U.S. Department of Labor

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

BRB No. 16-0275 BLA

GINGER HALSTEAD, on behalf of JOHNNY M. HALSTEAD	)	
Claimant-Respondent	)	
v.	)	
MEADOW RIVER COAL COMPANY	)	DATE ISSUED: 03/02/2017
and	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
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.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer/carrier.

Emily Goldberg-Kraft (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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-5280) of Administrative Law Judge Drew A. Swank, rendered on a miner's claim filed on March 14, 2013, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge determined that the miner had 23.84 years of coal mine employment and a totally disabling respiratory or pulmonary impairment. The administrative law judge found, therefore, that claimant invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).[2] The administrative law judge then concluded that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in determining that it did not rebut the presumed existence of legal pneumoconiosis and in applying 20 C.F.R. §718.305(d)(3). Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), states that there is merit to employer's argument that the administrative law judge erred in relying solely on 20 C.F.R. §718.305(d)(3) to discredit the opinions of Drs. Zaldivar and Rosenberg. The Director also asserts that the administrative law judge did not properly address whether employer rebutted the presumption, and did not properly weigh Dr. Rasmussen's diagnosis of pneumoconiosis.[3]

[1] Claimant, Ginger Halstead, is the widow of the miner, Johnny M. Halstead, who died on April 17, 2014, while his claim was pending. She is pursuing this claim on his behalf.

[2] Under Section 411(c)(4) of the Act, a miner's total disability or death is presumed to be due to pneumoconiosis if he or she had 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(b).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that: the miner had 23.84 years of qualifying coal mine employment; the miner suffered from a totally disabling respiratory impairment; and claimant invoked the rebuttable presumption at Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 14.

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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis, 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 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).

The administrative law judge considered simultaneously whether employer rebutted the presumed existence of legal pneumoconiosis[5] at 20 C.F.R. §718.305(d)(1)(i)(A) and the presumed fact of total disability causation at 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 14-17. The administrative law judge gave less weight to the opinions of Drs. Zaldivar and Rosenberg, who attributed the miner's totally disabling impairment to "idiopathic pulmonary fibrosis," because he determined that the regulation at 20 C.F.R. §718.305(d)(3) precluded rebuttal when the totally disabling obstructive respiratory or pulmonary disease was of unknown origin. Employer's Exhibits 2, 5; Decision and Order at 17. Based on these findings, the administrative law judge determined that employer failed to rebut the presumption that the miner's totally disabling respiratory impairment is due to legal pneumoconiosis. *Id.*

[4] The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 4, 6, 8. 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).

[5] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation also provides that "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or *substantially aggravated by*, dust exposure in coal mine employment." 20 C.F.R. §718.201(b) (emphasis added).

There is merit to employer's allegation that the administrative law judge erred in relying on 20 C.F.R. §718.305(d)(3) to discredit the opinions of Drs. Zaldivar and Rosenberg on rebuttal. The regulations provide that "[t]he presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling *obstructive* respiratory or pulmonary disease of unknown origin." 20 C.F.R. §718.305(d)(3) (emphasis added). In this case, all of the physicians diagnosed the miner exclusively with a *restrictive* respiratory or pulmonary impairment.[6] *See* Director's Exhibit 11; Employer's Exhibits 2, 5. However, the administrative law judge found that the opinions of Drs. Zaldivar and Rosenberg conflicted with the regulation precluding rebuttal when the totally disabling "*obstructive* respiratory or pulmonary disease" was of unknown origin. Decision and Order at 17, *citing* 20 C.F.R. §718.305(d)(3) (emphasis added). Because the sole basis for the administrative law judge's discrediting of the opinions of Drs. Zaldivar and Rosenberg was his erroneous application of 20 C.F.R. §718.305(d)(3), we vacate the administrative law judge's discrediting of these medical opinions, and his finding that employer did not rebut the Section 411(c)(4) presumption.

With respect to the existence of clinical pneumoconiosis, the administrative law judge determined, while placing the burden of proof on claimant, that Dr. Rasmussen's diagnosis was flawed because "[h]e, alone of the experts," found that the miner had the disease, which was "an opinion that this Decision and Order rejects."[7] Decision and Order at 17; Director's Exhibit 11. The issue before the administrative law judge, however, was whether *employer* submitted evidence sufficient to affirmatively *rebut* the existence of clinical pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(B). Therefore, we vacate the administrative law judge's discrediting of Dr. Rasmussen's diagnosis of clinical pneumoconiosis. *See Copley*, 25 BLR at 1-89.

In light of the errors in the administrative law judge's weighing of the medical opinions relevant to rebuttal of the Section 411(c)(4) presumption, we remand this case to the administrative law judge for reconsideration. When addressing the opinions of Drs. Zaldivar, Rosenberg, and Rasmussen on remand, the administrative law judge must first

[6] Dr. Zaldivar stated that the miner had "[s]evere restriction of vital capacity without any airway obstruction." Employer's Exhibit 2. Dr. Rosenberg reported that the miner's "pulmonary function tests demonstrated severe restriction which deteriorated quickly over time." Employer's Exhibit 5. Dr. Rasmussen diagnosed the miner with a "moderate, irreversible restrictive ventilator[y] impairment." Director's Exhibit 11.

[7] The administrative law judge determined that "[c]laimant has failed to prove by a preponderance of the evidence that the miner had coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)." Decision and Order at 9. Drs. Zaldivar and Rosenberg did not diagnose clinical pneumoconiosis. Employer's Exhibits 2, 4, 5.

render findings on rebuttal of the presumed existence of *both* legal *and* clinical[8] pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i). The administrative law judge must address both forms of pneumoconiosis to satisfy the statutory mandate to consider all relevant evidence, and to provide a framework for the analysis of the medical opinions on total disability causation at 20 C.F.R. §718.305(d)(1)(ii). *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting). Because the definition of legal pneumoconiosis encompasses only those chronic lung diseases or impairments that are "significantly related to, or substantially aggravated by, dust exposure in coal mine employment," the administrative law judge must determine whether employer has affirmatively proven, by a preponderance of the evidence, that these prerequisites are absent. 20 C.F.R. §718.201(a)(2), (b).

If the administrative law judge finds that employer has failed to disprove legal pneumoconiosis, he should then determine whether employer has disproven the presence of clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(B). In the event that the administrative law judge determines that employer *has* disproved the existence of both legal and clinical pneumoconiosis, 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 rebuttal of disability causation at 20 C.F.R. §718.305(d)(1)(ii).

However, if 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."[9] 20 C.F.R. §718.305(d)(1)(ii); *see Bender*, 782 F.3d at 137, 25 BLR

[8] Clinical pneumoconiosis is defined as "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).

[9] We agree with the Director, Office of Worker Compensation Programs, that the administrative law judge incorrectly references the standard applicable to 20 C.F.R. §718.204(c), when considering rebuttal at 20 C.F.R. §718.305(d)(1)(i)(A), (ii). *See* Decision and Order at 16. While a miner seeking to affirmatively establish total disability due to pneumoconiosis *without* the benefit of the Section 411(c)(4) presumption, pursuant to 20 C.F.R. §718.204(c), must show that pneumoconiosis is a "substantially contributing cause" of his or her impairment, rebuttal of the Section 411(c)(4) presumption of disability causation requires employer to establish that "*no part* of the miner's respiratory or pulmonary total disability was caused by

at 2-699. In the event that employer establishes, by a preponderance of the evidence, that claimant does not have legal and clinical pneumoconiosis, *or* that no part of claimant's disabling respiratory or pulmonary impairment was caused by legal or 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 Minich*, 25 BLR at 2-159. However, if employer fails to establish rebuttal, the administrative law judge may reinstate the award of benefits.

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pneumoconiosis[.]" 20 C.F.R. §718.305(d)(1)(ii) (emphasis added). Moreover, in revising the regulations to implement amended Section 411(c)(4), the Department of Labor clarified that the "no part" standard of 20 C.F.R. §718.305(d)(1)(ii) is different, and more favorable to claimants, than the "substantially contributing cause" standard for disability causation at 20 C.F.R. §718.204(c). 78 Fed. Reg. 59,102, 59,106-07 (Sept. 25, 2013). Thus, on remand, the administrative law judge must apply the proper rebuttal standard.

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 proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge