U.S. Department of Labor

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

BRB No. 16-0186 BLA

LARRY L. STRAUB	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SUMMIT ANTHRACITE, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	DATE ISSUED: 01/17/2017
	)	
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 of Adele Higgins Odegard, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2014-BLA-05155) of Administrative Law Judge Adele Higgins Odegard awarding benefits on claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on January 14, 2013.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with 18.69 years of underground coal mine employment,[3] and noted that employer conceded that claimant has 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 rebuttable presumption set forth at Section 411(c)(4).[4] The administrative law judge also found that employer did not rebut the

[1] Claimant initially filed a claim for benefits on August 5, 2004. Director's Exhibit 1. In a Proposed Decision and Order dated June 3, 2005, the district director denied the claim because claimant failed to establish any element of entitlement. *Id.* At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a hearing. *Id.* However, claimant subsequently requested that his claim be withdrawn. Administrative Law Judge Ralph A. Romano dismissed the claim on February 10, 2006. *Id.* Claimant filed a second claim on June 11, 2007. Director's Exhibit 2. Administrative Law Judge Janice K. Bullard denied the claim on January 13, 2011 because claimant failed to establish a totally disabling respiratory or pulmonary impairment. *Id.* Claimant's subsequent appeal to the Board was dismissed as abandoned on November 14, 2011. *Id.*

[2] If a miner has fifteen or more years of underground or substantially similar coal mine employment and establishes that he has 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] Claimant's coal mine employment was in Pennsylvania. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Because employer conceded that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law

Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in crediting the miner with fifteen years of qualifying coal mine employment, and therefore erred in finding that the miner invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer 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, has not filed a response brief.[5]

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 the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Employer notes that the parties stipulated to the fact that claimant had twenty-one years of coal mine employment, and agreed that all of claimant's employment was aboveground. Employer's Brief at 4. Employer argues that, "[b]ased upon this factor," the administrative law judge should have found that claimant could not invoke the Section 411(c)(4) presumption. *Id.*

Although the parties may stipulate to facts before an administrative law judge, the stipulations are not binding if the administrative law judge disapproves them. *See* 29 C.F.R. §18.83(a). At the hearing, the parties stipulated that claimant has pneumoconiosis, is totally disabled, and has twenty-one years of coal mine employment. Further, in colloquy with the administrative law judge, they agreed that the employment

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judge found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), and that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

was aboveground.[6] However, claimant's counsel stated, "[c]laimant believes that he is entitled to the rebuttable presumption since his work, although it may have been above ground, was under dirty, dusty, physical conditions similar to underground mines." Hearing Transcript at 6-8. In her Decision and Order, the administrative law judge found that the record supported the stipulation of twenty-one years of coal mine employment, but credited claimant with 18.69 years of qualifying coal mine employment on the basis that claimant had testified without contradiction, at his prior hearing, that all of this work was underground. Decision and Order at 3, 5, 8-9; May 21, 2010 Hearing Transcript at 17-19, 24-25.

Employer does not contend that the administrative law judge erred in calculating the length of claimant's coal mine employment, and does not point to any evidence that claimant did not perform underground coal mine employment for 18.69 years. Moreover, although counsel, in colloquy with the administrative law judge, agreed that claimant's employment was aboveground, it does not appear that that agreement was part of the stipulation. Further, the administrative law judge had discretion to reject counsels' agreement, in the face of evidence to the contrary. We, therefore, affirm, the administrative law judge's determination that claimant established 18.69 years of qualifying coal mine employment.[7] Consequently, we also affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption.

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[6] After a discussion of employer's stipulations, during which the attorneys for both parties said that all of claimant's employment was aboveground, the administrative law judge asked claimant's attorney if she accepted the stipulations:

> JUDGE ODEGARD: All right. And I take it then, Ms. Koschoff, that you are amenable to the stipulations that Mr. Straub has pneumoconiosis and is totally disabled?
>
> MS. KOSCHOFF: Yes, your honor.
>
> JUDGE ODEGARD: And how about the stipulation of 21 years of coal mine employment?
>
> MS. KOSCHOFF: That's acceptable.
>
> JUDGE ODEGARD: Then, so stipulated. . . .

Hearing Transcript at 8.

[7] We note that even if the administrative law judge were bound by the parties'

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

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 the miner had neither legal nor clinical pneumoconiosis,[8] 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 [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii).

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agreement that all of claimant's coal mine employment was aboveground, employer's argument that the stipulation precluded a finding that claimant had sufficient qualifying coal mine employment to invoke the Section 411(c)(4) would lack merit for two reasons. First, a miner who has performed aboveground coal mine employment at a surface mine can still invoke the presumption if the miner worked "in conditions substantially similar to those in underground mines," pursuant to 20 C.F.R. §718.305(b)(1)(i), (2). Second, and more relevant here, "where a miner has worked aboveground at an underground coal mine, he need not demonstrate that the work conditions were substantially similar to conditions in an underground mine to have the benefit of the Section 411(c)(4) presumption." *See Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-28-29 (2011). There is evidence in this case that, aside from some of his work for employer, all of claimant's coal mine employment was at underground mines. Claimant worked for employer from 1989 to 2004. Director's Exhibits 6, 7. He testified in his previous claim that all of his coal mine employment prior to working for employer was underground, and that only during his last six or eight years with employer did he work aboveground. May 21, 2010 Hearing Transcript at 17-19, 24-25. As the administrative law judge noted, claimant indicated in his description of his job duties that some of his work for employer was underground: "Worked inside on Gangway, timbering, used Jackhammer to drill the cut (the coal and the rock)[.]" Decision and Order at 8; Director's Exhibit 7. Substantial evidence therefore supports the administrative law judge's finding of 18.69 years of qualifying coal mine employment.

[8] "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).

The administrative law judge accepted, as supported by the record, employer's concession at the hearing that claimant has pneumoconiosis, and thus found that employer was unable to rebut the presumption by disproving the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(i).[9] Decision and Order at 2 n.2, 10; Hearing Transcript at 7. The administrative law judge, therefore, considered whether employer could establish that no part of claimant's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis, pursuant to 20 C.F.R. §718.304(d)(1)(ii).

The administrative law judge considered the medical opinions of Drs. Rothfleisch, Kraynak, and Hertz. Dr. Rothfleisch opined that claimant is "severely impaired," and that his pneumoconiosis and chronic obstructive pulmonary disease (COPD) contributed equally to his impairment. Director's Exhibit 13. Likewise, Dr. Kraynak opined that claimant's pneumoconiosis was, at minimum, a "substantial contributing factor" in his disability, and testified during his deposition that claimant is totally disabled due to pneumoconiosis. Claimant's Exhibit 1; Claimant's Exhibit 3 at 15-16, 22. Although Dr. Hertz interpreted an x-ray as positive for pneumoconiosis, the doctor opined that smoking, rather than coal dust exposure, caused claimant's COPD and emphysema. Employer's Exhibit 1 at 12, 16, 19. However, on cross-examination, Dr. Hertz conceded that he "cannot exclude" pneumoconiosis as one of the causes of claimant's condition. *Id*. at 25.

Because Drs. Rothfleisch and Kraynak opined that pneumoconiosis contributed to claimant's disabling pulmonary impairment, and Dr. Hertz "conceded that [claimant's] pneumoconiosis could be a factor in his disabling impairment," the administrative law judge determined that the evidence did not establish that "no part" of claimant's disability was due to pneumoconiosis. Decision and Order at 15. The administrative law judge, therefore, found that the evidence did not establish rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(ii). *Id.*

Employer argues that the administrative law judge erred in her consideration of Dr. Hertz's opinion. We disagree. Employer acknowledges that Dr. Hertz testified that he could not exclude pneumoconiosis as one of the causes of claimant's disabling pulmonary impairment, but contends that Dr. Hertz's opinion was consistent with that of Dr. Kraynak, who, in employer's view, "agreed that the smoking history in and of itself

[9] We affirm, as unchallenged on appeal, the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have clinical or legal pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(i). *Skrack*, 6 BLR at 1-711.

could give rise to all of the claimant's pulmonary symptoms and his impairment." Employer's Brief at 5. Employer, therefore, argues that the administrative law judge "should have found that the greater weight of the evidence of record showed that the claimant failed to establish that his disabling pulmonary impairment was wholly caused by pneumoconiosis." *Id.* We disagree. As an initial matter, we note that upon claimant's invocation of the Section 411(c)(4) presumption, the burden was no longer on claimant, but on employer to rebut the presumption by establishing that "no part" of claimant's totally disabling impairment was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Moreover, employer misconstrues Dr. Kraynak's opinion as being consistent with Dr. Hertz's opinion, or supporting rebuttal of the presumption. Although Dr. Kraynak acknowledged during his deposition that claimant has a significant smoking history, and agreed that such a history could cause a very severe obstructive lung disease even in the absence of any coal dust exposure, the doctor clearly testified, on cross-examination, that claimant is totally disabled due to pneumoconiosis. Claimant's Exhibit 3 at 18-19, 22.

The administrative law judge properly found that Dr. Hertz's concession that he could not exclude pneumoconiosis as a cause of claimant's total disability was insufficient to support a finding that "no part" of claimant's pulmonary 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, 143-44, 25 BLR 2-689, 2-708-10 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-57 (2015) (Boggs, J., concurring & dissenting); Decision and Order at 25. We, therefore, affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, and affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge