis and has a pulmonary impairment causally related to his coal mine employment that was a substantial contributing factor in causing or hastening his death." Brief for Claimant at 4 (unpaginated). Claimant, however, alleges no specific error with regard to the weight the administrative law judge accorded the conflicting medical opinions as to whether the miner had complicated pneumoconiosis or whether his death was hastened by simple pneumoconiosis. See *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Because the Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. See 20 C.F.R.

⁵ Section 411(c)(3) of the Act, implemented by 20 C.F.R. §718.304, provides, in relevant part, that there is an irrebuttable presumption that the miner died due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition that would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c). In determining whether claimant has established invocation of the irrebuttable presumption, the administrative law judge must consider all relevant evidence. *Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89, 21 BLR 2-615, 2-626-29 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (*en banc*).

§§802.211, 802.301. Consequently, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.304(b), 718.205(c).

Notwithstanding, after review of the parties' responses, we are persuaded that the Director is correct in maintaining that the case must be remanded to the administrative law judge. The Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), 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. Thus, we vacate the administrative law judge's denial of benefits and remand this case for a determination as to whether claimant is entitled to survivor's benefits, based on consideration of the evidence at Section 411(c)(4) of the Act. The administrative law judge is instructed on remand to allow the parties the opportunity to submit additional, relevant evidence, consistent with the evidentiary limitations at 20 C.F.R. §725.414.

Accordingly, the administrative law judge's Decision and Order Denying Survivor Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge