U.S. Department of Labor

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

BRB No. 16-0170 BLA

THOMAS H. PETERS	)
	)
Claimant-Respondent	)
	)
v.	)
	)
DAVID STANLEY CONSULTANTS	)
	)
and	)
	) DATE ISSUED: 12/22/2016
CHARTIS CASUALTY COMPANY	)
	)
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 of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

H. Brett Stonecipher and Cameron Blair (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer/carrier.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (14-BLA-5063) of Administrative Law Judge Drew A. Swank awarding benefits on a claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on December 31, 2012.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant at least fifteen years of qualifying coal mine employment,[2] and found that the 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 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 argues that the administrative law judge erred in denying its motion requesting that claimant attend two post-hearing medical evaluations by its medical experts. Employer also argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer further argues that the administrative law judge erred in finding that employer did not rebut the presumption. Claimant responds in support of both the administrative law judge's award of benefits, and his denial of employer's request to obtain additional

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[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] The record reflects that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction 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).

post-hearing medical evaluations. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, contending that the administrative law judge acted with his discretion in limiting employer's post-hearing submissions to rebuttal evidence.[3]

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).

Administrative Law Judge's Denial of Employer's Motion to Require Claimant to Submit to Post-Hearing Medical Examinations

Employer contends that the administrative law judge erred in denying its motion to conduct two post-hearing medical evaluations. The administrative law judge's procedural rulings will be upheld unless they constitute an abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

Background Information

On January 22, 2015, the administrative law judge issued a "Notice of Hearing and Pre-Hearing Order," wherein he notified the parties that all exhibits that they intended to submit at the hearing had to be exchanged with the opposing parties no less than twenty days prior to the hearing. Administrative Law Judge's Exhibit 1. The administrative law judge also mandated that the parties exchange "a brief pre-hearing report listing and summarizing all of the documentary evidence" fifty days prior to the hearing, and submit a pre-hearing report twenty days prior to the hearing. *Id.*

More than fifty days before the hearing, claimant provided employer with notice that he would be offering a medical report from Dr. Cohen. After Dr. Cohen evaluated claimant on March 19, 2015, claimant forwarded the doctor's May 26, 2015 medical report to employer on May 28, 2015. Claimant also included Dr. Cohen's medical report in his May 29, 2015 pre-hearing report that was submitted to the administrative law judge on June 1, 2015. Thus, there is no dispute that claimant complied with the pre-hearing notice requirements.

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[3] Because it is unchallenged on appeal, we affirm the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11.

On June 5, 2015, employer moved for a post-hearing extension in which to submit its two affirmative medical reports permitted pursuant to 20 C.F.R. §725.414(a).[4] Employer argued that the extension was necessary so that it could respond to claimant's submission of Dr. Cohen's medical report. Claimant objected to employer's motion, arguing that employer failed to establish good cause for its request to have claimant undergo post-hearing medical evaluations.

At the June 26, 2015 hearing, the administrative law judge considered the parties' arguments. Hearing Transcript at 12-15. Employer argued that because Dr. Cohen's medical report included pulmonary function studies indicative of a respiratory disability, employer was "within its right to obtain its own pulmonary function studies reviewed by its own physicians and to have a medical report from them." *Id.* at 13. The administrative law judge, however, noted that claimant had disclosed to employer, more than fifty days prior to the hearing, that he would be undergoing a medical evaluation by Dr. Cohen, and submitting his report. *Id.* at 14. The administrative law judge further noted that claimant had exchanged Dr. Cohen's medical report in accordance with his pre-hearing order. *Id.* Although the administrative law judge acknowledged that employer had a right to submit two affirmative medical reports, *see* 20 C.F.R. §725.414(a)(3)(i), he found that there was nothing to indicate that employer could not have exercised its right to develop its affirmative medical evidence before the hearing.[5] *Id.* at 15. Because employer had over two years to schedule its examinations of claimant, the administrative law judge denied employer's request to have claimant undergo post-hearing examinations. *Id.*; *see also* Decision and Order at 2 n.4. The administrative law judge, however, allowed employer the opportunity to submit two post-hearing rebuttal reports.[6] *See* 20 C.F.R. §725.414(a)(3)(ii).

[4] Employer had previously elected to submit the medical reports of Drs. Broudy and Rosenberg (based upon their review of the evidence) as its "allotted medical opinion evidence." Employer's Motion for Extension at 2.

[5] The administrative law judge stated that employer's "ability to send . . . [c]laimant to examinations isn't contingent on . . . [c]laimant coming up with evidence that helps his case and then [employer] get[s] to exercise [its] right." Hearing Transcript at 14.

[6] After the hearing, employer submitted supplemental reports from Drs. Broudy and Rosenberg, which the administrative law judge admitted into the record. Decision and Order at 2 n.3; Employer's Exhibits 12, 13.

Discussion

Employer contends that the administrative law judge's ruling, limiting its post-hearing submissions to rebuttal evidence, violated its due process rights. We disagree. The Due Process Clause of the United States Constitution, which applies to adjudicative administrative proceedings, requires that an employer receive notice and an opportunity to be heard before it is held liable for an award of benefits. *See Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 478, 24 BLR 2-135, 2-144 (6th Cir. 2009). Employer does not contend that it was not provided an opportunity to develop its case, to submit evidence, or to be heard within the time frames set forth by the regulations and by the administrative law judge. Moreover, employer was not precluded from having clamant examined prior to the hearing. We, therefore, agree with the Director that the administrative law judge "is not to blame for [employer's] decision to sit on its rights," and its failure to "develop a specific type of permitted medical evidence in a timely manner." Director's Response Brief at 3. Consequently, we hold that, under the facts of this case, the administrative law judge did not abuse his discretion in limiting employer's post-hearing evidence to rebuttal evidence. *See Clark*, 12 BLR at 1-153.

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

Employer next argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer specifically argues that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[7]

In determining whether claimant established that he has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Zlupko, Begley, Cohen, Broudy, and Rosenberg. The administrative law judge found that Dr. Rosenberg was the only physician that consistently opined, "without equivocation," that claimant could perform his usual coal mine work. Decision and Order at 19. The administrative law judge further found that a majority of the physicians opined that claimant could not perform all of his past duties. *Id.* While acknowledging that some of these opinions

[7] The administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 12-15.

"were less persuasive than others,"[8] the administrative law judge found, based on "a totality of the evidence," that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 19-20.

Employer argues that the administrative law judge erred in his consideration of Dr. Rosenberg's opinion. We agree. In finding that the medical opinion evidence established that claimant suffers from a totally disabling pulmonary impairment, the administrative law judge improperly relied on a head count of the physicians providing assessments, rather than on a qualitative analysis of their opinions. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992). The administrative did not explain why Dr. Rosenberg's assessment of the extent of claimant's pulmonary impairment was entitled to less weight than the contrary opinions of the other physicians. We, therefore, vacate the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration. On remand, when reconsidering whether claimant has satisfied his burden of establishing total disability, 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 Kertesz v. Crescent Hills Coal Co.,* 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

We note that the administrative law judge cannot properly evaluate the medical opinion evidence on total disability until he makes a determination of the nature and exertional requirements of claimant's usual coal mine employment. *Eagle v. Armco, Inc.*, 943 F.2d 509, 511, 15 BLR 2-201, 2-204 (4th Cir. 1991); *accord*, *Killman v. Director, OWCP*, 415 F.3d 716, 721, 23 BLR 2-250, 2-259 (7th Cir. 2005). Although the administrative law judge noted that claimant last worked in the mining industry as a mine

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[8] The administrative law judge found that while Dr. Zlupko opined that claimant would not be able to perform heavy labor, the doctor did not characterize or describe the exertional requirements of claimant's last coal mining job. Decision and Order at 19. The administrative law judge noted that Dr. Begley, who opined that claimant would not be able to perform his last coal mining job requiring moderate to heavy exertion, also failed to describe the requirements of claimant's last coal mine job. *Id.* Conversely, the administrative law judge found that Dr. Cohen described claimant's last coal mining job in great detail, and opined that claimant could not perform his past coal mine work. *Id.* The administrative law judge also found that Dr. Broudy's opinion regarding claimant's ability to perform his last mining job "evolved over time," with the doctor most recently testifying that claimant might not be able to perform all of the "arduous" work of his last coal mining job. *Id.* at 18-19.

examiner, Decision and Order at 5, he did not make a finding regarding the exertional requirements of that position. After he has determined the exertional requirements, the administrative law judge should evaluate all of the medical opinions of record, and determine whether each doctor had sufficient understanding of the exertional requirements of a mine examiner for the administrative law judge to credit the doctor's opinion on total disability and, if not, whether the doctor adequately described claimant's physical limitations. If an administrative law judge credits a doctor's statement of a claimant's physical limitations, he can consider the limitations together with the exertional requirements to determine if the opinion would support claimant's burden to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Scott v. Mason Coal Co*., 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995).

On remand, should the administrative law judge find that the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must weigh all the relevant new evidence together, both like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b).[9] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). Because we have vacated the administrative law judge's finding of total disability, we also vacate his finding that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

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. If claimant invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to employer to rebut the presumption by establishing that claimant does not have either legal or clinical pneumoconiosis,[10] 20 C.F.R. §718.305(d)(1)(i), or by

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[9] If claimant fails to establish total disability, an essential element of entitlement, benefits are precluded. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

[10] "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

establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(ii).

Employer contends that the administrative law judge erred in finding that the presumption was not rebutted. In support of its argument, employer asserts that the administrative law judge erred by relying on the fact that claimant was entitled to invocation of the Section 411(c)(4) presumption as a means of establishing that claimant has pneumoconiosis, without independently considering whether employer disproved the existence of both legal and clinical pneumoconiosis. Employer's Brief at 23-24. We agree.

In this case, the administrative law judge did not consider whether employer rebutted the presumption by disproving the existence of legal and clinical pneumoconiosis,[11] because he found the issue of whether claimant has coal workers' pneumoconiosis was determined when he found that claimant invoked the Section 411(c)(4) presumption. Decision and Order at 21. The administrative law judge, therefore, stated that the sole issue to be determined by him was whether the presumed fact of disability causation was rebutted. *Id.* In making this determination, the administrative law judge stated that employer must establish that coal worker's pneumoconiosis is not a "substantially contributing cause" of claimant's total disability. Decision and Order at 22. Thus, the administrative law judge did not apply the proper rebuttal standard set forth at 20 C.F.R. §718.305(d)(1)(ii) (employer must establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201."). Moreover, the administrative law judge conflated his determinations regarding the cause of claimant's respiratory impairment, namely whether it arises out of coal mine employment, with the cause of claimant's total respiratory disability, namely whether it is due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i), (ii).

In determining whether employer established rebuttal of the Section 411(c)(4) presumption, the administrative law judge should first determine whether employer has

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that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[11] The administrative law judge found only that the x-ray evidence did not carry claimant's burden of establishing the existence of coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that the record contained no biopsy or autopsy evidence pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 5-10.

established rebuttal at 20 C.F.R. §718.305(d)(1)(i) by disproving the presumed existence of both legal *and* clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A), (B); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting). In doing this, the administrative law judge should first consider whether employer has affirmatively established the absence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A). Performing the rebuttal analysis in the order set forth in the regulation satisfies the statutory mandate to consider all relevant evidence, and provides a framework for the analysis of the credibility of the medical opinions at Section 718.305(d)(1)(ii), the second rebuttal method. *See Minich*, 25 BLR at 1-159. Because the definition of legal pneumoconiosis encompasses only those diseases or impairments that are "significantly related to, or substantially aggravated by, dust exposure in coal mine employment," employer must prove that these prerequisites are absent to establish that claimant's pulmonary impairment is not legal pneumoconiosis. 20 C.F.R. §718.201(a)(2), (b); *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997).

If the administrative law judge finds that employer has failed to establish the absence of legal pneumoconiosis, he should then determine whether employer has disproved the presence of clinical pneumoconiosis arising out of coal mine employment at Section 718.305(d)(1)(i)(B). Once the administrative law judge finds that employer has failed to disprove the existence of both legal and clinical pneumoconiosis, he must then consider whether employer has rebutted the presumed fact of total disability causation at 20 C.F.R. §718.305(d)(1)(ii). Employer can accomplish this by proving that "no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); *see Minich*, 25 BLR at 2-159 (recognizing that to rebut the presumed causal relationship between pneumoconiosis and total disability, employer must establish that "no part, not even an insignificant part, of claimant's respiratory or pulmonary disability was caused by either legal or clinical pneumoconiosis."). If employer proves that claimant does not have legal and clinical pneumoconiosis, or that claimant's disabling pulmonary impairment was not caused by legal and clinical pneumoconiosis, employer has rebutted the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1); *Minich*, 25 BLR at 1-159.

The administrative law judge did not properly consider whether employer disproved the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §725.305(d)(1)(i)(A), (B) and did not apply the correct rebuttal standard at 20 C.F.R. §718.305(d)(1)(ii).[12] The administrative law judge's finding that the presumption was

[12] Moreover, we note that because the administrative law judge did not first make an independent finding as to whether employer disproved the existence of legal and

not rebutted is, therefore, vacated and the case is remanded for proper consideration under both methods of rebuttal, if necessary. 20 C.F.R. §718.305(d)(1)(i), (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

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clinical pneumoconiosis, we cannot affirm his finding regarding disability causation. *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting).