U.S. Department of Labor

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

BRB No. 15-0346 BLA

TERRY L. SHIPLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 06/30/2016
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

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

Anne Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (2012-BLA-6048) of Administrative Law Judge Drew A. Swank (the administrative law judge) rendered on a claim filed on August 4, 2011, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time. In a Decision and Order dated January 3, 2014, the administrative law judge credited claimant with 40.22 years of qualifying[1] coal mine employment, and noted the parties' stipulation that claimant has a totally disabling respiratory or pulmonary impairment. The administrative law judge therefore found that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] However, the administrative law judge found that employer/carrier (employer) rebutted the presumption, as claimant did not prove that his clinical pneumoconiosis was a "substantially contributing cause" of his total disability. Accordingly, the administrative law judge denied benefits.

In response to claimant's appeal, the Board held that the administrative law judge erred to the extent that he placed on claimant the burden of proving that his disability was due to pneumoconiosis.[3] *Shipley v. Consolidation Coal Co*., BRB No. 14-0120 BLA, slip op. at 4 (Aug. 31, 2014) (unpub.). The Board also held that the administrative law judge applied an incorrect standard in considering rebuttal of the presumption of disability

[1] The administrative law judge noted that claimant testified that most of his mining work was underground. Decision and Order at 4.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where claimant establishes at least fifteen years in underground coal mine employment, or in surface 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); 20 C.F.R. §718.305.

[3] The Board noted that "[o]nce the administrative law judge found that claimant had invoked the Section 411(c)(4) presumption, claimant was entitled to a presumption that his disabling impairment is due to pneumoconiosis, and employer bore the burden of rebutting it." *Shipley v. Consolidation Coal Co*., BRB No. 14-0120 BLA, slip op. at 4 (Aug. 31, 2014) (unpub.).

causation.[4] *Id*. Consequently, the Board vacated the administrative law judge's finding that employer rebutted the presumption and remanded the case for further consideration. *Id*. The Board instructed the administrative law judge, on remand, to consider whether the medical opinions of record are reasoned and documented, and affirmatively establish that claimant does not have clinical and legal pneumoconiosis,[5] or that no part of his disability was caused by pneumoconiosis. *Id*. at 5. Further, because employer bears the burden of proof on rebuttal, the Board instructed the administrative law judge to determine whether the medical opinions of employer's experts are credible, regardless of the weight he assigned to the other medical opinions of record. *Id*.

On remand, the administrative law judge found that employer established that claimant's pneumoconiosis played "no part" in causing his totally disabling respiratory or pulmonary impairment, thereby rebutting the Section 411(c)(4) presumption. Accordingly, the administrative law judge again denied benefits.

On appeal, claimant challenges the administrative law judge's finding that employer rebutted the presumption by proving that pneumoconiosis played no part in causing his totally disabling respiratory or pulmonary impairment. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), argues that the administrative law judge erred by failing to properly evaluate the opinions of Drs. Bellotte and Basheda, as he simply accepted the rationale given by the physicians without critically analyzing them.

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,

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[4] The Board noted that, with the burden improperly placed on claimant, the administrative law judge found that claimant failed to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (2). *Shipley*, BRB No. 14-0120 BLA, slip op. at 3 n.4. The Board also noted that the administrative law judge made no findings regarding the existence of legal pneumoconiosis. *Id*.

[5] "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). "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).

and in accordance with applicable law.[6] 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).

Claimant contends that the administrative law judge erred in finding that employer rebutted the Section 411(c)(4) presumption by proving that pneumoconiosis played no part in causing his totally disabling respiratory or pulmonary impairment. In rendering this finding, the administrative law judge gave substantial weight to the opinions of Drs. Bellotte and Basheda, that claimant's pulmonary impairment is caused by smoking and not coal dust exposure,[7] because he determined that the doctors have excellent credentials and their opinions were well-documented and well-reasoned. By contrast, the administrative law judge discounted the contrary opinions of Drs. Jaworski, Schaaf, and Begley because "[they did not] point to any specific evidence indicating that coal dust caused or contributed to a pulmonary or respiratory impairment in this particular miner."[8] Decision and Order on Remand at 11. In addition, the administrative law judge discounted the opinions of Drs. Jaworski and Begley because they did not explain how coal dust caused claimant's respiratory or pulmonary impairment. Based on the opinions of Drs. Bellotte and Basheda, the administrative law judge found that employer proved that pneumoconiosis played "no part" in causing claimant's totally disabling respiratory or pulmonary impairment, thereby rebutting the Section 411(c)(4) presumption.

Claimant argues that the administrative law judge erred in according "substantial weight" to the opinions of Drs. Bellotte and Basheda because they are "hostile to the Preamble and the regulatory framework." Claimant's Brief at 3. The Director agrees with claimant that the administrative law judge erred in evaluating the opinions of Drs. Bellotte and Basheda, arguing that the doctors' opinions should be discounted because

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[6] Because claimant's last coal mine employment occurred in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Hearing Tr. at 21.

[7] Dr. Bellotte opined that claimant's tobacco-induced emphysema and asthma contributed to his disabling respiratory impairment. Director's Exhibit 27; Employer's Exhibit 14. Similarly, Dr. Basheda opined that claimant's tobacco-induced chronic obstructive pulmonary disease with a component of asthma contributed to claimant's disabling pulmonary impairment. Employer's Exhibit 9.

[8] Drs. Jaworski, Schaaf, and Begley attributed claimant's disabling pulmonary impairment to smoking and coal dust exposure. Director's Exhibit 12; Employer's Exhibits 4, 9, 15; Claimant's Exhibits 1, 5, 9.

they are based on theories that are contrary to the science accepted by the Department of Labor (the Department) in the preamble to the 2001 regulatory revisions.[9] Director's Brief at 5-6. Claimant and the Director also argue that Dr. Basheda's opinion should be discounted because it conflicts with the regulations recognizing that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." Claimant's Brief at 7-8; Director's Brief at 6-7; 20 C.F.R. §718.201(c); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000). Further, the Director argues that the case must be remanded because the administrative law judge failed to consider whether Dr. Basheda provided a well-reasoned explanation for why coal dust exposure does not contribute to claimant's pulmonary disease. Claimant and the Director therefore assert that the administrative law judge failed to follow the Board's remand instructions when considering the credibility of the opinions of Drs. Bellotte and Basheda.

In its previous decision, the Board instructed the administrative law judge, on remand, to evaluate the credibility of the opinions of Drs. Bellotte and Basheda in light of the physicians' qualifications, the explanations provided for their medical findings, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *Shipley*, BRB No. 14-0120 BLA, slip op. at 5. Further, the Board directed the administrative law judge's attention to claimant's contention that the opinions of Drs. Bellotte and Basheda are contrary to the science accepted by the Department in the preamble, which recognizes that coal mine dust-induced obstructive disease can be shown by a reduced FEV1/FVC ratio. *Shipley*, BRB No. 14-0120 BLA, slip op. at 5 n.5, *citing* 65 Fed. Reg. at 79,943. In his Decision and Order on Remand, the administrative law judge acknowledged the qualifications of Drs. Bellotte and Basheda,[10]

[9] The Director, Office of Workers' Compensation Programs (the Director), argues that Drs. Bellotte and Basheda expressed views that are inconsistent with the position of the Department of Labor (the Department) that a reduced FEV1/FVC ratio may support a finding that a miner's respiratory impairment is due to coal dust exposure. Director's Brief at 5-6; 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); 20 C.F.R. §718.204(b)(2)(i)(C). The Director also argues that Dr. Bellotte expressed views that are inconsistent with the Department's position that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms, and that the risk of developing airways obstruction caused by coal dust exposure is additive with smoking. Director's Brief at 6; 65 Fed. Reg. at 79,938-43. Further, the Director argues that Dr. Bellotte expressed views that are inconsistent with the regulations and the Department's position that *legal* pneumoconiosis is independent of clinical pneumoconiosis, and that a diagnosis of *legal* pneumoconiosis does not require a positive x-ray. Director's Brief at 6; 65 Fed. Reg. at 79,945; 20 C.F.R. §718.202(a)(4), (b).

[10] The administrative law judge determined that "[Dr. Bellotte] possesses sound

and found that their opinions are well-documented.[11] The administrative law judge also determined that Dr. Bellotte's opinion is well-reasoned because "he relied upon [c]laimant's diagnostic tests to explain why coal dust exposure did not play any role in causing [c]laimant's totally disabling respiratory or pulmonary impairment."[12] Decision and Order on Remand at 6. In addition, the administrative law judge found that "[Dr. Basheda] thoroughly explained how the medical evidence demonstrates that [c]laimant's pneumoconiosis did not cause his totally disabling respiratory or pulmonary impairment."[13] *Id*. at 7. However, the administrative law judge did not consider

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qualifications, given that he is [B]oard-certified in internal and pulmonary medicine, a B-reader, and has served in several pulmonary and respiratory positions at United Hospital Center [in Clarksburg, West Virginia]." Decision and Order on Remand at 6. Similarly, the administrative law judge determined that "[Dr.] Basheda has excellent qualifications." *Id*. The administrative law judge noted that "[Dr.] Basheda is a B-reader and [B]oard-certified in internal medicine with sub-specialties in pulmonary diseases and critical care." *Id*. at 5. Additionally, the administrative law judge noted that "[Dr. Basheda] is licensed in two states, has served as a staff physician and medical director at several healthcare facilities, and is a well-published author." *Id*.

[11] The administrative law judge stated that "[a]lthough he did not review a great deal of medical records, Dr. Bellotte's opinion is well-documented because he personally examined [c]laimant and conducted diagnostic tests." Decision and Order on Remand at 6. The administrative law judge also stated that "[Dr.] Basheda . . . provided a well-documented opinion, given that he examined [c]laimant, recorded his medical history, current medications, social history, and reviewed numerous records, diagnostic tests, and other physician's [sic] reports." *Id*. at 6-7.

[12] The administrative law judge noted that "[Dr. Bellotte] stated that [c]laimant showed improvement across various pulmonary function studies" and that "[Dr.] Bellotte then explained that this indicated that [c]laimant did not have a pulmonary impairment caused by pneumoconiosis because his impairment would not be reversible and [c]laimant would not have shown any improvement in the various pulmonary function studies that he performed." Decision and Order on Remand at 6. The administrative law judge also noted that "Dr. Bellotte opined that [c]laimant's FEV1/FVC ratio showed that cigarette smoking caused [c]laimant's pulmonary impairment, not coal dust exposure." *Id*. Further, the administrative law judge noted that "Dr. Bellotte explained that [c]laimant's chest x-rays did not suggest that he had coal worker's [sic] pneumoconiosis because they did not show any dust burden." *Id*.

[13] The administrative law judge stated that "[Dr. Basheda] opined that [c]laimant

claimant's argument that the opinions of Drs. Bellotte and Basheda on this issue are based on views that are contrary to the medical science accepted by the Department in the preamble.

An administrative law judge may evaluate expert opinions in conjunction with the preamble to the 2001 regulations, as it sets forth the Department's resolution of questions of scientific fact relevant to the elements of entitlement. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313, 25 BLR 2-115, 2-129-30 (4th Cir. 2012); *see also A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). As discussed, *supra*, the Board instructed the administrative law judge, on remand, to consider claimant's argument that the opinions of Drs. Bellotte and Basheda are based on views that are contrary to the medical science accepted by the Department in the preamble, with respect to the significance of the FEV1/FVC ratio. On remand, the administrative law judge did not comply with the Board's instruction with respect to either physician. Instead, without considering claimant's argument, the administrative law judge credited Dr. Bellotte's explanation that it is possible to distinguish between impairments caused by smoking and coal dust exposure based on the FEV1/FVC ratio.[14] We therefore vacate the administrative law

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did not have clinical pneumoconiosis because most of his chest x-rays and CT scans were negative." Decision and Order on Remand at 7. Further, the administrative law judge stated that "[Dr.] Basheda also noted that coal worker's [sic] pneumoconiosis is a progressive and irreversible disease, yet [c]laimant showed reversibility after bronchodilators were applied during his pulmonary function studies." *Id.* Additionally, the administrative law judge stated that Dr. Basheda noted that "[c]laimant previously had been prescribed bronchodilator medications and anti-inflammatory agents and suffered from wheezing, all of which is inconsistent with a coal dust-related disease." *Id*.

[14] During a July 31, 2013 deposition, Dr. Bellotte responded, "yes" to the question, on cross-examination, "is it your opinion that you can look at the spirometry and lung volumes and tell us that [sic] which is caused by damage due to cigarette smoking and those abnormalities which are caused by coal dust exposure?" Employer's Exhibit 14 (Dr. Bellotte's Depo. at 19). Dr. Bellotte further testified that "[t]here is a reduction in the FEV1/FVC ratio [of an obstruction caused by coal dust exposure], but it's just not as great as you see in a patient who has cigarette-induced disease." *Id*. (Dr. Bellotte's Depo. at 20).

judge's finding that employer rebutted the presumed fact that claimant's total disability is due to pneumoconiosis.

In addition, the Director argues that the administrative law judge improperly credited Dr. Bellotte's explanation that claimant's emphysema is related to smoking, rather than coal dust exposure, because there is no dust burden on the chest x-ray.[15] Director's Brief at 6. The Director also argues that the administrative law judge erred in failing to adequately address whether Drs. Bellotte and Basheda credibly explained why coal dust exposure is not a causative factor for the irreversible portion of claimant's respiratory impairment.[16] *Id*. at 3, 7; *see Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Further, claimant and the Director argue that, in finding that Dr. Basheda's opinion is well-reasoned, the administrative law judge erred in crediting his explanation that claimant's asthma is not related to coal dust exposure because it did not manifest respiratory symptoms while claimant worked in the coal mining industry.[17] Claimant's Brief at 7-8; Director's Brief at 6-7.

In sum, claimant and the Director argue that the opinions of Drs. Bellotte and Basheda are based on views that are contrary to the regulations and the medical science

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[15] In a report dated March 27, 2012, Dr. Bellotte opined that "[t]he type of [e]mphysema that is seen on [claimant's] [c]hest [x]-ray is a manifestation of his tobacco[-]induced [l]ung [d]isease," given that "[t]here is no dust burden on this [c]hest [x]-ray." Director's Exhibit 7. During the deposition, Dr. Bellotte opined that claimant does not have a heavy coal dust burden in his lungs because his x-rays and CT scan were read as negative. Employer's Exhibit 14 (Dr. Bellotte's Depo. at 24). Dr. Bellotte testified that "[t]he [c]lassification system is set up so that the higher classifications are correlated with a higher coal dust burden." *Id*. (Dr. Bellotte's Depo. at 25). Dr. Bellotte further stated: "It doesn't mean the Category 0 does not have coal dust. It means the Category 3 has more coal dust than Category 1." *Id.*

[16] During the deposition, Dr. Bellotte indicated that claimant's asthma is probably partially reversible. Employer's Exhibit 14 (Dr. Bellotte's Depo. at 48-50). Dr. Basheda opined that claimant's disabling pulmonary impairment is caused by tobacco-induced chronic obstructive pulmonary disease and asthma manifesting as chronic airway obstruction with partial reversibility. Employer's Exhibit 9.

[17] In a report dated June 24, 2013, Dr. Basheda noted that "[claimant] worked in the coal mining industry for approximately forty years," and that "[h]is mining career was not terminated at a young age due to respiratory symptoms." Employer's Exhibit 9.

accepted by the Department in the preamble. On remand, in addressing whether the opinions of Drs. Bellotte and Basheda are sufficiently reasoned to affirmatively establish that pneumoconiosis played no part in causing claimant's totally disabling respiratory or pulmonary impairment, the administrative law judge should address these contentions. *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).

On remand, in evaluating whether the opinions of Drs. Bellotte, Basheda, Jaworski, Schaaf, and Begley are reasoned and documented, the administrative law judge must weigh the conflicting medical opinions, consistent with the foregoing discussion, to determine whether they affirmatively establish that claimant does not have legal and clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1).[18] If the administrative law judge finds that employer has disproved the existence of both legal and clinical pneumoconiosis, employer has rebutted the presumption at 20 C.F.R. §718.305(d)(1)(i), and the administrative law judge need not reach the issue of disability causation. If employer fails to rebut the presumption at 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must determine whether employer is able to rebut the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii) with credible proof that no part, not

[18] As discussed, *supra*, the administrative law judge found that the evidence did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), (2). The administrative law judge made no findings regarding the existence of legal and clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). Upon invocation of the Section 411(c)(4) presumption, however, the burden of proof shifts to the employer to disprove the existence of legal and clinical pneumoconiosis. Whether a totally disabled miner's impairment is due to pneumoconiosis is naturally linked to the antecedent issue of whether the miner has pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). Thus, when a claimant has invoked the Section 411(c)(4) presumption, an administrative law judge must first determine whether the employer has rebutted the presumption by disproving the existence of both legal and clinical pneumoconiosis before determining, if necessary, whether the employer has proven that no part of the miner's total disability is due to pneumoconiosis. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 141 (4th Cir. 2015) (observing that an employer is required to "rule out" any connection between pneumoconiosis and a miner's disability only when a claimant has invoked the Section 411(c)(4) presumption and the employer "cannot satisfy the first method of rebuttal under Section 718.305(d), namely, disproving the presence of pneumoconiosis"); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring & dissenting).

even an insignificant part, of claimant's pulmonary or respiratory disability was caused by either legal or clinical pneumoconiosis. *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149 (2015) (Boggs, J., concurring & dissenting); *see also West Virginia CWP Fund v. Bender*, 782 F.3d 129, 143-44, BLR (4th Cir. 2015).

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is vacated and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge