U.S. Department of Labor

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

BRB No. 18-0351 BLA

BEVERLY HOLT (o/b/o THOMAS D. HOLT, deceased) Claimant-Respondent v. CONSOLIDATION COAL COMPANY and CONSOL ENERGY, INCORPORATED Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/16/202 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05314) of Administrative Law Judge Drew A. Swank, on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on August 4, 2014.[1]

The administrative law judge accepted the parties' stipulations that the miner had at least twenty-one years of underground coal mine employment[2] and a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). He therefore found the miner invoked the Section 411(c)(4) presumption that he was totally disabled due to pneumoconiosis and established a change in an applicable condition of entitlement.[3] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §725.309(c). The administrative law judge further found employer did not rebut the presumption and awarded benefits.[4]

On appeal, employer contends the administrative law judge applied an incorrect legal standard in finding it did not rebut the Section 411(c)(4) presumption. Additionally, employer argues the administrative law judge erred in admitting untimely submitted chest x-ray interpretations without considering whether claimant established good cause for their

[1] On June 12, 2009, the district director denied the miner's first claim for benefits, filed on June 5, 2008, for failure to establish any element of entitlement. Director's Exhibit 1.

[2] The miner's coal mine employment occurred in Ohio. Hearing Transcript at 20. Accordingly, this case falls within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Under Section 411(c)(4) of the Act, a miner is presumed to be totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] The administrative law judge found the miner was entitled to benefits as of August 2014, the month in which he filed his claim. In an April 3, 2018 Order Denying Motion for Reconsideration, the administrative law judge denied the miner's Motion for Reconsideration arguing for an earlier onset date for benefits to commence.

late admission.[5] Claimant[6] responds in support of the award of benefits.[7] The Director, Office of Workers' Compensation Programs, has not filed a response.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits 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, 362 (1965).

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

Because the miner invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish the miner had neither legal nor clinical pneumoconiosis,[8] 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). We agree with

[5] We affirm, as unchallenged on appeal, the determination that the miner invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] Claimant is the widow of the miner, who died on July 17, 2019, while his claim was pending before the Board. On December 18, 2019, the Board received a Notice of Death and Motion to Add Interested Party, in which claimant's counsel stated the miner's wife intends to pursue the miner's claim on behalf of his estate. The Motion to Add Interested Party is granted and the caption is amended accordingly. *See* 20 C.F.R. §725.360(b).

[7] The Board dismissed claimant's cross-appeal as untimely and denied her motion for reconsideration of that order. *Holt v. Consolidation Coal Co.*, BRB Nos. 18-0351 BLA, 18-0351 BLA-A (Aug. 9, 2019) (Order) (unpub.); *Holt v. Consolidation Coal Co.*, BRB Nos. 18-0351 BLA, 18-0351 BLA-A (Jan. 16, 2020) (Order) (unpub.). Consequently, claimant's argument regarding the correct onset date will not be addressed in this appeal.

[8] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id.* 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).

employer that the administrative law judge made several errors when considering rebuttal.[9] Employer's Brief at 12-15, 21.

First, the administrative law judge began his analysis by considering whether the miner could establish clinical pneumoconiosis, ultimately finding that the miner "failed to prove that he has coal workers' pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(1)." Decision and Order at 10. This was error. The miner is presumed to have had clinical pneumoconiosis; the burden is on employer to disprove the existence of the disease. *See* 20 C.F.R. §718.305(d)(1)(i)(B); *Griffith v. Terry Eagle Coal Co.*, 25 BLR 1-223, 1-228 (2017); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). Further, the administrative law judge did not consider the medical opinion evidence regarding rebuttal of clinical pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4).

Second, the administrative law judge erred by considering the issue of disability causation without first evaluating whether employer disproved that the miner had legal pneumoconiosis. He found that because the miner invoked the Section 411(c)(4) presumption, he established "the presence of legal coal workers' pneumoconiosis." Decision and Order at 12. He then incorrectly stated "[a]s the issue of whether the miner had coal workers' pneumoconiosis was determined . . ., the single issue to be determined [on rebuttal] is whether [the miner's] total disability arose from his coal workers' pneumoconiosis due to his past coal mine employment." *Id.* at 13. The administrative law judge first should have considered whether employer disproved legal pneumoconiosis by proving that the miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See Minich*, 25 BLR at 1-159; 20 C.F.R. §§718.201(a)(2), (b); 718.305(d)(1)(i)(A). Only after determining that employer failed to disprove both legal and clinical pneumoconiosis at 20

[9] Employer's argument that invocation of the Section 411(c)(4) presumption does not include a presumption of legal pneumoconiosis lacks merit and is rejected. *See* 20 C.F.R. §718.305(d)(1)(i)(A); *Rockwood Cas. Ins. Co. v. Director, OWCP* [*Kourianos*], 917 F.3d 1198, 120 (10th Cir. 2019) (holding that invocation of the presumption requires the administrative law judge to presume the miner had legal pneumoconiosis due to coal mine dust exposure); *Consolidation Coal Co. v. Director, OWCP* [*Ross*], 911 F.3d 824, 844-45 (7th Cir. 2018) (rejecting identical argument); *Consolidation Coal Co. v. Director, OWCP* [*Noyes*], 864 F.3d 1142, 1146-50 (10th Cir. 2017) (same); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1070 (6th Cir. 2013) (affirming the administrative law judge's determination that the employer failed to rebut the presumed fact of legal pneumoconiosis); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01 (4th Cir. 1995); Employer's Brief at 28-29.

C.F.R. §718.305(d)(1)(i) should the administrative law judge have addressed whether employer disproved disability causation at 20 C.F.R. §718.305(d)(1)(ii). *See Minich*, 25 BLR at 1-159.

We reject claimant's argument that the administrative law judge's errors were harmless. Claimant argues the administrative law judge in effect merely collapsed the legal pneumoconiosis and disability causation rebuttal analyses in the same way the administrative law judge permissibly did in *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657 (6th Cir. 2015). Claimant's Brief at 16-19. We disagree.

In *Kennard*, the administrative law judge first considered whether the employer could rebut legal pneumoconiosis by establishing that the miner's chronic obstructive pulmonary disease (COPD) was not significantly related to or substantially aggravated by his coal mine dust exposure. *Kennard*, 790 F.3d at 666-68. Finding that the employer failed to establish the COPD was not legal pneumoconiosis, the administrative law judge used that conclusion to find the employer also failed to establish that no part of the miner's disability was caused by pneumoconiosis. *Id.* at 668. The United States Court of Appeals for the Sixth Circuit held that approach was reasonable. *Id.* Here, the administrative law judge did not address whether employer could disprove legal pneumoconiosis. Further, his use of an incorrect rebuttal standard is not harmless error, as we are unable to discern the extent to which that error affected his credibility determinations. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). We must therefore vacate the administrative law judge's findings that employer failed to rebut the Section 411(c)(4) presumption under 20 C.F.R. §718.305(d)(1)(i), (ii) and further vacate his award of benefits.

On remand, the administrative law judge is instructed to reconsider whether employer rebutted the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. He must begin his analysis considering whether employer disproved legal pneumoconiosis by establishing the miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[10] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Griffith*, 25 BLR at 1-229; *Minich*, 25 BLR at 1-155 n.8. The Sixth Circuit Court has held that employer may rebut legal pneumoconiosis by showing that the miner's coal mine employment "did not contribute, in part, to his alleged pneumoconiosis." *Island Creek*

[10] Because we have vacated the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption, we decline to address, as premature, employer's arguments pertaining to the administrative law judge's weighing of the medical opinion evidence relevant to the rebuttal of total disability causation.

Coal Co. v. Young, F.3d , No. 19-3113, 2020 WL 284522, at 4 (6th Cir. Jan. 21, 2020). The "in part" standard requires employer to show that coal mine dust exposure "had at most only a *de minimis* effect on [the miner's] lung impairment." *Id.* at 6. The administrative law judge must also determine whether employer has established that the miner did not have clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(B).

If the administrative law judge finds that employer has met its burden to disprove both legal and clinical pneumoconiosis by a preponderance of the evidence, 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. However, if employer fails to establish that the miner had neither legal nor clinical pneumoconiosis, the administrative law judge must then determine whether employer has rebutted the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii) 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); *Griffith*, 25 BLR at 1-229; *Minich*, 25 BLR at 1-159. If employer is unable to rebut the Section 411(c)(4) presumption under either 20 C.F.R. §718.305(d)(1)(i) or (ii), the administrative law judge must reinstate the award of benefits.

In determining the credibility of the medical opinions, the administrative law judge should address the 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. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Furthermore, he must set forth his findings in detail, including the underlying rationale for 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*, 12 BLR at 1-165.

Evidentiary Challenge

Employer also contends the administrative law judge erred in admitting two x-ray readings claimant submitted outside of the twenty-day requirement at 20 C.F.R. §725.456(b)(3), without first considering whether claimant established good cause for the admission of this evidence. Employer's Brief at 4-11. We agree.

[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).

Documentary evidence that was not submitted to the district director may be received in evidence, subject to the objection of any party, if such evidence is sent to all other parties at least twenty days before a hearing is held in connection with the claim. 20 C.F.R. §725.456(b)(2). Evidence not exchanged within the twenty-day time frame may still be admitted at the hearing with the written consent of the parties, or on the record at the hearing, or upon a showing of good cause. 20 C.F.R. §725.456(b)(3). If the parties do not waive the twenty-day requirement or good cause is not shown, the administrative law judge shall either exclude the late evidence from the record or remand the claim to the district director for consideration of such evidence. 20 C.F.R. §725.456(b)(3).

Fifty days before the hearing, pursuant to the Notice of Hearing and Prehearing Order, the parties exchanged preliminary evidence summaries designating their affirmative evidence. Employer designated Dr. Meyer's interpretation of an October 16, 2014 x-ray and Dr. Fino's interpretation of an April 23, 2015 x-ray as its affirmative x-ray interpretations. Twenty days before the hearing, claimant moved for additional time to submit rebuttal readings of these x-rays, to which employer objected. At the hearing, claimant submitted Dr. Crum's rebuttal interpretation of the October 16, 2014 x-ray and again requested additional time to submit a rebuttal reading of the April 23, 2015 x-ray. Hearing Transcript at 9. Over employer's objection, the administrative law judge admitted the October 16, 2014 x-ray interpretation and gave claimant additional time to submit a rebuttal interpretation of the April 23, 2015 x-ray. He ruled that it would waste time and taxpayer money to exclude evidence that claimant could simply submit later along with a request for modification if the claim was denied. *Id.* at 9-10; 20 C.F.R. §725.310.

The administrative law judge did not address whether claimant showed "good cause why such evidence was not exchanged" in a timely manner. 20 C.F.R. §725.456(b)(3). We reject claimant's argument that the administrative law judge's failure to follow the regulation was harmless because the administrative law judge found claimant did not establish clinical pneumoconiosis. Claimant's Brief at 14-16. Since we have vacated the award of benefits and are remanding the case for reconsideration of whether employer has rebutted the Section 411(c)(4) presumption, the administrative law judge will need to consider whether employer has rebutted clinical pneumoconiosis. We therefore vacate the administrative law judge's evidentiary ruling and remand the case for him to determine if claimant has established good cause[12] for not submitting her rebuttal readings of the

[12] Claimant's counsel explained he was not aware of the evidence employer intended to designate as its affirmative evidence until he received employer's evidence summary form on September 5, 2017, that he was on paternity leave and at a conference for most of September 2017, and that the district director failed to timely forward the April 23, 2015 x-ray to his expert. Claimant's Motion for an Extension of Time; Hearing Transcript at 12-13. Employer responded that good cause did not exist to submit rebuttal readings of

October 16, 2014 and April 23, 2015 x-rays in accordance with the twenty-day requirement. 20 C.F.R. §725.456(b)(3).

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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

Dr. Meyer's interpretation of the October 16, 2014 x-ray and Dr. Fino's interpretation of the April 23, 2015 x-ray because employer submitted those readings to the district director on April 27, 2015 and June 2, 2015. Employer's Objection to Claimant's Motion for Extension at 3; Director's Exhibits 27, 28.