U.S. Department of Labor

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

BRB No. 18-0052 BLA

DEBRA McCLANAHAN (o/b/o ELSTER McCLANAHAN, deceased)	)	
Claimant-Respondent	)	
v.	)	
BREM COAL COMPANY, LLC	)	
and	)	DATE ISSUED: 12/12/2018
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
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 Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, 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 (2013-BLA-05128) of Administrative Law Judge Alan L. Bergstrom, awarding benefits on a claim filed pursuant to 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 12, 2011.[1]

After crediting the miner with thirty-six years of coal mine employment,[2] at least fifteen years of which took place underground, the administrative law judge found that the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). He therefore found that the miner invoked the Section 411(c)(4) presumption that he was totally disabled due to pneumoconiosis.[3] 30 U.S.C. §921(c)(3) (2012). The administrative law judge further found that employer did not rebut the presumption, and awarded benefits accordingly.

[1] This case was previously before the Board based upon interlocutory appeals filed by claimant and the Director, Office of Workers' Compensation Programs (the Director), challenging the administrative law judge's orders directing the miner to attend a third physical examination for employer. *McClanahan v. Brem Coal Co.*, 25 BLR 1-171 (2016). The Board reversed the administrative law judge's orders, and remanded the case to the administrative law judge for further proceedings. *McClanahan*, 25 BLR at 1-178. The miner died on May 20, 2017, while the case was pending on remand before the administrative law judge. Claimant's Exhibit 27. Claimant, the surviving spouse of the miner, is pursuing the miner's claim. Claimant's Exhibits 26, 29.

[2] The record reflects that the miner's last coal mine employment was in Kentucky. Hearing Transcript at 28. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the evidence establishes fifteen or more years of underground coal mine employment, or coal mine employment in conditions

On appeal, employer contends that the administrative law judge erred in identifying it as the responsible operator. Employer also argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Employer further contends that the administrative law judge erred in awarding augmented benefits for the miner's adult daughter. Claimant has not filed a response brief. The Director, Office of Worker's Compensation Programs (the Director), has filed a limited response in support of the administrative law judge's identification of employer as the responsible operator.[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. 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).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(a)(1). An employer must meet five criteria to be considered a potentially liable operator: the miner must have worked for the operator for a cumulative period of at least one year; his employment must have included at least one working day after December 31, 1969; his disability or death must have arisen at least in part out of his employment with the operator; the operator must have been an operator after June 30, 1973; and the operator must be capable of assuming liability for the payment of benefits, through its own assets or insurance. 20 C.F.R. §725.494(a)-(e). Once a potentially liable operator has been properly identified by the Director, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits, or that another operator more recently employed the miner for at least one year and that operator is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c).

The district director designated employer as the responsible operator based on his finding that employer was the potentially liable operator that most recently employed claimant for a cumulative period of one year. Director's Exhibit 33. At employer's request,

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substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

the case was forwarded to the Office of Administrative Law Judges (OALJ) for a formal hearing. Director's Exhibits 37, 38.

After the administrative law judge conducted a telephonic hearing on November 7, 2016, employer submitted a single-page document entitled "Endorsements." Employer's Exhibit 11. It sets forth limits on the insurance policy issued by employer's carrier, Kentucky Employers Mutual Insurance (KEMI), and it specifically provides that the policy "does not cover bodily injury" to the miner.[5] *Id.* The endorsement further states that employer "will reimburse [KEMI] for any payment [it] must make because of bodily injury to [the miner]." *Id.*

The administrative law judge rejected employer's contention that KEMI was not responsible for the payment of the miner's black lung benefits. He determined that although KEMI was liable for the miner's black lung benefits, the language of the endorsement permitted it to seek reimbursement from employer for any benefits paid. Decision and Order at 28-19. Because employer was insured through a policy with KEMI for the miner's federal black lung benefits, the administrative law judge determined that employer was the responsible operator. *Id.*

Employer contends that the administrative law judge erred in finding that KEMI provided coverage for the miner's black lung benefits. The Director argues that the endorsement document and the miner's hearing testimony are inadmissible on the issue of liability, and thus should not have been considered by the administrative law judge. The Director notes that the endorsement document was not submitted by any party, nor was claimant designated as a liability witness, while this case was before the district director. Director's Brief at 2-3. Therefore, the Director asserts that the regulations precluded the administrative law judge from considering this evidence, absent a showing of extraordinary circumstances. *Id*. The Director notes that employer does not contend that there were extraordinary circumstances that would justify its failure to submit the document while the case was pending before the district director.

We agree with the Director's position. Because the identification of the responsible operator or carrier must be finally resolved by the district director before a case is referred to the OALJ, the regulations require that, absent extraordinary circumstances, all liability

[5] The miner testified that, as the owner of Brem Coal Company (employer), he excluded himself from workers' compensation coverage. Hearing Transcript at 39-40.

evidence must be submitted to the district director.[6] 20 C.F.R. §§725.407(d), 725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000).

On May 2, 2012, the district director issued a Schedule for the Submission of Additional Evidence, identifying employer as the responsible operator in this claim. Director's Exhibit 29. The district director informed the parties that they could submit additional documentary evidence relevant to liability, and could identify witnesses relevant to liability that the designated responsible operator intended to call if the case was referred to the OALJ, pursuant to 20 C.F.R. §725.414(b), (c). *Id*. at 6. Moreover, the district director stated that "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability, or testimony of a witness not identified at this stage of the proceedings, may be admitted into the record once a case is referred to the [OALJ]." *Id*. at 6-7, *citing* 20 C.F.R. §725.456(b)(1). Although employer responded to the Schedule for the Submission of Additional Evidence and disputed its status as the responsible operator, employer submitted no additional documentary evidence, nor did employer designate any liability witnesses. Director's Exhibit 31.

No party identified the miner as a potential hearing witness relevant to liability, or submitted the endorsement document, while this claim was pending before the district director. Therefore, this evidence could be considered only if the administrative law judge found "extraordinary circumstances" to justify its admission into the record. *See Weis v. Marfork Coal Co.*, 23 BLR 1-182, 1-191-92 (2006) (en banc) (McGranery & Boggs, JJ., dissenting). Neither the miner nor employer argued before the administrative law judge that their failure to comply with the regulation should be excused due to extraordinary circumstances, nor do they so argue before the Board. Thus, the endorsement document and the miner's hearing testimony relevant to the responsible operator issue were inadmissible, and cannot assist employer in contesting its designation as the responsible

[6] In addition, while the claim is before the district director, "all parties must notify the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator." 20 C.F.R. §725.414(c). In the absence of such notice, "the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator will not be admitted in any hearing conducted with respect to the claim unless the administrative law judge finds that the lack of notice should be excused due to extraordinary circumstances." 20 C.F.R. §725.414(c). The administrative law judge is obligated to enforce these limitations even if no party objects to the evidence or testimony. *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004) (holding that the evidentiary limitations set forth in the regulations are mandatory and, as such, are not subject to waiver).

operator. *See* 20 C.F.R. §§725.414(c), (d), 725.456(b)(1). We therefore affirm the administrative law judge's designation of employer as the responsible operator.[7]

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

Because the miner invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[8] 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. §718.305(d)(1)(i), (ii). The administrative law judge determined that employer failed to establish rebuttal by either method.

Employer argues that the administrative law judge erred in finding that it failed to prove that the miner did not suffer from clinical pneumoconiosis. In determining whether employer rebutted the existence of clinical pneumoconiosis, the administrative law considered eleven interpretations of five x-rays taken on September 29, 2011, February 9, 2012, April 18, 2012, June 8, 2012, and May 7, 2015. Although the administrative law judge found that the interpretations of the September 29, 2011, February 9, 2012, and May 7, 2015 x-rays were "in equipoise," he found that the April 18, 2012 and June 8, 2012 x-rays were positive for pneumoconiosis. Decision and Order at 37-38. The administrative

[7] Regardless of its admissibility, the Director accurately notes that the endorsement document does not explicitly refer to federal black lung coverage and therefore may have been limited to state workers' compensation liability in any event. Director's Brief at 4 n.2. The miner's hearing testimony, where he stated on two occasions that he was not excluded from federal black lung coverage, supports this view. Hearing Transcript at 39-40, 54. Moreover, we agree with the Director that, to the extent that the endorsement excluded the miner from federal black lung coverage, it would be contrary to law and therefore invalid. *Lovilia Coal Co. v. Williams*, 143 F.3d 317, 323 (7th Cir. 1998) (holding "that the very structure of the [the Black Lung Benefits Act] effectively requires that an insurance carrier provide benefits for all of a coal mine operator's black lung liability, and that the insurance carrier bears the burden of collecting proper premiums for all covered miners"); Director's Brief at 3-4.

[8] "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). Legal pneumoconiosis refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

law judge therefore found that the x-ray evidence did "not definitively establish that the [m]iner did not suffer from clinical pneumoconiosis." *Id.* at 38.

Employer argues that the administrative law judge erred in his consideration of the interpretations of the February 9, 2012 x-ray. Employer's Brief at 11. Although Dr. Alexander, a B reader and Board-certified radiologist, interpreted the February 9, 2012 x-ray as positive for pneumoconiosis, Claimant's Exhibit 3, two equally qualified physicians, Drs. DePonte and Wheeler, interpreted it as negative. Director's Exhibit 16; Employer's Exhibit 2. The administrative law judge accorded "no weight" to Dr. DePonte's x-ray interpretation. Decision and Order at 37.

As employer accurately notes, however, he failed to provide any basis for discrediting Dr. DePonte's interpretation. Consequently, the administrative law judge's analysis of the conflicting x-ray evidence does not comport with the requirements of the Administrative Procedure Act (APA), which provide that every adjudicatory decision must 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 on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Employer also contends that the administrative law judge erred in his consideration of the interpretations of the June 8, 2012 x-ray. Employer's Brief at 11-12. Dr. DePonte interpreted the x-ray as positive for pneumoconiosis; Dr. Wheeler interpreted it as negative. Claimant's Exhibit 2; Employer's Exhibit 1. The administrative law judge accorded "no weight" to Dr. Wheeler's interpretation because the doctor classified the film quality as a "3." Decision and Order at 37. We agree with employer that the administrative law judge erred in his consideration of Dr. Wheeler's x-ray interpretation. The regulations do not provide that an x-ray must be of optimal quality, only that it "be of suitable quality for proper classification of pneumoconiosis." 20 C.F.R. §718.102(a). Notably, Dr. Wheeler did not indicate that the film was unreadable.[9] Employer's Exhibit 1.

In light of the above-referenced errors, we vacate the administrative law judge's finding that employer failed to establish rebuttal by disproving the existence of clinical pneumoconiosis, and remand the case for further consideration. Moreover, we note that the administrative law judge failed to consider the medical opinion evidence relevant to the existence of clinical pneumoconiosis. *See Compton v. Island Creek Coal Co.*, 211 F.3d

[9] Dr. DePonte also classified the June 8, 2012 x-ray as having a film quality that was of less than optimal quality, giving the film a "2." Claimant's Exhibit 2. However, Dr. DePonte, like Dr. Wheeler, did not indicate that the x-ray was unreadable. *Id.*

203, 209 (4th Cir. 2000); Consequently, on remand, the administrative law judge must consider all of the relevant evidence and weigh the evidence as a whole to determine if employer has disproved the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B).[10]

In determining whether employer established rebuttal of the Section 411(c)(4) presumption on remand, the administrative law judge should first determine whether employer has established rebuttal at 20 C.F.R. §718.305(d)(1)(i) by disproving the presumed existence of both clinical *and* legal pneumoconiosis.[11] 20 C.F.R. §718.305(d)(1)(i)(A), (B); *see Minich*, 25 BLR at 1-159. 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. To establish that the miner's impairment was not legal pneumoconiosis, employer must demonstrate that the impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b).

If the administrative law judge determines that employer has failed to establish the absence of legal pneumoconiosis, he should then determine whether employer has disproven the presence of clinical pneumoconiosis arising out of coal mine employment at Section 718.305(d)(1)(i)(B). If the administrative law judge finds that employer has failed to rebut the existence of both legal and clinical pneumoconiosis in accordance with Section 718.305(d)(1)(i), 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

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[10] After the close of the formal hearing, claimant submitted a number of exhibits, including a postmortem tissue sample of the miner's right lung. Claimant's Exhibit 28. Although the administrative law judge summarized this evidence, he ultimately decided not to consider it, noting that employer did not have the opportunity to review the autopsy slides. Decision and Order at 3. Employer contends that the administrative law judge's review and summary of the excluded evidence was "extremely prejudicial," and asks that the case be remanded for a new hearing before a different administrative law judge. Employer's Brief at 6-7. We deny employer's request, as it cites no authority for its position nor does it cite any evidence of bias or prejudice in the administrative law judge's analysis. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992).

[11] The administrative law judge did not address whether employer established that the miner did not suffer from legal pneumoconiosis. Decision and Order at 38.

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."[12] 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 the miner did not have legal and clinical pneumoconiosis, or that the miner'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.

Benefits Augmentation

A miner's benefits may qualify for augmentation on behalf of a child if the requisite standards of relationship and dependency are met. *See* 20 C.F.R. §§725.201(c), 725.208, 725.209. For the purpose of augmenting the benefits of a miner, a child will be considered a dependent if the child is eighteen years or older and is a student. 20 C.F.R. §725.209(a). The term "student" refers to "an individual who is a 'full-time student' as defined in Section 202(d)(7) of the Social Security Act, 42 U.S.C. §402(d)(7) (see §§404.367-404.369 of this title)"[13] or "an individual under 23 years of age who has not completed 4 years of education beyond the high school level and who is regularly pursuing a full-time course of study or training" at a qualified institution. 20 C.F.R. §725.209(b)(1). A child does not cease to be a student during any interim period between school years, if that period does not exceed four months and the child has a "bona fide intention of continuing to pursue a full-time course of study or training." 20 C.F.R. §725.209(b)(3)(1).

On his application for benefits, the miner indicated that his adult daughter, born in 1992, was attending school. Director's Exhibit 2. The miner's daughter subsequently completed a "Student's Statement Regarding School Attendance," in which she indicated

[12] We note that, when evaluating the medical opinion evidence regarding rebuttal of the presumed fact of disability causation, the administrative law judge considered whether the physicians ruled out coal dust exposure as a cause of the miner's impairment. Decision and Order at 39. The proper inquiry is whether "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).

[13] Full-time attendance requires that the child be scheduled to attend school for at least twenty hours per week, unless an exception at 20 C.F.R. §404.367(c)(1)-(2) is met. 20 C.F.R. §404.367(c).

that she previously attended Alice Lloyd College from August 2010 to May 2011, was currently attending Southwest Virginia Community College (SWVCC) as a part-time student from August 2011 to May 2012, and intended to return to Alice Lloyd College from August 2012 until May 2013. Director's Exhibit 13. The registrar for Alice Lloyd College indicated that the miner's daughter was a full-time student from August 2012 to May 2013. Director's Exhibit 14. During the November 7, 2016 hearing, the miner testified that his daughter completed college, graduating "two years [ago] maybe," and that she transferred schools in order to graduate early. Hearing Transcript at 50-51.

The administrative law judge found that the miner was entitled to augmented benefits on behalf of his daughter:

> At the time of his application for benefits, the miner indicated that his daughter was a student. Documentation completed by the daughter shows she attended or planned to attend school from August 2010 through May 2013. However, while she indicated that she was not a full-time student, her school indicated that she was in attendance full-time. The [m]iner testified that he thought his daughter graduated from college about two years prior to the hearing. Therefore, [I] find the [m]iner's daughter was his dependent at the time he filed his application on December 12, 2011, and continued to be his dependent until December 31, 2014.

Decision and Order at 29 (Exhibit citations omitted).

We agree with employer that the administrative law judge failed to address discrepancies in the evidence regarding the miner's daughter's status and duration as a full time student. Although the registrar at Alice Lloyd College indicated that the miner's daughter was a full-time student there from August 2012 to May 2013, Director's Exhibit 14, the miner's daughter indicated that she was only a part-time student at SWVCC from August 2011 to May 2012. Director's Exhibit 13. Moreover, although the administrative law judge found the miner's testimony that his daughter graduated two years prior to the November 2016 hearing credible, the administrative law judge failed to reconcile it with the daughter's statement that she intended to attend school until May of 2013 and the miner's testimony that his daughter transferred schools in order to graduate early. Director's Exhibit 13; Hearing Transcript at 50-51. Because the administrative law judge failed to consider and weigh the conflicting evidence and failed to explain his findings in accordance with the APA, we vacate his determination that the miner was entitled to benefits augmentation from December 12, 2011 until December 31, 2014. *Wojtowicz*, 12 BLR at 1-165. If necessary, on remand, the administrative law judge should determine at

what times the miner's daughter was "regularly pursuing a full-time course of study" pursuant to 20 C.F.R. §725.209(b)(1) or was in an interim period between school years with "a bona fide intention of continuing to pursue a full-time course of study," pursuant to 20 C.F.R. §725.209(b)(3)(i).

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

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge