U.S. Department of Labor

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

BRB No. 17-0193 BLA

CHARLES M. BLANKENSHIP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MINGO LOGAN COAL COMPANY	)	DATE ISSUED: 02/28/2018
	)	
and	)	
	)	
ARCH COAL, INCORPORATED	)	
	)	
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 Carrie Bland, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-05473) of Administrative Law Judge Carrie Bland, rendered on a subsequent claim filed on June 12, 2013,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant established at least twenty-two years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. Thus, she found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c),[2] and invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

[1] Claimant filed three prior claims, each of which was denied by the district director. Director's Exhibits 1-3.

[2] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's last claim, filed on October 1, 2010, was denied by the district director on May 16, 2011, because the evidence was insufficient to establish total disability. Director's Exhibit 5. Consequently, claimant had to submit new evidence establishing that he is totally disabled in order to obtain a review of his subsequent claim on the merits. 20 C.F.R. §725.309(c)(3), (4).

[3] Pursuant to Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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); 20 C.F.R. §718.305. Employer does not contest the administrative law judge's findings that claimant established: at least twenty-two years of underground coal mine employment, a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and invocation of the Section 411(c)(4) presumption. Decision and Order at 6, 21-22. Those findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer contends that the administrative law judge applied the wrong legal standard in finding that it did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested to do so by the Board.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[5] 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); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-698 (4th Cir. 2015); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 29-30.

We affirm, as unchallenged on appeal, the administrative law judge's finding that employer did not disprove the existence of clinical pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). However, we agree with employer that the

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

[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).

administrative law judge applied the wrong legal standard in considering whether the evidence was sufficient to establish that claimant does not have legal pneumoconiosis.[6]

In addressing whether employer disproved legal pneumoconiosis, the administrative law judge found that: "Employer has not met its burden to establish that [claimant's] disabling respiratory impairment is not due, at least in part, to pneumoconiosis or exposure to coal mine dust. In order to meet this burden, [employer] *must affirmatively rule out a causal relationship between* [*claimant's*] *disabling respiratory impairment and his coal mine employment*." Decision and Order at 24 (emphasis added). The administrative law judge specifically rejected Dr. Rosenberg's opinion that claimant does not have legal pneumoconiosis, finding his conclusions, "*on their face*," insufficient "*to rule out* [claimant's] significant history of coal mine dust exposure as a factor in his disabling respiratory impairment." Decision and Order at 25 (emphasis added). Weighing Dr. Castle's opinion on the issue of legal pneumoconiosis, the administrative law judge likewise found that it "*does not rule out any contribution by* [*claimant's*] *significant history of coal mine dust exposure*." Decision and Order at 28 (emphasis added). Thus, the administrative law judge concluded that the opinions of Drs. Rosenberg and Castle did not satisfy employer's burden of proof pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).

Contrary to the administrative law judge's analysis, employer is not required to "rule out" any contribution from coal dust exposure to claimant's respiratory disease or impairment in order to disprove the existence of legal pneumoconiosis.[7] The proper

[6] Employer's failure to disprove clinical pneumoconiosis precludes rebuttal under the first method. 20 C.F.R. §718.305(d)(1)(i). The administrative law judge is required nonetheless to make a finding as to whether employer disproved legal pneumoconiosis as that finding is relevant to whether employer established the second method of rebuttal by proving that "no part of [claimant'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) (emphasis added).

[7] The "rule out," or "no part," standard applies only to the second method of rebuttal relating to disability causation. 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 502, 25 BLR 2-713, 2-716 (4th Cir. 2015); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge at times in her analysis combined the issues of legal pneumoconiosis and disability causation to such an extent that we are unable to discern if she was aware of the correct standards for each rebuttal method. Thus, we are compelled to remand this case for further consideration without reaching her specific credibility determinations.

inquiry is whether employer has shown by a preponderance of the evidence that claimant does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see Minich*, 25 BLR at 1-159.

Based on the administrative law judge's application of the wrong legal standard in considering whether employer disproved legal pneumoconiosis, we vacate her finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. On remand, the administrative law judge is instructed to consider 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 must then determine whether employer has rebutted the presumed fact of disability causation with credible proof that "no part of [claimant's] total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Minich*, 25 BLR at 1-159.

Accordingly, the 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

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge