U.S. Department of Labor

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

BRB No. 15-0164 BLA

BILLY GENE ENGLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DAY BRANCH COAL COMPANY, INCORPORATED	)	DATE ISSUED: 02/09/2016
	)	
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 and Order Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizen's Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Jonathan P. Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-5088) of Administrative Law Judge Theresa C. Timlin rendered on a claim filed pursuant to the

provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on January 19, 2011.[1] The administrative law judge credited claimant with 23.68 years in underground coal mine employment,[2] based on the parties' stipulation and claimant's testimony.[3] The administrative law judge further found that claimant established that he has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Consequently, the administrative law judge found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4).[4] The administrative law judge further found that employer failed to rebut the presumption.[5] Accordingly, the administrative law judge awarded benefits.

[1] Claimant has filed four prior claims. His initial claim, filed on August 29, 1995, was finally denied on February 10, 1997. His second claim, filed on April 17, 1998, was finally denied on August 17, 1998. His third claim, filed on February 3, 2003, was finally denied on December 12, 2003. His fourth claim, filed on January 24, 2006, was finally denied on September 25, 2006, for failure to establish total respiratory disability. Director's Exhibits 1-4; Decision and Order at 2, 6.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

[3] Employer concedes that all of claimant's coal mine employment was underground. *See* Employer's Brief at 2; Decision and Order at 5.

[4] As part of the Patient Protection and Affordable Care Act, Public Law No. 111-148, Congress enacted amendments to the Black Lung Benefits Act (the Act), which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the miner worked at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those of an underground mine, and where a totally disabling respiratory impairment is established. 30 U.S.C. §921(c)(4). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725.

[5] The administrative law judge also found that a change in an applicable condition of entitlement was shown, as one of the elements previously adjudicated against claimant, namely total disability, was established pursuant to 20 C.F.R. §725.309.

On appeal, employer contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis. In response, claimant urges affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, responds that employer's arguments regarding rebuttal are meritless, and should be rejected.[6]

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 Assocs., Inc.*, 380 U.S. 359 (1965).

In order to rebut the Section 411(c)(4) presumption, employer must disprove the existence of clinical and legal pneumoconiosis,[7] or establish that "no part of the miner's

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). In light of this affirmance, we also affirm the administrative law judge's determination that claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of his prior claim became final. *See* 20 C.F.R. §725.309. Additionally, we affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 23.68 years in underground coal mine employment, that claimant established invocation of the rebuttable presumption at Section 411(c)(4), and that employer conceded the existence of clinical pneumoconiosis. *See* Decision and Order at 5, 7-8, 14, 23-24, 37; *Skrack*, 6 BLR at 1-711.

[7] The regulation at 20 C.F.R. §718.201(a)(1) provides that:

> "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

The regulation at 20 C.F.R. §718.201(a)(2) provides that:

> "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment.

disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *W.Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 25 BLR 2-431 (6th Cir. 2013); *see also Morrison v. Tenn. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015) (Boggs, J., concurring and dissenting). In this case, the administrative law judge found that employer failed to rebut the presumption under either of the methods available.

Employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. In order to disprove the presence of pneumoconiosis, however, employer must disprove the existence of both clinical *and* legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). In this case, the administrative law judge found that employer conceded the existence of clinical pneumoconiosis. Consequently, the administrative law judge found that employer was precluded from rebutting the presumption pursuant to Section 718.305(d)(1)(i) by disproving the existence of legal pneumoconiosis.[8] *See Minich*, BLR , BRB No. 13-0544 BLA, slip

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[8] We note that, normally, in determining whether employer has established rebuttal of the Section 411(c)(4) presumption, 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 legal *and* clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A), (B); *see Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 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 prong. *See Minich*, BLR , BRB No. 13-0544 BLA, slip op. at 10-11. 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 obstructive impairment is not legal pneumoconiosis. 20 C.F.R. §718.201(a)(2), (b); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000).

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 legal and clinical pneumoconiosis, he must consider whether employer has rebutted the presumed fact of total disability causation at

op. at 10-11; *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Further, because of employer's concession as to the existence of clinical pneumoconiosis, its only avenue for rebuttal is the second prong of 20 C.F.R. §718.305(d)(1), which requires employer to show that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge permissibly found that Dr. Broudy's opinion as to disability causation was "equivocal" based on his statement that he "may have" considered pneumoconiosis to be a contributing factor in claimant's pulmonary impairment if claimant's x-ray were interpreted as positive. Decision and Order at 35; *see Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-117 (6th Cir. 1995); *see also Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993). She also properly noted that Dr. Broudy did not diagnose claimant as having clinical pneumoconiosis. Decision and Order at 36; Employer's Exhibits 5 at 8-13, 6 at 11. Contrary to the administrative law judge's finding, Dr. Bellotte failed to find the existence of clinical pneumoconiosis. The administrative law judge, therefore, permissibly discredited Dr. Broudy's opinion that clinical pneumoconiosis did not cause claimant's total respiratory disability. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Consequently, the administrative law judge properly found that employer failed to rebut the presumption of disability causation. 20 C.F.R. §718.305(d)(1)(ii). As the administrative law judge's determination is rational and supported by substantial evidence, it is affirmed. Hence, we

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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). In a recent decision, the United States Court of Appeals for the Fourth Circuit held that the "no part" standard is valid, and that it requires the party opposing entitlement to "rule out" any connection between pneumoconiosis and the miner's total disability. *W.Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-446 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); *Minich*, BLR , BRB No. 13-0544 BLA, slip op. at 10-11. slip op. at 11 (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 pneumoconiosis."). If employer proves that claimant does not have legal and clinical pneumoconiosis, or that claimant's disabling obstructive 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); *see Morrison v. Tenn. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

affirm the administrative law judge's conclusion that employer failed to establish rebuttal of the Section 411(c)(4) presumption under either available method of rebuttal. 20 C.F.R. §718.305(d)(1)(i), (ii).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge