U.S. Department of Labor

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

BRB No. 20-0052 BLA

ROBERT M. PLAVI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HELEN MINING COMPANY	)	
	)	
and	)	
	)	
VALLEY CAMP COAL COMPANY	)	DATE ISSUED: 09/29/2020
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying 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.

Bonnie Hoskins and Carl M. Brashear (Hoskins Law Offices PLLC), Lexington, Kentucky, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge Drew A. Swank's Decision and Order Denying Benefits (2018-BLA-05706) 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 October 21, 2016.

The administrative law judge credited Claimant with 18 years of underground coal mine employment based on the parties' stipulation, and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He thus found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). He further found Employer rebutted the presumption of both clinical and legal pneumoconiosis[2] and denied benefits.

On appeal, Claimant argues the administrative law judge erred in finding Employer rebutted the Section 411(c)(4) presumption. Employer and its Carrier (Employer) respond, urging affirmance of the denial and objecting to the application of the Section 411(c)(4) presumption. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[3]

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[1] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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] "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).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established eighteen 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.

The Benefit 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.[4] 33 U.S.C. §921(b)(3), as incorporated 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 - Legal Pneumoconiosis

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish that Claimant has neither legal nor clinical pneumoconiosis, 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).

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."[5] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge considered the opinions of Drs. Bajwa[6] and Fino.[7] Decision and Order at 12-13. Dr. Bajwa opined that there is no evidence of

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as Claimant's coal mine employment occurred in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 12.

[5] We affirm, as unchallenged, the administrative law judge's finding that Employer disproved the existence of clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 13.

[6] Dr. Bajwa opined that Claimant's pulmonary function study results were normal with a reduced exercise capacity and he did not have pneumoconiosis based on his x-ray and pulmonary function study. Director's Exhibit 18. He also opined that Claimant does not have a pulmonary impairment. *Id*.

[7] Dr. Fino observed Claimant has elevation of the right diaphragm, a mild reduction in his FVC and FEV1 on a pulmonary function study, and significant oxygen desaturation on exercise, "which were not present two years earlier," and an oxygen transfer and ventilatory impairment. Employer's Exhibit 1. He opined that there was no evidence of a

pneumoconiosis. Director's Exhibit 18. Dr. Fino opined that Claimant does not have legal pneumoconiosis but has a ventilatory impairment not related to coal dust exposure. Employer's Exhibit 1. After summarizing the opinions of Drs. Bajwa and Fino, the administrative law judge stated:

> Accordingly, the undersigned finds that the evidence is sufficient to establish that Claimant's respiratory impairment is entirely unrelated to coal mine dust exposure. Therefore, after considering all of the evidence together, the undersigned finds that Employer has also rebutted the presumption of the existence of legal coal workers' pneumoconiosis. 20 C.F.R. §718.305(a).

Decision and Order at 13.

Claimant argues the administrative law judge did not provide adequate reasons for crediting the opinions of Drs. Bajwa and Fino. We agree.

The Administrative Procedure Act (APA) requires the administrative law judge to consider all relevant evidence in the record, and to set forth his "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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). While the administrative law judge provided a summary of the opinions of Drs. Bajwa and Fino, he did not make any findings regarding the credibility of their opinions or the weight he accorded to them. Decision and Order at 12-13. Consequently, he failed to explain, in compliance with the APA, why he determined their opinions are sufficient to rebut the presumed fact that Claimant has legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A). *Wojtowicz*, 12 BLR at 1-165.

We also agree with Claimant's assertion that the administrative law judge erred in applying an incorrect burden on rebuttal. Claimant's Brief at 5-7. The administrative law judge began his legal pneumoconiosis analysis by stating "it is Employer's burden to establish the *absence* of 'any chronic lung disease or impairment and its sequelae arising out of coal mine employment.'" Decision and Order at 13, *citing* 20 C.F.R. §718.201(a)(2). He further found, however, that "Claimant has failed to meet his burden of proof in establishing the existence of either clinical or legal coal workers' pneumoconiosis." Decision and Order at 13. It thus appears he may have applied the wrong standard for when a miner is presumed to have legal pneumoconiosis; the burden is on Employer to

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coal mine dust related abnormality, but that there was a serious abnormality in Claimant's lung function and on his x-ray, possibly related to the recurrence of lung cancer. *Id*.

disprove the existence of the disease. *See* 20 C.F.R. §718.305(d)(1)(i)(A); *Griffith v. Terry Eagle Coal Co.*, 25 BLR 1-223, 1-228 (2017); *Minich*, 25 BLR at 1-155 n.8. Therefore, we vacate the administrative law judge's determination that Employer rebutted the Section 411(c)(4) presumption by establishing the absence of legal pneumoconiosis and remand the case for reconsideration of this issue.

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the entirety of the Affordable Care Act (ACA), including its provisions reinstating the Section 411(c)(4) presumption, is unconstitutional, and therefore, if this case is remanded to the administrative law judge, the Board should instruct him to determine whether Claimant is entitled to benefits without the benefit of the Section 411(c)(4) presumption. *See* Pub. L. No. 111-148, §1556 (2010); Employer's Response Brief at 2.

We note, however, that Employer's assertion regarding the constitutionality of Section 411(c)(4) is incorrect. The United States Court of Appeals for the Fifth Circuit recently held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the United States Court of Appeals for the Fourth Circuit held the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). We therefore reject Employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case.

Remand Instructions

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. Bajwa and Fino.

In determining the credibility of the opinions of Drs. Bajwa and Fino, 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 diagnoses. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986). He must set forth his findings on remand in detail, including the underlying rationale for his decision, as the APA requires. *See Wojtowicz*, 12 BLR at 1-165.

If the administrative law judge finds Employer has met its burden to disprove the existence of legal pneumoconiosis, Employer will have rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i) and 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 legal 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.

Accordingly, the administrative law judge's Decision and Order Denying 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

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge