U.S. Department of Labor

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

BRB No. 17-0585 BLA

GARY D. FOSTER Claimant-Respondent v. TERRY EAGLE COAL COMPANY, LLC and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/16/2018 DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand Awarding Benefits (2013-BLA-5298) of Administrative Law Judge Drew A. Swank, rendered on a claim filed on March 1, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time. In *Foster v. Terry Eagle Coal Co.*, BRB No. 16-0280 BLA (Mar. 9, 2017) (unpub.), the Board affirmed, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] However, the Board vacated the award of benefits because the administrative law judge did not properly consider whether employer established rebuttal of the Section 411(c)(4) presumption. On remand, the administrative law judge again determined that the evidence was insufficient to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the medical opinion evidence was insufficient to rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[3] or by establishing that "no

---

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that claimant is totally disabled due to pneumoconiosis if he establishes that he has fifteen or more years of underground or substantially similar coal mine employment, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b), (c)(1).

[2] 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 4.

[3] 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). This definition

part of the miner'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)(i), (ii). The administrative law judge found that employer rebutted the existence of clinical pneumoconiosis but did not rebut the existence of legal pneumoconiosis or the presumed fact that claimant is totally disabled due to pneumoconiosis. Decision and Order on Remand at 4-7. He concluded, therefore, that employer failed to rebut the Section 411(c)(4) presumption. *Id*. at 7.

Employer initially challenges the administrative law judge's finding that its experts' opinions were insufficient to rebut the presumed existence of legal pneumoconiosis. Both Drs. Zaldivar and Bellotte diagnosed asthma and stated that it was not caused or aggravated by coal dust exposure.[4] Decision and Order on Remand at 7-11; Director's Exhibit 21; Employer's Exhibits 4, 11, 12, 15, 16. The administrative law judge determined that although the opinions of Drs. Zaldivar and Bellotte were "well-reasoned and fairly persuasive[,]" they did not satisfy employer's burden to disprove the existence of legal pneumoconiosis. Decision and Order on Remand at 11. The administrative law judge stated:

> [N]either physician adequately explained *why* [c]laimant's asthma was not or could not have been caused or substantially aggravated by [c]laimant's more than 20 years of underground coal mine employment. . . . D[rs.] Zaldivar and Bellotte diagnosed [c]laimant with asthma, but did not significantly discuss the etiology of the disease. While one can infer the two physicians believe claimant's asthma is solely related to his smoking history,

---

encompasses any chronic respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). 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).

[4] Dr. Zaldivar examined claimant on September 12, 2012, and concluded that claimant has moderate reversible airway obstruction, hyperinflation with air trapping, a mild diffusion abnormality, and normal resting blood gases. Director's Exhibit 21 at 2. He opined that claimant does not have legal pneumoconiosis, but has "asthma and obesity, complicated by his smoking habit." *Id*. at 3. Dr. Bellotte examined claimant on March 5, 2013, and determined that claimant has a mild gas-exchange impairment at rest and moderate reversible airway obstruction. Employer's Exhibit 4. He opined that claimant does not have legal pneumoconiosis, but suffers from asthma and obesity, both of which are unrelated to coal dust exposure. *Id*.

> the fact still stands that neither Dr. Zaldivar nor Dr. Bellotte established that claimant does not have a lung disease significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

Decision and Order on Remand at 11. The administrative law judge therefore found that employer failed to rebut the presumption that claimant has legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A). *Id.*

Employer contends that the administrative law judge erred in finding that Drs. Zaldivar and Bellotte did not discuss the etiology of claimant's asthma or explain why it was not aggravated by coal dust exposure. This argument has merit. Contrary to the administrative law judge's determination, both physicians extensively addressed the prerequisites for diagnosing asthma, and agreed that although coal dust and other irritants trigger asthma, they do not cause the disease. Employer's Exhibits 3, 4, 11, 19, 12. As to the issue of aggravation, when Dr. Zaldivar was asked at his deposition whether coal dust can cause "an acute exacerbation of asthma," he responded, "[y]es, if the individual is exposed to a very dusty atmosphere and especially if the individual is not taking sufficient medication to protect them." Employer's Exhibit 11 at 19. He further stated that he did not view coal dust as a trigger for claimant's asthma because if it was, claimant "wouldn't be able to work [twenty-two] years in the coal mines . . . [and] if the coal dust were somehow causing it, when he quit work, he'd be better and he wasn't." *Id.* at 20. Dr. Bellotte agreed that coal dust can aggravate asthma, but described the aggravation as temporary and stated that it ends when the exposure ends. Employer's Exhibit 12 at 40.

Because, in contrast to the administrative law judge's characterization, Drs. Zaldivar and Bellotte discussed the etiology of claimant's asthma and offered explanations as to why they excluded coal dust as an aggravating factor, we must vacate the administrative law judge's discrediting of their medical opinions on legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A). *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). We must also vacate the administrative law judge's finding that employer failed to establish that no part of claimant's total respiratory or pulmonary disability is due to pneumoconiosis under 20 C.F.R. §718.305(d)(1)(ii), in light of his reliance on his weighing of the medical opinion evidence relevant to legal pneumoconiosis. Thus, we remand this case to the administrative law judge for reconsideration of whether the opinions of Drs. Zaldivar and Bellotte are sufficient to establish rebuttal of the Section 411(c)(4) presumption.

In considering these medical opinions on remand, the administrative law judge must determine whether the opinions of Drs. Zaldivar and Bellotte establish that claimant's asthma and accompanying obstructive impairment are not significantly related to, or substantially aggravated by, dust exposure in coal mine employment. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and

dissenting). He should address the explanations for the physicians' 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 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). If the administrative law judge determines again that the opinions of Drs. Zaldivar and Bellotte do not satisfy employer's burden to rebut the existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A), he can reinstate his finding that employer failed to rebut the presumed fact that claimant is totally disabled due to pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii), and the award of benefits.[5]

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is vacated and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

[5] An administrative law judge may discount medical opinions that a totally disabling respiratory or pulmonary impairment was not caused by pneumoconiosis because the physicians did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that the employer failed to rebut the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-505 (4th Cir. 2015).