U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0233 BLA

DONALD R. BAKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VIRGINIA CREWS COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 04/19/2021
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Kathy L. Snyder and Andrea L. Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Francine L. Applewhite's Decision and Order Awarding Benefits (2017-BLA-05633) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on May 2, 2014.[1]

The administrative law judge found Claimant established thirty years of coal mine employment, including at least fifteen years working underground or in substantially similar conditions, and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant established a change in an applicable condition of entitlement and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] 20 C.F.R. §§718.305, 725.309(c). The administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer filed a reply brief, reiterating its contentions.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated

[1] Claimant filed three prior claims that were denied. Director's Exhibits 1-3. The district director denied Claimant's most recent prior claim for failure to establish total disability. Director's Exhibit 3 at 4. Claimant took no further action until filing this subsequent claim on May 2, 2014. Director's Exhibit 5.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 8.

by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption,[4] the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[5] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found Employer failed to establish rebuttal by either method. As discussed below, the administrative law judge committed multiple errors that require remand.

Clinical Pneumoconiosis

To disprove clinical pneumoconiosis, Employer must establish that Claimant does not have any of the diseases "recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Initially, we agree with Employer that the administrative law judge erred in finding it did not disprove clinical pneumoconiosis because she failed to address all of Employer's designated x-ray evidence and she considered x-ray evidence that was not of record. As

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established at least fifteen years of qualifying coal mine employment, total disability, and invocation of the Section 411(c)(4) presumption. *See* 20 C.F.R. §§718.305, 725.309; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6, 13.

[5] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Employer correctly notes, Administrative Law Judge William J. Barto presided at the hearing in this claim on June 27, 2018. Claimant objected to Employer's Exhibits 1 and 2 (Dr. Meyer's negative reading of a July 25, 2007 x-ray and Dr. Tarver's negative reading of a September 28, 2011 x-ray), which Employer submitted as rebuttal readings of x-rays obtained in conjunction with Claimant's prior claims. After the hearing, Judge Barto issued an order excluding Employer's Exhibits 1 and 2, but gave Employer the opportunity to revise its x-ray designations. *Baker v. Va. Crews Coal Co.*, Case No. 2017-BLA-05633 (Sept. 11, 2018) (unpub. Order). On September 25, 2018, Employer submitted a revised evidence summary form designating Dr. Tarver's negative readings of the June 25, 2014 and December 16, 2015 x-rays, and Dr. Seaman's negative reading of a June 6, 2018 x-ray. The case was reassigned to the administrative law judge on January 17, 2019.

In considering the x-ray evidence, the administrative law judge weighed the two readings from the prior claim that Judge Barto had excluded, but did not consider the negative readings by Drs. Tarver and Seaman.[6] Because the administrative law judge failed to properly address Employer's designated x-ray evidence, we vacate her finding that the x-ray evidence is positive for pneumoconiosis and that Employer did not satisfy its burden of proof. *See* 30 U.S.C. §923(b) (fact-finder must address all relevant evidence); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (administrative law judge's failure to consider all relevant evidence requires remand); Decision and Order at 2.

Employer also correctly contends the administrative law judge erred by not addressing the medical opinions as part of her overall consideration of the evidence establishing clinical pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-09 (4th Cir. 2000) (administrative law judge must weigh all relevant evidence as a whole). Consequently, we vacate the administrative law judge's determination that Employer failed to disprove the existence of clinical pneumoconiosis.

[6] Specifically, in finding the June 25, 2014 x-ray positive for pneumoconiosis, the administrative law judge considered Dr. Crum's positive reading and Dr. Forehand's negative reading but did not consider Dr. Tarver's negative reading. Decision and Order at 14; Director's Exhibit 23. In finding the December 16, 2015 x-ray positive for pneumoconiosis, she considered only Dr. Crum's positive reading but did not consider Dr. Tarver's negative reading. Decision and Order at 15; Director's Exhibit 28. In finding the June 6, 2018 x-ray positive for pneumoconiosis, the administrative law judge again considered only Dr. Crum's positive reading but did not consider Dr. Seaman's negative reading. Decision and Order at 15; Employer's Exhibit 7.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

Employer correctly asserts the administrative law judge did not make a specific finding as to whether it disproved the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Under the heading "Total Disability," the administrative law judge gave "little weight to Dr. Zaldivar's opinions as to the cause of Claimant's disabling impairment not being related to coal workers' pneumoconiosis." Decision and Order at 11. She further found Dr. Castle expressed views contrary to the Act and gave "little weight to his opinion as to the cause of Claimant's disabling impairment not being related to coal mine work." *Id*. at 12-13. Under the heading of "Rebuttal of Pneumoconiosis," she found Employer did not disprove clinical pneumoconiosis but did not mention legal pneumoconiosis. *Id*. at 13-15. Under the heading "Rebuttal that Disability was Caused by Coal Mine Employment," the administrative law judge summarily stated that "as discussed within the decision, the Employer has failed to show that the Claimant's total disability was not caused by or substantially contributed to his coal mine employment, or that coal mining activity did not substantially aggravated [sic] his disabling impairments." *Id*. at 15.

Although Claimant contends the administrative law judge made sufficient findings from which to conclude Employer has not disproven legal pneumoconiosis, we are unable to discern the standard she applied in assessing the credibility of Employer's physicians. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). In order to disprove legal pneumoconiosis, Employer must establish that Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8. Because the administrative law judge has not made the necessary findings on legal pneumoconiosis applying this standard, we vacate her determination that Employer did not rebut the Section 411(c)(4) presumption by establishing that Claimant does not have pneumoconiosis. *See McCune*, 6 BLR at 1-998 (Board lacks authority to render factual findings to fill gaps in the administrative law judge's opinion).

Disability Causation

Employer may also rebut the Section 411(c)(4) presumption by establishing that "no part of [Claimant's] respiratory or pulmonary total disability was caused by

pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii). Employer asserts the administrative law judge did not apply this standard and thus failed to properly consider whether it established no part of Claimant's disabling impairment was caused by pneumoconiosis. We agree.

The administrative law judge stated that "[as] the Claimant has established by presumption, and the Employer has failed to rebut, a diagnosis of pneumoconiosis, the Employer may rebut the 15-year Presumption a second way, by establishing that the Miner's respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." Decision and Order at 15. She further stated that "the burden is on [Employer] to 'rule out' the possibility that coal mine employment is 'significantly related to' or has 'substantially aggravated' a lung disease or impairment." *Id*.

The administrative law judge's statements conflate the standards for disproving legal pneumoconiosis and establishing no part of Claimant's disabling impairment was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A), (ii). Contrary to the administrative law judge's analysis, the second method of rebuttal does not require Employer to eliminate "coal mine employment" as a contributing cause of Claimant's disability, but rather Employer must prove that no part of the Miner's disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Thus, Employer must establish that Claimant's respiratory disability is unrelated to either clinical pneumoconiosis or legal pneumoconiosis, which includes a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *Id*. Because the administrative law judge has not made the proper findings on clinical or legal pneumoconiosis, and she did not discuss the evidence under the correct legal standards for either methods of rebuttal, we vacate her finding that Employer did not establish no part of Claimant's disabling impairment was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i), (ii); *see Wojtowicz*, 12 BLR at 1-165; *McCune*, 6 BLR at 1-998.

Thus, based on the above errors, we vacate the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption and vacate the award of benefits.

Remand Instructions

The administrative law judge must reconsider whether Employer is able to rebut the presumption by establishing Claimant does not have clinical or legal pneumoconiosis. With regard to clinical pneumoconiosis, the administrative law judge must address all of the designated x-ray interpretations and medical opinions on the issue, and render a finding based on her consideration of the evidence as a whole as to whether Employer disproved the disease. *See* 20 C.F.R. §718.305(d)(1)(i)(B); *Minich*, 25 BLR at 1-157 n.11; *see also*

Compton, 211 F.3d at 207-08. The administrative law judge must also make a specific finding as to whether Employer disproved legal pneumoconiosis, regardless of her findings on clinical pneumoconiosis. *See Minich*, 25 BLR at 1-155 n.8. She must specifically consider whether Employer has established Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). Her analysis must consider all of the relevant evidence. *Minich*, 25 BLR at 1-157 n.11; *see also Compton*, 211 F.3d at 207-08. If Employer fails to establish Claimant does not have either form of pneumoconiosis, the administrative law judge must then determine whether Employer has established "no part of [Claimant's] total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Minich*, 25 BLR at 1-159. In rendering her determinations on remand, including those relating to credibility, the administrative law judge must explain the bases for all of her findings in accordance with the Administrative Procedure Act.[7] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[7] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must include "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge