U.S. Department of Labor

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

BRB No. 18-0454 BLA

EDWARD RAY ELLIS, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLACK BEAR MINING, INCORPORATED	)	DATE ISSUED: 09/20/2019
	)	
Employer-Petitioner	)	
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

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

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-05709) of Administrative Law Judge Drew A. Swank rendered pursuant to the Black Lung

Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on November 25, 2015.[1]

The administrative law judge credited claimant with twenty-three years of underground coal mine employment, as the parties stipulated, and found he established a totally disabling pulmonary impairment. The administrative law judge therefore determined claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] and established a change in the applicable condition of entitlement. The administrative law judge further found employer failed to rebut the presumption and 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 in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[3]

[1] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). In this case, because claimant's initial claim was denied for failure to establish pneumoconiosis, he was required to establish this element of entitlement to obtain review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where the evidence establishes fifteen 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. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

[3] We affirm as unchallenged on appeal the administrative law judge's findings that claimant established twenty-three years of qualifying coal mine employment, total respiratory or pulmonary disability, invocation of the Section 411(c)(4) presumption, and a change in the applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 26, 30-31.

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.[4] 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, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[5] or that "no part of [his] 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). The administrative law judge found employer failed to rebut the presumption by either method.[6] Decision and Order at 17, 31. Employer's assertion that the administrative law judge applied an incorrect standard in finding it failed to rebut the existence of legal pneumoconiosis has merit.

The administrative law judge began his rebuttal analysis by correctly recognizing that to disprove legal pneumoconiosis, employer must establish 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), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting); Decision and Order at 16. He then considered the opinions of Drs. Green, Raj, Zaldivar, and Fino. Decision and Order at 16; Director's Exhibits 12, 17, 20, 22; Claimant's Exhibits 1, 2. Drs. Green and Raj diagnosed legal pneumoconiosis in finding that claimant has chronic obstructive pulmonary disease (COPD) caused by cigarette smoking and coal mine dust exposure. Claimant's Exhibits 1,

[4] Because 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 (1989) (en banc); Director's Exhibit 4.

[5] "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).

[6] The administrative law judge found that employer established that claimant did not have clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 13. But Employer must also disprove legal pneumoconiosis in order to rebut the presumption under the first method at 20 C.F.R. §718.305(d)(1).

2. Drs. Zaldivar and Fino diagnosed COPD/emphysema attributable to cigarette smoking, which led to his lung cancer and subsequent surgery, but not to coal mine dust exposure. Director's Exhibits 17, 20. Noting that each physician diagnosed COPD, which includes emphysema, and that coal mine dust exposure is "link[ed] in a substantial way . . . to pulmonary impairment and COPD" as set forth in the Preamble to the 2001 regulations, the administrative law judge concluded employer failed to disprove legal pneumoconiosis:

> As the Act does not require that coal mine dust exposure be the sole cause of a claimant's respiratory impairment, for the reasons given in Section V, *infra*, the undersigned finds that the evidence is insufficient to establish that [c]laimant's respiratory impairment is *entirely unrelated* to coal mine dust exposure.

Decision and Order at 16-17 (emphasis added), *quoting* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). Thus, although the administrative law judge accurately quoted the rebuttal standard at the outset of his analysis, employer correctly asserts that his conclusion, employer failed to rebut the existence of legal pneumoconiosis, does not indicate whether he applied the correct rebuttal standard. Employer's Brief at 12-13. Rather, the administrative law judge apparently applied the "more substantial" standard for disproving disability causation. *See* Decision and Order at 26.

Nor is it clear the administrative law judge properly analyzed the evidence relevant to the existence of legal pneumoconiosis at Section V of his decision, as referenced above. There, he referred to rebuttal of disability causation, stating: "Employer failed to rebut the presumed existence of legal coal workers' pneumoconiosis. Thus, [e]mployer now faces a more substantial hurdle in trying to rebut the presumption that pneumoconiosis contributes to [c]laimant's disability." Decision and Order at 26. He determined "[e]mployer has failed to meet its burden of proving that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis." *Id*. at 31. But the proper standard is 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 mine dust exposure. *Minich*, 25 BLR at 154-56; Employer's Brief at 12-13.

We also agree with employer that the administrative law judge did not consider Dr. Oesterling's biopsy report when weighing the medical evidence relevant to establishing

rebuttal of the existence of legal pneumoconiosis.[7] Claimant underwent a left upper lobectomy for removal of lung cancer on March 17, 2015. Dr. Oesterling examined the biopsy slides and stated that the appearance of the tissues reflected exposure to "significant quantities of tobacco smoke either primarily or secondarily" and "minor" coal dust exposure.[8] Director's Exhibit 19. He identified the presence of respiratory bronchiolitis and adenocarcinoma of the lung, which he stated are conditions associated with the inhalation of tobacco smoke, not coal dust. *Id.* He also identified centrilobular emphysema and stated that the lack of coal dust in the damaged tissues meant he "[could not] attribute this emphysema to coal dust exposure." *Id.* Thus he concluded that the miner's "primary disease processes . . . cannot be attributed to coal dust." *Id*. Dr. Oesterling's comments are relevant to whether claimant's COPD/emphysema is "significantly related to, or substantially aggravated by dust exposure in coal mine employment" and therefore constitutes legal pneumoconiosis. 20 C.F.R. §718.201(a)(2), (b). The administrative law judge erred in not considering this relevant evidence. *See* 30 U.S.C. §923(b).

We also agree with employer that the administrative law judge did not adequately address the rationales Drs. Zaldivar and Fino provided for their determinations that claimant's pulmonary impairment is not related to coal dust exposure. Contrary to the administrative law judge's finding, while they both referenced the absence of radiological evidence of coal dust retention to conclude claimant did not have legal pneumoconiosis,[9]

[7] The administrative law judge determined Dr. Oesterling's biopsy report supports rebutting the presumption that claimant has clinical pneumoconiosis. Decision and Order at 12-13; Director's Exhibit 19.

[8] Dr. Oesterling observed: "no significant evidence of black pigment" in the pleura; minimal coal dust in the subpleural tissue; frequent smokers' macrophages in the bronchus; enlarged airspaces; alveoli with thickened membranes, dilated capillaries, and early fibrosis; and infiltration of the lymph nodes by adenocarcinoma with no deposition of coal dust. Director's Exhibit 19.

[9] As the administrative law judge noted, the Department of Labor has recognized that pneumoconiosis can be credibly diagnosed "notwithstanding a negative x-ray," and that legal pneumoconiosis, in the form of a clinically significant obstructive impairment, can exist in the absence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4), (b); 65 Fed. Reg. 79,920, 79,940-43 (Dec. 21, 2000); *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314 (4th Cir. 2012); Decision and Order at 31.

Drs. Zaldivar and Fino also cited biopsy evidence to support their conclusions.[10] *See* Decision and Order at 31; Director's Exhibits 17, 20. Because it is not clear Drs. Zaldivar and Fino relied solely on negative radiological evidence to conclude claimant does not have legal pneumoconiosis, the administrative law judge's determination to discredit their opinions for this reason alone cannot be affirmed. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

Because the administrative law judge considered the evidence under an incorrect rebuttal standard, omitted Dr. Oesterling's report from consideration, and apparently did not fully consider the medical opinions of Drs. Zaldivar and Fino, we vacate his finding that employer failed to establish rebuttal of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A). Further, as the administrative law judge's evaluation of the evidence relevant to rebuttal of legal pneumoconiosis may affect his evaluation of the evidence relevant to disability causation, we must also vacate that rebuttal finding. 20 C.F.R. §718.305(d)(1)(i)(A). We therefore vacate the award of benefits and remand this case to the administrative law judge.

On remand, the administrative law judge should first consider whether employer disproved the existence of legal pneumoconiosis by affirmatively establishing 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), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8. In doing so, he must address the opinion of Dr. Oesterling, in addition to the opinions of Drs. Zaldivar and Fino.[11]

[10] Dr. Zaldivar summarized Dr. Oesterling's biopsy report and stated, "[t]he absence of radiographic pneumoconiosis has been accompanied by absence of histological pneumoconiosis and also by the presence of a minimal amount of dust within the lungs that as noted by Dr. Oesterling, is not sufficient to even consider any impairment to be caused by it." Director's Exhibit 20. Dr. Fino initially diagnosed a mild pulmonary impairment due to smoking-related emphysema. Director's Exhibit 17. After reviewing Dr. Oesterling's biopsy report, and other medical records pertaining to the miner's cancer treatment, Dr. Fino stated: "I believe the pulmonary impairment is related to removal of lung tissue as a result of the lung cancer. I also believe there is some pulmonary emphysema present consistent with smoking." Director's Exhibit 20.

[11] In light of the diagnoses of legal pneumoconiosis that Drs. Green and Raj made, their opinions do not support employer's burden to affirmatively disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A). We therefore decline to address employer's contention that their medical opinions are not adequately documented and

If the administrative law judge finds employer has disproved the existence of both legal and clinical pneumoconiosis on remand, employer has rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i) and he need not reach the issue of disability causation. But if employer fails to rebut the presumption at 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must then determine whether employer has rebutted the presumed fact of disability causation 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).

The administrative law judge should address the explanations the physicians have provided for their diagnoses, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). He must set forth his findings in detail, including the underlying rationale for 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*, 12 BLR at 1-165; *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

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reasoned. Employer's Brief at 14-15. If, however, the administrative law judge credits the opinions of Drs. Zaldivar and Fino, he is required to resolve the conflict in the medical opinion evidence.

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.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge