U.S. Department of Labor

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

BRB No. 14-0351 BLA

LONNIE G. STOUT Claimant-Respondent v. UNITED STATES STEEL CORPORATION and UNITED STATES STEEL & CARNEGIE PENSION FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/08/2015 DECISION and ORDER

Appeal of the Decision and Order of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

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

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order (11-BLA-5660) of Administrative Law Judge Pamela J. Lakes awarding benefits 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 subsequent claim filed on April 7, 2010.[1]

Applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with at least twenty years of qualifying coal mine employment,[3] and noted that employer stipulated that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption set forth at Section 411(c)(4). Consequently, the administrative law judge also found that claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309(c). Finally, the administrative law judge determined that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the element of pneumoconiosis may be established by the fifteen-year presumption for

[1] Claimant initially filed a claim for benefits on November 30, 2005. Director's Exhibit 1. In a Decision and Order dated March 3, 2008, Administrative Law Judge Richard T. Stansell-Gamm found that the evidence established that claimant suffered from a totally disabling pulmonary impairment. *Id.* However, Judge Stansell-Gamm found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Id.* Accordingly, Judge Stansell-Gamm denied benefits. *Id.*

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

[3] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

the purpose of showing a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). Employer also contends that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's reliance on claimant's invocation of the Section 411(c)(4) presumption to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The Director also responds in support of the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption.[4]

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).

20 C.F.R. §725.309

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 1. Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing the existence of pneumoconiosis. 20 C.F.R. §725.309(c)(1), (3).

Employer argues that the administrative law judge erred in failing to consider whether claimant affirmatively established the existence of pneumoconiosis based on the new evidence, and thus demonstrated a change in the applicable condition of entitlement under 20 C.F.R. §725.309(c)(1). Contrary to employer's contention, because claimant

[4] Because employer does not challenge the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, he has satisfied his initial burden to demonstrate a change in the applicable condition of entitlement at 20 C.F.R. §725.309. *See Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794, 795, 25 BLR 2-285, 2-292 (7th Cir. 2013) (holding that the element of pneumoconiosis may be established by the fifteen-year presumption for the purpose of showing a change in an applicable condition of entitlement at 20 C.F.R. §725.309). Accordingly, we reject employer's allegation of error, and affirm the administrative law judge's finding that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).

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

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of both legal and clinical pneumoconiosis,[5] or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1). The administrative law judge found that employer failed to establish rebuttal by either method.

Initially, we address employer's contention that the administrative law judge improperly restricted employer to the two methods of rebuttal provided to the Secretary of Labor at 30 U.S.C. §921(c)(4). In support of its argument, employer relies upon the statutory language of 30 U.S.C. §921(c)(4), and the United States Supreme Court's holding in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976), that the rebuttal limitations are inapplicable to coal mine operators. Employer's Brief at 18-19. Employer's contention is substantially similar to the one that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring), and we reject it here for the reasons set forth in that decision.[6] *See also W.Va. CWP Fund v. Bender*, F.3d , No. 12-0234, 2015 WL

[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).

[6] The regulations also make clear that the rebuttal provisions apply to responsible operators. 20 C.F.R. §718.305(d)(1).

147069 (4th Cir. Apr. 2, 2015) (recognizing that the rebuttal provisions apply to coal mine operators as well as the Secretary).

In considering whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge considered the x-ray evidence. The administrative law judge found that the x-ray evidence was "equivocal" as to the existence of clinical pneumoconiosis and, therefore, did not assist employer in disproving the existence of the disease. Decision and Order at 7-8, 14. Because employer does not challenge this finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge also considered the medical opinion evidence. Although Drs. Fino, Castle, and Forehand opined that that claimant does not suffer from clinical pneumoconiosis, the administrative law judge accurately noted that their opinions were based, in part, upon negative x-ray interpretations. Because the administrative law judge found that the x-ray evidence was equivocal on the issue of clinical pneumoconiosis, the administrative law judge permissibly questioned the documentation underlying the opinions of Drs. Fino, Castle, and Forehand. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); Decision and Order at 9, 14. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not disprove the existence of clinical pneumoconiosis. We, therefore, affirm the administrative law judge's determination that employer failed to disprove the existence of clinical pneumoconiosis.[7]

Because employer does not raise any additional contentions of error, we affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal of the Section 411(c)(4) presumption.

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits is affirmed.

[7] Employer's failure to disprove the existence of clinical pneumoconiosis precludes a rebuttal finding that the miner does not suffer from pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). We, therefore, need not address employer's argument that the administrative law judge erred in finding that employer failed to disprove the existence of legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

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REGINA C. McGRANERY
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

Because the administrative law judge invoked the Section 411(c)(4) presumption and permissibly discounted the medical opinions of Drs. Fino and Castle, I concur in the result.

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JUDITH S. BOGGS
Administrative Appeals Judge