U.S. Department of Labor

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

BRB No. 15-0041 BLA

JIMMY D. GOAD Claimant-Petitioner v. SELECT MINING, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/30/2015 DECISION and ORDER

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

Leonard Stayton, Inez, Kentucky, for claimant.

Francesca Tan and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2013-BLA-5390) of Administrative Law Judge Richard A. Morgan rendered on a claim filed on February 6, 2012, pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944

(2012) (the Act). In crediting claimant with at least 34 years of coal mine employment, the administrative law judge found that 15 or more of those years were in underground coal mine employment. The administrative law judge also found that the medical opinion evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge therefore found that claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. However, the administrative law judge found that employer established rebuttal of the presumption at amended Section 411(c)(4) by disproving the existence of clinical and legal pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that employer established rebuttal of the presumption at amended Section 411(c)(4) by disproving the existence of legal pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[1]

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.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

In 2010, Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this

[1] Because the administrative law judge's length of coal mine employment finding and his findings that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and that employer established the absence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibits 3, 6. Accordingly, the Board will apply the law 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).

living miner's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where 15 or more 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 impairment are established. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

We affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as it was filed after January 1, 2005 and was pending after March 23, 2010. 30 U.S.C. §921(c)(4). We also affirm the administrative law judge's unchallenged finding that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Because claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that no part of claimant's total disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d). The administrative law judge found that employer established rebuttal of the presumption at amended Section 411(c)(4) by the first method, as he determined that employer established the absence of clinical and legal pneumoconiosis.

Claimant contends that the administrative law judge erred in finding that employer established rebuttal of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) by disproving the existence of legal pneumoconiosis. The administrative law judge considered the opinions of Drs. Rasmussen, Rosenberg and Zaldivar. Dr. Rasmussen diagnosed legal pneumoconiosis based on a restrictive lung disease due, in part, to coal mine dust exposure. Director's Exhibit 12; Claimant's Exhibits 1 (Dr. Rasmussen's Depo. at 11-12), 2. Conversely, Drs. Rosenberg and Zaldivar opined that claimant does not have legal pneumoconiosis because claimant's restrictive lung condition is caused by extrinsic factors, such as an elevated diaphragm and obesity, and not coal mine dust exposure. Director's Exhibit 21; Employer's Exhibits 2, 10 (Dr. Zaldivar's Depo. at 35), 11 (Dr. Rosenberg's Depo. at 25).

The administrative law judge gave little weight to Dr. Rasmussen's opinion that claimant suffers from legal pneumoconiosis because "Dr. Rasmussen did not explain why coal dust exposure caused claimant's restriction despite acknowledging a problematic hemidiaphragm." Decision and Order at 20. The administrative law judge then stated, "[g]iven application of the PPACA presumption, this is of little, if any, consequence." *Id.* In considering the opinions of Drs. Rosenberg and Zaldivar that claimant does not have legal pneumoconiosis, the administrative law judge noted that "Drs. Rosenberg and Zaldivar both opined that claimant's restrictive impairment should be supported by

radiographic evidence." *Id.* The administrative law judge further noted that "the BLBA contemplates lung disease absent radiographic evidence." *Id*. Because the administrative law judge determined that the opinions of Drs. Rosenberg and Zaldivar were based on an erroneous premise, he gave less weight to these opinions.

Nevertheless, the administrative law judge noted that the opinions of Drs. Rosenberg and Zaldivar were also based on negative CT scans, x-rays, preserved oxygenation with exercise, elevated right hemidiaphragm and obesity. The administrative law judge therefore stated:

> While I give [Dr. Rosenberg's] opinion less weight because he noted that there should be radiographic evidence in support of a coal dust-induced restriction, I find his opinion well-documented and reasoned because he relied upon claimant's preserved oxygenation with exercise and elevated right hemidiaphragm (an etiology that Dr. Rasmussen could not exclude) to reach a diagnosis of no legal pneumoconiosis.

Id. The administrative law judge additionally stated:

> I give [Dr. Zaldivar's] opinion less weight because he noted that there should be radiographic evidence in support of a coal dust-induced restriction, but nonetheless find it well-reasoned and documented given that he relied upon claimant's elevated right hemidiaphragm (an etiology that Dr. Rasmussen could not exclude) to reach a diagnosis of no legal pneumoconiosis.

Id. at 21. Hence, the administrative law judge found that employer established rebuttal of the presumption at amended Section 411(c)(4) by disproving the existence of legal pneumoconiosis.

We hold that the administrative law judge erred by selectively analyzing the medical opinions, *see Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-297 (1984), and by failing to adequately explain the bases for his findings of fact and conclusions of law, as required by the Administrative Procedure Act,[3] *see Wojtowicz v. Duquesne Light Co.*, 12

[3] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge invoked the 15-year presumption, 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. *Wojtowicz*, 12 BLR at 1-165. Rather than initially determining whether claimant satisfied the

BLR 1-162, 1-165 (1989). The administrative law judge determined that Dr. Rasmussen failed to explain why coal dust exposure caused claimant's restriction despite acknowledging a problematic hemidiaphragm. However, the administrative law judge did not address whether Drs. Rosenberg and Zaldivar adequately explained why claimant's presumed chronic lung disease was not significantly related to, or substantially aggravated by, his history of at least 34 years of coal dust exposure. Thus, the administrative law judge did not apply the type of scrutiny to the opinions of Drs. Rosenberg and Zaldivar that he applied to Dr. Rasmussen's opinion. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139 (1999) (en banc). We, therefore, vacate the administrative law judge's finding that employer established the absence of legal pneumoconiosis. Consequently, we vacate the administrative law judge's finding that employer established rebuttal of the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis, and remand the case for further consideration of the evidence thereunder.

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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 that 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 18-21. The administrative law judge should have first considered whether claimant invoked the amended Section 411(c)(4) presumption, and then analyzed the evidence as to whether employer successfully met its burden of rebuttal. *See Minich v. Keystone Coal Mining Corp.*, BRB No. 13-0544 BLA, slip op. at 10-11 (Apr. 21, 2015)(Boggs, J., concurring and dissenting). Regardless, the administrative law judge erred in weighing the opinions of Drs. Rasmussen, Rosenberg and Zaldivar with regard to the issue of legal pneumoconiosis, requiring remand.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for further proceedings 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