U.S. Department of Labor

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

BRB No. 16-0135 BLA

RICHARD L. CREE (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CENTRAL CAMBRIA DRILLING COMPANY	)	
	)	
	)	DATE ISSUED: 12/13/2016
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 of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

John S. Cupp, Jr., Uniontown, Pennsylvania, for claimant.

D. Scott Newman (Burns White LLC), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (13-BLA-5328) of Administrative Law Judge Drew A. Swank awarding benefits 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 claim filed on December 30, 2011.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant[2] with at least fifteen years of qualifying coal mine employment,[3] and found, as the parties stipulated, that claimant had 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 invoked the rebuttable presumption set forth at Section 411(c)(4). The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established at least fifteen years of qualifying coal mine employment and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not rebut the presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.[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,

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] Claimant died on August 5, 2014, while his claim was pending before the administrative law judge. Decision and Order at 5; Employer's Brief at 2; Claimant's Brief at 4.

[3] The record reflects that claimant's last coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Because employer does not challenge the administrative law judge's finding that the evidence established that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

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).

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

Employer initially argues that the administrative law judge erred in determining that claimant had sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption. To invoke the presumption, claimant must establish that he had at least fifteen years of "employment in one or more underground coal mines," or coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2). In this case, claimant indicated that he worked as a drill runner, a rock loader, and a hoist operator. Director's Exhibit 3.

Employer contends that the administrative law judge erred in failing to explain how he determined that claimant established the requisite fifteen years of qualifying coal mine employment to invoke the Section 411(c)(4) presumption. We agree. In determining the length of claimant's coal mine employment, the administrative law judge noted that the district director found that claimant had 27.94 years of coal mine employment. Decision and Order at 4. The administrative law judge then adopted that finding, and credited claimant with at least 27.94 years of coal mine employment. *Id*. The administrative law judge subsequently found, without further analysis, that claimant "has [fifteen] years or more of qualifying coal mine employment," and that claimant, therefore, invoked the Section 411(c)(4) presumption. *Id*. at 10. Notably, the administrative law judge did not make any specific findings regarding the length of time that claimant spent in underground coal mine employment, or whether claimant's coal mine work occurred at a surface mine in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(2). Consequently, we must vacate the administrative law judge's determination that claimant established the requisite fifteen years of qualifying coal mine employment for invocation of the Section 411(c)(4) presumption, and remand the case for the administrative law judge to make specific findings regarding whether claimant established any qualifying coal mine employment pursuant to 20 C.F.R. §718.305(b)(2).

Because we have vacated the administrative law judge's finding that claimant established fifteen years of qualifying coal mine employment, we also vacate his determination that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). On remand, should the administrative law judge determine that claimant had

fifteen years of qualifying coal mine employment, claimant will have established invocation of the Section 411(c)(4) presumption.

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

In the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, in the event that the administrative law judge, on remand, again finds the Section 411(c)(4) presumption invoked. Because the administrative law judge found that 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 had neither legal nor clinical pneumoconiosis,[5] 20 C.F.R. §718.305(d)(1)(i), or by establishing 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." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer asserts that the administrative law judge erred in failing to address whether employer could establish rebuttal of the Section 411(c)(4) presumption by establishing that claimant's clinical pneumoconiosis did not arise out of his coal mine employment. Employer's Brief at 14-15. We agree. When a miner invokes the Section 411(c)(4) presumption, he presumptively establishes the following elements of entitlement; (1) the existence of pneumoconiosis; (2) that his pneumoconiosis arose out of coal mine employment; and (3) that pneumoconiosis caused his disability. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 555, 25 BLR 2-339, 2-348 (4th Cir. 2013) (Niemeyer, J., concurring). Consequently, an employer can effectively rebut the Section 411(c)(4) presumption that claimant suffered from clinical pneumoconiosis arising out of his coal mine employment by not only establishing that claimant did not suffer from clinical pneumoconiosis, but also by establishing that the clinical pneumoconiosis, if present, did not arise out of his coal mine employment. 20 C.F.R. §718.305(d)(1)(i)(B).

[5] "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).

In this case, employer does not challenge the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 9. However, employer challenges the administrative law judge's finding that employer submitted "no evidence rebutting the presumption that . . . [c]laimant's coal workers' pneumoconiosis . . . arose from his coal mine employment."[6] *Id.* Employer argues that it submitted relevant evidence on this issue, namely Dr. Wolfe's positive interpretation of a February 7, 2012 x-ray, wherein the doctor commented that the parenchymal changes were "nonspecific and could result from [a] cause other than pneumoconiosis," Director's Exhibit 16, and Dr. Fino's opinion that the irregular opacities seen on a July 24, 2012 x-ray were not secondary to coal mine dust inhalation.[7] Director's Exhibit 15.

An administrative law judge is required to consider all relevant evidence in the record. *See* 30 U.S.C. §923(b). Because the administrative law judge failed to consider relevant evidence, we vacate his finding that employer failed to establish that claimant's clinical pneumoconiosis did not arise out of his coal mine employment. We, therefore, vacate the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption, and remand this case for further consideration.

In summary, if the administrative law judge, on remand, finds that claimant had fifteen years of qualifying coal mine employment, claimant is entitled to invocation of the Section 411(c)(4) presumption. The administrative law judge must then consider whether employer can rebut the presumption by establishing that claimant's clinical pneumoconiosis did not arise out of his coal mine employment. 20 C.F.R. §718.305(d)(1)(i)(B). If employer establishes that claimant's clinical pneumoconiosis did not arise out of his coal mine employment, employer would have to also establish that claimant did not suffer from legal pneumoconiosis in order to rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i)(A). Should the administrative law judge, on remand, determine that employer has not rebutted the presumption by establishing that claimant had neither legal nor clinical pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i), he must consider whether employer can rebut the presumption by establishing that "no part

[6] The administrative law judge made this finding in his consideration of whether employer could establish rebuttal of the Section 718.203(b) presumption that claimant's clinical pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); Decision and Order at 9-10.

[7] Dr. Fino explained that "the presence of only irregular opacities, in the absence of rounded opacities, is inconsistent with the diagnosis of coal workers' pneumoconiosis." Director's Exhibit 15 at 9.

of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201."[8] 20 C.F.R. §718.305(d)(1)(ii).

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

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[8] Employer asserts that the rule-out standard set forth in 20 C.F.R. §718.305(d)(1)(ii) does not apply to coal mine operators. We disagree. Employer's contention is identical to the one that the United States Court of Appeals for the Fourth Circuit rejected in *West Virginia CWP Fund v. Bender*, 782 F.3d 129, 138-43, 25 BLR 2-689, 2-699-708 (4th Cir. 2015), and we reject it here for the reasons set forth in that decision.