

No. 10-1948

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

**JACQUELINE J. KEENE (Widow of
NORMAN KEENE)**

Petitioner

v.

CONSOLIDATION COAL COMPANY

and

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,**

Respondents

**On Petition for Review of an Order of the Benefits
Review Board, United States Department of Labor**

BRIEF FOR THE FEDERAL RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUE 2

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 4

 A. Statutory and Regulatory Background 4

 B. Evidence Relevant to the 15-Year Presumption 7

 C. The Decisions Below 9

SUMMARY OF THE ARGUMENT 11

ARGUMENT

 A. Standard of review 12

 B. The Court Should Vacate the Denial of Benefits and
 Remand This Case to the ALJ to Determine Whether Mrs.
 Keene Has Invoked the 15-Year Presumption of
 Entitlement Under 30 U.S.C. § 921(c)(4) 13

CONCLUSION 18

COMBINED CERTIFICATIONS 19

TABLE OF AUTHORITIES

CASES

Chen v. Holder,
578 F.3d 515 (7th Cir. 2009)14

Director, OWCP v. Midland Coal Co.,
855 F.2d 509 (7th Cir. 1988)15

Harlan Bell Coal Co. v. Lemar,
904 F.2d 1042 (6th Cir. 1990)14

Roberts & Schaefer Co. v. Director, OWCP
400 F.3d 992 (7th Cir. 2005)12

*Urbania v. Central States, Southeast and Southwest Areas
Pension Fund*,
421 F.3d 580 (7th Cir. 2005)16

Zeigler Coal Co. v. Director, OWCP
312 F.3d 332 (7th Cir. 2002) 4

Zeigler Coal Co. v. Director, OWCP
326 F.3d 894 (7th Cir. 2003) (*en banc*)..... 12

STATUTES

Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-944

Section 411(a), 30 U.S.C. § 921(a)..... 5

Section 411(c)(4), 30 U.S.C. § 921(c)(3)10

Section 411(c)(4), 30 U.S.C. § 921(c)(4) 5, 13, 14, 17

Section 422(l), 30 U.S.C. § 932(l) 6

Patient Protection and Affordable Care Act,
Pub. L. No. 111-148, § 1556 (2010)

Section 1556.....3, 6, 13

REGULATIONS

20 C.F.R. § 718.202 4
20 C.F.R. § 718.202(a)(1) 9
20 C.F.R. § 718.202(a)(2) 8, 9, 17
20 C.F.R. § 718.202(a)(4) 8, 17
20 C.F.R. § 718.203 4
20 C.F.R. § 718.203(b) 10
20 C.F.R. § 718.204(b) 8, 15
20 C.F.R. § 718.204(c)(1) 17
20 C.F.R. § 718.205(a) 6, 13
20 C.F.R. § 718.205(c) 6, 13
20 C.F.R. § 718.304 10
20 C.F.R. § 718.304(a) 10
20 C.F.R. § 718.304(b) 10
20 C.F.R. § 718.305(a) 5, 14
20 C.F.R. § 718.305(e) 5
20 C.F.R. § 725.103 5
20 C.F.R. § 725.212 4
20 C.F.R. § 725.212(a)(1) 4
20 C.F.R. § 725.212(a)(2) 4
20 C.F.R. § 725.414 8, 17
20 C.F.R. § 725.414(a)(2) 8
20 C.F.R. § 725.414(a)(3) 8
20 C.F.R. § 725.491 3
20 C.F.R. § 725.494 3
20 C.F.R. § 725.495 3

MISCELLANEOUS

156 Cong. Rec. S2083 (daily ed. March 25, 2010) 6

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

On Petition for Review of a Final Order of the Benefits
Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

Jacqueline Keene petitions this Court to review a final order of
the Department of Labor's Benefits Review Board. The

jurisdictional statement in Mrs. Keene's opening brief is correct and complete.

STATEMENT OF THE ISSUE

Mrs. Keene's claim for federal black lung benefits was denied because she failed to prove that pneumoconiosis caused her husband's death. While her appeal was pending, Congress amended the Black Lung Benefits Act to reinstate a statutory presumption that provides claimants with an alternate route to prove their entitlement to benefits. The amendment explicitly applies to claims, like Mrs. Keene's, that were filed after January 1, 2005 and pending on or after March 23, 2010. Should the Court remand the claim to the Office of Administrative Law Judges for consideration and application of the amended law?

STATEMENT OF THE CASE

After her husband's death, Jacqueline Keene filed this claim for federal black lung survivor's benefits on January 3, 2005. (Director's Exhibit "DX" 2A).¹ Consolidation Coal Company

¹ Citations to exhibits refer to the record before the ALJ and the Board. Exhibits ending in "A" were introduced in Mrs. Keene's (cont'd . . .)

("Consol") timely controverted Mrs. Keene's eligibility for benefits.² (DX 5A, 6A). The district director denied her claim, finding that she had established that her husband had worked as a coal miner for "over 35 years" and had suffered from coal workers' pneumoconiosis, but not that the disease had contributed to his death. (DX 11A). Mrs. Keene timely requested a formal hearing before an administrative law judge. (DX 12A, 13A).

Administrative Law Judge Edward Miller ("the ALJ") heard Mrs. Keene's claim on February 13, 2007, then issued his December 31, 2008 decision denying benefits. Like the district director, the ALJ concluded that although Mrs. Keene had established that her husband suffered coal workers'

(. . . cont'd)

claim. Because section 1556 of the Patient Protection and Affordable Care Act affects only Mrs. Keene's claim, the Director will not summarize the procedural history or medical evidence associated with the pending miner's claim.

² Consol is liable for any benefits awarded to Mrs. Keene because it is the coal mine operator that most recently employed her husband for a period of at least one year of coal mine employment. See 20 C.F.R. §§ 725.491, .494-.495. Consol initially controverted its identification as the liable operator, but later conceded that issue. (DX 10A).

pneumoconiosis, she had not established that the disease had contributed to his death.³ He therefore denied her claim. The Benefits Review Board affirmed that denial, as well as the denial of the miner's claim, on February 26, 2010. Mrs. Keene filed a timely appeal to this Court.

STATEMENT OF THE FACTS

A. Statutory and Regulatory Background

To obtain benefits under the Act, Mrs. Keene must prove (1) that her husband had coal workers' pneumoconiosis, and (2) that the disease caused, contributed to, or hastened his death. 20 C.F.R. §§ 718.202, 718.203, 718.205, 725.212; *Zeigler Coal Co. v. Director, OWCP*, 312 F.3d 332, 333-34 (7th Cir. 2002).⁴ A claimant

³ The ALJ also heard and denied Mr. Keene's claim. The ALJ accepted Consol's stipulations that he suffered from coal workers' pneumoconiosis and was totally disabled by a pulmonary impairment, but found that the miner had failed to prove that his pneumoconiosis had contributed to that disability. (Appendix 31, 35).

⁴ She must also prove that she was dependent upon the miner and that she is not currently married. 20 C.F.R. § 725.212(a)(1), (2). Consol does not dispute that Mrs. Keene satisfies these requirements.

bears the ultimate burden of proof on both issues, 20 C.F.R. § 725.103, but may be aided by certain statutory presumptions.

One such presumption is 30 U.S.C. § 921(c)(4)'s "15-year presumption." The 15-year presumption can be invoked if the miner (1) "was employed for fifteen years or more in one or more underground coal mines" or in surface mines "substantially similar to conditions in an underground mine" and (2) suffered from "a totally disabling respiratory or pulmonary impairment[.]" 30 U.S.C. § 921(c)(4). If those criteria are met, the claimant invokes a rebuttable presumption that the miner "is totally disabled by pneumoconiosis [and] that his death was due to pneumoconiosis[.]" An operator can rebut the 15-year presumption by demonstrating that the miner "does not, or did not, have pneumoconiosis" or that "his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." *Id.*

When Mrs. Keene filed her claim, and when the ALJ and Board issued their decisions, the 15-year presumption was available only to claimants who filed for benefits before January 1, 1982. *See* 30 U.S.C. § 921(a), (c)(4); 20 C.F.R. § 718.305(a), (e). A surviving spouse could therefore establish her entitlement to benefits only by

affirmatively proving that the miner had coal workers' pneumoconiosis and that the disease caused, contributed to or hastened his death. 20 C.F.R. § 718.205(a), (c).

Congress revived section 411(c)(4) in section 1556 of the Patient Protection and Affordable Care Act ("PPACA"). Pub. L. No. 111-148, § 1556 (2010). Section 1556 of the PPACA makes section 411(c)(4) of the Act applicable to claims filed after January 1, 2005, and pending on or after the enactment date of the PPACA – March 23, 2010. *Id.* See also 156 Cong. Rec. S2083-84 (daily ed. March 25, 2010) (statement of Sen. Byrd).⁵

⁵ The PPACA also amended section 422(l), which provides that the survivors of miners who are found to be totally disabled due to pneumoconiosis are automatically entitled to federal black lung benefits upon the miner's death. 30 U.S.C. § 932(l). Section 422(l) is not currently applicable to Mrs. Keene's claim. Her husband's claim for benefits was denied below.

B. Evidence Relevant to the 15-Year Presumption⁶

The miner alleged between thirty and forty years of coal mine employment. (DX 1 pp.4, 6; DX 2 pp.4, 6; DX 5). From 1966 to 1974, he worked as a shovel oilier; from 1974 to 1979, he worked as a tractor operator; from 1979 to 1980, he worked as a tippel tractor operator; and from 1980 to 1981 he worked as a tractor operator. (DX 7). He stated that all of his coal mine employment from 1939 to 1981 was in a strip mine and that he was exposed to dust, gases or fumes in all of his jobs. (DX 1 p.6; DX 2 p.6). There is no contrary evidence in the record. The miner did not provide testimony in any of his three claims, and Mrs. Keene was not asked about her husband's exposure to coal mine dust at her 2007 hearing.

In the adjudication of the miner's claim, Consol stipulated that Mr. Keene was totally disabled. (Appendix ("App.") 35). However,

⁶ The Director will not address the arguments raised by Mrs. Keene regarding the denial of her husband's claim or the ALJ's determination that she failed to establish that her husband's pneumoconiosis contributed to his death without the aid of the 15-year presumption. We therefore summarize only the facts and evidence relevant to the invocation and rebuttal of the 15-year presumption.

prior to the PPACA's reinstatement of the 15-year presumption, the issue was irrelevant to Mrs. Keene's claim for survivor's benefits. Therefore, much of the evidence on this issue was not submitted in Mrs. Keene's claim.⁷ Because the ALJ has not considered whether the evidence submitted in Mrs. Keene's claim establishes total disability pursuant to 20 C.F.R. § 718.204(b), we will not discuss it here.

Consol concedes that the autopsy evidence establishes that Mr. Keene had pneumoconiosis. See Consol's July 16, 2007 post-hearing brief, pp. 10-11 ("The employer concedes the fact that the evidence submitted by both its own, and the claimant's, experts in the case at bar support a finding that the miner had simple coal workers' pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(2) and (a)(4)."). The parties did not develop evidence on, and the ALJ did

⁷ Section 725.414 limits the amount of evidence each party can submit in support of its case. 20 C.F.R. § 725.414(a)(2), (3). For that reason, and because the issues are generally different in miners' and survivors' claims – the miner's claim concerns pulmonary disability and disability causation, while the survivor's claim concerns the cause of the miner's death – the evidence in the miner's claim does not match the evidence in Mrs. Keene's claim, although some overlap exists.

not address, the question of whether the miner's pulmonary disability was unrelated to his pneumoconiosis. As with total disability, this issue was not relevant to Mrs. Keene's claim until the PPACA went into effect.

C. The Decisions Below

The ALJ found that the miner had established "at least 39 years of coal mine employment," including work as a shovel oilier, tractor operator, and tipple operator. (App. 17). The ALJ did not consider whether that employment occurred in conditions substantially similar to those in an underground mine because the 15-year presumption was not available to Mrs. Keene at the time. The ALJ next determined that the miner suffered from coal workers' pneumoconiosis. Although he determined that the weight of the x-ray evidence was negative for the disease, 20 C.F.R. § 718.202(a)(1), he accepted Consol's concession that the autopsy evidence established the presence of simple clinical pneumoconiosis under 20 C.F.R. § 718.202(a)(2).⁸ (App. 31). Additionally, the ALJ invoked

⁸ For purposes of claims filed under the Act, pneumoconiosis can be divided into "simple" and "complicated." Complicated (cont'd . . .)

the presumption at 20 C.F.R. § 718.203(b) that the disease arose out of his coal mine employment, and found that Consol had not rebutted the presumption.⁹ (App. 31-32).

The ALJ then turned to the question of whether Mrs. Keene had borne her burden of proving that pneumoconiosis caused or hastened her husband's death. The three medical experts who addressed that issue provided conflicting opinions. Dr. Pineda stated that pneumoconiosis had contributed to the miner's death but did not hasten it. (App. 24). Dr. Perper concluded that the miner's pneumoconiosis had hastened his death. (App. 19-21). Dr. Tuteur disagreed. (App. 21-22). He stated that the miner did not suffer from pneumoconiosis at all. He went on to opine that, even if the miner had suffered from the disease, it would have been too

(. . . cont'd)

pneumoconiosis is generally established by x-ray evidence of opacities measuring at least one centimeter in diameter, or biopsy or autopsy evidence of massive lesions in the lung. 20 C.F.R. § 718.304(a), (b). A claimant who proves the existence of complicated coal workers' pneumoconiosis invokes an irrebuttable presumption of entitlement. 30 U.S.C. § 921(c)(3); 20 C.F.R. § 718.304.

⁹ Section 718.203(b) provides that if a claimant establishes at least ten years of coal mine employment and clinical pneumoconiosis, then he invokes a rebuttable presumption that the disease arose out of his coal mine employment.

mild to have contributed to the miner's death. (App. 36). After weighing this conflicting testimony and the other medical evidence of record, the ALJ denied Mrs. Keene's claim, concluding that "the preponderance of the evidence . . . indicates that [pneumoconiosis] did not contribute to or hasten the miner's death." (App. 37).

The Board affirmed the ALJ's decision as "rational and supported by substantial evidence." (App. 7). The Board affirmed the ALJ's finding that the miner had coal workers' pneumoconiosis as unchallenged on appeal. (App. 3 n.3). The Board found that Mrs. Keene's argument "relates to the administrative law judge's weighing of the conflicting medical opinion evidence," and that the Board was not empowered to reweigh the evidence. (App. 7).

SUMMARY OF THE ARGUMENT

The ALJ concluded that Mrs. Keene had not carried her burden of proof to establish that her husband's death had been caused or hastened by pneumoconiosis. That conclusion is no longer dispositive. By reinstating the 15-year presumption, Congress established an alternate path to entitlement.

If Mrs. Keene establishes the two prerequisites to invoke that presumption (a totally disabling impairment and at least 15 years in

an underground mine or conditions substantially similar), the burden will shift to Consol to prove that pneumoconiosis did not contribute to Mr. Keene's disability. The ALJ did not consider any of these questions, which were irrelevant to a black lung survivor's claim prior to the PPACA. The Court should therefore remand the claim with instructions to consider the applicability of the 15-year presumption and to reopen the record as appropriate.

ARGUMENT

A. Standard of Review

The issues addressed in this brief involve questions of law. The Court reviews legal issues *de novo*. *Roberts & Schaefer Co. v. Director, OWCP*, 400 F.3d 992, 996 (7th Cir. 2005) (citation omitted). However, the Director's interpretation of the Act is entitled to deference. *Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894, 901 (7th Cir. 2003) (*en banc*).

B. The Court should vacate the denial of benefits and remand this case to the ALJ to determine whether Mrs. Keene has invoked the 15-year presumption of entitlement under 30 U.S.C. § 921(c)(4).

At the time the ALJ denied her claim for survivor's benefits, Mrs. Keene could prove entitlement only by establishing, by a preponderance of the evidence, that her husband had coal workers' pneumoconiosis and that the disease caused, contributed to, or hastened his death. 20 C.F.R. § 718.205(a), (c). That is no longer the case. After the ALJ and Board decisions below, Congress reinstated the 15-year presumption. This change in law applies to all claims filed after January 1, 2005, that are pending on or after March 23, 2010. PPACA § 1556(c). Mrs. Keene filed her claim on January 3, 2005, and it remains pending. (DX 2A). The change in law therefore applies to her claim.¹⁰

Given that section 1556 of the PPACA potentially changes the parties' respective burdens of proof and raises new issues, on remand the ALJ should reopen the record where he deems it necessary to permit the parties to develop evidence regarding the

¹⁰ It does not apply to her late husband's claim, which was filed on August 20, 2001.

nature of the miner's coal mine employment, whether he suffered from a totally disabling pulmonary impairment, and (if necessary) whether the miner's pneumoconiosis contributed to his pulmonary disability. See *Chen v. Holder*, 578 F.3d 515, 517-18 (7th Cir. 2009) (vacating order and remanding case so petitioner could present evidence on issue that did not arise until 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 after change in law).

To successfully invoke the 15-year presumption, Mrs. Keene must establish two prerequisites. The first is that her husband worked for at least fifteen years in underground coal mines, or in surface mines with substantially similar conditions. 30 U.S.C. § 921(c)(4); 20 C.F.R. § 718.305(a). Although the ALJ found that Mr. Keene worked as a coal miner for far more than the necessary fifteen years, he did not consider whether the miner spent those years in an underground mine or in a surface mine in substantially similar conditions. The miner stated only that all of his coal mine employment was in surface mines and that he was exposed to dust, gases or fumes in all of his jobs. (DX 1 p.6; DX 2 p.6).

This Court has held that a claimant need only prove that the miner “was exposed to sufficient coal dust in his surface mine employment,” and does not need to establish the conditions in underground mines as a comparison. *Director, OWCP v. Midland Coal Co.*, 855 F.2d 509, 512 (7th Cir. 1988). Because the dust conditions at the surface mines where Mr. Keene worked were not relevant prior to the PPACA’s enactment, the parties had no reason to develop any evidence on this issue, and the ALJ had no reason to consider it. Consequently, the Director suggests that on remand the ALJ reopen the record to permit the parties to develop evidence regarding those conditions.

The second prerequisite Mrs. Keene must establish is that her husband suffered from a totally disabling respiratory or pulmonary impairment as defined by 20 C.F.R. § 718.204(b). Although Consol conceded that the evidence introduced in the miner’s claim established total pulmonary disability, much of that evidence was not introduced in Mrs. Keene’s claim because total disability was

not at issue.¹¹ Consequently, on remand the ALJ should determine whether the record evidence is sufficient to determine whether or not the miner was totally disabled. If the evidence is insufficient, the ALJ should reopen the record to permit the parties to develop evidence on the issue.

If Mrs. Keene successfully invokes the 15-year presumption by establishing those two elements, the burden shifts to Consol, which can rebut it in two ways. The first, proving that Mr. Keene did not suffer from pneumoconiosis, is not available to Consol. Consol conceded below that the autopsy evidence establishes the existence of coal workers' pneumoconiosis. See Consol's July 16, 2007 post-hearing brief, pp. 10-11 ("The employer concedes the fact that the evidence submitted by both its own, and the claimant's, experts in the case at bar support [sic] a finding that the miner had simple

¹¹ If Consol ultimately prevails in the miner's claim, it may be estopped from arguing that the miner was not totally disabled by a pulmonary impairment. See, e.g., *Urbania v. Central States, Southeast and Southwest Areas Pension Fund*, 421 F.3d 580, 589 (7th Cir. 2005) (party may be estopped from advocating position where it prevailed on inconsistent position in prior action based on same facts). That question is not before the Court because the miner's claim remains pending.

coal workers' pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(2) and (a)(4).”).

The second method of rebuttal, proving that Mr. Keene's pneumoconiosis was not a “substantially contributing cause” of his totally disabling pulmonary impairment, remains open. 30 U.S.C. § 921(c)(4); 20 C.F.R. § 718.204(c)(1). Because that issue was not relevant to Mrs. Keene's claim, it was not considered by the ALJ.¹² On remand, the ALJ should reopen the record to permit the parties to develop evidence on the issue, subject to the evidentiary limitations at 20 C.F.R. § 725.414.

¹² While the ALJ denied Mr. Keene's claim on the ground that pneumoconiosis did not contribute to his total disability, his finding is not binding on Mrs. Keene's claim. The miner bore the burden of proof on that issue in his claim. If Mrs. Keene successfully invokes the 15-year presumption on remand, Consol will bear the burden of rebutting it. Further, the parties in Mrs. Keene's claim have not yet developed evidence regarding the issue. Finally, Mr. Keene's claim has not yet been finally resolved.

CONCLUSION

The Director respectfully requests that the Court vacate the denial of Mrs. Keene's claim for survivor's benefits and remand this case to the ALJ for further consideration.

Respectfully submitted,

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COMBINED CERTIFICATIONS

I hereby certify that:

1) This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because it contains 3,231 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface (14-point Bookman Old Style) using Microsoft Office Word 2003.

2) On December 1, 2010, paper copies of the Director's brief were served by mail, postage prepaid, and an electronic copy of the brief in portable document format was served, via e-mail, on the following:

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3) That the text of the electronic brief is identical to the text of the paper copies.

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