U.S. Department of Labor

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

BRB No. 16-0280 BLA

GARY D. FOSTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TERRY EAGLE COAL COMPANY, LLC	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 02/09/2017
	)	
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 Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Kathy L. Snyder and Andrea L. Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2013-BLA-5298) of Administrative Law Judge Drew A. Swank 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 miner's claim filed on March 1, 2012.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with fifteen or more years of qualifying coal mine employment,[2] and found that claimant established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief.[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.[4] 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).

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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 a claimant establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] The administrative law judge found that claimant has 20.64 years of coal mine employment, based on the totality of the evidence. Decision and Order at 4.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established fifteen or more years of qualifying coal mine employment, total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and invocation of the rebuttable presumption of total disability due to pneumoconiosis under the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

Because 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 has neither legal nor clinical pneumoconiosis,[5] or by 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)(i), (ii). In this case, the administrative law judge found that employer failed to rebut the Section 411(c)(4) presumption. Employer contends 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 has 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 5-10. After finding that claimant failed to establish the existence of pneumoconiosis through x-ray or biopsy evidence at 20 C.F.R. §718.202(a)(1), (2), the administrative law judge considered 20 C.F.R. §718.202(a)(3) and, as discussed above, found that claimant is 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 9-12, 19.

The administrative law judge found that because claimant invoked the Section 411(c)(4) presumption, "[c]laimant has therefore proven the existence of legal coal workers' pneumoconiosis." Decision and Order at 19. The administrative law judge further stated that, "[a]s the issue of whether [c]laimant has coal workers' pneumoconiosis was determined . . . the single issue to be determined is whether [claimant's] total disability arose from his coal workers' pneumoconiosis due to his past coal mine employment." Decision and Order at 20-21.

The administrative law judge considered the opinions of Drs. Zaldivar and Bellotte on the issue.[6] Both doctors opined that claimant does not have legal or clinical

[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).

[6] The administrative law judge also discussed Dr. Rasmussen's opinion that claimant's disabling pulmonary impairment is due to a combination of coal mine dust

pneumoconiosis, but suffers from a disabling impairment due to smoking, asthma, and obesity, unrelated to coal dust exposure. Director's Exhibit 21; Employer's Exhibits 4, 11, 12, 15, 16. The administrative law judge determined that their opinions were not sufficient to rebut the presumption because "[a]ll of the experts agree to some extent that [c]laimant's asthma contributes to his pulmonary impairment." Decision and Order at 23. Referencing the inclusion of asthma and emphysema as chronic obstructive pulmonary diseases in the preamble to the regulations,[7] the administrative law judge found that, "[d]espite [Dr. Zaldivar's and Dr. Bellotte's] attempts to dispute the connection between asthma and coal mine dust exposure, . . . [p]er the [*p*]*reamble*, [c]laimant's asthma is linked in a substantial way to his coal mine dust exposure . . . ." *Id.* Thus, the administrative law judge found that employer did not rebut the Section 411(c)(4) presumption by disproving the causal relationship between claimant's respiratory disability and his presumed legal pneumoconiosis. *Id.*

Employer asserts that the administrative law judge erred in failing to determine whether employer disproved the existence of legal pneumoconiosis. Employer's Brief at 4-5. Employer further contends that the administrative law judge did not apply the correct legal standard in finding that employer failed to rebut the presumed fact of disability causation. *Id.* at 5-11. Employer's contentions have merit.

Initially, as employer asserts, the administrative law judge erred in failing to address whether employer disproved the existence of legal pneumoconiosis by showing that claimant does not have a respiratory condition that is significantly related to, or

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exposure and cigarette smoking, Director's Exhibit 10, and Dr. Gaziano's opinion that pneumoconiosis and cigarette smoking contributed to claimant's impairment, Claimant's Exhibit 10. Dr. Gaziano opined that asthma was claimant's primary impairment. *Id.*

[7] In particular, the administrative law judge noted that, in relevant part, the preamble states:

> The term "chronic obstructive pulmonary disease" (COPD) includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema and asthma. Airflow limitation and shortness of breath are features of COPD, and lung function testing is used to establish its presence. Clinical studies, pathological findings, and scientific evidence regarding the cellular mechanisms of lung injury link, in a substantial way, coal mine dust exposure to pulmonary impairment and chronic obstructive lung disease.

Decision and Order at 23.

substantially aggravated by, coal dust exposure. *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 154-56 (2015) (Boggs, J., concurring and dissenting); Employer's Brief at 18-20. The administrative law judge also failed to make a proper finding on the existence of clinical pneumoconiosis.[8]

Further, the administrative law judge applied an incorrect standard in addressing the issue of whether employer disproved the presumed fact of disability causation. Pursuant to 20 C.F.R. §718.305(d)(ii), the correct standard to be applied with respect to causation is whether employer established 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. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *Minich*, 25 BLR at 154-56.

Under the facts of this case, the administrative law judge's use of an incorrect rebuttal standard is not harmless error.[9] The administrative law judge did not sufficiently explain his analysis of the medical opinion evidence to allow us to discern the extent to which the administrative law judge's reliance on an incorrect rebuttal standard affected

[8] The administrative law judge determined earlier in his decision that claimant did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), (2), but the administrative law judge did not consider the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 9-10. Moreover, the administrative law judge should have determined whether employer affirmatively established that claimant does not have clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B), not whether claimant established the existence of the disease.

[9] We note that, on its face, the administrative law judge's blanket rejection of the opinions of Drs. Zaldivar and Bellotte as contrary to the preamble cannot be affirmed. In evaluating expert medical opinions, an administrative law judge may consult the preamble as a statement of medical studies found credible by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-264-65 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314, 25 BLR 2-115, 2-130 (4th Cir. 2012). However, as employer asserts, an administrative law judge must not use the preamble as a legal rule or presumption that all obstructive lung disease is pneumoconiosis. *See Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32; Employer's Brief at 6. Rather, whether a particular miner's COPD or asthma arose out of dust exposure in coal mine employment must be determined on a case-by-case basis, in light of the administrative law judge's consideration of the evidence of record. *See* 65 Fed. Reg. 79,920, 79,938 (Dec. 20, 2000); *Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32.

his credibility determinations. We, therefore, vacate the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(i), (ii) and his award of benefits.

On remand, the administrative law judge should begin his analysis by considering whether employer disproved the existence of legal pneumoconiosis by affirmatively establishing that claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8. The administrative law judge also must determine whether employer has affirmatively established that claimant does not have clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(B); *Minich*, 25 BLR at 154-56.

If, on remand, the administrative law judge finds that employer has disproved the existence of both 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 has rebutted the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii) with credible proof that "no part of [claimant's] total disability was caused by pneumoconiosis as defined in [Section] 718.201." 20 C.F.R. §718.305(d)(1)(ii).

Moreover, when considering all the relevant medical opinion evidence of record, 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.[10] *See*

[10] Employer argues that the administrative law judge mischaracterized the opinions of Drs. Zaldivar and Bellotte. The administrative law judge found that "[Dr. Zaldivar] testified how he disagreed with the [*p*]*reamble* to the regulations linking asthma and COPD to each other and to coal mine dust exposure." Decision and Order at 22, *citing* Employer's Exhibit 11 at 20. Contrary to the administrative law judge's characterization, at a November 2, 2015 deposition, Dr. Zaldivar testified that "it is true that asthma is a form of COPD, but that doesn't mean that every COPD is asthma." Employer's Exhibit 11 at 20. Dr. Zaldivar further testified that "[i]t doesn't mean that every asthma is COPD either[,] because some people actually reverse completely, and they don't have COPD with asthma." *Id*. Thus, Dr. Zaldivar did not disagree with the Department of Labor's recognition that COPD, including asthma, can be related to coal mine dust exposure.

Milburn Colliery Co. v. Hicks, 138 F.3d 524, 533, 21 BLR 2-323, 2-235 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). In so doing, the administrative law judge should set forth his findings on remand in detail, including the underlying rationale of his decision, as required by the Administrative Procedure Act,[11] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

With regard to Dr. Bellotte's opinion, the administrative law judge found that "[Dr. Bellotte] further testified that [asthma] is separate and distinct from COPD, and that the [*p*]*reamble* to the regulations is incorrect to combine COPD and asthma as being part of the same disease process." Decision and Order at 22, *citing* Employer's Exhibit 12 at 19-20. At a November 4, 2015 deposition, Dr. Bellotte testified that asthma is "distinct from chronic obstructive pulmonary diseases, which are chronic bronchitis and emphysema, because this is reversible and those are essentially not reversible." Employer's Exhibit 12 at 19. Dr. Bellotte also agreed that "since the preamble was issued, the medical community has actually separated out asthma from the other two entities." *Id*. at 20. Further, Dr. Bellotte indicated that coal mine dust exposure did not cause asthma. *Id*. at 22. Thus, we reject employer's assertion that the administrative law judge mischaracterized Dr. Bellotte's opinion.

[11] The Administrative Procedure Act provides that every adjudicatory decision must include 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).

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 proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge