

BRB No. 09-0742 BLA

MICHAEL J. VICE)
)
 Claimant-Petitioner)
)
 v.)
)
 PITTSBURG & MIDWAY COAL MINING)
 COMPANY (CHEVRON MINING,)
 INCORPORATED)) DATE ISSUED: 06/28/2010
)
 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 Adele Higgins Odegard,
Administrative Law Judge, United States Department of Labor.

Jack Jacobs (Maples & Jacobs, LLC), Birmingham, Alabama, for claimant.

John W. Hargrove (Bradley Arant Boult Cummings, LLP), Birmingham,
Alabama, for employer.

Jeffrey S. Goldberg (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, McGRANERY, and HALL, Administrative Appeals
Judges.

PER CURIAM:

Claimant appeals the Decision and Order (08-BLA-5741) of Administrative Law
Judge Adele Higgins Odegard 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 subsequent claim filed on August 2, 2007. After crediting claimant with nineteen years of coal mine employment,¹ the administrative law judge found that the medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). After finding that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). However, the administrative law judge found that the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends, *inter alia*, that the administrative law judge erred in finding that the evidence did not establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). 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.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

By Order dated May 4, 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. The parties have responded.

The Director contends that Section 1556 affects this case and that a remand is required. The Director states that, because claimant filed his claim after January 1, 2005, and it was still pending on March 23, 2010, the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), applies to this claim.² The Director requests that this case

¹ The record indicates that claimant's coal mine employment was in Alabama. Director's Exhibit 4. 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, 1-202 (1989) (*en banc*).

² Section 411(c)(4) provides that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling

be remanded to the administrative law judge to consider whether claimant has established entitlement pursuant to the Section 411(c)(4) presumption. The Director further states that, because the presumption alters the required findings of fact and the allocation of the burden of proof, the administrative law judge must allow the parties the opportunity to submit additional, relevant evidence, consistent with the evidentiary limitations at 20 C.F.R. §725.414.

Claimant agrees that Section 1556 affects this case and that a remand is required. Employer also agrees that Section 1556 is applicable to this case, but argues that, based on the administrative law judge's finding that claimant failed to establish that his total disability was due to pneumoconiosis, the Section 411(c)(4) presumption has been rebutted. Thus, employer urges affirmance of the administrative law judge's denial of benefits.

After review of the parties' responses, we are persuaded that the Director is correct in maintaining that the administrative law judge's findings, and the denial of benefits, must be vacated and the case remanded to the administrative law judge. Relevant to this living miner'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 at least fifteen years of qualifying coal mine employment, and that he has a totally disabling respiratory impairment, there is a rebuttable presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). In this case, claimant filed his claim after January 1, 2005, he was credited with nineteen years of coal mine employment, and he established a totally disabling respiratory or pulmonary impairment.³ Section 411(c)(4) further provides that, if the presumption is invoked, the burden of proof shifts to employer to establish that claimant does not have pneumoconiosis or that claimant's "respiratory or pulmonary impairment did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4). Contrary to employer's assertion, therefore, we cannot affirm the denial of benefits because claimant did not establish that his total disability was due to pneumoconiosis. Accordingly, we must vacate the

respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis and/or that the miner's 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)). The Director, Office of Workers' Compensation Programs, notes that claimant was credited with nineteen years of coal mine employment, and established that he is totally disabled.

³ In the current appeal, employer does not challenge the administrative law judge's finding of total disability, or his finding of nineteen years of coal mine employment.

administrative law judge's findings under 20 C.F.R. §718.204(c), and remand this case to the administrative law judge.

On remand, the administrative law judge must initially consider whether claimant is entitled to invocation of the presumption at Section 411(c)(4). If the administrative law judge determines that the presumption is applicable to this claim, he must allow both parties the opportunity to submit evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414.

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.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge