U.S. Department of Labor

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

BRB No. 18-0032 BLA

TERRY L. SHIPLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 05/14/2019
	)	
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 on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Jeffrey R. Soukup and William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand Awarding Benefits (2012-BLA-06048) 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 miner's claim filed on August 4, 2011, and is before the Board for the third time.

In its initial decision, the Board vacated the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption[1] because he failed to consider whether employer disproved that claimant has pneumoconiosis and improperly placed the burden on claimant to disprove disability causation. *Shipley v. Consolidation Coal Co*., BRB No. 14-0120 BLA (Aug. 13, 2014) (unpub.). In its second decision,[2] the Board again vacated the finding that employer rebutted the presumption in part because the administrative law judge failed to consider on remand claimant's contention that the opinions of Drs. Bellotte and Basheda are based on views that are contrary to the preamble. *See* 20 C.F.R. §718.305(d)(1)(i); *Shipley v. Consolidation Coal Co*., BRB No. 15-0346 BLA, slip op at 9 (June 30, 2016) (unpub.), *aff'd on recon*. *Shipley v. Consolidation Coal Co*., BRB No. 15-0346 BLA (Feb. 22, 2017) (unpub. Order). On remand, the

[1] Under Section 411(c)(4) of the Act, a miner is presumed totally disabled due to pneumoconiosis if he has 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); *see* 20 C.F.R. §718.305(b). In a Decision and Order dated January 3, 2014, the administrative law judge credited claimant with 40.22 years of qualifying coal mine employment, and noted the parties' stipulation that claimant has a totally disabling respiratory impairment. He therefore found claimant invoked Section 411(c)(4) presumption.

[2] We incorporate the complete procedural history of this case as set forth in the Board's two prior decisions. *Shipley v. Consolidation Coal Co*., BRB No. 14-0120 BLA (Aug. 13, 2014) (unpub.), and *Shipley v. Consolidation Coal Co*., BRB No. 15-0346 BLA (June 30, 2016) (unpub.), *aff'd on recon*. *Shipley v. Consolidation Coal Co*., BRB No. 15-0346 BLA (Feb. 22, 2017) (unpub. Order).

administrative law judge found that employer did not rebut the Section 411(c)(4) presumption and awarded benefits.

In the present appeal, employer asserts the Board exceeded its authority by remanding the case for the administrative law judge to consider the medical opinions in light of the medical science in the preamble. Employer also argues the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, filed a limited response, asserting the Board did not exceed its authority in the prior appeal.

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).

The Board's Prior Instructions

Initially, we reject employer's contention that the Board exceeded its review authority in the prior appeal by requiring the administrative law judge, on remand, to assess the medical opinion evidence in light of the tenets of the preamble. Employer's Brief at 9-11. The Board did not sua sponte order the administrative law judge to consult the preamble. Rather, in its initial decision in 2014 the Board noted claimant's argument that the opinions of Drs. Bellotte and Basheda are contrary to the medical science accepted by the Department of Labor in the preamble and "[left] these arguments for the administrative law judge to consider on remand." *Shipley*, BRB No. 14-0120 BLA, slip op. at 5 n.5. On remand, the administrative law judge issued an order on February 3, 2015 allowing additional briefing, at which time claimant reiterated his arguments to the administrative law judge. In his 2015 decision on remand, however, the administrative law judge did not address claimant's arguments. Thus, when the case was decided by the Board a second time in 2016, it noted the administrative law judge's omission and instructed him "to consider *claimant's argument* that the opinions of Drs. Bellotte and Basheda are based on views that are contrary to the medical science accepted by the Department in the preamble." *Shipley*, BRB No. 15-0346 BLA, slip op. at 7 (emphasis added). Moreover, employer's argument that the remand instructions exceeded the Board's review authority was

[3] Because claimant'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 (1989) (en banc); Hearing Transcript at 21.

previously considered and rejected by the Board pursuant to employer's request for reconsideration. *Shipley v. Consolidation Coal Co.*, BRB No. 15-0346 BLA (Feb. 22. 2017) (unpub. Order on Recon.). As employer has not shown that the Board's prior holding was clearly erroneous or that any other exception to the law of the case doctrine applies, we decline to disturb it. *See Coleman v. Ramey Coal Co*., 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990).

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to establish that the miner had 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). The administrative law judge found employer failed to rebut the presumption by either method. 2017 Decision and Order on Remand at 4, 16, 21.

To disprove legal pneumoconiosis,[5] employer must establish 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* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). On remand, the administrative law judge

[4] "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).

[5] The administrative law judge stated that he previously determined that the x-ray evidence supports rebuttal of the presumed existence of clinical pneumoconiosis. 2017 Decision and Order on Remand at 4. Asserting the Board did not disturb that finding on appeal, the administrative law judge determined that the present issue is whether employer can prove the absence of legal pneumoconiosis. *Id*. Contrary to the administrative law judge's statement, the Board previously noted that the administrative law judge failed to make a finding regarding clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Shipley*, BRB No. 15-0346 BLA, slip op. at 9 n.18. Any error is harmless, however, in light of our affirmance of the award of benefits for failure to rebut legal pneumoconiosis or total disability due to legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

reconsidered the medical opinions of Drs. Bellotte and Basheda that claimant does not have legal pneumoconiosis but has an obstructive impairment due to smoking-related emphysema and asthma.[6] 2017 Decision and Order on Remand at 5-11; Director's Exhibit 27; Employer's Exhibits 9, 14. The administrative law judge found their opinions inadequately explained and, therefore, insufficient to disprove legal pneumoconiosis. 2017 Decision and Order on Remand at 11, 16.

We reject employer's argument that the administrative law judge erred in discounting the medical opinions of Drs. Bellotte and Basheda. Employer's Brief at 11-24. While Drs. Bellotte and Basheda each acknowledged coal mine dust exposure could cause claimant's symptoms or test results, they attributed claimant's obstructive impairment entirely to the effects of cigarette smoke exposure and asthma. 2017 Decision and Order on Remand at 10; Director's Exhibit 27 at 6; Employer's Exhibits 9 at 20, 22; 14 at 50. In light of the medical science found credible in the preamble finding the effects of smoking and coal dust exposure are additive, the administrative law judge permissibly found that neither physician adequately explained why claimant's more than forty years of coal mine dust exposure did not significantly contribute, along with these other factors, to his impairment. *See* 20 C.F.R. §718.201(a)(2), (b); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14, 25 BLR 2-115, 2-128 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); 2017 Decision and Order on Remand at 10-11, 15-16. Because the administrative law judge permissibly discredited the only opinions supportive of a finding that claimant does not have legal pneumoconiosis,[7] we affirm his finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next addressed whether employer established 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); 2017 Decision and Order on Remand at 16-21. He permissibly discredited the opinions of Drs. Bellotte and

[6] The administrative law judge also considered the opinions of Drs. Jaworski, Begley and Schaaf that claimant has legal pneumoconiosis. 2017 Decision and Order on Remand at 11-15.

[7] We decline to address employer's allegations of error regarding the administrative law judge's consideration of the opinions of Drs. Begley and Schaaf as they do not assist employer in establishing rebuttal of the Section 411(c)(4) presumption. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 26-34.

Basheda[8] because neither physician diagnosed legal pneumoconiosis, contrary to his finding that employer did not disprove the existence of the disease.[9] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015), *quoting Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995) (where physician failed to properly diagnose pneumoconiosis, an administrative law judge "may not credit" that physician's opinion on causation absent "specific and persuasive reasons," in which case the opinion is entitled to at most "little weight"); 2017 Decision and Order on Remand at 18. We therefore affirm the administrative law judge's finding that employer failed to rebut the presumed fact of disability causation. *See* 20 C.F.R. §718.305(d)(1)(ii).

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and employer did not rebut the presumption, claimant is entitled to benefits.

[8] Dr. Bellotte opined claimant's tobacco-induced emphysema and asthma contributed to his disabling respiratory impairment. Director's Exhibit 27. Dr. Basheda opined claimant's tobacco-induced obstructive pulmonary disease with a component of asthma contributed to his disabling pulmonary impairment. Employer's Exhibit 9.

[9] Neither Dr. Bellotte nor Dr. Basheda offered an opinion on disability causation independent of his mistaken belief that claimant did not have legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge