U.S. Department of Labor

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

BRB Nos. 17-0327 BLA
17-0327 BLA-A
and 17-0382 BLA

ELIZABETH LAWSON (o/b/o and Widow of DELBERT R. LAWSON)	)	
Claimant-Respondent Cross-Petitioner	)	
v.	)	
HANOVER RESOURCES, LLC	)	
and	)	DATE ISSUED: 04/04/2018
BRICKSTREET	)	
Employer/Carrier-Petitioners Cross-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeals and Cross-Appeal of the Decisions and Orders of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Francesca Tan and Andrea L. Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals, and claimant[1] cross-appeals, the Decision and Order (2014-BLA-0557) of Administrative Law Judge Drew A. Swank awarding benefits on a miner's claim filed on July 12, 2013 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Employer also appeals the Decision and Order (2016-BLA-05427) of Administrative Law Judge Drew A. Swank awarding benefits on a survivor's claim filed on December 11, 2015 pursuant to the Act.[2]

In a Decision and Order dated February 24, 2017, the administrative law judge credited the miner with thirty years of qualifying coal mine employment,[3] and found that the evidence established that he suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that the miner invoked the Section 411(c)(4) presumption,[4] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further determined that employer failed to rebut the

[1] Claimant is the surviving spouse of the miner, who died on November 13, 2015. Hearing Transcript at 27.

[2] Employer's appeal in the miner's claim was assigned BRB No. 17-0327 BLA, claimant's cross-appeal in the miner's claim was assigned BRB No. 17-0327 BLA-A, and employer's appeal in the survivor's claim was assigned BRB No. 17-0382 BLA. By Order dated July 12, 2017, the Board consolidated these appeals for purposes of decision only.

[3] The miner's coal mine employment was in West Virginia. Hearing Transcript at 36. 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 is totally disabled due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim. In a separate Decision and Order dated April 12, 2017, the administrative law judge found that claimant was entitled to derivative survivor's benefits pursuant to Section 422(*l*) of the Act, based on the miner's award. 30 U.S.C. §932(*l*).

On appeal employer contends that the administrative law judge erred in finding that the miner had at least fifteen years of qualifying coal mine employment, and therefore erred in invoking the Section 411(c)(4) presumption. Employer further argues that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption.[5] Claimant responds in support of the administrative law judge's award of benefits. However, in her cross-appeal of the miner's claim, claimant provides additional reasons for the administrative law judge to find that employer cannot rebut the Section 411(c)(4) presumption. Employer has filed a single brief in response to claimant's brief on cross-appeal and in reply to claimant's response brief. The Director, Office of Workers' Compensation Programs, has not filed a response to these appeals.

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).

The Miner's Claim

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

Employer argues that the administrative law judge erred in determining that the miner had sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption. Employer's Brief at 5-6. Section 411(c)(4), as implemented by 20 C.F.R. §718.305, requires at least fifteen years of employment, either in "underground coal mines," or in "coal mines other than underground coal mines" in substantially similar conditions. Section 718.305(b)(2) provides that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence established the existence of 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).

The administrative law judge credited the miner with thirty years of above-ground coal mine employment.[6] Decision and Order at 4. He subsequently found, without further analysis, that the miner's "thirty years of above-ground coal mining employment is sufficient for invoking the [Section 411(c)(4) presumption]." *Id*. at 11. He did not make any specific findings regarding whether the miner's coal mine work occurred in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(2). Consequently, we vacate the administrative law judge's determination that the miner established the requisite fifteen years of qualifying coal mine employment for invocation of the Section 411(c)(4) presumption. On remand, the administrative law judge is instructed to make specific findings regarding whether the miner was regularly exposed to coal-mine dust during his thirty years of above-ground coal mine employment. 20 C.F.R. §718.305(b)(2). Because we have vacated the administrative law judge's finding of fifteen years of qualifying coal mine employment, we also vacate his finding that the miner invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

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

In the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, in the event that the administrative law judge again finds the Section 411(c)(4) presumption invoked. If the miner invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to employer to rebut the presumption by establishing that the miner did not have either legal or clinical pneumoconiosis,[7] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(ii).

[6] Although employer contends that the evidence does not establish fifteen years of qualifying coal mine employment, it does not challenge the administrative law judge's determination that the miner had thirty years of above-ground coal mine employment. This finding is therefore affirmed. *See Skrack*, 6 BLR 1-710 at 1-711.

[7] "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). "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 contends that the administrative law judge erred in finding that the presumption was not rebutted. In support of its argument, employer asserts that the administrative law judge erred by relying on the fact that the miner established invocation of the Section 411(c)(4) presumption as a means of establishing that the miner had legal pneumoconiosis, without independently considering whether employer disproved the existence of both legal and clinical pneumoconiosis. Employer's Brief at 7-14. We agree.

In this case, the administrative law judge did not consider whether employer rebutted the presumption by disproving the existence of legal and clinical pneumoconiosis,[8] because he erroneously found that the issue of whether the miner had pneumoconiosis was determined when he found that the miner invoked the Section 411(c)(4) presumption. Decision and Order at 14. The administrative law judge stated that the sole issue to be determined by him was whether the miner's total disability arose out of clinical pneumoconiosis due to coal mine dust exposure. *Id*. In making this determination, the administrative law judge stated that employer must establish that clinical pneumoconiosis was not a "substantially contributing cause" of the miner's total disability. *Id.* at 18-19. Thus, the administrative law judge did not apply the proper rebuttal standard set forth at 20 C.F.R. §718.305(d)(1)(ii) (employer must establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201."). Moreover, the administrative law judge conflated his determinations regarding the cause of the miner's respiratory impairment, namely whether it arose out of coal mine employment, with the cause of the miner's total respiratory disability, namely whether it was due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i), (ii).

In determining whether employer established rebuttal of the Section 411(c)(4) presumption on remand, the administrative law judge should first determine whether employer has established rebuttal at 20 C.F.R. §718.305(d)(1)(i) by disproving the presumed existence of both legal *and* clinical pneumoconiosis.[9] 20 C.F.R.

[8] The administrative law judge found only that the x-ray and digital x-ray evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that the record contained no biopsy or autopsy evidence pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 7-10. The administrative law judge did not address whether the medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

[9] We note that, on its face, the administrative law judge's blanket rejection of the opinions of Drs. Zaldivar and Jarboe, as contrary to the preamble to the 2001 regulations, cannot be affirmed. Decision and Order 19. In evaluating expert medical opinions, an administrative law judge may consult the preamble as a statement of medical science studies found credible by the Department of Labor when it revised the definition of

§718.305(d)(1)(i)(A), (B); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting). In doing this, the administrative law judge should first consider whether employer has affirmatively established the absence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A). Performing the rebuttal analysis in the order set forth in the regulation satisfies the statutory mandate to consider all relevant evidence, and provides a framework for the analysis of the credibility of the medical opinions at Section 718.305(d)(1)(ii), the second rebuttal method. *See Minich*, 25 BLR at 1-159. To establish that the miner's impairment was not legal pneumoconiosis, employer must demonstrate that it is more likely than not that the impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[10] 20 C.F.R. §718.201(a)(2), (b).

If the administrative law judge determines that employer has failed to establish the absence of legal pneumoconiosis, he should then determine whether employer has disproven the presence of clinical pneumoconiosis arising out of coal mine employment at Section 718.305(d)(1)(i)(B).[11] If the administrative law judge finds that employer has failed to rebut the existence of both legal and clinical pneumoconiosis in accordance with Section 718.305(d)(1)(i), he must then consider whether employer has rebutted the presumed fact of total disability causation at 20 C.F.R. §718.305(d)(1)(ii). Employer can

---

pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-264-65 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314, 25 BLR 2-115, 2-130 (4th Cir. 2012). However, an administrative law judge must not use the preamble as a legal rule that all obstructive lung disease or asthma is pneumoconiosis. *See Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32.

[10] On remand, the administrative law judge must evaluate the credibility of the medical opinions in light of the physicians' qualifications, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

[11] Employer argues, and we agree, that the administrative law judge erred in not considering the medical opinion evidence and treatment records when determining whether clinical pneumoconiosis was established. Employer's Brief at 10-11. On remand, when determining if employer rebutted the existence of clinical pneumoconiosis the administrative law judge should consider all relevant evidence and weigh it together as a whole. *Island Creek v. Compton*, 211 F.3d 203, 209, 22 BLR 2-162, 2-171 (4th Cir. 2000).

accomplish this by proving that, more likely than not, "no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); *see Minich*, 25 BLR at 2-159 (recognizing that to rebut the presumed causal relationship between pneumoconiosis and total disability, employer must establish that "no part, not even an insignificant part, of claimant's respiratory or pulmonary disability was caused by either legal or clinical pneumoconiosis."). If employer proves that the miner did not have legal and clinical pneumoconiosis, or that the miner's disabling pulmonary impairment was not caused by legal and clinical pneumoconiosis, employer has rebutted the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1); *Minich*, 25 BLR at 1-159.

As discussed, *supra*, the administrative law judge did not properly consider whether employer disproved the existence of legal and clinical pneumoconiosis pursuant to 20 C.F.R. §725.305(d)(1)(i)(A), (B) and did not apply the correct rebuttal standard at 20 C.F.R. §718.305(d)(1)(ii).[12] The administrative law judge's finding that the presumption was not rebutted is, therefore, vacated and the case is remanded for proper consideration under both methods of rebuttal, if necessary. 20 C.F.R. §718.305(d)(1)(i), (ii).

On cross-appeal, claimant contends that the administrative law judge erred in finding that the medical opinions of Drs. Rasmussen, Cohen, and Sood were insufficient to support a finding of legal pneumoconiosis. Claimant specifically argues that the administrative law judge erred in discrediting their opinions as contrary to the preamble to the 2001 regulations, because they determined that it was not possible to apportion the damage to the miner's lungs due to smoking and coal mine dust exposure. Decision and Order at 20; Claimant's Brief on Cross-Appeal at 6-9. We agree. A physician need not specifically apportion the extent to which various causal factors contribute to a respiratory or pulmonary impairment, in order to provide a credible opinion regarding the cause of a miner's impairment. *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *see also Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003). Consequently, we vacate the administrative law judge's determination that the opinions of Drs. Rasmussen, Cohen, and Sood were entitled to reduced weight, and therefore vacate his finding that the evidence is not sufficient to establish the existence of

[12] Moreover, we note that because the administrative law judge did not first make an independent finding as to whether employer disproved the existence of legal and clinical pneumoconiosis, we cannot review his finding regarding disability causation. *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting).

pneumoconiosis under 20 C.F.R. Part 718, absent the Section 411(c)(4) presumption. Decision and Order at 20.

The Survivor's Claim

In light of our decision to vacate the administrative law judge's award of benefits in the miner's claim, we also vacate the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932)(*l*). On remand, should the administrative law judge deny benefits in the miner's claim,[13] he must consider whether claimant can establish entitlement to survivor's benefits by establishing that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988).

[13] If the administrative law judge, on remand, again awards benefits in the miner's claim, claimant is automatically entitled to benefits in the survivor's claim pursuant to Section 932(*l*). *See* 30 U.S.C. §932(*l*).

Accordingly, the administrative law judge's Decisions and Orders are 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

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge