U.S. Department of Labor

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

BRB No. 17-0131 BLA

JOSEPH J. INGRAM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LONG BRANCH ENERGY	)	DATE ISSUED: 11/30/2017
	)	
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.

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

Andrea L. Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-5136) of Administrative Law Judge Drew A. Swank, rendered on a claim filed on November 19, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined that claimant established 31.16 years of underground coal mine employment and a totally disabling respiratory or

pulmonary impairment. Thus, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge further found that employer failed to rebut the presumption and awarded benefits.

On appeal, employer contends that the administrative law judge did not conduct a proper analysis of whether claimant established total disability. Employer also contends that the administrative law judge did not properly address relevant issues and evidence in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.[2] Employer filed a reply brief, reiterating its arguments on 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).

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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] Employer states that the administrative law judge "did not consider the Social Security Earnings Statement" in finding that claimant established 31.16 years of underground coal mine employment." Employer's Brief in Support of Petition for Review at 5. However, employer does not explain with specificity how the administrative law judge erred in calculating the length of claimant's coal mine employment. Unless the party identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). We therefore affirm the administrative law judge's finding that claimant established 31.16 years of underground coal mine employment. Decision and Order at 4.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *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

In the absence of contrary probative evidence, a miner's disability is established by: i) pulmonary function studies showing values equal to or less than those listed in Appendix B of 20 C.F.R Part 718; or ii) arterial blood-gas studies showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; or (iii) if the miner has pneumoconiosis and suffers from cor pulmonale with right-sided congestive heart failure; or (iv) where a physician exercising reasoned medical judgment concludes that the miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).[4]

The administrative law judge determined that claimant established total disability based on the qualifying blood-gas studies pursuant to 20 C.F.R. §718.204(b)(2)(ii).[5] Employer correctly asserts that the administrative law judge did not discuss the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer's Brief in Support of Petition for Review at 5. We consider this error to be harmless, however, as the three medical opinions by Drs. Zaldivar, Farney, and Green conclude that claimant has a totally disabling respiratory or pulmonary impairment.[6] *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Director's Exhibits 10, 25; Employer's Exhibit 3.

[4] The administrative law judge determined that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), as the pulmonary function studies are non-qualifying for total disability. Decision and Order at 11. Because the record does not contain evidence that claimant has cor pulmonale, claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

[5] The record contains five blood-gas studies. The studies dated December 19, 2014 and May 26, 2015 had non-qualifying values at rest but qualifying values with exercise. Director's Exhibits 10, 25. The May 17, 2016 study was conducted at rest only and had qualifying values. Claimant's Exhibit 1. The administrative law judge relied on the qualifying exercise studies and the most recent resting study to find that claimant establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). We affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), as it is unchallenged by employer on appeal. *Skrack*, 6 BLR at 1-711; Decision and Order at 13.

[6] Dr. Zaldivar stated that "[f]rom a pulmonary standpoint, [claimant] is not able to do his usual work that requires him to do general labor." Director's Exhibit 25.

Dr. Farney diagnosed a pulmonary impairment and opined that claimant "is totally and permanently disabled to such an extent that he would be unable to perform his regular coal mine job or work requiring similar effort." Employer's Exhibit 3.

Employer also contends that the administrative law judge did not properly consider the contrary probative evidence prior to finding that claimant established total disability. Employer's Brief in Support of Petition for Review at 5. We consider any error by the administrative law judge to be harmless, as pulmonary function studies and blood-gas studies measure different types of impairments, and the non-qualifying pulmonary function studies do not necessarily constitute contrary probative evidence under 20 C.F.R. §718.204(b)(2). *See Larioni*, 6 BLR at 1-1278; *Sheranko v. Jones and Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984). In light of the qualifying exercise blood-gas studies and the unanimous medical opinion evidence, we conclude that substantial evidence supports the administrative law judge's finding that claimant is totally disabled. We therefore affirm the administrative law judge's determination that claimant is entitled to invocation of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

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

Once the Section 411(c)(4) presumption of total disability due to pneumoconiosis is invoked, the burden shifts to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[7] or by establishing that "no part of [claimant'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)(i), (ii).

In considering whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge noted that he initially found that claimant established the existence of clinical pneumoconiosis, based on the x-ray evidence at 20 C.F.R. §718.202(a)(1). Decision and Order at 9, 13. The administrative law judge then stated

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Dr. Green stated that claimant "is totally disabled from a pulmonary capacity standpoint and could not return to his pervious coal mine employment" on the basis of the exercise blood-gas study results. Director's Exhibit 10.

[7] Legal pneumoconiosis is "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). 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).

that "the single issue to be determined [on rebuttal] was whether [c]laimant's total disability arose from his coal workers' pneumoconiosis due to his past coal mine employment." *Id*. at 13. The administrative law judge found that employer failed to disprove the presumed fact of disability causation and concluded that employer was unable to rebut the Section 411(c)(4) presumption. *Id*. at 15.

Employer asserts that the administrative law judge erred in failing to determine whether employer disproved the existence of legal pneumoconiosis prior to reaching the issue of disability causation. Employer also argues that the administrative law judge erred in failing to consider all of the evidence relevant to whether employer disproved the existence of clinical pneumoconiosis, relying only on his finding that the x-ray evidence was positive for the disease. Employer's assertions of error have merit.

Before considering whether employer has established that no part of claimant's total respiratory disability is caused by pneumoconiosis, an administrative law judge must first determine whether employer has established that claimant does not suffer from pneumoconiosis as defined in 20 C.F.R. §718.201.[8] *See* 20 C.F.R. §718.305(d)(1)(i); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting). With respect to legal pneumoconiosis, an administrative law judge must initially consider all of the relevant evidence, placing the burden of proof on employer to establish that claimant does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see Minich*, 25 BLR at 1-159. With respect to clinical pneumoconiosis, an administrative law judge must consider all of the relevant evidence, placing the burden of proof on employer to establish that claimant does not have the disease as defined in 20 C.F.R. §718.201(a)(1). *See Minich*, 25 BLR at 1-159. Only after determining that employer failed to disprove the existence of both legal and clinical pneumoconiosis should an administrative law judge determine whether employer established that "no part" of claimant's pulmonary or respiratory disability was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii). *Id*.

Here, as employer asserts, the administrative law judge erred in failing to address whether employer disproved the existence of legal pneumoconiosis. Furthermore, the administrative law judge failed to make a proper finding, based on a weighing of all the relevant evidence together, on the existence of clinical pneumoconiosis, with the burden

[8] The administrative law judge first considered in his Decision and Order whether claimant could prove that he has clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge stopped his analysis after concluding that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). Decision and Order at 7-11.

of proof on employer to disprove the disease. *See* 20 C.F.R. §§718.305(d)(1), 718.202(a); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000).

Moreover, the administrative law judge applied an incorrect rebuttal standard in considering whether employer disproved the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge required employer to disprove "the legal presumption that [claimant's] coal workers' pneumoconiosis was a 'substantially contributing cause' of [c]laimant's total pulmonary or respiratory disability." Decision and Order at 15. The correct standard to be applied, however, is 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." *See* 20 C.F.R. §718.305(d)(1)(ii); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *Minich*, 25 BLR at 1-159.

Turning to the administration law judge's specific credibility determinations, the administrative law judge stated, "Dr. Zaldivar's conclusion that an idiopathic pulmonary fibrosis was in part causing [c]laimant's pulmonary impairments [] cannot, per the regulation [at 20 C.F.R. §718.305(d)], rebut the presumption." Decision and Order at 16. The regulation at 20 C.F.R. §718.305(d) provides that "[t]he presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling *obstructive* respiratory or pulmonary disease of unknown origin." 20 C.F.R. §718.305(d)(3) (emphasis added). To the extent that Dr. Zaldivar specifically opined that claimant does not have an obstructive respiratory or pulmonary disease,[9] the administrative law judge erred in relying on 20 C.F.R. §718.305(d)(3) as a basis for discrediting Dr. Zaldivar's opinion. Director's Exhibit 25. Thus, we vacate the administrative law judge's finding that Dr. Zaldivar's opinion is insufficient to disprove the presumed fact of disability causation.[10]

[9] In contrast, Dr. Green diagnosed chronic obstructive pulmonary disease. Claimant's Exhibit 1. Dr. Farney diagnosed chronic bronchitis but stated that claimant "does not have chronic obstructive pulmonary disease by conventional criteria." Employer's Exhibit 3. On remand, the administrative law judge must resolve the conflict in the evidence over whether claimant has an obstructive respiratory or pulmonary disease prior to applying 20 C.F.R. §718.305(d)(3).

[10] We reject employer's assertion that the administrative law judge selectively analyzed Dr. Farney's opinion, and thus erred in finding it was insufficient to support rebuttal. In determining that employer did not disprove disability causation, the administrative law judge rationally found that Dr. Farney's "reliance, in part, on epidemiological studies demonstrating the greater damage caused by smoking versus coal

Based on these errors, we vacate the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. On remand, the administrative law judge is instructed to reconsider whether employer established rebuttal in accordance with the regulations. Specifically, the administrative law judge is instructed to begin his rebuttal 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*, 25 BLR at 1-155 n.8. The administrative law judge must also reconsider, with the burden of proof on employer, whether the evidence is sufficient to affirmatively establish that claimant does not have clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B).

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 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 pursuant to 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must then determine whether employer has rebutted the presumed fact of disability causation with credible proof that "no part of [claimant's] total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); *see Minich*, 25 BLR at 1-159.

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mine dust does not prove . . . that . . . [c]laimant's impairments were not contributed to by his coal mine dust exposure." Decision and Order at 15; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997) (It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985) (An administrative law judge may reject an opinion based on generalities and not the specific facts of the case).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge