U.S. Department of Labor

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

BRB No. 14-0436 BLA

VELDA MALCOMB (on behalf of RONALD D. MALCOMB)	)	
Claimant-Petitioner	)	
v.	)	
POTOMAC COAL COMPANY	)	DATE ISSUED: 09/30/2015
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (David Huffman Law Services), Crab Orchard, West Virginia, for claimant.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (2012-BLA-5039) of Administrative Law Judge Richard A. Morgan, rendered on a miner's subsequent claim

[1] Claimant is the surviving spouse of the miner, who died on November 12, 2011. Director's Exhibit 34. She is pursuing this pending claim on the miner's behalf. Decision and Order Denying Benefits at 2.

filed on August 3, 2010,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited the miner with at least thirty years of coal mine employment. Based on the filing date of the claim, and his determinations that the miner worked at least fifteen years in underground coal mine employment and suffered from a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. However, the administrative law judge further found that employer rebutted the presumption by disproving the existence of pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A), (B), and he denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that employer rebutted the amended Section 411(c)(4) presumption. Claimant asserts that the administrative law judge did not hold employer to its burden of proof, and did not adequately explain the basis for his finding that employer disproved both legal and clinical pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response, unless specifically requested to do so by the Board.[4]

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[2] The miner's first claim, filed on May 8, 1973, was denied for failure to establish any of the requisite elements of entitlement. Director's Exhibit 1. The miner's second claim, filed on January 7, 2004, was denied by Administrative Law Judge Jeffrey Tureck on March 6, 2006, based on his finding that the miner was not totally disabled, without consideration of the other elements of entitlement. Director's Exhibit 2. The miner took no further action with regard to that denial until he filed the current subsequent claim. Director's Exhibit 4.

[3] Under amended Section 411(c)(4), there is a rebuttable presumption that the miner was totally disabled due to pneumoconiosis, if the evidence establishes that the miner had at least fifteen years of underground coal mine employment, or surface coal mine employment in substantially similar conditions, and the evidence establishes a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that: the miner worked at least fifteen years in underground coal mine employment; the miner suffered from a totally disabling respiratory or pulmonary impairment; claimant established a change in an applicable condition of entitlement pursuant to 20 C.FR. §725.309(c), and further invoked the amended Section 411(c)(4) presumption that the

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

In order to rebut the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4), employer bears the burden to affirmatively prove that claimant does not suffer from legal and clinical pneumoconiosis,[6] or establish that "no part of the miner's total respiratory or pulmonary disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA, slip op. at 10-11 (Apr. 21, 2015) (Boggs, J., concurring & dissenting).

The administrative law judge invoked the 15-year presumption in this case, but the organization of his analysis of the issues in the Decision and Order makes it difficult to discern the standards of proof applied when reviewing his findings of fact and conclusions of law, as required by the Administrative Procedure Act, 30 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[7] *See Wojtowicz v.*

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miner was totally disabled due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3, 15, 22-23, 26.

[5] The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 6. Accordingly, 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 (1989) (en banc).

[6] "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).

[7] The administrative law judge noted that "the absence of pneumoconiosis cannot be established pursuant to [20 C.F.R.] §718.202(a)(2), because there is no biopsy evidence in the record." Decision and Order 17. The administrative law judge also

Duquesne Light Co., 12 BLR 1-161, 1-165 (1989). Rather than initially determining whether claimant satisfied the prerequisites for invocation of the rebuttable presumption at amended Section 411(c)(4), the administrative law judge began his analysis in this case by observing that claimant had the burden to establish the existence of pneumoconiosis, in the absence of a presumption. Decision and Order at 17. The administrative law judge noted the applicability of amended Section 411(c)(4) and found employer successfully rebutted the presumption of pneumoconiosis, although he had not yet analyzed the evidence to determine whether claimant successfully invoked the rebuttable presumption. *Id*. at 15-20. The administrative law judge should have first considered whether Claimant invoked the amended 411(c)(4) presumption, and then analyzed the evidence as to whether employer successfully met its burden of rebuttal. *See Minich*, BRB No. 13-0544 BLA, slip op. at 9 n.11, 10-11 . Regardless, the administrative law judge further failed to consider the underlying rationales for the conclusions of Drs. Castle and Zaldivar, that the miner did not suffer from legal pneumoconiosis, requiring remand. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998).

Claimant asserts that the opinions of Drs. Castle and Zaldivar should not be credited because they "explicitly relied on their inability to diagnose any radiographic changes [of] pneumoconiosis in [the miner's] lungs as a starting point for their assumption that he did not suffer from pneumoconiosis." Brief on Behalf of Claimant at 6 (unpaginated). Claimant maintains that the administrative law judge's "decision violate[s] 20 C.F.R. §718.202(b) which prohibits the denial of a claim on the basis of negative chest x-rays." *Id*. Claimant's arguments have merit, in part.

Dr. Castle reviewed the medical evidence of record, as outlined in his report dated February 21, 2012.[8] He indicated that, in 2008, the miner had no significant airway obstruction or restriction. Employer's Exhibit 5 at 38. However, Dr. Castle noted that, between 2008 and 2011, the miner had a "significant cerebrovascular accident" which left him "essentially bedbound," with "very significant muscular weakness and swallowing dysfunction." *Id*. at 39. Reviewing the March 21, 2011 pulmonary function study obtained by Dr. Rasmussen, Dr. Castle opined that there was no evidence of obstruction, but that the miner suffered from moderate restrictive disease, which developed after multiple episodes of aspiration and aspiration pneumonia. *Id.* at 38. He

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observed that "a finding regarding the existence of pneumoconiosis may be made with positive X-ray evidence." *Id.* at 18.

[8] Dr. Castle also submitted a March 21, 2005 report that was considered by Judge Tureck in the miner's previous claim in finding that the miner was not totally disabled due to a respiratory or pulmonary impairment. Director's Exhibit 2.

opined that the miner's physiology following the cerebrovascular event was "a very significant contributing factor" to his restrictive respiratory impairment. *Id.* He explained that "while it is possible, though unlikely, to develop a pure restrictive defect in coal workers' pneumoconiosis, it is not possible for this to occur without the finding of very significant interstitial lung disease indicating the presence of coal workers' pneumoconiosis radiographically." *Id.* According to Dr. Castle, the "time interval for the development of these findings is entirely inconsistent with what would occur with coal workers' pneumoconiosis," but is consistent with recurrent pneumonia related to the miner's oropharyngeal cancer therapy. *Id.* Dr. Castle attributed the miner's significant hypoxemia to his history of aspiration pneumonia and congestive heart failure. *Id.* Dr. Castle concluded that the miner did not suffer from clinical or legal pneumoconiosis, and was not totally disabled as a result of coal workers' pneumoconiosis or a coal dust-induced lung disease. *Id.*

Dr. Zaldivar prepared a report dated October 4, 2011,[9] based on his examination of the miner on September 28, 2011, a review of hospital records from 2008 through 2010 and a review of Dr. Rasmussen's March 21, 2011 medical report. Employer's Exhibit 1. Dr. Zaldivar opined that the miner's restrictive impairment was due to repeated aspiration pneumonias and musculoskeletal weakness. *Id.* at 6. He stated that the miner's diffusion capacity and blood gas abnormalities were caused by recurrent aspiration pneumonias suffered over the "previous two years" from 2009 through 2011 and were unrelated to the miner's occupation as a coal miner. *Id.* Dr. Zaldivar concluded that there is no evidence of clinical or legal pneumoconiosis and that, from the pulmonary standpoint, the miner was incapable of performing his usual coal mining work. *Id.*

In his January 27, 2014 deposition, Dr. Zaldivar was asked whether the credibility of earlier x-ray interpretations that were positive for pneumoconiosis was diminished by the negative x-ray that he obtained during his examination of claimant. Employer's Exhibit 10 at 19. Dr. Zaldivar answered in the affirmative, agreeing that because pneumoconiosis is a permanent disease, it was not possible that the miner had clinical pneumoconiosis that disappeared by the time his examination. *Id.* Dr. Zaldivar further opined that the miner's spirometry revealed restrictive disease with a decreased vital capacity, and a decreased total lung capacity, and stated:

> If one doesn't know the case and one has only breathing tests, then one says, well, that's because there is a restrictive lung disease.

[9] Dr. Zaldivar previously examined the miner on October 27, 2004. Director Exhibit 2. His report was considered in the miner's previous claim by Judge Tureck. *Id.*

> But in the context of this case, one says, no, it's tremendous muscular weakness and maybe some fibrosis from the chronic infection.

Id. at 23. Interpreting a January 10, 2008 pulmonary function study conducted at West Virginia University, Dr. Zaldivar opined that the mild restriction in vital capacity, with normal lung capacity, implied that there was "some problem with weakness in the chest muscles," but an increase in the residual volume indicated that "some of the restriction may have been due to an obstruction." *Id.* 24. He also stated that, when coal mine dust causes a restrictive defect and a decreased diffusion capacity, "you must have radiographic changes." *Id.* at 25-26.

We agree with claimant that the administrative law judge erred in failing to properly address whether the opinions of Drs. Castle and Zaldivar are sufficiently reasoned to affirmatively establish that claimant does not have legal pneumoconiosis. The regulation at 20 C.F.R. §718.202(a)(4) provides that "notwithstanding a negative x-ray," a reasoned and documented medical opinion can establish the existence of pneumoconiosis. 30 U.S.C. §923(b); 20 C.F.R. §718.202(a)(4), (b); 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000). To the extent that Drs. Castle and Zaldivar require radiographic evidence of clinical pneumoconiosis in order to diagnose legal pneumoconiosis, the administrative law judge failed to properly consider whether their views are inconsistent with the regulations, and the position of the Department of Labor, that legal pneumoconiosis is a disease independent of clinical pneumoconiosis and that diagnosis of this disease does not require a positive x-ray. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 492, 23 BLR 2-18, 2-29 (7th Cir. 2004) (The court upheld the administrative law judge's discounting of a doctor's opinion, that a miner did not have legal pneumoconiosis, where the doctor stressed the absence of x-ray evidence, even though the doctor's opinion could have been construed differently.); *Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989). Furthermore, the administrative law judge did not discuss whether Dr. Castle's requirement, that claimant have evidence of an obstructive impairment, in addition to his restrictive impairment, in order to diagnose legal pneumoconiosis, is contrary to the definition at 20 C.F.R. §718.201, which states that legal pneumoconiosis "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) (emphasis added); 65 Fed. Reg. 79,937-39 (Dec. 20, 2000). Thus, we vacate the administrative law judge's determination that employer disproved the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).

Additionally, we must vacate the administrative law judge's findings with regard to both legal and clinical pneumoconiosis, as he failed to weigh relevant evidence in the record. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). The administrative law judge noted that there were medical records, dating from 2007 to

2011, from West Virginia University Hospital "consist[ing] of miscellaneous records regarding pneumonia and cancer treatments" and including diagnoses of "CWP/COPD [coal workers' pneumoconiosis and chronic obstructive pulmonary disease]" but he did not make a finding as to the weight to which this evidence was entitled, if any. The administrative law judge also did not discuss: the hospital records from Summerville Memorial Hospital and Charleston Area Medical Center that included diagnoses and/or a tracked a history of COPD from 2008 through 2010; the miner's death certificate, which listed COPD as an underlying cause leading to the miner's immediate cause of death; and the evidence from the miner's 1973 and 2004 claims. Director's Exhibits 24, 25, 34. Because the treatment records contain positive x-ray evidence for pneumoconiosis, the administrative law judge erred in not considering the effect, if any, of the hospitalization and treatment records on the credibility of employer's physicians, who cite to the lack of evidence of clinical pneumoconiosis or obstructive respiratory impairment as a basis for excluding a diagnosis of legal pneumoconiosis in this case. *See Hicks*, 138 F.3d at 533; 21 BLR at 2-335; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). We therefore vacate the administrative law judge's finding that employer established rebuttal of the amended Section 411(c)(4) presumption by establishing that the miner did not have legal or clinical pneumoconiosis. *See Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 898, 22 BLR 2-409, 426-427 (7th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000).

On remand, the administrative law judge must consider the entire record in determining whether or not employer has affirmatively established that the miner did not have legal pneumoconiosis. The administrative law judge must specifically address the probative value of the opinions of Drs. Zaldivar and Castle, including the explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. The administrative law judge is also instructed to consider all of the x-ray evidence in the record to determine whether employer has rebutted the presumed fact of clinical pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The administrative law judge should also reevaluate the medical opinion evidence, in light of his x-ray findings, and then determine whether all of the relevant evidence, when weighed together as a whole, establishes that the miner did not have clinical pneumoconiosis.

If the administrative law judge finds that employer disproved the existence of both legal pneumoconiosis and clinical pneumoconiosis, employer has rebutted the amended Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i), and the administrative law judge must reinstate the denial of benefits. However, if employer fails to establish rebuttal under the first method, the administrative law judge must consider whether employer has rebutted the presumed fact of total disability causation at 20 C.F.R.

§718.305(d)(1)(ii). Employer can accomplish this by proving that "no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); *Bender*, 782 F.3d 129, 143; *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013)*; Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Minich*, BRB No. 13-0544 BLA, slip op. at 11 (To rebut the presumed causal relationship between pneumoconiosis and total disability, employer must establish that "no part, not even an insignificant part, of claimant's respiratory or pulmonary disability was caused by pneumoconiosis."). In rendering his Decision and Order on remand, the administrative law judge must also set forth his findings in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order Denying 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.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge