U.S. Department of Labor

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

BRB No. 16-0253 BLA

JAMES A. MINICH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KEYSTONE COAL MINING CORPORATION	)	
	)	
and	)	
	)	
ROCHESTER & PITTSBURGH COAL COMPANY	)	DATE ISSUED: 03/02/2017
	)	
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 Awarding Benefits on Remand of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Daniel K. Evans and Timothy C. MacDonnell (Black Lung Legal Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Norman A. Coliane (Thompson Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, for employer/carrier.

Rebecca J. Fiebig (Nicholas C. Geale, Acting Solicitor of Labor, Maia 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, BOGGS and BUZZARD, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Remand (2012-BLA-5373) of Administrative Law Judge Natalie A. Appetta, rendered on a subsequent claim filed on August 20, 2010, pursuant to the provisions of 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.[1]

Initially, in a Decision and Order dated July 31, 2013, Administrative Law Judge Drew A. Swank credited claimant with twenty-nine years of underground coal mine employment[2] and found that claimant suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Based on those determinations, and the filing date of the claim, Judge Swank found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] Judge Swank further found that employer did not rebut the presumption. Accordingly, Judge Swank awarded benefits.

[1] We incorporate the procedural history of the case as set forth in *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-152 n.1 (2015) (Boggs, J., concurring and dissenting).

[2] Claimant was last employed in the coal mining industry in Pennsylvania. Director's Exhibits 1, 10. Accordingly, the Board will apply the law 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).

[3] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

Upon review of employer's appeal, the Board affirmed, as unchallenged, Judge Swank's findings that claimant established at least fifteen years of underground coal mine employment, total disability at 20 C.F.R. §718.204(b)(2), and invocation of the Section 411(c)(4) presumption.[4] *Minich v. Keystone Coal Mining Co*., 25 BLR 1-149, 1-153 n.5 (2015) (Boggs, J., concurring and dissenting). Moreover, a majority of the Board's three-member panel rejected employer's argument that it may rebut the Section 411(c)(4) presumption with proof that pneumoconiosis is not a "substantially contributing cause" of claimant's totally disabling respiratory or pulmonary impairment. *Id*. at 1-554-57. Rather, the majority upheld the standard codified at 20 C.F.R. §718.305(d)(1)(ii), which provides that the party opposing entitlement may rebut the Section 411(c)(4) presumption by establishing that "no part" of claimant's total disability was caused by pneumoconiosis. *Id*.

The Board agreed with employer, however, that Judge Swank erred in weighing the medical evidence on rebuttal. *Minich*, 25 BLR at 1-157-64. Specifically, on the issue of pneumoconiosis, the Board held that Judge Swank erred in failing to consider all of the relevant evidence, and erred in placing the burden of proof on claimant to establish the existence of pneumoconiosis. *Id*. at 1-157 n. 11. On the issue of whether employer rebutted the presumed fact of disability causation, the Board held that Judge Swank erred by requiring employer to rule out "coal dust exposure" as a cause of claimant's totally disabling impairment, when the standard at 20 C.F.R. §718.305(d)(1)(ii) requires employer to rule out "pneumoconiosis" as a cause, by establishing that "no part" of claimant's total disability was caused by pneumoconiosis. *Id*. at 1-157-59. Therefore, the Board remanded the case for Judge Swank to reconsider whether employer rebutted the Section 411(c)(4) presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[5] or by establishing that "no part of [claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20

[4] Because claimant invoked the Section 411(c)(4) presumption based on a finding that the new evidence established total respiratory disability, claimant also demonstrated a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). *See Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794, 25 BLR 2-285, 2-293 (7th Cir. 2013); *Minich*, 25 BLR at 1-157 n. 11.

[5] "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).

C.F.R. §718.305(d)(1)(i), (ii); *see Minich*, 25 BLR at 1-157-59. The Board instructed Judge Swank to address and weigh all of the relevant evidence on rebuttal, with the burden on employer. *Minich*, 25 BLR at 1-157-64.

On remand, the case was reassigned, without objection,[6] to Judge Natalie A. Appetta (the administrative law judge), who issued her Decision and Order on January 28, 2016. The administrative law judge found that employer did not establish that claimant has neither legal nor clinical pneumoconiosis, or establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. Therefore, the administrative law judge found that employer failed to rebut the Section 411(c)(4) presumption, and she awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption. Specifically, reiterating its arguments from the prior appeal regarding the rebuttal standard, employer asserts that 20 C.F.R. §718.305 impermissibly creates a rebuttal standard different from the one in the Act, and contends that employer should not be required to "rule out" a connection between pneumoconiosis and claimant's total disability. Employer's Brief at 16, 21, 23-32. Both claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, noting that employer raises the same arguments regarding the rebuttal standard that the Board addressed and rejected in *Minich*. Both claimant and the Director assert that the administrative law judge rationally found 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 contends that the "plain meaning of the statute and the expressed intent of Congress in using the 'arising out of language' in regard to rebuttal of the fifteen year presumption . . . conveys that rebuttal can be established by showing that there is not at least a significant causal connection between pneumoconiosis and the miner's disability or death." Employer's Brief at 18. Employer maintains that by requiring it to "rule out" a causal connection between claimant's disability and pneumoconiosis, the regulation at 20 C.F.R. §718.305 impermissibly "creates a new standard of rebuttal from that which is

[6] Administrative Law Judge Drew A. Swank issued an Order on November 16, 2015, stating that the case was reassigned "[d]ue to case file management," and providing the parties an opportunity to object to the reassignment. No party objected.

established in the Act." *Id*. at 19. Employer also asserts that principles of statutory construction and established case law further support its argument that the "rule out" standard should not be applied to rebuttal of the Section 411(c)(4) presumption. *Id*. at 23-32. Therefore, employer contends that "a doctor's opinion that determines that there is no significant contribution to the miner's total respiratory disability from pneumoconiosis is facially sufficient to establish rebuttal under the Section 411(c)(4) statute or the regulation at [20 C.F.R.] §718.305(d)(1)(ii)." *Id*. at 21.

We decline to reconsider these arguments, as the Board has already considered and rejected them. *Minich*, 25 BLR at 1-554-57; *see also Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 667, 25 BLR 2-725, 2-739 (6th Cir. 2015); *W.Va. CWP Fund v. Bender*, 782 F.3d 129, 138-43, 25 BLR 2-689, 2-699-708 (4th Cir. 2015) (holding that the rule-out standard set forth in 20 C.F.R. §718.305(d) is a reasonable exercise of the Department of Labor's authority, and that it "lawfully applies to coal mine operators as well as to the Secretary"); *PBS Coals, Inc. v. Director, OWCP* [*Davis*], 607 F. App'x 159, 160 (3d Cir. 2015); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1336-37, 1346, 25 BLR 2-549, 2-555-56, 2-568-70 (10th Cir. 2014); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1069-71, 25 BLR 2-431, 2-445-47 (6th Cir. 2013). The Board's holdings on this issue constitute the law of the case, and employer has not shown that an exception to the doctrine applies here. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (Brown, J., dissenting).

Apart from its repeated challenge to the rebuttal standard at 20 C.F.R. §718.305(d)(1)(ii), employer does not challenge the administrative law judge's findings on remand, that the x-ray and medical opinion evidence failed to establish that claimant does not have clinical pneumoconiosis, or her finding that the opinions of Drs. Fino and Basheda were not sufficiently credible to establish that claimant does not have legal pneumoconiosis. Decision and Order on Remand at 9-21; 20 C.F.R. §718.305(d)(1)(i). Nor does employer challenge the administrative law judge's finding that Drs. Fino and Basheda failed to credibly explain why no part of claimant's total disability was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. *Id*. at 21-22; 20 C.F.R. §718.305(d)(1)(ii). Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Thus, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

GREG J. BUZZARD
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring in the result:

Although there is merit in employer's arguments regarding the presumption, because the administrative law judge found that the opinions of Drs. Fino and Basheda were not credible on the issues of pneumoconiosis and disability causation, and employer does not challenge those credibility determinations, I concur in the result.

JUDITH S. BOGGS
Administrative Appeals Judge