U.S. Department of Labor

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

BRB No. 18-0173 BLA

EDWARD G. PIPER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EIGHTY FOUR MINING COMPANY	)	DATE ISSUED: 03/12/2019
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	
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.

Paul E. Sutter (SutterWilliams, LLC), Morgantown, West Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05821) of Administrative Law Judge Drew A. Swank, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on March 5, 2015.

The administrative law judge found that claimant established 27.63 years of underground coal mine employment[1] and a totally disabling respiratory or pulmonary impairment pursuant 20 C.F.R. §718.204(b)(2). Thus, 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).[2] The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that it failed to rebut the presumption.[3] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 13; Director's Exhibit 5.

[2] 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.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that he has neither legal nor clinical pneumoconiosis,[4] 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 employer that the administrative law judge erred in finding that it failed to rebut the presumption.

The administrative law judge began his analysis by considering whether claimant could prove that he has pneumoconiosis pursuant to 20 C.F.R. §718.202(a), ultimately finding that claimant "failed to prove by a preponderance of the evidence that he has coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)." Decision and Order at 5-12. This was error, as claimant is presumed to have clinical pneumoconiosis; the burden is on employer to rebut the existence of the disease. *See* 20 C.F.R. §718.305(d)(1)(i)(B); *Griffith v. Terry Eagle Coal Co.* BLR , BRB No. 16-0587 BLA, slip op. at 4-6 (Sept. 6, 2017) (pub.); *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); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25 (3d Cir. 1997).

The administrative law judge also erred by considering the issue of disability causation without first evaluating whether employer rebutted the presumption that claimant has legal pneumoconiosis. He found that because claimant invoked the Section 411(c)(4) presumption, claimant established "that he suffers from legal coal workers' pneumoconiosis." Decision and Order at 8-12. He then stated that, "[a]s the issue of whether [claimant] ha[s] coal workers' pneumoconiosis was determined . . . the single issue to be determined is whether [c]laimant's total disability arose from his coal workers' pneumoconiosis due to his past coal mine employment." *Id*. at 14. The administrative law judge first should have considered whether employer disproved legal pneumoconiosis by showing that claimant does not have a chronic lung disease or impairment that is

[4] 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).

"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 an employer fails to disprove both legal and clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i) should the administrative law judge consider whether the employer rebutted disability causation at 20 C.F.R. §718.305(d)(1)(ii).

Finally, on the issue of disability causation, the administrative law judge applied an incorrect rebuttal standard. He found the opinions of employer's experts, Drs. Basheda and Rosenberg, unpersuasive and thus insufficient "to rebut the legal presumption that coal workers' pneumoconiosis is a 'substantially contributing cause' of [c]laimant's total pulmonary or respiratory disability contained at 20 C.F.R. §718.305." Decision and Order at 15-16; Employer's Exhibits 3, 4. The proper inquiry is whether employer establishes that "no part" of claimant's total respiratory disability is due to pneumoconiosis, not whether pneumoconiosis is a "substantially contributing cause" of the disability. *See* 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge's use of an incorrect rebuttal standard is not harmless error, as we are unable to discern the extent to which it 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 his finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 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. As the Board explained in *Minich* and *Griffith*, he must begin his analysis by considering whether employer has disproved the existence of legal pneumoconiosis by establishing that claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Griffith*, BRB No. 16-0587 BLA, slip op. at 4; *Minich*, 25 BLR at 1-155 n.8. He must also determine whether employer has established that claimant does not have clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(B); *Griffith*, BRB No. 16-0587 BLA, slip op. at 4-5; *Minich*, 25 BLR at 154-56.

If the administrative law judge finds that employer has met its burden to disprove the existence of 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 claimant has neither legal nor clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i), 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 [claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [Section] 718.201." 20 C.F.R. §718.305(d)(1)(ii); *see Helen Mining Co. v. Elliott*, 859 F.3d 226, 237-38 (3d Cir. 2017); *Griffith*, BRB No. 16-0587 BLA, slip op. at 5; *Minich*, 25 BLR at 1-159. If employer is unable to rebut the Section 411(c)(4) presumption pursuant to 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 Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). Furthermore, he must set forth his findings in detail, including the underlying rationale for his decision, as required by the Administrative Procedure Act,[5] 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.

[5] 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).

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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge