U.S. Department of Labor

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

BRB No. 16-0624 BLA

CLEVE C. COSTLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 08/03/2017
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	
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.

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-5141) of Administrative Law Judge Drew A. Swank, rendered on a claim filed on September 24, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Based on his determinations that claimant established twenty-five years of above-ground coal mine employment and a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] The administrative law judge further found that employer failed to rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge did not adequately address whether claimant's above-ground coal mine employment was performed in conditions that were substantially similar to those in underground mines, prior to finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge applied the wrong legal standard in considering whether employer established rebuttal of the presumption. Claimant responds, urging affirmance of the award 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. Employer also filed a reply brief, reiterating its arguments.

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.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Invocation of the Section 411(c)(4) Presumption - Substantial Similarity

In order to invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), under the facts of this case, claimant is required to

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[1] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis, if he has at least fifteen years of underground coal mine employment, or coal mine employment in conditions that were substantially similar to those in underground mines, and also suffers from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b).

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

establish that he worked at least fifteen years in above-ground coal mine employment in "conditions substantially similar to those in underground mines."[3] 20 C.F.R. §718.305(b)(1)(i). This requirement is met if claimant establishes that he "was regularly exposed to coal-mine dust" while working at an above-ground mine. 20 C.F.R. §718.305(b)(2); *see* 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490-91, 25 BLR 2-633, 2-643 (6th Cir. 2014).

Employer contends that the administrative law judge did not properly address whether claimant worked in conditions that were substantially similar to those in an underground mine. Employer's assertion of error has merit.

The administrative law judge noted that "[t]o invoke the presumption [claimant] must have fifteen years or more of underground or the equivalent of mining work and a totally disabling respiratory or pulmonary impairment." Decision and Order at 11. The administrative law judge then stated, "[b]ased upon a review of the evidence . . . [c]laimant's above-ground coal mining employment is sufficient for invoking the presumption at 20 C.F.R. §718.305." Decision and Order at 11, *citing* Director's Exhibits 3-8; Employer's Exhibit 11 at 7.

Based on the administrative law judge's conclusory findings, we are unable to discern whether the administrative law judge conducted the analysis required by 20 C.F.R. §718.305(b)(2). Although the administrative law judge referenced Director's Exhibits 3-8 and Employer's Exhibit 11 at 7, he failed to summarize and discuss how the evidence at those exhibits establishes that claimant was regularly exposed to coal mine dust in his above-ground coal mine employment.[4] Because the administrative law judge failed to explain the bases for his findings and conclusions in accordance with the

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[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant established twenty-five years of above-ground coal mine employment and a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Director's Exhibit 3 is the CM-911 "Employment History" form; Director's Exhibit 4 is the CM-913 form entitled "Description of Coal Mine Work and Other Employment," wherein claimant described the duties of his job as a mechanic from 1949 to 1984; Director's Exhibit 5 is a letter from Ernest Bruns, President of Bruns Coal Company; Director's Exhibits 6 and 7 are entitled "Co-Worker's Confirmation of Pension Applicant's Work History;" Director's Exhibit 8 is an employment history prepared by Westmoreland Coal Company; and Employer's Exhibit 11 is Dr. Basheda's deposition transcript.

Administrative Procedure Act (APA),[5] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by U.S.C. §932(a), we must vacate the administrative law judge's finding that claimant established at least fifteen years of qualifying above-ground coal mine employment for invocation of the Section 411(c)(4) presumption. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). We therefore must vacate the award of benefits and remand this case for further consideration.

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

In the interest of judicial economy, we will also address employer's arguments pertaining to rebuttal of the presumption. Once the Section 411(c)(4) presumption is invoked, the burden of proof shifts to employer to rebut the presumption by establishing that claimant has neither legal[6] nor clinical[7] pneumoconiosis, or that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [Section] 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). In this case, the administrative law judge found that employer failed to rebut the Section 411(c)(4) presumption. Employer contends that the administrative law judge erred in making that finding.

The administrative law judge began his analysis of the elements of entitlement by considering whether claimant could prove that he has clinical pneumoconiosis pursuant

[5] The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "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).

[6] Legal pneumoconiosis is defined as "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 that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[7] 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).

to 20 C.F.R. §718.202(a) based on x-ray evidence, biopsy or autopsy evidence, invocation of a presumption at 20 C.F.R. §§718.304[8] or 718.305, or medical opinion evidence. 20 C.F.R. §718.202(a)(1)-(4); Decision and Order at 5-9. After finding that claimant failed to establish the existence of clinical pneumoconiosis through x-ray or biopsy evidence at 20 C.F.R. §718.202(a)(1), (2), the administrative law judge considered 20 C.F.R. §718.202(a)(3) and, as discussed above, found that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, set forth at 20 C.F.R. §718.305. Decision and Order at 13.

The administrative law judge next stated that because claimant invoked the Section 411(c)(4) presumption, claimant "establish[ed] the presence of legal coal workers' pneumoconiosis." Decision and Order at 13. The administrative law judge further stated that because the issue of whether claimant had coal workers' pneumoconiosis was determined by operation of the legal presumption, "the single issue to be determined is whether [c]laimant's total disability arose from his coal workers' pneumoconiosis due to his past coal mine employment." *Id.* at 14.

After summarizing the medical opinions, the administrative law judge concluded that employer failed to rebut the presumption and explained:

> Doctor Basheda advanced a number of intriguing arguments as to why Claimant's pulmonary impairments were caused solely by his smoking with no contribution from his coal mine dust exposure. Unfortunately, his failure to support any of his arguments with references to medical literature or studies renders his intriguing arguments as being less-than-compelling arguments. The same is true for Dr. Hippensteel's opinions. Without citations to[,] or support from[,] medical literature, [*e*]*mployers' experts' opinions are not persuasive and do not rebut the legal presumption that coal workers' pneumoconiosis is a "substantially contributing cause" of Claimant's total pulmonary or respiratory disability contained at 20 C.F.R. § 718.305.*

Decision and Order at 17 (emphasis added).

Employer asserts that the administrative law judge erred in failing to determine whether employer disproved the existence of legal pneumoconiosis, prior to reaching the issue of whether it disproved the presumed fact of disability causation. Employer's Brief

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[8] There is no evidence in the record indicating that claimant has complicated pneumoconiosis for invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304.

in Support of Petition for Review at 13-16. We agree. An administrative law judge must address both forms of pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i) to satisfy the statutory mandate to consider all relevant evidence, and to provide a framework for the analysis of the medical opinions on the issue of total disability causation at 20 C.F.R. §718.305(d)(1)(ii). *See Minich*, 25 BLR at 1-159. With regard to legal pneumoconiosis, an administrative law judge must determine whether employer has shown that claimant does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). In this case, the administrative law judge erred in failing to address whether employer disproved the existence of legal pneumoconiosis. The administrative law judge also erred in failing to make a proper finding on the existence of clinical pneumoconiosis, with the burden of proof on employer to disprove the disease.

Further, employer correctly contends that the administrative law judge applied an incorrect rebuttal standard in addressing the issue of whether employer disproved the presumed fact of disability causation. Employer's Brief in Support of Petition for Review at 17-19. The administrative law judge required employer to disprove the "legal presumption that coal workers' pneumoconiosis is a 'substantially contributing cause' of [c]laimant's total pulmonary or respiratory disability." Decision and Order at 15. However, pursuant to 20 C.F.R. §718.305(d)(1)(ii), the correct standard to apply with respect to disability causation is to consider whether employer has established that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis" as defined in 20 C.F.R. §718.201. *See Minich*, 25 BLR at 154-56.

Under the facts of this case, the administrative law judge's use of an incorrect rebuttal standard is not harmless error, as we are unable to discern the extent to which the administrative law judge's reliance on an incorrect standard affected his credibility determinations. *See Wojtowicz*, 12 BLR at 1-165; *McCune*, 6 BLR at 1-998. We, therefore, 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)(1)(i), (ii) and the award of benefits.

III. Remand Instructions

The administrative law judge is instructed on remand to reconsider whether claimant established that he worked at least fifteen years in above-ground coal mine employment in conditions that were substantially similar to those in underground mines. In so doing, the administrative law judge must identify and explain how the evidence supports a finding that claimant was regularly exposed to coal mine dust. 20 C.F.R.

§718.305(b)(2); *see* 78 Fed. Reg. 59,105 (Sept. 25, 2013).[9] If claimant establishes on remand that he worked in conditions that were substantially similar to those in underground mines for at least fifteen years, claimant will have established the requisite years of qualifying coal mine employment for invocation of the Section 411(c)(4) presumption and the administrative law judge must then reconsider whether employer established rebuttal in accordance with the regulations.

Specifically, the administrative law judge is instructed to begin his analysis by considering whether employer disproved the existence of legal pneumoconiosis by affirmatively establishing that 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. The administrative law judge also must determine whether employer has affirmatively established that claimant does not have clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); *Minich*, 25 BLR at 1-159. If the administrative law judge finds that employer has disproved the existence of both legal and clinical pneumoconiosis, employer has rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i), and the administrative law judge need not reach the issue of disability causation. However, if employer fails to establish that claimant has neither legal nor clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must then 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 [Section] 718.201." 20 C.F.R. §718.305(d)(1)(ii). *Minich*, 25 BLR at 1-159. If employer is unable to rebut the Section 411(c) presumption pursuant to either 20 C.F.R. §718.305(d)(1)(i) or (ii), claimant has established entitlement to benefits.

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[9] The Department of Labor has described the appropriate inquiry for determining substantial similarity as follows:

> [I]t is unnecessary for a claimant to prove anything about dust conditions existing at an underground mine for purposes of invoking the 15-year presumption. Instead, the claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal[-]mine dust, and thus that the miner's work conditions approximated those at an underground mine.

78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013) (emphasis added).

Alternatively, if claimant is unable to establish that he worked in conditions substantially similar to those in underground mines, claimant will not invoke the Section 411(c)(4) presumption, and the administrative law judge must then consider whether claimant is able to establish entitlement to benefits pursuant to 20 C.F.R. Part 718. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

In determining the credibility of the medical opinions on remand, 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 Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-235 (4th Cir. 1998). Furthermore, the administrative law judge is instructed to set forth his findings on remand in detail, including the underlying rationale of his decision, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

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