U.S. Department of Labor

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

BRB No. 18-0184 BLA

CHARLES E. HAUBER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ENERGY WEST MINING COMPANY	)	DATE ISSUED: 03/12/2019
	)	
Employer-Petitioner	)	
	)	
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 and Lucinda L. Fluharty (Jackson Kelly PLLC), 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-5671) of Administrative Law Judge Drew A. Swank, rendered on a claim filed on September 3, 2015, 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 found that claimant established twenty-two years of coal mine employment, working aboveground at

an underground mine site, and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Thus, he found that claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] 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 claimant is totally disabled and thereby invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge did not apply the correct legal standard on rebuttal and erred in discrediting its medical experts. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer filed a reply, reiterating it arguments.[2]

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.[3] 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).

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

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant can establish total disability based

[1] Under Section 411(c)(4) of the Act, claimant is entitled to a 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); 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established twenty-two years of qualifying coal mine employment. Decision and Order at 4; *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The record reflects that claimant's last coal mine employment was in Utah. Decision and Order at 5; Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all evidence supporting total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge found that claimant established total disability based on Dr. Saludes' medical opinion.[4] 20 C.F.R. §718.204(b)(2)(iv). Employer contends the administrative law judge erred in determining the exertional requirements of claimant's usual coal mine employment, did not rationally explain his finding at 20 C.F.R. §718.204)(b)(2)(iv), and failed to properly weigh the contrary evidence. We reject employer's arguments.

Pursuant 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that claimant last worked as a loader operator/truck driver. Decision and Order at 17; Director's Exhibit 2; Hearing Transcript at 16-17, 24. Claimant testified that his work involved climbing in and out of the truck and around the truck to "make your checks and everything," unloading "rock dust" and "belt supplies," and changing air filters and "keeping the scrubber clean." Hearing Transcript at 17, 22-23. Relying on the Dictionary of Occupational Titles (DOT), the administrative law judge determined that claimant's usual coal mine employment involved "medium exertional work." Decision and Order at 17. He then weighed the opinions of Drs. Lenkey, Basheda, and Saludes. *Id*. at 17-18; Director's Exhibits 7, 25; Claimant's Exhibit 1. Because Drs. Lenkey[5] and Basheda[6]

[4] The administrative law judge found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 12-14.

[5] Dr. Lenkey examined claimant on December 17, 2015 on behalf of the Department of Labor and reviewed claimant's employment history, Form CM-911a. Director's Exhibit 7. He initially opined that claimant is totally disabled based on the pulmonary function study results. *Id*. In a supplemental report dated January 19, 2017, he changed his opinion and stated that "[m]ost likely [claimant] is able to perform his last coal mining job, particularly noting that he was a loader operator and for the most part, this was not requiring as much exertion as a center minor [sic] or roof bolter, etc." Director's Exhibit 28.

[6] Dr. Basheda examined claimant on September 28, 2016 and diagnosed a "class II" impairment of the whole person. Director's Exhibit 15. At his deposition, Dr. Basheda testified that claimant was not totally disabled as he "did not have to load or unload the

inaccurately considered claimant's job to be "non-exertional," the administrative law judge found their opinions unpersuasive and entitled to little weight. Decision and Order at 18. In contrast, he found Dr. Saludes' opinion[7] that claimant is unable from a respiratory standpoint to perform his job as a truck driver/loader to be "the most persuasive" and sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*.

Employer generally contends that the administrative law judge erred in determining the exertional requirements of claimant's job and therefore erred in rejecting the disability opinions of its experts. Employer does not explain with any specificity, however, why the administrative law judge's reliance on the DOT was improper.[8] 20 C.F.R. §802.211(b); *see Cox v. Director, OWCP*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). We therefore affirm the administrative law judge's finding that claimant's usual coal mine employment required medium exertion and his assignment of less weight to the opinions of Drs. Lenkey and Basheda for basing their disability opinions on exertional requirements less demanding than claimant's actual work. Decision and Order at 17-18; *see Rockwood Casualty Insurance Co. v. Director, OWCP*, No. 18-9520, 2019 WL 1030266 at *18 (10th Cir. Mar. 5, 2019)*; Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); *Ondecko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989).

We also reject employer's contention that the administrative law judge erred in crediting Dr. Saludes' opinion because he, like Drs. Lenkey and Basheda, described claimant's job as non-exertional. Although Dr. Saludes believed that claimant "did not have a lot of exertional activity" in his last job as a loader operator/truck driver, he specifically opined that claimant does not have the respiratory capacity to perform that work based on the results of his pulmonary function study showing an "FEV1/FVC ratio of 37 [percent]." Claimant's Exhibit 1. Because a rational interpretation of Dr. Saludes' opinion is that claimant is unable to perform the physical demands of his usual coal mine

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truck in any way, [claimant] said this was not exertional work, he basically sat in his truck and drove around." Employer's Exhibit 6.

[7] Dr. Saludes examined claimant on July 7, 2017, and opined that while claimant "did not have a lot of exertional activity in his last job," he is disabled from performing his job based on the pulmonary function study results. Claimant's Exhibit 1.

[8] At the hearing, the administrative law judge took official notice of the Dictionary of Occupational Titles (DOT) without objection, Hearing Transcript at 6, and employer does not assert that he misapplied the DOT.

employment, whether classified as non-exertional or medium exertional work, we see no error in the administrative law judge's reliance on Dr. Saludes' opinion to find claimant totally disabled. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988).

Additionally, there is no merit to employer's argument that Dr. Saludes' opinion is less probative because it is based on a non-qualifying pulmonary function study. The regulations provide that "[w]here total disability cannot be shown" based on pulmonary function studies and blood gas studies, "total disability may nevertheless be found" based on a physician's "reasoned medical judgment." 20 C.F.R. §718.204(b)(2)(iv); *see Cornett*, 227 F.3d at 577 (even a non-qualifying pulmonary function study reflecting a mild impairment may be totally disabling); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997). Employer has not shown how the administrative law judge erred in finding Dr. Saludes' opinion reasoned and sufficient to establish that claimant has a respiratory impairment that precludes him from performing his usual coal mine work as a loader operator/truck driver. *See Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1024 (10th Cir. 2010); *Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993); *see Cox*, 791 F.2d 446; *Sarf*, 10 BLR at 1-120-21.

We therefore affirm the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv), and his overall determination that claimant established total disability pursuant to 20 C.F.R. §718.204(b). *See Rafferty*, 9 BLR at 1-232; Thus, we affirm the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish he has neither legal nor clinical pneumoconiosis,[9] 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); *see Antelope Coal Co./Rio Tinto*

[9] 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).

Energy Am. v. Goodin, 743 F.3d 1331, 1336-37 (10th Cir. 2014); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting). We agree with employer that the administrative law judge erred in finding the presumption unrebutted.

The administrative law judge began his analysis by considering whether claimant could prove clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a), ultimately finding that he "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 9. This was error, as claimant is presumed to have clinical pneumoconiosis; the burden is on employer to disprove the existence of the disease. *See* 20 C.F.R. §718.305(d)(1)(i)(B); *Griffith v. Terry Eagle Coal Co.*, BRB No. 16-0587 BLA, slip op. at 4-6 (Sept. 6, 2017) (pub.); *Minich*, 25 BLR at 1-154-56. 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).

The administrative law judge also erred by considering the issue of disability causation without first evaluating whether employer disproved 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 18. He then incorrectly stated that, "[a]s the issue of whether [claimant] ha[s] coal workers' pneumoconiosis was determined . . . the single issue to be determined [on rebuttal] is whether [c]laimant's total disability arose from his coal workers' pneumoconiosis due to his past coal mine employment." *Id*. at 19-20. He first should have considered whether employer disproved legal pneumoconiosis by proving that claimant does not have a chronic lung disease or impairment "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 employer failed to disprove both legal and clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i) should the administrative law judge address whether employer disproved disability causation at 20 C.F.R. §718.305(d)(1)(ii). *See Minich*, 25 BLR at 1-159.

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. Lenkey and Basheda, 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 21; Director's Exhibit 28; Employer's Exhibit 6. 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 contributed 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.

Remand Instructions

On remand, the administrative law judge is instructed to reconsider whether employer rebutted the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305; *Goodin*, 743 F.3d at 1336-37. He must begin his analysis by considering whether employer 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 6; *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 6; *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, 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 Griffith*, BRB No. 16-0587 BLA slip op. at 6; *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 Gunderson*, 601 F.3d at 1024; *Pickup*, 100 F.3d at 873; *Hansen*, 984 F.2d at 370. He must set forth his findings in detail, including the

underlying rationale for his decision, as required by the Administrative Procedure Act,[10] 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.

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

[10] 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).