U.S. Department of Labor

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

BRB No. 14-0394 BLA

RONALD L. HODGES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ITMANN COAL COMPANY	)	DATE ISSUED: 08/06/2015
	)	
Employer-Respondent	)	
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Ronald L. Hodges, Beckley, West Virginia, *pro se*.

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

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

PER CURIAM:

Claimant appeals, without the assistance of legal counsel,[1] the Decision and Order Denying Benefits (2012-BLA-05075) of Administrative Law Judge Theresa C. Timlin,

[1] Cindy Viers, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Viers is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

rendered on a claim filed on May 18, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with eighteen years of underground coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Initially, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Based on the filing date of the claim, and the administrative law judge's determinations that claimant established at least fifteen years of qualifying coal mine employment and a totally disabling pulmonary or respiratory impairment, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge further determined, however, that employer rebutted the presumption. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The administrative law judge first considered whether claimant established the existence of pneumoconiosis. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge weighed nine readings of three x-rays dated November 23, 2010, June 28, 2011

[2] Relevant to this claim, amended Section 411(c)(4) provides that if a miner worked at least fifteen years in underground coal mine employment, or in coal mine employment in conditions that are substantially similar to those of an underground mine, and also has a totally disabling respiratory or pulmonary impairment, he or she is entitled to a rebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

and July 17, 2012. The November 23, 2010 x-ray was read as positive for pneumoconiosis by Dr. Miller, dually qualified as a Board-certified radiologist and B reader, but read as negative for pneumoconiosis by Drs. Tarver and Meyer, both also dually qualified radiologists, and by Dr. Rasmussen, a B reader.[4] Director's Exhibits 10, 12; Claimant's Exhibit 3; Employer's Exhibit 5. The June 28, 2011 x-ray was read as positive for pneumoconiosis by Dr. Alexander, a dually qualified radiologist, but as negative for pneumoconiosis by Dr. Tarver. Claimant's Exhibit 2; Employer's Exhibit 3. The July 17, 2012 x-ray was read as positive for pneumoconiosis by Dr. Miller, but as negative for pneumoconiosis by Dr. Shipley, who is also a dually qualified radiologist. Claimant's Exhibit 1; Employer's Exhibit 8.

The administrative law judge gave greatest weight to the readings by the dually qualified radiologists, and found that the November 23, 2010 x-ray was negative, while the x-rays dated June 28, 2011 and July 17, 2012 were in equipoise. Decision and Order at 9. The administrative law judge explained that "the most recent [x]-rays are most probative of [claimant's] current medical state, especially as pneumoconiosis is considered to be a progressive and irreversible disease." *Id*. Based on these findings, the administrative law judge concluded that claimant failed to meet his burden of proving the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Id*. The administrative law judge also found that claimant failed to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), as "all of the medical opinions (by Drs. Rasmussen, Zaldivar and Castle) agree that there is insufficient evidence to find clinical pneumoconiosis." *Id*. at 15. Additionally, the administrative law judge determined that because "all of the doctor's [sic] conclude that [c]laimant's pulmonary function limitations are the result of his cardiac disease and complications resulting from his coronary arterial bypass graft surgery," claimant did not establish the existence of legal pneumoconiosis. *Id*. at 16. In considering rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge applied her findings at 20 C.F.R. §718.202(a)(1),[5] and (4) and found that employer established rebuttal of the amended Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.

[4] Dr. Navani read the November 23, 2010 x-ray for quality purposes only. Director's Exhibit 10.

[5] The administrative law judge permissibly accorded greater weight to the interpretations by physicians who are dually qualified radiologists. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); Decision and Order at 9. Therefore, we affirm her findings that the November 23, 2010 x-ray is negative and the June 28, 2011 and July 17, 2012 x-rays are in equipoise, based on the readings by dually qualified radiologists. Moreover, the administrative law judge rationally relied on the most recent x-rays, dated June 28, 2011 and July 17, 2012, which

In order to rebut the presumption at amended Section 411(c)(4), employer must establish that claimant does not have legal[6] and clinical[7] pneumoconiosis, or establish 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)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA, slip op. at 10-11 (Apr. 21, 2015) (Boggs, J., concurring and dissenting). The administrative law judge concluded that employer disproved the existence of clinical and legal pneumoconiosis and, therefore, rebutted the amended Section 411(c)(4) presumption under 20 C.F.R. §718.305(d)(1)(i).

Initially, we conclude that the administrative law judge erred in her approach to this case by placing the burden of proof on claimant to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4), prior to her consideration of whether claimant invoked the presumption at amended Section 411(c)(4). *See Minich*, slip op. at 9 n.11. As discussed, *infra*, by failing to address first whether claimant was entitled to invocation of the amended 411(c)(4) presumption, the administrative law judge failed to properly allocate the burden of proof on rebuttal.

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were inconclusive, as more probative of claimant's current condition, based on the progressive and irreversible nature of pneumoconiosis. *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998) (recognizing that pneumoconiosis is a progressive and irreversible disease); Decision and Order at 9.

[6] Legal pneumoconiosis is defined as including "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[7] Clinical pneumoconiosis is defined as:

> [T]hose diseases recognized by the medical community as pneumoconiosis, *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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

We must vacate the administrative law judge's finding at 20 C.F.R. §718.305(d)(1)(i) because she did not place the burden of proof on employer to disprove the existence of clinical pneumoconiosis. Because claimant invoked the amended Section 411(c)(4) presumption, he is entitled to a presumption that he suffers from clinical pneumoconiosis. *See Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Minich*, slip op. at 10-11. The burden then shifts to employer to rebut the presumption with affirmative proof that claimant does not have clinical pneumoconiosis. *Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66. Consequently, her determination that employer has rebutted the presumption of clinical pneumoconiosis is inadequately explained in view of her determination that the most recent x-ray evidence was most reliable and her finding that the x-ray evidence was in equipose. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'd sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Decision and Order at 9. Furthermore, to the extent that the administrative law judge's findings with respect to the x-ray evidence also influenced her consideration of the medical opinion evidence, we vacate her finding that employer disproved the existence of clinical and legal pneumoconiosis, based on the medical opinions of Drs. Zaldivar and Castle.[8] We therefore vacate the administrative law judge's denial of benefits.

On remand, we instruct the administrative law judge to reconsider whether employer has established rebuttal of the amended 411(c)(4) presumption by disproving the existence of legal and clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A), (B); *Minich*, slip op. at 10-11. As the administrative law judge previously placed the burden of proof on claimant to establish the existence of clinical pneumoconiosis by x-ray, on remand, she must reconsider the x-ray, CT scan and medical opinion evidence relevant to the issue, with the burden of proof properly allocated to employer.

If employer is unable to establish that claimant does not have legal and clinical pneumoconiosis, the administrative law judge must consider whether employer has rebutted the presumed fact of total disability causation. Employer can accomplish this by proving that "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). In a recent decision, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that the "no part" standard is valid, and that it requires the party opposing entitlement to "rule out" any connection between pneumoconiosis and the miner's total disability. *Bender*, 782 F.3d at 143; *see also Big Branch Res., Inc. v.*

[8] Drs. Zaldivar and Castle rely on negative x-ray and CT scan readings as a basis for their respective opinions that claimant does not have clinical or legal pneumoconiosis. Director's Exhibit 11; Employer's Exhibits 4, 6, 7, 9, 10.

Ogle, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Minich*, slip op. at 11 (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 pneumoconiosis.").

In considering the medical opinions, the administrative law judge must specifically determine whether the opinions of the medical experts, including Drs. Zaldivar and Castle, are reasoned and documented. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). The administrative law judge should consider factors relevant to the probative value of the opinions, including the doctors' explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). In rendering her findings on remand, the administrative law judge must explain her rationale, as required by the Administrative Procedure Act, 30 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 1-161, 1-165 (1989).

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

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge