U.S. Department of Labor

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

BRB No. 17-0447 BLA

RICKY A. BOOTH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PREMIUM ENERGY, LLC	)	DATE ISSUED: 05/29/2018
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	
	)	
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.

Joseph E. Wolfe and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-5573) of Administrative Law Judge Drew A. Swank, rendered on a claim filed on November 7, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant had eighteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, and thus invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[1] He further found that employer failed to rebut the presumption and awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established total disability and was thereby entitled to the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that it did not rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested to do so by the Board.[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).

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[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where 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 are established. 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 at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[3] Because the miner's last coal mine employment was in West Virginia, 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, 1-202 (1989) (en banc); Director's Exhibit 4.

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

A miner is totally disabled if he has a respiratory or pulmonary impairment which, standing alone, prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based upon: pulmonary function studies, arterial blood gas studies, evidence of 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 consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See 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 considered ten pulmonary function studies conducted on five separate dates.[4] The pre-bronchodilator and post-bronchodilator studies obtained on December 19, 2014 and May 28, 2015 were non-qualifying[5] for total disability. The pre-bronchodilator and post-bronchodilator studies obtained on April 20, 2016 and September 19, 2016 were qualifying. Director's Exhibits 18, 23; Claimant's Exhibit 1; Employer's Exhibit 3. On October 13, 2016, claimant underwent a pre-bronchodilator study that was qualifying, while the post-bronchodilator study was non-qualifying. Claimant's Exhibit 5. The administrative law judge found that because "a majority of the most recent [studies] qualified (five of the six 2016 [studies])," claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 12. After concluding that claimant established total disability based on the pulmonary function study evidence, the administrative law judge did not render findings under the remaining subsections of 20 C.F.R. §718.204(b)(2)(ii)-(iv).

Employer contends that the administrative law judge's reliance on the pulmonary function studies in 2016 is not rationally explained, given that only two years separates the December 19, 2014 and October 13, 2016 studies. Employer also asserts that substantial

[4] Employer states that "the division of the pre-[bronchodilator] and post-bronchodilator studies performed at five different dates into [ten] separate [studies] is a decision method that is unexplained and irrational." Employer fails to explain, however, how it was prejudiced by use of this method. *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference.").

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

evidence fails to support the administrative law judge's ultimate finding that claimant established total disability based on the 2016 pulmonary function studies, as the most recent study – the October 13, 2016 study – "yielded contradictory results."

Employer's arguments are without merit. We see no error in the administrative law judge's decision to give greater weight to the more recent 2016 studies, the preponderance of which are qualifying for total disability, over the older non-qualifying studies. *See Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233 (Table), 20 BLR 2-67, 2-72 (4th Cir. 1996), *citing Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-148 (6th Cir. 1988) (An administrative law judge may credit evidence that better reflects the miner's respiratory or pulmonary status at the time of the hearing); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 51-52, 16 BLR 2-61, 2-64-65 (4th Cir. 1992) (It is rational to give greater weight to more recent evidence if it shows that the miner's condition has progressed or worsened).

Furthermore, while the October 13, 2016 post-bronchodilator study is non-qualifying, the pre-bronchodilator study conducted on that same day is qualifying for total disability. The Department of Labor has cautioned against reliance on post-bronchodilator results in determining total disability: "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis." 45 Fed. Reg. 13,682 (Feb. 29, 1980). Because the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) is supported by substantial evidence, it is affirmed.

We agree with employer, however, that the administrative law judge erred by not rendering findings as to whether claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii) and (iv), and by failing to weigh the contrary probative evidence.[6] *Shedlock*, 9 BLR at 1-198. Because the administrative law judge did not consider all of the relevant evidence and make the necessary findings pursuant to 20 C.F.R. §718.204(b), we vacate his determinations that claimant established a totally disabling respiratory or pulmonary impairment and invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305; *see McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

[6] The record contains five non-qualifying blood gas studies and the conflicting medical opinions of Drs. Basheda, Green, Raj, and Zaldivar as to whether claimant is totally disabled. Director's Exhibits 18, 23, Claimant's Exhibits 1, 5; Employer's Exhibit 3.

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

Once a claimant invokes the Section 411(c)(4) presumption, the burden of proof shifts to the employer to establish that he has neither clinical nor legal pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i), or that "no part" of his totally disabling impairment was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Although we have vacated the determination that claimant invoked the Section 411(c)(4) presumption, in the interest of judicial economy we address the administrative law judge's findings that employer did not rebut the presumption.

In weighing the x-ray evidence, the administrative law judge erred by placing the burden of proof on claimant to establish clinical pneumoconiosis, when it is *employer's* burden to establish that he does not have the disease. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 9. Additionally, employer correctly asserts that the administrative law judge did not properly consider all of the relevant evidence on the issue of clinical pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1)-(4); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-11, 22 BLR 2-162, 2-169-74 (4th Cir. 2000). Specifically, although the administrative law judge considered the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), he did not consider the treatment records and medical opinions relevant to the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge also erred in failing to address whether employer disproved that claimant has legal pneumoconiosis, a finding that is necessary for a proper analysis of whether employer is able to rebut the Section 411(c)(4) presumption 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)(ii).

For all of these reasons, we vacate the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(d)(i), (ii); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Remand Instructions

The administrative law judge is instructed on remand to render findings as to whether claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iv). He must also make an overall determination as to whether claimant satisfied his burden to establish a totally disabling respiratory or pulmonary impairment, taking into consideration the contrary probative evidence pursuant to 20 C.F.R. §718.204(b)(2). If claimant establishes a totally disabling respiratory or pulmonary impairment, the Section 411(c)(4)

presumption is invoked. If claimant fails to establish total disability on remand, he is not entitled to the Section 411(c)(4) presumption and benefits are precluded under 20 C.F.R. Part 718.

If the presumption is invoked, the administrative law judge must then reconsider whether employer established rebuttal in accordance with the regulations. Specifically, the administrative law judge is instructed to first begin his analysis by considering whether employer disproved the existence of legal pneumoconiosis by affirmatively 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 Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting). Once a finding on the existence of legal pneumoconiosis is made, the administrative law judge should next determine whether employer has affirmatively established that claimant does not have clinical pneumoconiosis, weighing all of the relevant evidence in this case, including x-rays, medical opinions, and treatment records. 20 C.F.R. §718.305(d)(1)(i)(B); *Minich*, 25 BLR at 1-159; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-11, 22 BLR 2-162, 2-169-74 (4th Cir. 2000).

If the administrative law judge finds that employer has disproved the existence of *both* legal and clinical pneumoconiosis, employer has rebutted the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i). 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 is able to establish rebuttal under 20 C.F.R. §718.305(d)(1)(ii), with credible proof that "no part of [claimant's] total disability was caused by pneumoconiosis as defined in [Section] 718.201." *Minich*, 25 BLR at 1-159. If employer is unable to rebut the Section 411(c) presumption pursuant to either 20 C.F.R. §718.305(d)(1)(i) or (ii), claimant is entitled to benefits. The administrative law judge is instructed to set forth his findings on remand in detail, including the underlying rationale of his decision, as required by the Administrative Procedure Act.[7] *See Wojtowicz*, 12 BLR at 1-165.

[7] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 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

JONATHAN ROLFE
Administrative Appeals Judge