U.S. Department of Labor

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

BRB No. 18-0011 BLA

JOHNNIE R. WILSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WARRIOR COAL, LLC	)	DATE ISSUED: 10/25/2018
	)	
and	)	
	)	
MAPCO, INCORPORATED	)	
	)	
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 Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-05699) of Administrative Law Judge Timothy J. McGrath, rendered on a claim filed on July 31, 2013, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act), . The parties stipulated to thirty-nine years of underground coal mine employment and employer conceded that claimant has 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 under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge further found that employer did not rebut the presumption and awarded benefits, commencing July 2013.

On appeal, employer argues that the administrative law judge applied the wrong legal standard in finding that it did not rebut the Section 411(c)(4) presumption. Employer also contends that the case must be remanded for the administrative law judge to explain his finding that benefits should commence as of July 2013. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] Under Section 411(c)(4) of the Act, there is a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if it is established that the miner 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); 20 C.F.R. §718.305(b).

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16.

[3] Because claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

Once claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[4] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to establish rebuttal under either method.

Employer asserts that the administrative law judge applied an incorrect legal standard in finding that the evidence was insufficient to establish that claimant does not have legal pneumoconiosis and in finding that employer did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[5] Employer's assertion of error has merit.

Initially, the administrative law judge properly recognized that in order to disprove the existence of legal pneumoconiosis employer "must establish the absence of any respiratory or pulmonary impairment arising out of coal mine employment, including chronic pulmonary disease resulting from respiratory or pulmonary impairment significantly related to[,] or substantially aggravated by[,] dust exposure in coal mine employment." Decision and Order at 20; *see* 20 C.F.R. §§718.305(d)(1)(i)(A), 718.201(a)(2), (b). However, in rejecting Dr. Tuteur's opinion that claimant does not have legal pneumoconiosis, the administrative law judge stated that "[e]mployer's burden is not to establish a clinical diagnosis but to exclude coal dust exposure as a factor in [c]laimant's respiratory impairment."[6] Decision and Order at 20. The administrative law judge further

[4] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*. 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 determined that employer disproved the existence of clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 19.

[6] Employer relies on the opinions of Drs. Tuteur and Selby to rebut the Section 411(c)(4) presumption. Relevant to the issue of legal pneumoconiosis, Dr. Tuteur opined that claimant has chronic obstructive pulmonary disease (COPD) due to smoking and not

concluded that employer was unable to disprove legal pneumoconiosis because neither Dr. Tuteur, nor Dr. Selby, "provided an adequately reasoned opinion as to whether [c]laimant's totally disabling impairment was related, in any way, to dust exposure in coal mine employment." *Id*. at 21. He concluded that "their opinions are not sufficient to establish [that] [c]laimant's severe and disabling obstructive pulmonary impairment is not due, at least in part, to his history of coal mine dust exposure." *Id*. at 23.

Contrary to the administrative law judge's analysis, employer is not required to "exclude coal dust exposure as a factor" for claimant's respiratory disease or show that claimant's impairment "is not due at least in part" to coal dust exposure, in order to disprove the existence of legal pneumoconiosis. The proper inquiry is whether employer has shown 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) (emphasis added); *see Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-22 (6th Cir. 2000).

Because we are unable to discern the extent to which the administrative law judge's application of the wrong legal standard affected his weighing of the medical opinions of Drs. Tuteur and Selby, we must remand this case for further explanation by the administrative law judge and application of the correct standard. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). We therefore vacate the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i). Decision and Order at 23. Because we have vacated the administrative law judge's findings regarding legal pneumoconiosis, we also vacate his determination that employer failed to establish rebuttal by proving that that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii).[7] *Id*. at 24. We therefore vacate the administrative law

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coal dust exposure. Employer's Exhibit 3. Dr. Tuteur relied on statistics to support his opinion that claimant does not have legal pneumoconiosis and he explained that it was reasonable to apply a "relative risk assessment" in rendering a clinical diagnosis. *Id*. Dr. Selby attributed claimant's COPD to smoking and probable asthma. Director's Exhibit 18.

[7] The administrative law judge discredited the opinions of Drs. Tuteur and Selby on the issue of disability causation because neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. Decision and Order at 24.

judge's award of benefits, and remand this case for further consideration of whether employer has rebutted the Section 411(c)(4) presumption.

On remand, the administrative law judge is instructed to consider whether employer has disproved the presumed fact of legal pneumoconiosis by 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), *see* 20 C.F.R. §718.305(d)(1)(i)(A); *Minich*, 25 BLR at 1-155 n.8. The administrative law judge must also determine whether employer has disproved the presumed fact of disability causation by establishing that 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)(ii); *see Minich*, 25 BLR at 1-159.

Commencement Date for Benefits

The date for the commencement of benefits is the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-184 (1989). If the date is not ascertainable from the record, benefits will commence the month the claim was filed, unless evidence establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990). Because we have vacated the award of benefits, we vacate the administrative law judge's finding that claimant is entitled to benefits commencing as of July 2011, the month in which he filed his claim.[8] On remand, if the administrative law judge finds that claimant is entitled to benefits, he must determine if the evidence establishes the onset date of claimant's total disability due to pneumoconiosis and determine the date for the commencement of benefits in accordance with 20 C.F.R. §725.503(b). *See Krecota*, 868 F.2d at 603; *Owens*, 14 BLR at 1-50.

[8] The administrative law judge did not make a specific finding as to whether the record established the onset date of claimant's total disability due to pneumoconiosis. Decision and Order at 25.

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