U.S. Department of Labor

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

BRB No. 22-0398 BLA

RONALD M. WRIGHT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTHERN SON, INCORPORATED	)	DATE ISSUED: 04/11/2023
	)	
Employer - Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for Employer.

Before: BOGGS, BUZZARD, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2021-BLA-05838) rendered on a claim filed on June 13, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with twenty years of qualifying surface coal mine employment and accepted the parties' stipulation that Claimant has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined Claimant 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).[1] He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer asserts the ALJ erred in concluding Claimant established fifteen years of qualifying coal mine employment for purposes of invoking the Section 411(c)(4) presumption. It further asserts the ALJ erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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

Qualifying Coal Mine Employment

Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination

[1] Section 411(c)(4) 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[2] The Board will apply the law of the United States Court of Appeals for the Third Circuit because Claimant performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 4.

based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

Additionally, to invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if [Claimant] demonstrates that [he] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001).

The ALJ noted Claimant alleged approximately thirty-five years of coal mine employment on his application for benefits, twenty-seven years on his employment history form, and twenty-five years at the hearing. Decision and Order at 4, *citing* Hearing Transcript at 11-24; Director's Exhibits 2, 3. He also indicated the district director found twenty years of coal mine employment. Decision and Order at 4, *citing* Director's Exhibits 28, 36. He then concluded "based upon a totality of the evidence, [] Claimant has [twenty] years of coal mine employment, an amount greater than [fifteen] years." Decision and Order at 4. The ALJ further stated "Claimant's coal mining work was aboveground" and concluded he invoked the Section 411(c)(4) presumption. Decision and Order at 5-6, *citing* Hearing Transcript at 11; Director's Exhibits 2, 3.

Employer asserts the ALJ's conclusions fail to satisfy the Administrative Procedure Act (APA)[3] because he provided "no analysis" nor "any rationale" in determining Claimant established at least fifteen years of qualifying coal mine employment. Employer's Brief at 12-15. We agree.

The ALJ's bare conclusions do not provide an adequate explanation for how he determined Claimant established twenty years of coal mine employment or whether Claimant's aboveground coal mine employment occurred in conditions that were "substantially similar" to those in an underground mine and, therefore, do not comport with the APA. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 4-6; Employer's Brief at 12-15. Because we are unable to discern the basis for these findings,

[3] The APA provides 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).

we vacate the ALJ's determination that Claimant established twenty years of qualifying coal mine employment. Decision and Order at 6. Thus, we also vacate his finding that Claimant invoked the Section 411(c)(4) presumption and his award of benefits. *Id.* at 7, 18.

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

In the interest of judicial economy, we will address Employer's argument that the ALJ erred in finding that it failed to rebut the Section 411(c)(4) presumption. Because the ALJ found Claimant invoked the Section 411(c)(4) presumption, he shifted the burden to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[4] 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). The ALJ found Employer rebutted the presumption that Claimant suffers from clinical pneumoconiosis but did not rebut the presumption that he has legal pneumoconiosis or that no part of his total disability was caused by it. Decision and Order at 11-15.

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).

Employer relies on Dr. Basheda's opinion to disprove legal pneumoconiosis. Decision and Order at 12-15. Dr. Basheda initially diagnosed Claimant with severe chronic obstructive pulmonary disease (COPD) due to his significant smoking history but could not exclude some contribution from coal dust exposure. Employer's Exhibit 1 at 12-13. After reviewing additional medical records, Dr. Basheda opined Claimant's COPD has an "asthmatic component" and is due solely to smoking and unrelated to coal mine dust

[4] "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).

exposure because he had an acute response to bronchodilators and his obstruction "significant[ly] decline[d]" in a short period of time. Employer's Exhibits 3 at 10-11, 9 at 13-21. He also generally explained coal mine dust exposure can only cause occupational asthma which resolves with the cessation of exposure. Employer's Exhibit 9 at 21. The ALJ found Dr. Basheda's opinion that Claimant's COPD is unrelated to coal mine dust exposure conflicted with the preamble to the 2001 revised regulations and was unsupported by reference to any medical literature. Decision and Order at 14-15. Therefore, he found Employer failed to rebut the presumption. *Id.* at 15.

Employer contends the ALJ erred in rejecting Dr. Basheda's opinion on legal pneumoconiosis as contrary to the preamble. Employer's Brief at 15-16. We agree.

The ALJ found Dr. Basheda's opinion that Claimant's COPD is solely due to smoking is not supported by reference to any medical literature. Decision and Order at 14-15. In addition, the ALJ found his opinion that Claimant's COPD is unrelated to coal dust exposure to be in conflict with the preamble, which the ALJ stated "does not distinguish between occupational and non-occupational asthma" and "connects asthma, as a type of COPD, directly to coal mine dust exposure." *Id.* at 14, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec 20, 2000). The ALJ appears to conclude, erroneously, that COPD, including asthma, must be attributable to coal mine dust inhalation and therefore Claimant's COPD constitutes legal pneumoconiosis. *Id.* at 14-15. Contrary to the ALJ's finding, whether a particular miner's COPD is due to coal mine dust exposure must be determined on a case-by-case basis in light of his consideration of the evidence. *See* 65 Fed. Reg. at 79,938; *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 861 (D.C. Cir. 2002).

Because we are unable to discern the extent to which the ALJ's erroneous consideration of the preamble affected his weighing of Dr. Basheda's medical opinion, we must vacate his finding that Employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i). *See Wojtowicz*, 12 BLR at 1-165; Decision and Order at 15. Because we have vacated the ALJ's findings regarding legal pneumoconiosis, we also vacate his determination that Employer failed to establish rebuttal by proving that no part of Claimant's respiratory or pulmonary disability was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii).[5] Decision and Order at 15-17.

Remand Instructions

[5] The ALJ discredited Dr. Basheda's opinion on disability causation because he did not diagnose legal pneumoconiosis, which was contrary to the ALJ's finding that Employer failed to disprove the existence of legal pneumoconiosis. Decision and Order at 17.

On remand, the ALJ must consider all relevant evidence and determine the length of Claimant's coal mine employment. The ALJ must then determine whether Claimant established that he performed his coal mine employment in conditions substantially similar to underground coal mine employment,[6] again taking into consideration all relevant evidence. *See* 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013) (unnecessary for a claimant to prove anything about dust conditions existing at an underground mine; claimant need only develop evidence addressing the dust conditions at the non-underground mine).

If Claimant establishes fifteen years of qualifying coal mine employment on remand, he will invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). The ALJ must then determine whether Employer can rebut the presumption by establishing Claimant does not have legal pneumoconiosis[7] or "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). Alternatively, if Claimant is unable to establish at least fifteen years of qualifying coal mine employment, the ALJ must address whether he established all the elements of entitlement under 20 C.F.R. Part 718 by a preponderance of the evidence. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *see Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

In reaching his conclusions on remand, the ALJ must explain the bases for his credibility determinations, findings of fact, and conclusions of law as the APA requires. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165.

[6] Conditions at a surface coal mine are "substantially similar" to those in underground coal mine employment if the miner was "regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

[7] We note that in weighing the medical opinion evidence at rebuttal, the ALJ erred in stating Dr. Zlupko "only diagnosed Claimant with coal workers' pneumoconiosis . . . [and that] he made no other diagnosis." Decision and Order at 14. Dr. Zlupko also specifically opined Claimant's pulmonary impairment is due to a combination of smoking and coal dust exposure. Director's Exhibit 9 at 4. As a result, Dr. Zlupko's opinion cannot aid Employer in rebutting the presumption of legal pneumoconiosis if it is invoked on remand.

Accordingly, we vacate the ALJ's Decision and Order Awarding Benefits and remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge