U.S. Department of Labor

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

BRB No. 19-0512 BLA

LARRY W. CLUTTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LEIVASY MINING CORPORATION	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 09/18/2020
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Samuel B. Petsonk (Petsonk, PLLC), Beckley, West Virginia, for Claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for Employer/Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Drew A. Swank's Decision and Order Awarding Benefits (2018-BLA-06137) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on November 20, 2015.

The administrative law judge found, based on the parties' stipulations, Claimant has twenty years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). Thus he found 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).[1] 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 failed to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

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

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[1] Section 411(c)(4) of the Act provides a rebuttable presumption 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] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established twenty years of underground coal mine employment, a totally disabling respiratory impairment, and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 7, 8, 14.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because Claimant's coal mine employment occurred in West Virginia. Director's Exhibits 4, 7.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[4] 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). The administrative law judge found Employer did not establish rebuttal by either method.[5] Employer's assertion that the administrative law judge applied an incorrect standard in finding it failed to disprove Claimant has legal pneumoconiosis has merit. Employer's Brief at 9-12.

The administrative law judge began his rebuttal analysis by correctly recognizing that to disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "s*ignificantly* 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) (emphasis added); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting); Decision and Order at 8. He then considered the opinions of Drs. Zaldivar and Scattaregia.[6] Decision and Order at 14-15; Director's Exhibits 13, 20, 32, 36, 43; Employer's Exhibit 2. Dr. Zaldivar opined Claimant does not have legal pneumoconiosis but suffers from a pulmonary impairment due to asthma since childhood, obesity, paralysis of his left diaphragm, and obstructive sleep apnea. Director's Exhibit 36; Employer's Exhibit 2. Dr. Scattaregia opined Claimant's coal dust exposure "may have contributed . . . to a minor degree" to his chronic

[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). This 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).

[5] The administrative law judge found Employer disproved clinical pneumoconiosis. Decision and Order at 9-14. Employer must also disprove legal pneumoconiosis to rebut the presumption under the first method at 20 C.F.R. §718.305(d)(1).

[6] The administrative law judge also considered treatment records for Claimant's chronic obstructive pulmonary disease (COPD), sleep apnea, left hemidiaphragm paralysis, asthma, and obesity. Director's Exhibits 36, 39.

obstructive pulmonary disease (COPD) and chronic bronchitis. Director's Exhibits 43. Noting Dr. Scattaregia diagnosed COPD and Dr. Zaldivar diagnosed asthma, and that coal mine dust exposure is "link[ed] in a substantial way . . . to pulmonary impairment and [COPD] as set forth in the preamble to the 2001 regulations,[7] the administrative law judge concluded Employer failed to disprove Claimant has legal pneumoconiosis, stating:

> As the Act does not require that coal mine dust exposure be the sole cause of a claimant's respiratory impairment, for the reasons given in Section V, *infra*, the undersigned finds that the evidence is insufficient to establish that Claimant's respiratory impairment is *entirely unrelated* to coal mine dust exposure despite Dr. Zaldivar's assertion that Claimant does not have legal coal workers' pneumoconiosis.

Decision and Order at 15 (emphasis added), *quoting* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). Thus, although the administrative law judge accurately stated the rebuttal standard relating to legal pneumoconiosis at the outset of his analysis, he erred by applying a more

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[7] The administrative law judge noted, in relevant part, that the preamble states:

> The term ["COPD"] includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema and asthma. Airflow limitation and shortness of breath are features of COPD, and lung function testing is used to establish its presence. Clinical studies, pathological findings, and scientific evidence regarding the cellular mechanisms of lung injury link, in a substantial way, coal mine dust exposure to pulmonary impairment and chronic obstructive lung disease.

Decision and Order at 15, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). As Employer correctly argues, the administrative law judge appeared to conclude, erroneously, that COPD must be attributable to coal mine dust inhalation and therefore constitutes legal pneumoconiosis. Employer's Brief at 12. Contrary to the administrative law judge's conclusion, whether a particular miner's COPD or asthma/emphysema 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); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012). Here, Dr. Zaldivar explicitly stated Claimant's long-standing asthma began during his childhood and the remodeling of his lungs was due to smoking. Employer's Exhibit 2. Dr. Scattaregia opined tobacco use and COPD "probably" contributed more than coal dust to his "overall problem causing the disability." Director's Exhibits 20, 32.

rigorous "no part" standard in concluding that Employer failed to rebut legal pneumoconiosis's existence. Decision and Order at 15-18.

Additionally, he erred in applying an incorrect standard to determine disability causation in Part V of his Decision and Order. He stated Employer "must rule out the miner's *coal mine employment* as a contributing cause of the totally disabling respiratory or pulmonary impairment," *Id*. at 17, *quoting* 77 Fed. Reg. 19,456, 19,463 (Mar. 30, 2012) (emphasis added), and applied that erroneous standard in analyzing the evidence and reaching his conclusions.[8] The correct standard is whether Employer disproved disability causation by showing that no part of the miner's respiratory or pulmonary total disability was caused by *pneumoconiosi*s.

Because the administrative law judge considered the evidence under an incorrect rebuttal standard, we vacate his finding that Employer failed to establish rebuttal of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A). 30 U.S.C. §923(b). Further, as the administrative law judge's evaluation of the evidence relevant to rebuttal of legal pneumoconiosis may have affected his evaluation of the evidence relevant to disability causation, and because he applied the wrong standard in determining disability causation, we must also vacate that rebuttal finding. 20 C.F.R. §718.305(d)(1)(ii). We therefore vacate the award of benefits and remand this case to the administrative law judge.

On remand, the administrative law judge should first consider whether Employer disproved the existence of legal pneumoconiosis by affirmatively establishing 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. In doing so, he must fully address the opinions of Drs. Zaldivar and Scattaregia.

If the administrative law judge finds Employer has disproved the existence of legal pneumoconiosis, Employer has rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i), and he need not reach the issue of disability causation. However, if Employer fails to rebut the presumption at 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must determine whether Employer has rebutted the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii) with credible proof that "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 Helen Mining Co. v. Elliott*, 859 F.3d 226, 237-38 (3d Cir. 2017); *Minich*, 25 BLR at 1-159.

[8] The administrative law judge's analysis also appears to confuse issues pertinent to the existence of legal pneumoconiosis with those pertinent to disability causation.

The administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-235 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). He must set forth his findings on remand in detail, including the underlying rationale for his decision, as the Administrative Procedure Act requires,[9] 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).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, 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

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