U.S. Department of Labor

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

BRB No. 18-0249 BLA

JOHN A. GLITSKY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CQ ENERGY PARTNERS, LIMITED	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 03/26/2019
	)	
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 of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2017-BLA-05878) of Administrative Law Judge Drew A. Swank, awarding benefits on a claim filed on May 27, 2016 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge initially noted that the parties stipulated that claimant had thirty-seven years of coal mine employment.[1] He further found that at least fifteen of those years were underground, and that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). He therefore invoked the rebuttable presumption that claimant is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). 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 did not apply the correct legal standard when he found that it did not rebut the Section 411(c)(4) presumption.[3] Claimant responds in support 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] Claimant's coal mine employment was in Pennsylvania. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction 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).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where he establishes at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 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 made several errors in considering rebuttal.

First, 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 clinical pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(1)." Decision and Order at 9. This was error. 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 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).

Second, the administrative law judge 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, he established "the existence of legal coal workers' pneumoconiosis." Decision and Order at 14. He then incorrectly stated "[a]s the issue of whether [claimant] has 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 15. 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

[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).

disability causation at 20 C.F.R. §718.305(d)(1)(ii). *See Minich*, 25 BLR at 1-159. We therefore vacate the administrative law judge's findings 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. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. 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."[5] 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.

[5] We agree with employer that the administrative law judge's blanket rejection of Dr. Basheda's opinion, as contrary to the preamble to the 2001 regulations, constituted error. Decision and Order 17; Employer's Brief at 19-20. In evaluating expert medical opinions, an administrative law judge may consult the preamble as a statement of medical science studies found credible by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314 (4th Cir. 2012). However, an administrative law judge must not use the preamble as a legal rule that all obstructive lung disease or asthma is pneumoconiosis. *See Looney*, 678 F.3d at 314-16. We also agree with employer that the administrative law judge erred in stating that Dr. Fino failed to explain the origin of claimant's oxygenation impairment. Employer's Brief at 20-21; Decision and Order at 17. As employer accurately notes, Dr. Fino opined that claimant's drop in oxygen saturation is due to his lung cancer, which was unrelated to coal dust exposure. Employer's Exhibits 2, 4.

§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 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 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,[6] 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.

[6] 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

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge