U.S. Department of Labor

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

BRB No. 17-0254 BLA

EDDIE D. BRYANT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TRAVIS TRUCKING, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 02/22/2018
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe, Williams & Reynolds), Norton, Virginia, for claimant.

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

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2016-BLA-05305) of Administrative Law Judge Drew A. Swank awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on October 23, 2013.

The administrative law judge credited claimant with 23.93 years of qualifying coal mine employment,[1] and found that the evidence established that he suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption,[2] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further determined that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that it is the responsible operator. Employer further argues that the administrative law judge erred in finding that claimant had over fifteen years of qualifying coal mine employment, and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, agreeing with

[1] Claimant's coal mine employment was in West Virginia. Director's Exhibit 4. 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] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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 impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

employer that the case must be remanded for reconsideration of the responsible operator issue, because the administrative law judge did not make a specific finding as to whether employer employed claimant for a cumulative period of not less than one year.[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. 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

Employer, Travis Trucking, Incorporated (Travis Trucking), initially challenges its designation as the responsible operator. The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e), one of which is that the operator must have employed the miner for a cumulative period of not less than one year.

Although the administrative law judge noted this requirement, he did not make any findings to support a determination that Travis Trucking satisfied it. The administrative law judge instead summarily concluded that, "[b]ased on the totality of the evidence, . . . [Travis Trucking] is the properly identified responsible operator." Decision and Order at 4-5. The administrative law judge's analysis 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."[4] 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). We therefore vacate the administrative law judge's finding that Travis Trucking is the

[3] Because employer does not challenge the administrative law judge's finding that the evidence established that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983)

[4] Although the Director, Office of Workers' Compensation Programs, asserts that the record contains substantial evidence to support a finding that Travis Trucking employed claimant for at least one year, he agrees that a "remand is necessary to allow the [administrative law judge] to consider the issue and relevant evidence." Director's Brief at 3.

responsible operator, and remand the case for further consideration.

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

Employer next argues that the administrative law judge erred in determining that claimant had sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption. To invoke the presumption, claimant must establish that he had at least fifteen years of "employment in one or more underground coal mines," or coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

The administrative law judge credited claimant with 23.93 years of above-ground coal mine employment. Decision and Order at 4. He subsequently found, without further analysis, that claimant's "above-ground coal mining employment is sufficient for invoking the [Section 411(c)(4) presumption]." *Id*. at 11. He did not make any specific findings regarding whether the miner's coal mine work occurred in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(2). Consequently, we vacate the administrative law judge's determination that claimant established the requisite fifteen years of qualifying coal mine employment for invocation of the Section 411(c)(4) presumption. On remand, the administrative law judge is instructed to make specific findings regarding whether the miner was regularly exposed to coal-mine dust during his 23.93 years of above-ground coal mine employment.[5] 20 C.F.R. §718.305(b)(2). Because we have vacated the administrative law judge's finding of fifteen years of qualifying coal mine employment, we also vacate his finding that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

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

In the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, in the event that the administrative law judge again finds the Section 411(c)(4) presumption invoked. If claimant invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to

[5] Because employer does not challenge the administrative law judge's finding regarding the length of claimant's coal mine employment, the administrative law judge's finding of 23.93 years of coal mine employment is affirmed. *Skrack*, 6 BLR at 1-711.

employer to rebut the presumption by establishing that claimant does not have either legal or clinical pneumoconiosis,[6] 20 C.F.R. §718.305(d)(1)(i), 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)(ii).

Employer contends that the administrative law judge erred in finding that the presumption was not rebutted. In support of its argument, employer asserts that the administrative law judge erred by relying on the fact that claimant established invocation of the Section 411(c)(4) presumption as a means of establishing that claimant has legal pneumoconiosis, without independently considering whether employer disproved the existence of both legal and clinical pneumoconiosis. Employer's Brief at 9-12. We agree.

In this case, the administrative law judge did not consider whether employer rebutted the presumption by disproving the existence of legal and clinical pneumoconiosis,[7] because he found that the issue of whether claimant has pneumoconiosis was determined when he found that claimant invoked the Section 411(c)(4) presumption.[8] Decision and Order at 13. The administrative law judge,

[6] "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).

[7] The administrative law judge found only that the x-ray evidence did not carry claimant's burden of establishing the existence of coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that the record contained no biopsy evidence pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 7-10.

[8] We note that, on its face, the administrative law judge's blanket rejection of the opinions of Drs. Zaldivar and Basheda, as contrary to the preamble, cannot be affirmed. Decision and Order 19-20. In evaluating expert medical opinions, an administrative law judge may consult the preamble as a statement of medical science 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, an administrative law judge must not

therefore, stated that the sole issue to be determined by him was whether the presumed fact of disability causation was rebutted. *Id.* at 15. In making this determination, the administrative law judge stated that employer must establish that coal worker's pneumoconiosis is not a "substantially contributing cause" of claimant's total disability. *Id.* at 19. Thus, the administrative law judge did not apply the proper rebuttal standard set forth at 20 C.F.R. §718.305(d)(1)(ii) (employer must establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201."). Moreover, the administrative law judge conflated his determinations regarding the cause of claimant's respiratory impairment, namely whether it arises out of coal mine employment, with the cause of claimant's total respiratory disability, namely whether it is due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i), (ii).

In determining whether employer 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 Co.*, 25 BLR 1-149, 159 (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 method. *See Minich*, 25 BLR at 1-159. To establish that claimant's impairment is not legal pneumoconiosis, employer must demonstrate that it is more likely than not that the impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[9] 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

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use the preamble as a legal rule or presumption that all obstructive lung disease or asthma is pneumoconiosis. *See Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32.

[9] On remand, the administrative law judge must evaluate the credibility of the medical opinions in light of the physicians' qualifications, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

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 718.305,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 by proving that, more likely than not, "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); *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 claimant does not have legal and clinical pneumoconiosis, or that claimant'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.

The administrative law judge did not properly consider whether employer disproved the existence of legal and clinical pneumoconiosis pursuant to 20 C.F.R. §725.305(d)(1)(i)(A), (B) and did not apply the correct rebuttal standard at 20 C.F.R. §718.305(d)(1)(ii).[10] The administrative law judge's finding that the presumption was not rebutted is, therefore, vacated and the case is remanded for proper consideration under both methods of rebuttal, if necessary. 20 C.F.R. §718.305(d)(1)(i), (ii).

[10] Moreover, we note that because the administrative law judge did not first make an independent finding as to whether employer disproved the existence of legal and clinical pneumoconiosis, we cannot affirm his finding regarding disability causation. *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting).

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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge