U.S. Department of Labor

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

BRB No. 17-0543 BLA

JOHN D. WARD, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 08/28/2018
Employer-Petitioner	)	
	)	
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 on Modification of Carrie Bland, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith, Charleston, West Virginia, for claimant.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Modification (2015-BLA-05253) of Administrative Law Judge Carrie Bland rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-

944 (2012) (the Act). This case involves a subsequent claim[1] filed on March 14, 2011, which is now being considered pursuant to claimant's request for modification.

Initially, Administrative Law Judge Richard A. Morgan denied benefits because he found that the new evidence did not establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, did not establish a change in the applicable condition of entitlement at 20 C.F.R. §725.309. Director's Exhibit 33. Upon review of claimant's appeal, the Board affirmed Judge Morgan's denial of benefits. *Ward v. Consolidation Coal Co.*, BRB No. 13-0495 BLA (Mar. 31, 2014)(unpub.).

Claimant timely requested modification pursuant to 20 C.F.R §725.310 and submitted additional evidence. Director's Exhibit 34. The district director issued a Proposed Decision and Order granting modification on November 19, 2014. Director's Exhibit 36. At employer's request, the case was referred to the Office of Administrative Law Judges for a hearing. Director's Exhibits 37, 40. Thereafter, the administrative law judge granted the parties' request for a decision on the record. Decision and Order at 2 (unpaginated).

The administrative law judge credited claimant with at least thirty-one years of coal mine employment,[2] either underground or in conditions substantially similar to those in an underground coal mine, and found that the new evidence established that claimant has 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 established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c)[3] and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section

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[1] Claimant's initial claim, filed on September 8, 1999, was finally denied by the district director on November 9, 1999, because claimant did not establish that he had a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1.

[2] Claimant's last coal mine employment was in West Virginia. Hearing Transcript, Nov. 8, 2012, at 9. Accordingly, the Board will apply the law 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).

[3] Pursuant to 20 C.F.R. §725.310, the administrative law judge additionally found that claimant established a change in conditions since Administrative Law Judge Richard A. Morgan's June 27, 2013 decision denying benefits, and a mistake of fact in Judge Morgan's determination that claimant did not establish total disability. Decision and Order at 15 (unpaginated).

411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[4] She further found that employer failed to rebut the presumption, and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge applied the wrong legal standard in finding that it failed to rebut the Section 411(c)(4) presumption. Employer further challenges the administrative law judge's determination regarding the commencement date for benefits. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.[5]

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).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[6] 20 C.F.R. §718.305(d)(1)(i), or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R.

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where the evidence establishes 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. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

[5] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established a change in the applicable condition of entitlement at 20 C.F.R. §725.309 and invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Employer's Brief at 8, 20.

[6] "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).

§718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

We agree with employer that the administrative law judge applied the wrong legal standard in considering whether the evidence was sufficient to establish that claimant does not have legal pneumoconiosis.[7] Employer's Brief at 8-15. To prove that claimant does not have legal pneumoconiosis, employer must demonstrate that he 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), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge initially set out the proper legal standard. Decision and Order at 18 (unpaginated). She then considered the opinions of Drs. Fino, Zaldivar, and Bellotte. Drs. Fino and Zaldivar opined that claimant does not have legal pneumoconiosis, but suffers from a severe restrictive impairment that is due to interstitial pulmonary fibrosis unrelated to his coal mine employment. Employer's Exhibits 2 at 9; 5 at 32-35; 6 at 7, 12. She also considered the opinion of Dr. Bellotte, who opined that claimant has a restrictive impairment and hypoxemia due to obesity, and asthma unrelated to coal mine dust exposure. Director's Exhibit 33.

After discussing the medical opinions of Drs. Fino and Zaldivar, the administrative law judge found that the opinions were insufficient to establish that claimant does not have legal pneumoconiosis because they did not "explain why pneumoconiosis was not at least a partial cause of [claimant's] respiratory or pulmonary disability." Decision and Order at 21 (unpaginated), *citing W. Va. CWP Fund v. Bender*, 782 F.3d 129, 143 (4th Cir. 2015) and *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 502 (4th Cir. 2015).[8] The administrative law judge further found that Dr. Bellotte failed to explain why none of claimant's respiratory or pulmonary impairment was due to coal mine dust exposure.[9] Decision and

[7] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B). Decision and Order at 15-17 (unpaginated).

[8] The cases cited address the second method of rebuttal, relating to disability causation, at 20 C.F.R. §718.305(d)(1)(ii). *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 143 (4th Cir. 2015); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 502 (4th Cir. 2015).

[9] The administrative law judge also considered, but discounted, the opinions of Drs. Rasmussen and Shamma-Othman diagnosing claimant with legal pneumoconiosis. Director's Exhibits 15, 34. The administrative law judge found that Dr. Shamma-Othman's

Order at 21 (unpaginated). Additionally, the administrative law judge found that the opinions of Drs. Fino and Zaldivar were "not sufficient to meet . . . [e]mployer's burden on rebuttal" because the physicians did not identify a cause of claimant's disabling interstitial pulmonary fibrosis. *Id*., *citing* 20 C.F.R. §718.305(d)(3).[10]

Although the administrative law judge initially stated the correct legal standard, she ultimately applied an improper legal standard in determining whether employer established that claimant does not have legal pneumoconiosis. The administrative law judge required Dr. Zaldivar to "rule out" coal mine dust exposure as a cause of claimant's restrictive impairment and to explain why claimant's coal mine dust exposure could not have caused any of his respiratory impairment. Decision and Order at 18, 20 (unpaginated). She similarly found that Dr. Fino's explanation was "not sufficient to exclude claimant's . . . coal mine dust exposure as a factor" in claimant's restrictive impairment. Decision and Order at 21 (unpaginated). The administrative law judge required Dr. Bellotte to explain why none of claimant's respiratory impairment was related to his coal mine dust exposure. *Id*.

Contrary to the administrative law judge's analysis, employer is not required to "rule out" any contribution from coal dust exposure to claimant's respiratory disease or impairment in order to disprove the existence of legal pneumoconiosis.[11] The proper inquiry is whether employer has shown by a preponderance of the evidence 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(b); *see Minich*, 25 BLR at 1-155 n.8, 1-159.

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opinion did not meet employer's "burden to establish that no part of . . .[c]laimant's respiratory impairment is due to his significant history of coal mine dust exposure, in other words, that he does not have legal pneumoconiosis." Decision and Order at 22 (unpaginated).

[10] Section 718.305(d)(3) provides that the Section 411(c)(4) "presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling *obstructive* respiratory or pulmonary disease of unknown origin." (emphasis added).

[11] The "rule out," or "no part," standard applies only to the second method of rebuttal relating to disability causation. 20 C.F.R. §718.305(d)(1)(ii); *see Epling*, 783 F.3d at 502; *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155-56 (2015) (Boggs, J., concurring and dissenting).

Based on the administrative law judge's application of the wrong legal standard in considering whether employer established that claimant does not have legal pneumoconiosis, we vacate her finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. On remand, the administrative law judge is instructed to consider whether employer has established that claimant does not have 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 is additionally instructed that employer is not required to establish the specific cause of claimant's lung disease in order to establish that he does not have legal pneumoconiosis. *See* 77 Fed. Reg. 19,456, 19,463-64 (Mar. 30, 2012), *citing Tanner v. Freeman United Coal Co.*, 10 BLR 1–85, 1–87 (1987).

Employer next argues that the administrative law judge erred by determining that employer did not establish rebuttal of the Section 411(c)(4) presumption by establishing that no part of claimant's disability was caused by pneumoconiosis. Employer's Brief at 15-19. Employer asserts that the administrative law judge combined the two methods of rebuttal at Section 411(c)(4) and failed to weigh the medical opinions in determining whether employer rebutted the presumed fact of disability causation. We agree.

In determining that employer did not rebut the presumed fact of disability causation, the administrative law judge stated that "[e]mployer must affirmatively rule out a causal relationship between [c]laimant's disability and his coal mine employment." Decision and Order at 22 (unpaginated). Contrary to the administrative law judge's analysis, employer must demonstrate that "no part of [claimant's] respiratory or pulmonary total disability was caused by *pneumoconiosis* as defined in [20 C.F.R.] § 718.201" 20 C.F.R. §718.305(d)(1)(ii); *Minich*, 25 BLR at 1-159. Further, the administrative law judge did not make an independent finding on the disability causation issue, but stated only, "As discussed above, I find that the opinions of Dr. Selby[12] do not establish that the [c]laimant's pneumoconiosis played no part in his totally disabling respiratory impairment." Decision and Order at 23 (unpaginated). The administrative law judge did not otherwise discuss or weigh the medical opinion evidence regarding rebuttal of the presumed fact of disability causation. The administrative law judge concluded that "none of the medical evidence

[12] The Board assumes the administrative law judge meant to refer to the opinions of Drs. Fino, Zaldivar, and Bellotte, as the record does not reflect the admission of a medical opinion from Dr. Selby.

sufficiently rules out a causal relationship between [claimant's] disabling respiratory impairment and his coal mine employment . . . ." *Id*.

Because the administrative law judge applied an improper standard and combined her legal pneumoconiosis and disability causation rebuttal findings, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.305(d)(1)(ii). On remand, after determining whether employer has established that claimant does not have legal pneumoconiosis, the administrative law judge must determine whether employer has rebutted the presumed fact of disability causation with credible proof that "no part of [claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis" as defined in 20 C.F.R. §718.201.[13] 20 C.F.R. §718.305(d)(1)(ii); *see Bender*, 782 F.3d at 143; *Epling*, 783 F.3d at 502; *Minich*, 25 BLR at 1-159.

Commencement Date for Benefits

The date for the commencement of benefits is the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date is not ascertainable from the record, benefits will commence the month the claim was filed, unless evidence establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). Additionally, in a subsequent claim, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

Because we have vacated the award of benefits, we vacate the administrative law judge's finding that claimant is entitled to benefits commencing as of March 2011, the month in which he filed this claim. Additionally, we agree with employer that the administrative law judge erred in ordering that benefits should commence as of the claim filing date, without first attempting to ascertain whether the evidence established the onset date of total disability due to pneumoconiosis. Employer's Brief at 22.

On remand, if the administrative law judge finds that claimant is entitled to benefits, she must determine if the evidence establishes the onset date of claimant's total disability due to pneumoconiosis. 20 C.F.R. §725.503(b); *Krecota*, 868 F.2d at 603; *Owens*, 14 BLR

[13] Because we conclude that the administrative law judge applied improper rebuttal standards and combined the issues of legal pneumoconiosis and disability causation, we remand this case for further consideration without reaching her specific credibility determinations.

at 1-50. Additionally, because the administrative law judge relied on the new medical evidence submitted on modification to find that claimant is now totally disabled, Decision and Order at 14-15 (unpaginated), she should explain her basis for granting modification of Judge Morgan's previous decision denying benefits for failure to establish total disability, and set the benefits commencement date in accordance with 20 C.F.R. §725.503(d).[14]

[14] If modification is based on a change in conditions, claimant is entitled to benefits as of the month of onset of total disability due to pneumoconiosis, or if that date is not ascertainable, as of the date he requested modification. 20 C.F.R. §725.503(d)(2). If modification is based on the correction of a mistake in fact, claimant is entitled to benefits from the date he became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the date he filed his claim, unless credited evidence establishes that he was not disabled at any subsequent time. 20 C.F.R. §725.503(d)(1); *see Eifler v. Peabody Coal Co.*, 926 F.3d 663, 666 (7th Cir. 1991); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). Here, the administrative law judge erroneously found both a change in conditions and a mistake in a determination of fact. She found that the new evidence submitted on modification established a "change in a condition of entitlement since Judge Morgan's June 27, 2013 denial." Decision and Order at 15 (unpaginated). She then found, however, that "there was a mistake in a determination of fact in Judge Morgan's determination that . . . [c]laimant did not establish . . . a totally disabling respiratory impairment." *Id.*

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Modification 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

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge