U.S. Department of Labor

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

BRB No. 16-0212 BLA

DARL B. FRIDLEY Claimant-Respondent v. ROBLEE COAL COMPANY, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/31/2016 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05162) 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 subsequent claim filed on July 15, 2013.[1]

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with 36.44 years of qualifying[3] coal mine employment, based on the parties' stipulation. As the parties also stipulated to the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4). Consequently, the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). The administrative law judge further found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that it 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, did not file a brief in this appeal.[4]

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[1] Claimant filed his first claim on May 20, 1991. Director's Exhibit 1. It was finally denied by the district director on September 25, 1991, because claimant failed to establish any of the elements of entitlement. *Id*. Claimant filed this claim on July 15, 2013. Director's Exhibit 3.

[2] 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); *see* 20 C.F.R. §718.305.

[3] The parties stipulated that claimant worked in conditions substantially similar to underground mining. Hearing Transcript at 6, 31.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant has 36.44 years of qualifying coal mine employment, that the evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2), that claimant invoked

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.[5] 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).

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal[6] nor clinical pneumoconiosis,[7] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). In this case the administrative law judge found that employer failed to rebut the presumption. Employer argues that the administrative law judge erred in making that finding.

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the presumption of total disability due to pneumoconiosis at Section 411(c)(4), and that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] Because the record indicates that claimant's coal mine employment was in West Virginia, this case arises within the jurisdiction 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 Exhibits 1, 5.

[6] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation also provides that "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[7] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconiosis, *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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1).

The administrative law judge began his analysis of the elements of entitlement by considering whether claimant could prove that he has pneumoconiosis pursuant to 20 C.F.R. §718.202(a), which permits a finding of pneumoconiosis on the basis of chest x-ray evidence, biopsy or autopsy evidence, invocation of a presumption at 20 C.F.R. §§718.304 or 718.305, or medical opinion evidence. *See* 20 C.F.R. §718.202(a)(1)-(4); Decision and Order at 8-10. After noting that there was no x-ray, autopsy, or biopsy evidence of pneumoconiosis in the record, pursuant to 20 C.F.R. §718.202(a)(1), (2), the administrative law judge proceeded to 20 C.F.R. §718.202(a)(3) and, as discussed above, found that claimant is totally disabled and, pursuant to 20 C.F.R. §718.305, could invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Decision and Order at 10-11. The administrative law judge found that, because claimant invoked the Section 411(c)(4) presumption, "[c]laimant has therefore proven the existence of legal coal workers' pneumoconiosis." Decision and Order at 11. The administrative law judge further stated that, "[a]s the issue of whether [c]laimant has coal workers' pneumoconiosis was determined . . . the single issue to be determined is whether [c]laimant's total disability arises from his coal workers' pneumoconiosis due to his past coal mine employment." Decision and Order at 13.

Relevant to this issue, the administrative law judge considered the medical opinions of Drs. Zaldivar and Bellotte,[8] that claimant suffers from a disabling obstructive impairment that is due to claimant's asthma and cigarette smoking, and is not caused by coal mine dust exposure.[9] Employer's Exhibits 1, 2. The administrative law judge determined that the opinions of Drs. Zaldivar and Bellotte are not sufficient "to rebut the legal presumption that coal workers' pneumoconiosis is a 'substantially contributing cause' of [c]laimant's total pulmonary or respiratory disability contained at 20 C.F.R. §718.305." Decision and Order at 14. Referencing the inclusion of asthma and

[8] The administrative law judge also discussed the opinions of Drs. Gaziano, Begley, and Schroedl, that claimant's disabling obstructive impairment is due to a combination of coal mine dust exposure and cigarette smoking. Decision and Order at 13-14. The administrative law judge discredited the opinions of Drs. Gaziano, Begley, and Schroedl, as inadequately explained. *Id.* at 15.

[9] Dr. Zaldivar opined that claimant does not have legal or clinical pneumoconiosis. Employer's Exhibit 1. Rather, Dr. Zaldivar diagnosed a severe lung disease related to a combination of asthma and smoking, and not related to coal dust exposure. *Id.* Dr. Zaldivar specifically noted that claimant has "life-long bronchospasm of asthma coupled with the combination of emphysema from smoking, plus asthma." *Id.* Similarly, Dr. Bellotte opined that claimant does not have legal or clinical pneumoconiosis. Employer's Exhibit 2. Dr. Bellotte found that "[t]he emphysema noted on the chest x-ray is characteristic of a patient with tobacco abuse and asthma." *Id.*

emphysema as chronic obstructive pulmonary diseases in the preamble to the regulations,[10] the administrative law judge stated:

> Employer's experts Drs. Zaldivar and Bellotte attribute Claimant's asthma and emphysema solely to his smoking in contravention to the Preamble to the Regulations.
>
> . . .
>
> Regardless of whether Drs. Zaldivar and Bellotte link asthma and emphysema to coal mine dust exposure, the Preamble does.

Decision and Order at 14-15. Thus, the administrative law judge found that employer did not establish rebuttal of the Section 411(c)(4) presumption by disproving the causal relationship between claimant's respiratory disability and his presumed legal pneumoconiosis. *Id*. at 15.

Employer asserts that the administrative law judge erred in failing to address whether employer disproved the existence of legal pneumoconiosis. Employer's Brief at 18-20. Employer contends that the opinions of Drs. Zaldivar and Bellotte support employer's burden. Employer further contends that the administrative law judge applied an incorrect rebuttal standard in finding that employer failed to rebut the presumed fact of disability causation. Employer's contentions have merit.

Initially, as employer asserts, the administrative law judge erred in failing to address whether employer disproved the existence of legal pneumoconiosis by showing that claimant does not have a respiratory condition that is significantly related to, or substantially aggravated by coal dust exposure. *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 154-56 (2015) (Boggs, J., concurring and dissenting); Employer's Brief at

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[10] In particular, the administrative law judge noted that, in relevant part, the preamble states:

> The term "chronic obstructive pulmonary disease" (COPD) includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema and asthma. Airflow limitation and shortness of breath are features of COPD, and lung function testing is used to establish its presence. Clinical studies, pathological findings, and scientific evidence regarding the cellular mechanisms of lung injury link, in a substantial way, coal mine dust exposure to pulmonary impairment and chronic obstructive lung disease.

Decision and Order at 14-15.

18-20. The administrative law judge also failed to make a proper finding on the existence of clinical pneumoconiosis.[11] Further, the administrative law judge applied an incorrect standard in addressing the issue of whether employer disproved the presumed fact of disability causation. Pursuant to 20 C.F.R. §718.305(d)(ii), the correct standard to be applied with respect to causation 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 W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Minich*, 25 BLR at 154-56.

We further conclude that, under the facts of this case, the administrative law judge's use of an incorrect rebuttal standard is not harmless error. The administrative law judge did not sufficiently explain his analysis of the medical opinion evidence to allow us to discern the extent to which the administrative law judge's reliance on an incorrect rebuttal standard affected his credibility determinations.[12] We, therefore, vacate administrative law judge's award of benefits and his finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(i), (ii).

On remand, the administrative law judge should 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

[11] The administrative law judge determined earlier in his decision that claimant did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), (2), but the administrative law judge did not consider the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 9-10. Moreover, the administrative law judge should have determined whether employer affirmatively established that claimant does not have clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B), not whether claimant established the existence of the disease.

[12] We note that, on its face, the administrative law judge's blanket rejection of the opinions of Drs. Zaldivar and Bellotte, as contrary to the preamble, cannot be affirmed. In evaluating expert medical opinions, an administrative law judge may consult the preamble as a statement of medical science studies found credible by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-264-65 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314, 25 BLR 2-115, 2-130 (4th Cir. 2012). However, an administrative law judge must not use the preamble as a legal rule or presumption that all obstructive lung disease is pneumoconiosis. *See Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32.

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 also must determine whether employer has affirmatively established that claimant does not have clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(B); *Minich*, 25 BLR at 154-56.

If, on remand, 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. If employer fails to rebut the presumption at 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must determine whether employer has rebutted the presumed fact of disability causation at 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." 20 C.F.R. §718.305(d)(1)(ii).

Moreover, on remand, when considering all the relevant medical opinion evidence of record, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-235 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). In so doing, the administrative law judge should set forth his findings on remand in detail, including the underlying rationale of his decision, as required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge