U.S. Department of Labor

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

BRB No. 15-0202 BLA

KENNETH E. JACKSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RED BONE MINING COMPANY	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY, INCORPORATED	)	DATE ISSUED: 03/10/2016
	)	
	)	
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 Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, 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 Awarding Benefits (2013-BLA-5789) of Administrative Law Judge Drew A. Swank (the administrative law

judge), rendered on a claim filed on October 12, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). The administrative law judge credited claimant with 29.37 years of coal mine employment[1] and found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and total respiratory disability pursuant to 20 C.F.R. §718.204(b) overall. The administrative law judge, therefore, found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §§921(c)(4)(2012).[2] The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge failed to properly evaluate the medical opinion evidence in finding total respiratory disability established pursuant to Section 718.204(b)(2)(iv) and failed to consider all of the evidence in finding total respiratory disability established pursuant to Section 718.204(b) overall. Employer contends, therefore, that the administrative law judge erred in finding claimant entitled to invocation of the Section 411(c)(4) presumption. Moreover, employer asserts that the administrative law judge erred in finding that the presumption was not rebutted. Employer further asserts that the administrative law judge failed to render findings that meet with the requirements of the Administrative Procedure Act (APA).[3] Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in response to

[1] The administrative law judge noted that at least 20-21 years of claimant's coal mine employment were in underground coal mines, while the remainder were in above ground mining in conditions substantially similar to those in underground mining. Decision and Order at 5; Hearing Transcript at 14-16.

[2] Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)(2012), provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. Under the implementing regulations, once the presumption is invoked, the burden shifts to employer to rebut the presumption by showing that the miner did not have pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4)(2012), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii).

[3] The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all 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).

employer's appeal. Employer, in reply to claimant's response, reiterates its assignments of error with regard to the administrative law judge's rebuttal analysis.[4]

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption
Total Respiratory Disability

Employer contends that the administrative law judge erred in finding the medical opinion evidence established the presence of a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv). The medical opinion evidence consists of the opinions of Drs. Jaworski, Basheda, Fino and Begley.

Dr. Jaworski opined that claimant's "respiratory impairment is mild and by itself should not prevent [him] from performing his last coal mine job."[6] Decision and Order at 17; Director's Exhibit 11. During deposition, however, Dr. Jaworski "admitted on cross-examination that if [c]laimant demonstrated on testing a significantly reduced diffusion capacity or desaturation with exertion that he might change his opinion as to whether [c]laimant could perform his last coal mining job." Decision and Order at 17; Employer's Exhibit 6 at 25.

[4] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established 29.37 years of qualifying coal mine employment, and that the evidence of record failed to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 5, 12-16; Hearing Transcript at 14-16.

[5] As claimant's last coal mine employment was in West Virginia, we will apply the law of the United States Court of Appeals for the Fourth Circuit. Decision and Order at 6; Director's Exhibit 6; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[6] The administrative law judge found that claimant's last coal mine employment was that of a boltman/mechanic, and included welding duties. Decision and Order at 6; Director's Exhibit 4; Hearing Transcript at 18. The miner testified that he had to walk "inclines" and "lift" and "carry" tools to service the belts. Hearing Transcript at 18-21.

Dr. Basheda opined that "[c]laimant's pulmonary functioning 'would not prevent [claimant] from performing his last coal mining work or work of similar effort.'" Decision and Order at 17; Employer's Exhibit 1 at 13-14. During deposition, pursuant to cross-examination, Dr. Basheda stated "that because [c]laimant did not demonstrate exercise-induced oxygen desaturation, he would not find him disabled from a pulmonary standpoint." Decision and Order at 18; Employer's Exhibit 17 at 18-19, 22. On re-direct examination by employer's counsel, however, "when asked if claimant could do heavy labor, Dr. Basheda opined that 'it probably would be difficult [for claimant] to do exertional labor.'" Decision and Order at 18; Employer's Exhibit 17 at 23.

Dr. Fino opined that claimant has "disabling emphysema." Decision and Order at 18; Employer's Exhibit 10 at 10. During his deposition, Dr. Fino testified that "[b]ased upon [c]laimant's diffusing capacity," "[he] could not do his past coal mining work[.]" Decision and Order at 18; Employer's Exhibit 16 at 14. On cross examination, Dr. Fino "testified that [c]laimant was disabled from his coal mine employment due to a pulmonary impairment." Decision and Order at 18; Employer's Exhibit 16 at 26.

Dr. Begley opined that claimant was incapable of returning to his coal mine employment, which required moderate to heavy exertion, due to his pulmonary impairment. Decision and Order at 18; Claimant's Exhibit 1 at 2. During his deposition, Dr. Begley testified that "[c]laimant's pulmonary impairments would prevent him from performing his prior coal mining work." Decision and Order at 18; Employer's Exhibit 9 at 34-35.

Considering these four opinions, the administrative law judge found that claimant established that he has a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv) and, consequently, found claimant entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Specifically, the administrative law judge found that Dr. Jaworski "equivocated on his opinion as to claimant's ability to perform his past coal mining work," while Dr. Basheda stated on re-direct examination that claimant would have difficulty performing exertional labor and Dr. Fino testified that claimant could not perform his past coal mine employment.

Employer specifically contends that the administrative law judge erred in rejecting Dr. Jaworski's opinion as equivocal when, in fact, Dr. Jaworski was merely answering a hypothetical question regarding whether claimant would be able to perform his usual coal mine employment, if his test results were different. Employer argues that Dr. Jaworski's opinion regarding claimant's diffusing capacity was "theoretical" and did not render his opinion that claimant could perform his coal mine employment equivocal. Employer's Brief at 10-11. We disagree.

Initially, the administrative law judge found that Dr. Jaworski reported that claimant has a mild respiratory impairment that should not prevent his former coal

mining work as a belt mechanic. However, the administrative law judge also found that Dr. Jaworski opined that "[m]ore precise evaluation of work capacity and exercise gas exchange wasn't possible as the exercise was medically contraindicated due to new right bundle-branch block on EKG and abnormal Allen test." Decision and Order at 17; Director's Exhibit 16. The administrative law judge noted that Dr. Jaworski stated that bronchodilator testing had not been conducted, because claimant had taken his inhaler medications the morning of testing. Decision and Order at 17; Employer's Exhibit 6 at 15. Furthermore, the administrative law judge found Dr. Jaworski's reiteration that claimant could perform his last coal mining job, was made "with a caveat that if claimant does have asthma, … he might have times in which his pulmonary impairment would be much more severe." Decision and Order at 17; Employer's Exhibit at 16-17, 25.

The administrative law judge permissibly interpreted Dr. Jaworski's deposition testimony as a concession that, "if claimant demonstrated on testing a significantly reduced diffusion capacity or desaturation with exertion[,] that might change his opinion as to whether claimant could perform his last coal mining job." Decision and Order at 17; Employer's Exhibit 6 at 7, 16-19; Director's Exhibit 11. Moreover, Dr. Jaworski stated that claimant "does have an asthmatic component and, … a component of obstructive airway disease due to coal dust exposure." Employer's Exhibit 6 at 17-18. We conclude that substantial evidence supports the administrative law judge's finding that Dr. Jaworski "equivocated as to claimant's ability to perform his past coal mining work," based on the fact that exercise testing was not performed by claimant in conjunction with his original DOL examination, and on his differential asthma diagnosis and additional statements. Decision and Order at 19. Consequently, the administrative law judge permissibly accorded little weight to Dr. Jaworski's opinion that "[c]laimant could perform his most recent coal mining job." Decision and Order at 17; *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

Next, employer contends that the administrative law judge failed to resolve the evidentiary conflict arising between Dr. Fino's opinion, that claimant has a total respiratory disability based on his "diffusing capacity," and Dr. Basheda's statement that it can be "a little controversial" "to solely base disability on a diffusion measurement." Employer's Brief at 9, 12-13. The administrative law judge, however, specifically summarized Dr. Basheda's lengthy testimony regarding claimant's oxygen desaturation, noting "concern about the diffusion measurement." Decision and Order at 18; Employer's Exhibit 17 at 16-19, 22. The administrative law judge found that Dr. Fino addressed the exertional requirements of claimant's usual coal mine work, included "the results of a variety of his examinations and diagnostic tests," referenced claimant's "disabling emphysema," and concluded that claimant is totally disabled from his last coal mine employment due to a pulmonary impairment. Decision and Order at 18. The administrative law judge further noted that Dr. Fino testified that claimant's diffusing capacity showed that claimant's lungs were "clearly significantly impaired," and opined that "even with the postbronchodilator spirometry results," claimant "still has a disabling

impairment."[7] Employer's Exhibit 16 at 13-16. Thus, we reject employer's argument that the administrative law judge failed to resolve an evidentiary conflict regarding the reliability of Dr. Fino's opinion, as he fully considered the opinions of Drs. Basheda and Fino and explained why he credited Dr. Fino's opinion on total disability. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4, 1-6 (1987).

In sum, we reject employer's arguments regarding the administrative law judge's findings as to the opinions of Drs. Jaworski and Fino.[8] Moreover, we reject employer's argument that the administrative law judge failed to sufficiently analyze and discuss the medical opinions pursuant to the requirements of the APA. *See* Decision and Order at 17-19. We therefore affirm the administrative law judge's finding that the preponderance of the medical opinion evidence established total respiratory disability pursuant to Section 718.204(b)(2)(iv). Additionally, we are unpersuaded by employer that the administrative law judge erred in not specifically weighing all of the evidence relevant to total disability together pursuant to Section 718.204(b). The administrative law judge reviewed the pulmonary function and blood gas study evidence and he reviewed the physicians' opinions, including the underlying testing they conducted.[9] Decision and Order at 13-19; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). Consequently, we affirm the administrative law judge's consideration of the totality of the evidence, and his conclusion that it established that claimant suffers from total respiratory disability pursuant to Section 718.204(b) overall.[10] *See Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-86 (2012). The administrative law judge's

[7] Dr. Fino stated that claimant's blood gas testing confirmed his "impression of what would happen from his spirometry plus diffusion." Employer's Exhibit 16 at 116.

[8] The administrative law judge's findings regarding the opinions of Drs. Basheda and Begley on total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) are affirmed, as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[9] For example, the administrative law judge found Dr. Fino's opinion "persuasive" because "he relates individual diagnostic tests to each of his conclusions." Decision and Order at 23.

[10] The administrative law judge set forth the totality of the evidence he weighed relevant to total respiratory disability at 20 C.F.R. §718.204(b). Decision and Order at 12-19. Employer has not identified any relevant evidence which was not considered or properly weighed by the administrative law judge. Employer's Brief at 13.

determination that claimant established invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis is, therefore, affirmed.

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

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 was entitled to invocation of the Section 411(c)(4) presumption as a means of establishing that claimant has pneumoconiosis, without independently considering whether employer disproved the existence of both clinical and legal pneumoconiosis.[11] Employer's Brief at 18-19. Additionally, employer argues that the administrative law judge did not utilize the correct standard in finding that the presumption of disability causation was not established. We agree.

In this case, the administrative law judge did not consider whether employer rebutted the presumption by disproving the existence of clinical[12] or legal pneumoconiosis, because he found "that [c]laimant established he suffers from legal coal workers' pneumoconiosis through the operation of a legal presumption," *i.e.*, because claimant was entitled to invocation of the Section 411(c)(4) presumption, the existence of pneumoconiosis was established. Decision and Order at 19; *see* 20 C.F.R. §718.202(a)(3). The administrative law judge, therefore, stated that the sole issue to be determined by him was whether the presumption of disability causation was rebutted. Decision and Order at 20-21. In making this determination, he stated that he must determine whether claimant's "coal worker's pneumoconiosis is a substantially contributing cause of [claimant's] total disability," Decision and Order at 25, rather than determining whether "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201[,]" as set forth in 20 C.F.R. §718.305(d)(1)(ii). Moreover, the administrative law judge conflated his

[11] '"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).

[12] 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 or autopsy evidence pursuant to 20 C.F.R. §718.202(a)(2).

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 Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 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 prong. *See Minich*, BLR , BRB No. 13-0544 BLA, slip op. at 10-11. Because the definition of legal pneumoconiosis encompasses only those diseases or impairments that are "significantly related to, or substantially aggravated by, dust exposure in coal mine employment," employer must prove that these prerequisites are absent to establish that claimant's obstructive impairment is not legal pneumoconiosis. 20 C.F.R. §718.201(a)(2), (b); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000).

If the administrative law judge finds that employer has failed to establish the absence of legal pneumoconiosis, he should then determine whether employer has disproved the presence of clinical pneumoconiosis arising out of coal mine employment at Section 718.305(d)(1)(i)(B). Once the administrative law judge finds that employer has failed to disprove the existence of both legal and clinical pneumoconiosis, 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 "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).

In a recent decision, the United States Court of Appeals for the Fourth Circuit held that the "no part" standard is valid, and that it requires the party opposing entitlement to "rule out" any connection between pneumoconiosis and the miner's total disability. *W. Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-446 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); *Minich*, BLR , BRB No. 13-0544 BLA, slip op. at 10-11 (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 pneumoconiosis."). If employer proves that claimant

does not have legal and clinical pneumoconiosis, or that claimant's disabling obstructive 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); *see Morrison v. Tenn. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *Bender*, 782 F.3d at 129, BLR (4th Cir. 2015); *Minich*, BLR , BRB No. 13-0544 BLA, slip op. at 10-11.

The administrative law judge did not properly consider whether employer disproved the existence of clinical and legal pneumoconiosis pursuant to Section 725.305(d)(1)(i)(A), (B) and did not apply the correct rebuttal standard at Section 718.305(d)(1)(ii).[13] *See Bender*, 782 F.3d at 144, BLR ; *Minich*, BLR , BRB No. 13-0544 BLA slip op. at 10-11. 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 prongs of rebuttal. 20 C.F.R. §718.305(d)(1)(i), (ii).

[13] Moreover, we note that because the administrative law judge did not first make an independent finding as to whether employer disproved the existence of clinical and legal pneumoconiosis, we cannot affirm his finding regarding disability causation. *See Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015)(Boggs, J., concurring and dissenting).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge