

U.S. DEPARTMENT OF LABOR  
BENEFITS REVIEW BOARD  
WASHINGTON, D.C.

|   |   |                         |
|---|---|-------------------------|
| CHERI D. HATFIELD (widow of<br>CECIL E. HATFIELD)   | ) |                         |
|   | ) |                         |
|   | ) |                         |
| Claimant/Respondent   | ) | BRB No. 10-252 BLA      |
|   | ) |                         |
| v.  | ) | Case No. 2008-BLA-05384 |
|   | ) |                         |
| EASTERN COAL CORP., self-insured<br>through THE PITTSSTON COMPANY                           | ) | OWCP No. XXX-XX-8587    |
|   | ) |                         |
|   | ) |                         |
| Employer/Respondent   | ) |                         |
|   | ) |                         |
| and   | ) |                         |
|   | ) |                         |
|   | ) |                         |
| DIRECTOR, OFFICE OF WORKERS'<br>COMPENSATION PROGRAMS, UNITED<br>STATES DEPARTMENT OF LABOR | ) |                         |
|   | ) |                         |
|   | ) |                         |
| Party-in-Interest/Petitioner  | ) |                         |

DIRECTOR'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

The Director, Office of Workers' Compensation Programs ("OWCP"), hereby appeals the Decision and Order ("ALJ D&O") issued on November 27, 2009, by Administrative Law Judge ("ALJ") Daniel F. Solomon in this case. The ALJ's order denies Cheri D. Hatfield's ("Claimant") claim under the Black Lung Benefits Act ("BLBA"), 30 U.S.C. §§ 901-945, *amended* by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556 (2010).<sup>1</sup> As explained below, the ALJ's denial of benefits must be

---

<sup>1</sup> The miner last worked in the Commonwealth of Kentucky. Director's Exhibit ("DX") 7. Therefore, this claim is governed by the law of the United States Court of Appeals for the Sixth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

vacated and the case remanded for further consideration because the BLBA has been amended since the decision was issued, the amended provision applies to this claim, and the amendment could affect the outcome of this claim. 20 C.F.R. § 802.211.

#### STATEMENT OF THE PROCEDURAL HISTORY AND FACTS

Cheri D. Hatfield (“the Claimant”), widow of Cecil D. Hatfield (“the miner”), filed a claim for survivor’s benefits under the BLBA on October 31, 2006. DX 2. In a proposed decision and order, issued on June 22, 2007, the district director awarded benefits. DX 32. Employer timely requested a hearing. After holding a hearing, the ALJ issued his decision and order denying benefits on November 27, 2009.

The miner’s last coal mine employment was with Eastern Coal Corporation (“the Employer”) in 1988. DX 7 at 3. On June 20, 1988, the Kentucky Workers’ Compensation Board awarded the miner full benefits for occupational lung disease. DX 9. The miner died on June 30, 2006. The miner did not file a claim for federal black lung benefits.

#### STANDARD OF REVIEW

The Board’s scope of review is defined by statute. The ALJ’s Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

### ALJ DECISION AND ORDER

The parties stipulated and the ALJ found that the miner had at least 32 years of coal mine employment, that Eastern Coal Corporation was the properly named responsible operator, and that the case was within the jurisdiction of the Sixth Circuit. ALJ D&O at 3, ¶5. The ALJ evaluated the medical evidence addressing the cause of the miner's death. He found that the two medical opinions upon which the claimant relied – by Drs. Hussain and Perper - failed to credibly establish that the miner's death was due to pneumoconiosis. The ALJ concluded that Dr. Hussain's opinion was unexplained and unsubstantiated. The ALJ found that Dr. Perper's opinion could not be credited because the doctor had primarily relied on biopsy slides that he interpreted as demonstrating clinical pneumoconiosis. The ALJ found that the biopsy evidence was inconclusive given the contrary finding of Dr. Caffrey, the employer's pathologist, that the pathology slides did not establish pneumoconiosis.

With regard to the employer's medical report, the ALJ noted that Dr. Rosenberg had opined that the miner died of obstructive lung disease with a superimposed infection process rather than pneumoconiosis and that any large densities developed due to inflammation. *Id.* at 7, ¶1. But the ALJ faulted Dr. Rosenberg for failing to address whether pneumoconiosis hastened the miner's death. *Id.* at 7, ¶3. The ALJ concluded that because no credible evidence established death due to pneumoconiosis, the Claimant failed to establish entitlement to benefits. The ALJ noted that it was therefore unnecessary for him to address whether the miner had pneumoconiosis, and if so, whether the disease arose out of coal mine employment. *Id.* at 7, ¶4.

## ISSUE

WHETHER THE ALJ'S DECISION DENYING BENEFITS MUST BE VACATED AND THE CASE REMANDED SO THAT THE ALJ MAY APPLY THE 2010 AMENDMENTS TO THE BLACK LUNG BENEFITS ACT.

## ARGUMENT

PURSUANT TO THE 2010 AMENDMENTS TO THE BLACK LUNG BENEFITS ACT, A STATUTORY PRESUMPTION OF DEATH DUE TO PNEUMOCONIOSIS APPLIES TO THIS CLAIM; CONSEQUENTLY, THE ALJ'S DECISION SHOULD BE VACATED AND THE CASE REMANDED SO THAT THE ALJ MAY CONSIDER CLAIMANT'S ENTITLEMENT TO BENEFITS UNDER THE PRESUMPTION.

The ALJ denied benefits because he concluded that the claimant failed to establish that the miner's death was due to pneumoconiosis. Although the ALJ appropriately applied the law in effect at the time he issued his decision, the BLBA has now been amended to include a statutory presumption of death due to pneumoconiosis applicable to this claim. Because application of this presumption could result in an award of benefits, the ALJ's decision denying the claim should not be affirmed. Rather, the ALJ's decision should be vacated, and the case remanded for the ALJ to consider the claimant's entitlement pursuant to the statutory presumption.

### A. The 2010 BLBA Amendments

Section 1556 of the Patient Protection and Affordable Care Act ("PPACA"), Pub. L. No. 111-148, § 1556 (2010), amended the BLBA to make Section 411(c)(4), 30 U.S.C. 921(c)(4), applicable to certain claims. In the case of a miner's survivor, Section 411(c)(4) provides a presumption that the miner's death was due to pneumoconiosis if certain conditions are met. Previously, Section 411(c)(4) had applied only to claims filed prior to January 1, 1982. The 2010 amendment makes Section 411(c)(4) applicable to all

miners' and survivors' claims filed after January 1, 2005 that are pending on or after the enactment date of the PPACA – March 23, 2010. Pub. L. No. 111-148, § 1556(c) (2010). *See also* 156 Cong. Rec. S2083-84 (daily ed. March 25, 2010)(statement of Sen. Byrd). Because the instant claim was filed in October 2006, and because it was pending on the PPACA's enactment date, Section 411(c)(4) applies to this claim.

#### B. The Section 411(c)(4) Presumption

To invoke the Section 411(c)(4) presumption, the claimant must establish that the miner worked at least 15 years in an underground coal mine or in a surface coal mine in conditions substantially similar to those in an underground mine. *Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512 (7th Cir. 1988). Secondly, the claimant must establish that the miner suffered from a totally disabling respiratory or pulmonary impairment under the criteria contained in 20 C.F.R. § 718.204. *See* 20 C.F.R. § 718.305(c).<sup>2</sup> The presumption of death due to pneumoconiosis may be rebutted by proving either that the miner did not have pneumoconiosis or that the miner's death did not arise in whole or in part out of his coal mine employment. *See Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988).<sup>3</sup>

---

<sup>2</sup> Section 718.305 implements the Section 411(c)(4) presumption. Consequently, the regulation may be consulted for guidance regarding the application of the statutory presumption, notwithstanding subsection 718.305(d), which states that the regulation applies only to claims filed before January 1, 1982.

<sup>3</sup> When the Section 411(c)(4) presumption was originally enacted, a survivor could establish entitlement by proving either that the miner was totally disabled due to pneumoconiosis at the time of his death or that the miner died due to pneumoconiosis. In *Alexander*, the Board held that if the originally enacted Section 411(c)(4) presumption is invoked in a survivor's claim, the miner is presumed to have been totally disabled due to pneumoconiosis and to have died due to pneumoconiosis and that the party opposing entitlement must rebut both presumptions to prevail. 12 BLR at 1-47. *See also* 20 C.F.R. § 718.305(d). At the time that Congress prospectively repealed Section 411(c)(4) in 1981, it eliminated the ability of a survivor to establish entitlement by demonstrating the



### C. Remand is Required so the ALJ May Apply the Section 411(c)(4) Presumption

The ALJ did not consider this widow's claim pursuant to Section 411(c)(4) and the case must be remanded for him to do so. Section 411(c)(4) requires a determination of whether the miner was totally disabled due to a respiratory or pulmonary impairment, an issue that was not relevant to survivors' claims prior to the 2010 amendments. Successful invocation of the presumption will alter the parties' burdens of proof and impose on the employer the obligation of showing either that the miner did not suffer from pneumoconiosis or that his death was unrelated to pneumoconiosis in order to defeat entitlement. Such alterations in required findings of fact and in allocation of burdens of proof require remand and renewed ALJ consideration.<sup>4</sup>

For those same reasons, the ALJ must offer the parties the opportunity to submit additional evidence relevant to the Section 411(c)(4) presumption. Given that the 2010 amendment now puts at issue whether the miner was totally disabled and potentially changes the parties' respective burdens of proof, it would be unjust not to allow the submission of additional evidence by both parties. *See Tackett v. Benefits Review Board*, 806 F.2d 640, 642 (6th Cir. 1986)(allowing remand for claimant to present additional evidence after change in law); *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1047-50 (6th Cir. 1990)(holding that employer should be allowed to present additional evidence

---

miner was totally disabled. *Mancia v. Director, OWCP*, 130 F.3d 579, 584 n.6 (3d Cir. 1997). That rule was not affected by the 2010 amendments. Consequently, Section 411(c)(4), as applied to survivors' claims filed after January 1, 2005, does not give rise to a presumption of total disability due to pneumoconiosis and the party opposing entitlement need not rule out coal mine employment as a cause of disability to rebut the presumption.

<sup>4</sup> Because Claimant established at least 32 years of underground coal mine employment, DX 4 at 2; DX 9, she has already met one of the two requirements for invoking the Section 411(c)(4) presumption.

after change in law). Any additional evidence submitted must be consistent with the evidentiary limitations. 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).

Accordingly, the ALJ's decision denying benefits should be vacated, and the case remanded for the ALJ to apply the Section 411(c)(4) presumption to this claim.

CONCLUSION

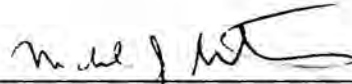
In accordance with the above discussion, the Director requests that the decision and order be vacated and the claim remanded to the ALJ for reconsideration of the claim under the applicable law.

Respectfully submitted,

PATRICIA M. SMITH  
Solicitor of Labor

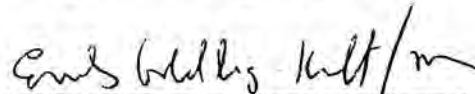
RAE ELLEN JAMES  
Associate Solicitor

M. ELIZABETH MEDAGLIA  
Deputy Associate Solicitor



---

MICHAEL J. RUTLEDGE  
Counsel for Administrative  
Litigation and Legal Advice



---

EMILY GOLDBERG-KRAFT  
Attorney  
U.S. Department of Labor

Office of the Solicitor  
Suite N-2117  
Frances Perkins Building  
200 Constitution Ave., N.W.  
Washington, D.C. 20210  
(202) 693-5642

Attorneys for the Director, Office of  
Workers' Compensation Programs



CERTIFICATE OF SERVICE

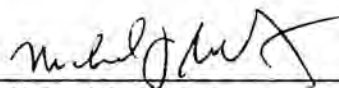
I hereby certify that on April 1, 2010, copies of the foregoing documents were served by mail, postage prepaid, on the following:

Joseph E. Wolfe, Esquire  
Wolfe, Williams & Rutherford  
PO Box 625  
Norton, VA 24273

Lois A. Kitts, Esquire  
Baird and Baird  
PO Box 351  
Charleston, WV 25333

Eastern Coal Corp.  
C/O Pittston Coal Group  
PO Box 1268  
Abingdon, VA 24212

The Pittston Company  
C/O Wells Fargo  
PO Box 3389  
Charleston, WV 25333



---

Michael J. Rutledge  
Attorney  
U.S. Department of Labor