U.S. Department of Labor

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

BRB No. 18-0592 BLA

CAROLE ALLAN (Widow of THOMAS ALLAN) Claimant-Petitioner v. MONTEREY COAL COMPANY Self-Insured Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/14/2019 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and the Decision and Order on Claimant's Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Vernon L. Plummer, II (Plummer Law Offices), Shelbyville, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for self-insured employer.

William M. Bush (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 GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits and the Decision and Order on Claimant's Motion for Reconsideration (2011-BLA-06329) of Administrative Law Judge Clement J. Kennington on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). On October 25, 2010, the miner filed a written notice of intent to file a claim for benefits and thereafter filed a claim form on November 9, 2010. Director's Exhibit 2.

After stating the parties stipulated that the miner worked for twenty-eight years in underground coal mine employment[2] prior to working for fourteen years as a mine inspector for the State of Illinois, the administrative law judge credited the miner with forty-two years of qualifying coal mine employment. Decision and Order Denying Benefits at 2 n.5, 11. He then found that the evidence did not establish the miner was totally disabled due to a respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Because claimant failed to establish total disability, the administrative law judge found she did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C §921(c)(4),[3] or establish entitlement to benefits under 20 C.F.R. Part 718. He thus denied the claim and, subsequently, denied claimant's motion for reconsideration.

[1] Claimant is the widow of the miner, who died on January 4, 2015. Employer's Exhibit 22. Claimant is pursuing the miner's claim on his behalf. Decision and Order Denying Benefits at 1 n.1; Decision and Order on Claimant's Motion for Reconsideration at 1 n.1.

[2] The miner's coal mine employment was in Illinois. Director's Exhibit 3; Hearing Transcript at 5-6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if the claimant establishes 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.

On appeal, claimant contends the administrative law judge erred in finding she did not establish total disability and, therefore, erred in finding she did not invoke the Section 411(c)(4) presumption. Employer responds, urging affirmance.

The Director, Office of Workers' Compensation Programs (the Director), responds, asserting the administrative law judge erred in addressing total disability as it was an uncontested issue. Director's Brief at 2-3. The Director also asserts that although the parties stipulated to twenty-eight years of coal mine employment, they did not stipulate that it was at underground mines. *Id*. at 3 n.3. Consequently, the Director urges the Board to remand this case for the administrative law judge to "make complete findings regarding the length and the nature of the miner's coal mine employment."[4] *Id*. at 3. If the administrative law judge does reconsider the miner's coal mine employment on remand and finds the evidence establishes at least fifteen years of qualifying coal mine employment, the Director asserts invocation of the Section 411(c)(4) presumption is thereby established and the administrative law judge should determine whether employer has rebutted it. *Id*.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's decision 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).

Pursuant to the regulations, "[any] party may, on the record, withdraw [its] controversion of any or all issues set for hearing." 20 C.F.R. §725.462. In any case referred to the Office of Administrative Law Judges (OALJ) for a hearing, the district director must provide a "statement . . . of contested and uncontested issues in the claim." 20 C.F.R. §725.421(b)(7). Thus, "the hearing shall be confined to those contested issues which have been identified by the district director . . . or any other issue raised in writing before the district director." 20 C.F.R. §725.463(a). An administrative law judge may consider a new issue "only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director" and the administrative law judge gives the parties notice prior to issuing his decision. 20 C.F.R. §725.463(b); *Rockwood Cas. Ins. Co. v. Director, OWCP* [*Kourianos*], 917 F.3d 1198, 1215-1218 (10th Cir. 2019), *petition for cert. filed*, No. 19-0023 (U.S. June 28, 2019). Moreover, a party is bound by its stipulations and concessions. *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013); *Nippes v. Florence Mining Co.*, 12 BLR 1-108 (1985). An administrative law judge commits error if he addresses an issue that is not disputed. *Kott v. Director,*

[4] The Director concedes, however, that there is evidence in the record that the miner's work occurred at underground mines. Director's Brief at 3 n.3.

OWCP, 17 BLR 1-9, 1-13-14 (1992); *Perry v. Director, OWCP*, 5 BLR 1-527, 1-529 (1982).

We agree with the Director that the administrative law judge erred in addressing the uncontested issue of total disability,[5] without considering the requirements of 20 C.F.R. §725.463 or the effect of employer's subsequent concession at trial. The district director identified the contested issues on the referral form, Form CM-1025, sent to the OALJ. Director's Exhibit 23 at 1-2. The district director did not identify total disability as a contested issue. *Id*. Moreover, before and during the hearing, employer conceded total disability but only contested the cause of the disability. Employer's Pre-Hearing Report; Hearing Transcript at 19. In its post-hearing brief, employer reiterated that it disputed pneumoconiosis but conceded the medical evidence "seems to clearly establish that [the miner] was permanently and totally disabled." Employer's Post-Hearing Brief at 3. We therefore vacate the administrative law judge's finding that claimant did not establish total disability. *See* 20 C.F.R. §§725.421(b)(7), 725.462, 725.463(a), (b); *Kourianos*, 917 F.3d at 1216 (affirming administrative law judge's denial of employer's motion to withdraw stipulation; claimant's employment history was "easily ascertainable" before district director);[6] *Burris*, 732 F.3d at 730 (employer "bound by its concession below that [claimant] is totally disabled and has met his burden of demonstrating a change in one of the conditions of entitlement"); *Kott*, 17 BLR at 1-13-14 (administrative law judge committed reversible error in addressing the issue of whether the miner had pneumoconiosis as it was uncontested); *Thornton v. Director, OWCP*, 8 BLR 1-277, 1-279 (1988) (administrative law judge erred in allowing the Director to add the issues of pneumoconiosis and whether it arose out of coal mine employment one week before the hearing because they were "easily ascertainable" at the district director level); *Simpson v. Director, OWCP*, 6 BLR 1-49, 1-50-51 (1983) (same as *Kott*).

We also agree with the Director that the administrative law judge did not make a proper finding of the miner's years of qualifying coal mine employment for purposes of

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[5] A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or comparable and gainful work. *See* 20 C.F.R. §718.204(b)(1). Proof may come from pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv).

[6] Unlike the employer in *Kourianos*, which attempted to withdraw its responsible operator stipulation before the administrative law judge, employer in this case affirmatively conceded the issue before the administrative law judge.

invoking the Section 411(c)(4) presumption.[7] We therefore vacate the denial of benefits and remand the claim for the administrative law judge to reconsider whether claimant invoked the Section 411(c)(4) presumption and, if not, entitlement to benefits under 20 C.F.R. Part 718. In so doing, the administrative law judge must make a specific finding as to the length and nature of the miner's coal mine employment.[8] 20 C.F.R. §718.305(b)(2); *see Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988).[9] If he finds claimant has satisfied her burden of establishing the elements necessary to invoke the Section 411(c)(4) presumption, the burden shifts to employer to rebut the presumption

[7] As the Director points out, the parties stipulated to twenty-eight years of coal mine employment but did not specify whether that work occurred at an underground mine or at a surface mine in conditions substantially similar to those in an underground mine. Hearing Transcript at 18. The Director states, however, that there is evidence "suggesting" that the miner's work was qualifying for purposes of invoking the Section 411(c)(4) presumption; specifically, the miner's employment history form identifies all of his work from June 1946 through March 1981 as occurring at "underground coal mine[s]." Director's Brief at 3 n.3; Director's Exhibit 3. The parties also agreed the miner worked an additional fourteen years as a state mine inspector. Hearing Transcript at 17-20. However, these years do not count towards the miner's length of coal mine employment because work as a state mine inspector does not constitute the work of a miner under the Act. *See Navistar, Inc. v. Forester*, 767 F.3d 638, 645-47 (6th Cir. 2014).

[8] The administrative law judge may not consider the issue of total disability absent notice to the parties and a finding that the issue was not reasonably ascertainable before the district director, as well as an explanation as to why employer's subsequent concession at trial should not be binding. *See Rockwood Cas. Ins. Co. v. Director, OWCP* [*Kourianos*], 917 F.3d 1198, 1215-1218 (10th Cir. 2019), *petition for cert. filed*, No. 19-0023 (U.S. June 28, 2019); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013); *Thornton v. Director, OWCP*, 8 BLR 1-277, 1-279 (1988). Employer did not respond to the Director's brief and therefore has identified no such arguments or explanations before the Board.

[9] In interpreting the originally-enacted Section 411(c)(4), the Seventh Circuit rejected the argument that surface miners must present evidence addressing the conditions in underground mines in order to prove substantial similarity. *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-513 (7th Cir. 1988). Instead, the court held that an aboveground miner "is required only to produce sufficient evidence of the surface mining conditions under which he worked." *Id*.

by establishing the miner had neither legal nor clinical pneumoconiosis,[10] or 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)(i), (ii).

[10] "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).

Accordingly, the administrative law judge's Decision and Order Denying Benefits and Decision and Order on Claimant's Motion for Reconsideration are vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge