U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0343 BLA[1]

LINDA A. STACY (Widow of HARRIAL STACY) Claimant-Respondent v. ISLAND CREEK COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/26/2017 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

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

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Ann Marie Scarpino (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for

[1] The Board dismissed employer's appeal as abandoned on January 28, 2016, but reinstated the appeal upon employer's motion for reconsideration. *Stacy v. Island Creek Coal Co.*, BRB No. 15-0343 BLA (Apr. 15, 2016) (Order).

Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-05120) of Administrative Law Judge Paul R. Almanza (the administrative law judge), rendered on a survivor's claim filed on August 31, 2010, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[2] The administrative law judge credited the miner with eighteen years of qualifying coal mine employment[3] and found that claimant established that the miner had a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the presumption set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[4] that the miner's death was due to pneumoconiosis. The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in crediting the miner with eighteen years of qualifying coal mine employment, and consequently erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer failed to rebut the presumption. Claimant responds in support of the administrative law judge's award of

[2] Claimant is the widow of the miner, who died on July 16, 2010. Director's Exhibit 9.

[3] The miner's coal mine employment was in Virginia. Hearing Transcript at 30. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where the miner worked fifteen or more years in underground or substantially similar coal mine employment, and had a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b), (c)(2).

benefits.[5] The Director, Office of Workers' Compensation Programs, declined to file a response brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

Qualifying Coal Mine Employment

Employer challenges the administrative law judge's finding that the miner had eighteen years of qualifying coal mine employment. Employer's Brief at 6-10. Citing a 2007 denial of the miner's claim, in which Administrative Law Judge Linda S. Chapman found that the miner had eighteen years of coal mine employment, the administrative law judge interpreted Judge Chapman's finding to be that the miner had eighteen years of "qualifying" employment. Decision and Order at 2 (citing *H.E.S.* [*Stacy*] *v. Island Creek Coal Co.*, 2006-BLA-6183, slip op. at 3 (Aug. 13, 2007) (unpub.)). Because the 2007 denial of benefits became final, the administrative law judge concluded that "the doctrine of collateral estoppel bars relitigation of the issue" in this survivor's claim. Decision and Order at 2. The administrative law judge also determined that his finding was supported by evidence submitted by claimant and employer regarding the length of the miner's employment, and by the Social Security Administration's statement of the miner's earnings. *Id*.; Director's Exhibits 3, 5, 6. Although employer contended that claimant failed to establish that any of the miner's coal mine employment other than his work for employer was underground or in substantially similar conditions, the administrative law judge rejected that argument by citing 20 C.F.R. §725.202(a), which provides a rebuttable presumption that any person working in or around a coal mine is a miner. Decision and Order at 2. The administrative law judge determined that employer offered no evidence to rebut that presumption, and therefore found that the miner had "at least eighteen years of coal mine employment." *Id*. at 2-3.

Employer argues that the administrative law judge erred in applying collateral estoppel to find that the miner had eighteen years of qualifying coal mine employment for purposes of the Section 411(c)(4) presumption. Employer's Brief at 6-10. Employer also

[5] We affirm the administrative law judge's unchallenged finding that claimant established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

contends that the administrative law judge erred in applying 20 C.F.R. §725.202(a) to find that the miner worked as an underground coal miner. *Id*. at 7-8. Employer's arguments have merit.

As an initial matter, employer notes correctly that in her 2007 decision, Judge Chapman did not determine whether the miner's coal mine employment was underground or in substantially similar conditions, a requirement for invocation of the Section 411(c)(4) presumption. *Stacy*, 2006-BLA-6183, slip op. at 3; Employer's Brief at 7. Judge Chapman found only that the miner had eighteen years of coal mine employment. *Stacy*, 2006-BLA-6183, slip op. at 3. The administrative law judge therefore erred when he concluded that Judge Chapman found that the miner had eighteen years of "qualifying" employment. Decision and Order at 2. As a result of that error, the administrative law judge also erred in applying the doctrine of collateral estoppel. Collateral estoppel precludes relitigation of an issue only if, among other requirements, the identical issue was litigated, actually determined, and necessary to the decision in a prior proceeding. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217-18, 23 BLR 2-393, 2-401 (4th Cir. 2006). The issue of whether the miner had fifteen years of qualifying coal mine employment for purposes of the Section 411(c)(4) presumption was not litigated, determined, or necessary to the decision when Judge Chapman denied the miner's claim.[6] Thus, the 2007 decision from Judge Chapman does not establish that the miner had sufficient qualifying coal mine employment for claimant to invoke the Section 411(c)(4) presumption or preclude employer from litigating this issue.

We also agree with employer that the administrative law judge erred in citing 20 C.F.R. §725.202(a) to find that all of the miner's coal mine work was underground. Section 725.202(a) defines the term "miner" and provides a rebuttable presumption that "any person working in or around a coal mine or coal preparation facility is a miner." Employer argued below that claimant failed to establish that the miner's work for other employers was underground coal mine employment, and thus failed to establish that the miner had enough underground coal mine employment to invoke the Section 411(c)(4) presumption. The administrative law judge rejected that argument by citing 20 C.F.R. §725.202(a) and determining that employer "has not offered any evidence to rebut the presumption that [the miner] worked as an underground coal miner throughout his career." Decision and Order at 2-3. That was error. Section 725.202(a) sets forth the conditions under which an individual is presumed to be a miner, but does not establish a

[6] As employer points out, there would have been little reason to determine the qualifying nature of the miner's employment in 2007 because the Section 411(c)(4) presumption was not revived until 2010 with the passage of the Patient Protection and Affordable Care Act, Public Law No. 111-148. Employer's Brief at 7.

presumption of underground coal mine employment or otherwise address the conditions of a miner's employment.[7]

Finally, the administrative law judge erred when he cited the employment history form submitted by claimant, a statement from employer about the miner's work history, and the miner's Social Security earnings records as evidence that the miner had eighteen years of qualifying employment. Decision and Order at 2; Director's Exhibits 3, 5, 6. Although the employment history form that claimant submitted indicates that the miner performed underground coal mine work for employer from 1968 to 1988, employer's statement indicates that the miner worked for employer from 1970 to 1984, excluding periods when the miner was laid off, sick or injured. Director's Exhibits 3, 5. The miner's Social Security earnings records provide no information about whether the miner's coal mine employment was underground or in substantially similar conditions. Director's Exhibit 6. The administrative law judge failed to explain how this evidence supports a finding that the miner had eighteen years, or at least fifteen years, of qualifying coal mine employment for purposes of invoking the Section 411(c)(4) presumption. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

In light of these errors, we must vacate the administrative law judge's finding that the miner had eighteen years of qualifying coal mine employment for purposes of the Section 411(c)(4) presumption, and remand this case for reconsideration. Consequently, we also vacate the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. On remand, the administrative law judge must consider the evidence regarding the miner's coal mine employment and explain the bases for his finding. If he finds that claimant has established that the miner had at least fifteen years of qualifying coal mine employment, claimant will have invoked the Section 411(c)(4) presumption. If claimant is unable to establish that the miner had at least fifteen years of qualifying coal mine employment, the administrative law judge must determine whether claimant can establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205.

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

[7] The Director, Office of Workers' Compensation Programs, declined to file a response brief in this case, but noted his agreement with employer that the administrative law judge "erred by concluding that 20 C.F.R. §725.202(a) provides a rebuttable presumption of underground coal mine employment. Instead, it creates only a presumption that an individual who works in or around a coal mine or coal preparation facility is a miner." Director's Letter at 1 n.1.

In the interest of judicial economy, we address employer's argument that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Employer asserts that the administrative law judge applied an improper rebuttal standard by requiring employer to rule out pneumoconiosis as a cause of the miner's disability. Employer's Brief at 11-12. We agree. Invocation of the Section 411(c)(4) presumption in a survivor's claim gives rise to a presumption that the miner's death was due to pneumoconiosis. To rebut the presumption, the party opposing entitlement must establish either that the miner did not have pneumoconiosis, or that "no part" of the miner's death was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).

The administrative law judge, however, stated that employer could rebut the presumption by disproving the existence of pneumoconiosis, or by proving that the miner's "totally disabling respiratory or pulmonary impairment is wholly unrelated to pneumoconiosis."[8] Decision and Order at 19; *see also id*. at 22. The administrative law judge determined that employer failed rebut the presumption by either method.[9] *Id*. at 19-22.

Contrary to the administrative law judge's analysis, the cause of the miner's respiratory disability is irrelevant in determining whether employer rebutted the presumption of death due to pneumoconiosis. Because the administrative law judge erroneously considered the issue of disability causation instead of determining whether the miner's death was unrelated to his pneumoconiosis, we must vacate the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(ii). If the administrative law judge finds on remand that claimant has invoked the Section 411(c)(4) presumption, he must determine whether employer has rebutted the presumption by proving that no part of the miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii); *Copley*, 25 BLR at 1-89.

[8] The administrative law judge also erroneously stated that employer could rebut the presumption by establishing that "pneumoconiosis was not a contributing cause" of the miner's pulmonary or respiratory disability. Decision and Order at 21.

[9] The administrative law judge determined that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis, finding that the evidence established that the miner had both clinical and legal pneumoconiosis. Decision and Order at 19-20. We affirm those findings, which are unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge