U.S. Department of Labor

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

BRB No. 15-0197 BLA

GARY W. WELCH SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 02/11/2016
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 Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: BOGGS, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-5579) of Administrative Law Judge Drew A. Swank, rendered on a miner's claim filed on November 9, 2010, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). The administrative law judge credited claimant with sixteen

years of underground coal mine employment,[1] and found that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)(2012),[2] that he is totally disabled due to pneumoconiosis. The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant has a totally disabling respiratory or pulmonary impairment, and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption.[3] Employer also contends that the administrative law judge erred in finding that employer did not rebut the presumption. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has responded to employer's 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. 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 argues that the administrative law judge erred in finding that claimant established that he is totally disabled, pursuant to 20 C.F.R. §718.204(b)(2), and thus erred in finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); Employer's Brief at 6 n.4.

[1] Claimant's coal mine employment was in West Virginia. Hearing Transcript at 26. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] If a miner establishes fifteen or more years of underground or substantially similar coal mine employment and the existence of a totally disabling respiratory or pulmonary impairment, Section 411(c)(4) provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. § 921(c)(4)(2012); *see* 20 C.F.R. §718.305.

[3] We affirm the administrative law judge's unchallenged determination that claimant had sixteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-5.

Specifically, employer contends that the administrative law judge based his finding of total disability solely on the pulmonary function study evidence, without considering the arterial blood gas study evidence and medical opinion evidence, and without weighing the evidence supportive of total disability against the contrary probative evidence. Employer argues, therefore, that the administrative law judge failed to comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), which requires that the administrative law judge consider all relevant evidence, render findings on all material issues of fact or law, and set forth the rationale underlying his findings.

After reviewing the arguments on appeal, the administrative law judge's findings, and the relevant evidence, we affirm the administrative law judge's determination that claimant established total disability under 20 C.F.R. §718.204(b)(2). The administrative law judge considered the pulmonary function study evidence, pursuant to 20 C.F.R. §718.204(b)(2)(i), accurately noted that all six studies were qualifying,[4] and found that claimant established the existence of a totally disabling respiratory or pulmonary impairment. Decision and Order at 14-15. Although employer correctly points out that the administrative law judge failed to consider the blood gas study evidence and medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iv), *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), employer has not explained how consideration of that evidence would alter the administrative law judge's finding.[5] *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how "error to which [it] points could have made any difference"). The record contains three resting blood gas studies, all of which were non-qualifying, a qualifying exercise blood gas study performed by Dr. Rasmussen, and a non-qualifying exercise study performed by Dr. Zaldivar.[6] Director's Exhibit 9; Employer's Exhibits 1, 3. However, Drs. Rasmussen, Zaldivar and Castle, the three physicians who provided medical opinions, all agreed that claimant is totally disabled based on his pulmonary function studies, regardless of the presence of non-qualifying blood gas studies. Director's

[4] A qualifying pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[5] There is no evidence in the record of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(iii).

[6] A qualifying blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

Exhibit 9 at 3; Employer's Exhibit 1 at 3; Employer's Exhibit 3 at 11. All three physicians understood that claimant's coal mine employment required him to perform heavy labor,[7] and all three opined that he is totally disabled based on the pulmonary function testing, which they all agreed showed a severe obstructive impairment and a moderate reduction in diffusing capacity.[8] Director's Exhibit 9 at 2-3; Employer's Exhibit 1 at 2-3; Employer's Exhibit 3 at 10-11. In light of the administrative law judge's proper determination that the pulmonary function studies support a finding of total disability, and the unanimous opinion among the physicians that the pulmonary function studies demonstrate that claimant is disabled from performing his usual coal mine employment, we affirm the administrative law judge's finding of total disability. *See* 20 C.F.R. §718.204(b)(2). Consequently, we also affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

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

If a claimant invokes the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden of proof shifts to the employer to rebut the presumption by

[7] Claimant's last coal mine employment was as a helper on the miner. Director's Exhibit 3; Hearing Tr. at 16. Drs. Rasmussen and Castle were both aware that that was claimant's last coal mine employment, and that it involved heavy labor. Director's Exhibit 9 at 2; Employer's Exhibit 6 at 6-7. Although Dr. Zaldivar indicated that he was unsure whether working as a miner helper was claimant's last coal mine employment, he stated that he knew that claimant had worked as a helper, and that the position required heavy labor. Employer's Exhibit 5 at 7.

[8] The record reflects that, to the extent the physicians relied on the blood gas studies, the physicians did not indicate that those studies supported a determination that claimant is not totally disabled. The exercise study performed by Dr. Rasmussen was qualifying, and he observed "[m]arked impairment in oxygen transfer during very light exercise." Director's Exhibit 9. Although the studies performed by Dr. Zaldivar were not qualifying, he noted the drop in PO_2 with exercise and concluded that claimant's "severe airway obstruction . . . is causing the blood gases to become abnormal because of ventilation and perfusion mismatch and diffusion impairment." Employer's Exhibit 1 at 2; Employer's Exhibit 5 at 18. Similarly, Dr. Castle noted a decrease in claimant's PO_2 with exercise, and concluded that it was due to "tobacco smoke induced pulmonary emphysema with ventilation/perfusion mismatching and diffusion abnormality occurring due to that process." Employer's Exhibit 3 at 10-11.

establishing that the claimant has neither clinical nor legal pneumoconiosis,[9] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part" of the claimant's totally disabling impairment was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). In this case, the administrative law judge found that employer failed to rebut the Section 411(c)(4) presumption by either method. Employer argues that the administrative law judge erred in making that finding.

The administrative law judge began his analysis of the elements of entitlement by considering whether claimant could prove that he had pneumoconiosis pursuant to 20 C.F.R. §718.202(a), which permits a finding of pneumoconiosis on the basis of chest x-ray evidence, biopsy or autopsy evidence, invocation of a presumption at 20 C.F.R. §§718.304 or 718.305, or medical opinion evidence. *See* 20 C.F.R. §718.202(a)(1)-(4); Decision and Order at 7-9. Crediting Dr. Meyer's negative interpretation of a January 2, 2013, x-ray over Dr. Rasmussen's positive interpretation of a July 19, 2011, x-ray, because of Dr. Meyer's dual qualifications as a Board-certified radiologist and B reader, the administrative law judge found that claimant "has *not proven by a preponderance* of the [chest x-ray] evidence that he has coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)." Decision and Order at 9-11 (emphasis in original). After noting that there was no autopsy or biopsy evidence in the record, pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge proceeded to 20 C.F.R. §718.202(a)(3) and, as discussed above, found that claimant was totally disabled and, pursuant to 20 C.F.R. §718.305, could invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Decision and Order at 11-15. The administrative law judge concluded that "the presence of legal coal workers' pneumoconiosis is established by the operation of that presumption." *Id*. at 15.

The administrative law judge then considered whether employer could rebut the Section 411(c)(4) presumption, but determined that "the issue of whether [c]laimant has coal workers' pneumoconiosis was determined" earlier in his decision, and thus concluded that "the single issue to be determined [in his rebuttal analysis] is whether [c]laimant's total disability arises from his coal workers' pneumoconiosis due to his past coal mine employment." Decision and Order at 16-17. After weighing the opinion of Dr.

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

Rasmussen, who concluded that claimant's coal mine dust exposure "contributed significantly" to his impairment, and those of Drs. Zaldivar and Castle, both of whom attributed claimant's impairment only to his smoking history, the administrative law judge discredited all of the physicians' opinions and found that "[e]mployer has not rebutted the legal presumption that coal workers' pneumoconiosis is a 'substantially contributing cause' to [c]laimant's total pulmonary or respiratory disability[.]" *Id*. at 17-20. Having determined that employer failed to rebut the Section 411(c)(4) presumption, the administrative law judge awarded benefits. *Id*. at 20-21.

We agree with employer that the administrative law judge erred by failing to address whether employer rebutted the Section 411(c)(4) presumption by disproving the existence of both clinical and legal pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(i). Employer's Brief at 6-13. After finding that claimant invoked the presumption, the administrative law judge concluded that "the presence of legal coal workers' pneumoconiosis is established by the operation of that presumption," Decision and Order at 15, and then moved on to what he believed was "the single issue to be determined": whether claimant's total disability is due to his pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 16-17.

As an initial matter, the administrative law judge did not make a proper finding on the existence of clinical pneumoconiosis. Although he determined earlier in his decision that claimant failed to establish the existence of clinical pneumoconiosis through x-ray, autopsy, or biopsy evidence, pursuant to 20 C.F.R. §718.202(a)(1), (2), he did not consider the medical opinion evidence, pursuant to 20 C.F.R. §718.202(a)(4). Dr. Rasmussen opined that claimant has clinical pneumoconiosis, and Drs. Zaldivar and Castle concluded that he does not have the disease. Director's Exhibit 9; Employer's Exhibit 1 at 3; Employer's Exhibit 3 at 11. The administrative law judge should have weighed the medical opinion evidence, together with all of the other relevant evidence, to determine whether employer established that claimant does not have clinical pneumoconiosis.[10] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-11, 22 BLR 2-162, 2-169-74 (4th Cir. 2000); Decision and Order at 9-11.

[10] Employer argues further that the administrative law judge failed to consider a negative reading of a digital x-ray that employer submitted as "other medical evidence" pursuant to 20 C.F.R. §718.107. Employer's Brief at 10; Employer's Exhibit 3; *see* Administrative Law Judge Exhibit 2 at 8 (Employer's Evidence Summary Form). On remand, the administrative law judge should initially address the admissibility of the digital x-ray reading, and consider it, as appropriate, in determining whether employer has established that claimant does not have clinical pneumoconiosis.

Moreover, the administrative law judge effectively applied the wrong standard in his rebuttal analysis by incorporating his earlier weighing of the x-ray evidence, in which he placed the burden on claimant to establish the existence of clinical pneumoconiosis. Decision and Order at 11, 17. Rebuttal of the Section 411(c)(4) presumption, however, places the burden on employer to disprove the existence of pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *E. Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 506 (4th Cir. 2015). Thus, as a general rule, it is more logical for the administrative law judge to determine first whether a claimant is entitled to the Section 411(c)(4) presumption of pneumoconiosis, and only then to make any necessary findings regarding the existence of clinical and legal pneumoconiosis, bearing in mind which party bears the burden of proof. *See Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA, slip op. at 9 n.11 (Apr. 21, 2015).

The administrative law judge also erred in concluding that "the presence of legal coal workers' pneumoconiosis is established by the operation of [the Section 411(c)(4)] presumption," and thereafter failing to consider the evidence regarding the existence of legal pneumoconiosis. Decision and Order at 15-17. Invocation of the presumption does not conclusively establish the existence of legal pneumoconiosis; its existence is presumed, but employer has the opportunity to rebut the presumption. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d); *Toler*, 805 F.3d at 506. Drs. Zaldivar and Castle both concluded that claimant does not have legal pneumoconiosis. If credited, their opinions would be sufficient to establish that claimant does not have legal pneumoconiosis. *See Minich*, BRB No. 13-0544 BLA, slip op. at 10; Employer's Exhibit 1 at 3; Employer's Exhibit 3 at 11.

For all of these reasons, we vacate the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis, and remand this case for further consideration. Consequently, we must also vacate the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by proving that no part of claimant's total disability was caused by pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(ii).[11] Whether a totally

[11] In his rebuttal analysis under 20 C.F.R. §718.305(d)(1)(ii), the administrative law judge repeatedly invoked the "substantially contributing cause" disability causation standard set forth at 20 C.F.R. §718.204(c), and concluded that "[c]laimant has proven that his coal workers' pneumoconiosis is a 'substantially contributing cause' of his total disability." Decision and Order at 17-20. Ordinarily, a claimant seeking to establish entitlement to benefits under 20 C.F.R. Part 718 must prove that pneumoconiosis is a substantially contributing cause of the claimant's disabling impairment. 20 C.F.R. §718.204(c). Upon invocation of the Section 411(c)(4) presumption, however, the burden on this issue shifts to the employer, and the standard of proof is more demanding:

disabled miner's impairment is due to pneumoconiosis is naturally linked to the antecedent issue of whether the miner has pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). Thus, when a claimant has invoked the Section 411(c)(4) presumption, an administrative law judge must first determine whether the employer has rebutted the presumption by disproving the existence of both clinical and legal pneumoconiosis before addressing the second rebuttal method, if necessary, and determining whether the employer has proven that no part of the claimant's total disability is due to pneumoconiosis. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 141 (4th Cir. 2015) (observing that an employer is required to "rule out" any connection between pneumoconiosis and a miner's disability only when a claimant has invoked the Section 411(c)(4) presumption and the employer "cannot satisfy the first method of rebuttal under Section 718.305(d), namely, disproving the presence of pneumoconiosis"); *Minich*, BRB No. 13-0544 BLA, slip op. at 10-11.

The Board's decision in *Minich* laid out the proper framework for the administrative law judge's analysis at the rebuttal stage:

> The administrative law judge should begin his analysis at [20 C.F.R. §] 718.305(d)(1)(i)(A) by considering all relevant and credible evidence to determine whether employer has proved that claimant does not have legal pneumoconiosis, as defined in 20 C.F.R. §718.201(a)(2). Even if legal pneumoconiosis is found to be present, the administrative law judge must determine whether employer has disproved the existence of clinical pneumoconiosis arising out of coal mine employment at [20 C.F.R. §] 718.305(d)(1)(i)(B), as both of these determinations are important to satisfy the statutory mandate to consider all relevant evidence pursuant to 30 U.S.C. §923(b), and to provide a framework for the analysis of the credibility of the medical opinions at [20 C.F.R. §] 718.305(d)(1)(ii)," the second rebuttal prong.

Minich, BRB No. 13-0544 BLA, slip op. at 10-11. The Board added that where, as in this case, the administrative law judge performed an incomplete evaluation of the evidence relevant to the existence of clinical pneumoconiosis, with the burden of proof

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employer must prove that "no part" of claimant's total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 143 (4th Cir. 2015).

improperly on claimant, "on remand, the administrative law judge must address and weigh all evidence relevant to the issue, including the medical opinion evidence, with the burden on employer." *Minich*, BRB No. 13-0544 BLA, slip op. at 11. Finally, the Board held that:

> If employer proves that claimant does not have legal and clinical pneumoconiosis, employer has rebutted the Section 411(c)(4) presumption at [20 C.F.R. §] 718.305(d)(1)(i), and the administrative law judge need not reach the issue of disability causation. If employer fails to rebut the

> presumption at [20 C.F.R. §] 718.305(d)(1)(i), the administrative law judge must determine whether employer is able to rebut the presumed fact of disability causation at [20 C.F.R. §] 718.305(d)(1)(ii) with credible proof that no part, not even an insignificant part, of claimant's pulmonary or respiratory disability was caused by either legal or clinical pneumoconiosis.

Minich, BRB No. 13-0544 BLA, slip op. at 10-11; *see also Bender*, 782 F.3d at 143-44.

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.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge