U.S. Department of Labor

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

BRB No. 17-0086 BLA

GARY N. MAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINE BROTHERS MINING COMPANY, INCORPORATED	)	DATE ISSUED: 08/30/2017
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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.

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

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-5101) of Administrative Law Judge Drew A. Swank, rendered on a subsequent claim filed on December 26, 2013,[1] 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 found that claimant established 15.88 years of underground coal mine employment and that the new evidence proved that claimant has a totally disabling respiratory or pulmonary impairment. Therefore, the administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c),[2] and also invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge applied the wrong legal standard in considering whether employer established rebuttal of the presumption

[1] Claimant filed an initial claim on August 13, 1973, which was denied by the district director on June 20, 1980, because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed a second claim on February 15, 2011, which was denied by the district director on September 21, 2011, because claimant failed to establish total disability. Director's Exhibit 2. Claimant took no further action with regard to the denial until he filed the current subsequent claim. Director's Exhibit 4.

[2] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he failed to establish total disability. Director's Exhibit 2. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing total disability. 20 C.F.R. §725.309(c)(3), (4).

[3] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

and erred in weighing the evidence. 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.[4]

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.[5] 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. Rebuttal of the Section 411(c)(4) 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

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that: Claimant established 15.88 years of underground coal mine employment; a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2); a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c); 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, 11, 13-15.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

[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).

found that employer failed to rebut the Section 411(c)(4) presumption. We agree with employer 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 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 or 718.305, or medical opinion evidence. 20 C.F.R. §718.202(a)(1)-(4); Decision and Order at 7-11. 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 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 15.

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" and "has furthermore demonstrated an element of entitlement adjudicated against him in his prior claim." Decision and Order at 13-14. 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 15.

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

> The persuasiveness of Dr. Zaldivar's opinion is fundamentally undermined by his determination, contrary to the finding of this Decision, that the miner did not suffer from legal coal workers' pneumoconiosis. . . . His opinion is further rendered unpersuasive by his failure to provide a reference citation to certain of his propositions, such as only complicated coal workers' pneumoconiosis can cause restriction.
>
> ….
>
> Doctor Castle's opinions are also unpersuasive for the same reasons: he too failed to diagnose legal coal workers' pneumoconiosis contrary to this opinion . . . and likewise failed to provide references or citations for his assertions such as restriction in coal workers' pneumoconiosis cases only occurs with significant findings of interstitial pulmonary fibrosis. . . . Due to these reasons the undersigned finds that Employer has failed to rebut the presumption invoked by 20 C.F.R. § 718.305 and Claimant has therefore

> proven that his coal workers' pneumoconiosis was a "substantially contributing cause" of his total pulmonary disability. 20 C.F.R. § 718.204(c)(1).

Decision and Order at 17.

Employer correctly asserts that the administrative law judge erred in failing to determine whether employer disproved legal pneumoconiosis, prior to reaching the issue of whether it disproved the presumed fact of disability causation.[8] Employer's Brief in Support of Petition for Review at 7-8, 14-15. When evaluating the issue of legal pneumoconiosis, the administrative law judge must weigh the evidence and 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); *see Minich*, 25 BLR at 1-159. Only after determining that employer is unable to disprove the existence of legal pneumoconiosis should the administrative law judge consider whether employer established that "no part" of claimant's pulmonary or respiratory disability was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii).

Furthermore, employer correctly contends that the administrative law judge applied an incorrect legal standard in considering whether employer disproved the presumed fact of disability causation. The administrative law judge stated that employer had the burden 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 17. 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

[8] Additionally, the administrative law judge concluded that claimant failed to establish the existence of clinical pneumoconiosis based on the x-ray evidence. However, the administrative law judge failed to properly consider whether employer disproved clinical pneumoconiosis, based on a weighing of all the relevant evidence and with the burden of proof on employer. *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting).

administrative law judge's reliance on an incorrect standard affected his credibility determinations. *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 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.

II. Remand Instructions

The administrative law judge is instructed on remand to 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 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 established that claimant does not have clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); *see 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 evidence 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); *see 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 and the award of benefits may be reinstated.[9]

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

[9] Employer's burden is to establish rebuttal by a preponderance of the evidence, i.e., more likely than not claimant does not have clinical or legal pneumoconiosis or more likely than not no part of claimant's disabling respiratory or pulmonary impairment was caused by pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich*, 25 BLR at 1-154-56.

medical judgments, and the sophistication of, and bases for, their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-235 (4th Cir. 1998); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). 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 Administrative Procedure Act,[10] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by U.S.C. §932(a). *See Wojtowicz*, 12 BLR at 1-165.

[10] 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).

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

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge