U.S. Department of Labor

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

BRB No. 17-0175 BLA

DONALD R. BELL, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOUNTAIN LAUREL COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 01/23/2018
	)	
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 on Second Remand of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith, Charleston, West Virginia, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Barry H. Joyner (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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Second Remand (2011-BLA-05879) of Administrative Law Judge Paul C. Johnson, Jr., 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 August 18, 2010, and is before the Board for the third time.

In the initial decision, Administrative Law Judge Kenneth A. Krantz found that the x-ray evidence did not establish the existence of complicated pneumoconiosis.[1] Consequently, Judge Krantz found that claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] Judge Krantz found that claimant established 15.48 years of underground coal mine employment.[3] Judge Krantz also found that the evidence established that claimant had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Judge Krantz therefore found that claimant invoked the Section 411(c)(4) presumption that he was totally disabled due to pneumoconiosis. However, Judge Krantz found that employer rebutted the presumption by establishing that claimant did not have pneumoconiosis. Accordingly, Judge Krantz denied benefits.

[1] Administrative Law Judge Kenneth A. Krantz did not render findings pursuant to 20 C.F.R. §718.304(b), (c).

[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.

[3] Claimant's coal mine employment was in West Virginia. Director's Exhibit 3. 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).

Pursuant to claimant's appeal, the Board vacated Judge Krantz's finding that the x-ray evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), and remanded the case for further consideration. *Bell v. Mountain Laurel Coal Co.*, BRB No. 13-0175 BLA (Dec. 23, 2013) (unpub.). Additionally, although the Board affirmed Judge Krantz's finding that claimant invoked the Section 411(c)(4) presumption, the Board vacated his finding that employer rebutted the presumption. *Id.*

On remand, Judge Krantz found that the x-ray evidence did not establish the existence of complicated pneumoconiosis. Judge Krantz, therefore, again found that claimant could not invoke the irrebuttable Section 411(c)(3) presumption. Moreover, Judge Krantz found that employer established rebuttal of the Section 411(c)(4) presumption by proving that claimant did not suffer from pneumoconiosis. Accordingly, Judge Krantz denied benefits.

Pursuant to claimant's appeal, the Board held that Judge Krantz failed to consider all the relevant evidence regarding the existence of complicated pneumoconiosis. *Bell v. Mountain Laurel Coal Co.*, BRB No. 15-0004 BLA (Nov. 20, 2015) (unpub.). The Board therefore vacated Judge Krantz's finding that the evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and remanded the case for further consideration. *Id.* The Board also vacated Judge Krantz's finding that employer established rebuttal of the Section 411(c)(4) presumption by disproving the existence of clinical and legal pneumoconiosis. *Id.*

On remand, due to Judge Krantz's unavailability, the case was reassigned, without objection, to Administrative Law Judge Paul C. Johnson, Jr. (the administrative law judge). In a Decision and Order on Second Remand dated November 29, 2016, the administrative law judge found that the evidence established the existence of complicated pneumoconiosis. He therefore found that claimant was entitled to invocation of the irrebuttable presumption set forth at 20 C.F.R. §718.304.[4] Alternatively, the administrative law judge found that because employer could not rebut the Section 411(c)(4) presumption, claimant was also entitled to benefits pursuant to this provision. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the Board erred in vacating the previous denials of benefits issued by Judge Krantz in 2013 and 2014. Employer also challenges the administrative law judge's finding that the evidence established the existence of

[4] The administrative law judge further found that claimant was entitled to the presumption that his complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b).

complicated pneumoconiosis. Employer further argues that the administrative law judge erred in finding that it failed to 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, asserting that the Board should decline to address employer's challenges to its earlier decisions. The Director further responds in support of the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption.

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).

Employer initially argues that the Board erred in vacating the previous denials of benefits issued by Judge Krantz in 2013 and 2014. Employer's Brief at 8-19. The Board's previous holdings in this case constitute the law of the case. As employer has not demonstrated any exception to the law of the case doctrine, we decline to address its arguments. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Employer also contends that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Because claimant invoked the Section 411(c)(4) presumption,[5] the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor 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 [20 C.F.R.] §718.201." 20

[5] The Board previously affirmed Judge Krantz's finding that claimant invoked the Section 411(c)(4) presumption. *Bell v. Mountain Laurel Coal Co.*, BRB No. 13-0175 BLA (Dec. 23, 2013) (unpub.).

[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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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).

C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.[7]

In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered Dr. Castle's medical opinion.[8] Dr. Castle diagnosed disabling obstructive lung disease due to cigarette smoking, and not coal mine dust exposure. Employer's Exhibits 1, 2. The administrative law judge discredited Dr. Castle's opinion because he found it inconsistent with the regulations and the scientific evidence credited by the Department of Labor in the preamble to the 2001 regulatory revisions. Decision and Order on Second Remand at 19-20.

Employer argues that the administrative law judge erred. We disagree. The administrative law judge noted that Dr. Castle observed that when coal dust causes a respiratory impairment, it generally does so "by causing a mixed, irreversible obstructive and restrictive ventilatory defect." Decision and Order on Second Remand at 19; Employer's Exhibit 1 at 7. Based in part on the absence of a restrictive impairment, Dr. Castle opined that claimant's obstructive pulmonary impairment was not due to coal mine dust exposure. *Id.* The administrative law judge permissibly accorded less weight to Dr. Castle's opinion because he found the doctor's reasoning inconsistent with the Department's definition of legal pneumoconiosis, which recognizes that legal pneumoconiosis may be purely obstructive in nature, and is not limited to conditions causing "a mixed obstructive and restrictive ventilatory defect."[9] Decision and Order on

[7] The administrative law judge, however, found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order on Second Remand at 21.

[8] The administrative law judge also considered the opinions of Drs. Forehand and Ghio. Because Dr. Forehand opined that the majority of claimant's lung damage is due to coal mine dust exposure, the administrative law judge found that Dr. Forehand's opinion does not assist employer in disproving the existence of legal pneumoconiosis. Decision and Order on Second Remand at 20; Director's Exhibit 10. The administrative law judge discredited Dr. Ghio's opinion that claimant does not suffer from legal pneumoconiosis because it was based largely on the doctor's finding that claimant has no pulmonary impairment, a conclusion the administrative law judge found was contrary to the evidence of record. Decision and Order on Second Remand at 20; Employer's Exhibits 3, 4. Because employer does not challenge these findings, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[9] Because the administrative law judge provided a valid basis for according less weight to Dr. Castle's opinion, we need not address employer's remaining arguments

Second Remand at 19; *see* 20 C.F.R. §718.201(a)(2); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12, 25 BLR 2-115, 2-125 (4th Cir. 2012). We therefore affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Further, because it is unchallenged on appeal, we 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.[10] *See* 20 C.F.R. §718.305(d)(1)(ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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regarding the weight he accorded to his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[10] Because we have affirmed the administrative law judge's finding that claimant is entitled to benefits pursuant to Section 411(c)(4) of the Act, we need not address employer's contentions of error regarding the administrative law judge's alternative finding that claimant is also entitled to benefits pursuant to Section 411(c)(3). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge