U.S. Department of Labor

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

BRB No. 16-0587 BLA

ROLAND L. GRIFFITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TERRY EAGLE COAL COMPANY, LLC	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 09/06/2017
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Ashley M. Harmon (Jackson Kelly PLLC), Morgantown, 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 (2014-BLA-5693) 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 miner's claim filed on July 29, 2013.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with twenty-eight years of underground coal mine employment and found that the evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge applied an incorrect legal standard in considering whether employer rebutted the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has 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 by 30

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a claimant establishes 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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-eight years of underground coal mine employment and total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 13-14.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Tr. at 14-15.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Rebuttal of the Section 411(c)(4) Presumption

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 nor clinical pneumoconiosis,[4] or by establishing 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." 20 C.F.R. §718.305(d)(1)(i), (ii). In this case, the administrative law judge found that employer failed to rebut the Section 411(c)(4) presumption. Employer contends that the administrative law judge erred in making that finding.

The administrative law judge began his analysis of this case 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 5-10. After finding that claimant failed to establish the existence of clinical pneumoconiosis through x-ray or biopsy evidence at 20 C.F.R. §718.202(a)(1), (2), the administrative law judge considered 20 C.F.R. §718.202(a)(3) and found that because claimant had invoked the Section 411(c)(4) presumption he had established "that he suffers from legal coal workers' pneumoconiosis." Decision and Order at 9-12, 13. The administrative law judge then stated that, "[a]s the issue of whether [claimant] ha[s] coal workers' pneumoconiosis was determined . . . the single issue to be determined is whether [c]laimant's total disability arose from his coal workers' pneumoconiosis due to his past coal mine employment." Decision and Order at 14.

Relevant to this issue, the administrative law judge considered the medical opinions of employer's experts, Drs. Zaldivar and Bellotte, that claimant suffers from

[4] 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). 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 coal dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

totally disabling asthma caused by cigarette smoking, not coal mine dust exposure. Director's Exhibit 23; Employer's Exhibits 1, 8. The administrative law judge determined that their opinions were flawed and unpersuasive, however, and thus insufficient "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 17.

Employer asserts that the administrative law judge erred in failing to determine whether employer disproved the existence of legal pneumoconiosis prior to reaching the issue of whether it disproved the presumed fact of disability causation. Employer's Brief at 9-21. We agree. There are two methods of rebutting the presumption: 1) disproving the existence of legal and clinical pneumoconiosis; or 2) establishing that no part of the miner's total respiratory disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i), (ii); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

Before considering whether employer has established that no part of claimant's total respiratory disability is caused by pneumoconiosis, an administrative law judge must first determine whether employer has established that claimant does not suffer from pneumoconiosis, as defined in 20 C.F.R. §718.201(a)(2), (b). *See* 20 C.F.R. §718.305(d)(1)(i); *Minich*, 25 BLR at 1-159. With respect to legal pneumoconiosis, an administrative law judge thus must initially consider all evidence relevant to 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." *See Minich*, 25 BLR at 1-159. With respect to clinical pneumoconiosis, an administrative law judge must consider all of the relevant evidence, placing the burden of proof on employer to establish that claimant does not have the disease, as defined in 20 C.F.R. §718.201(a)(1). Only after determining that the employer failed to disprove the presence of both legal and clinical pneumoconiosis should an administrative law judge determine whether employer established that "no part" of claimant's pulmonary or respiratory disability was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii).

Here, after determining that claimant invoked the Section 411(c)(4) presumption, the administrative law judge failed to make a proper finding on the existence of clinical pneumoconiosis, with the burden of proof on employer to disprove the disease. The administrative law judge should have determined whether employer 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. Invocation establishes a rebuttable presumption that the miner suffers from both legal and clinical pneumoconiosis. *See Minich*, 25 BLR at 1-159. By requiring the claimant to

establish the existence of clinical pneumoconiosis, the administrative law judge placed the burden of proof on the wrong party. *See Minich*, 25 BLR at 1-159. Further, the administrative law judge did not consider the medical opinion evidence regarding the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) in his rebuttal analysis.

As employer asserts, the administrative law judge also erred in failing to address whether employer disproved the existence of legal pneumoconiosis. The administrative law judge should have determined whether employer established 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." *See Minich*, 25 BLR at 1-159.

Moreover, employer correctly contends that the administrative law judge applied an incorrect rebuttal standard in addressing the issue of whether employer disproved the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii). Employer's Brief at 23-25. The administrative law judge required employer to disprove "the legal presumption that coal workers' pneumoconiosis is a 'substantially contributing cause' of [c]laimant's total pulmonary or respiratory disability." Decision and Order at 17. The correct standard to be applied, however, 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* 20 C.F.R. §718.305(d)(1)(ii); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *Minich*, 25 BLR at 1-154-56.

The administrative law judge's use of an incorrect rebuttal standard is not harmless error, as we are unable to discern the extent to which it affected his credibility determinations. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. 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), (ii) and further vacate his award of benefits.

II. Remand Instructions

The administrative law judge is instructed to reconsider whether employer established rebuttal in accordance with the regulations. The administrative law judge is instructed to begin his analysis by considering whether employer disproved the existence 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), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8. Similarly, the administrative law

judge must determine whether employer has 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 the administrative law judge finds that employer has met its burden to disprove the existence of both legal and clinical pneumoconiosis by a preponderance of the evidence, 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. However, if employer fails to establish that claimant has neither legal nor clinical pneumoconiosis pursuant to 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 at 20 C.F.R. §718.305(d)(1)(ii) by establishing 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); *see Minich*, 25 BLR at 1-159. If employer is unable to rebut the Section 411(c)(4) presumption pursuant to either 20 C.F.R. §718.305(d)(1)(i) or (ii), the administrative law judge must reinstate the award of benefits.

In determining the credibility of the medical opinions, 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). Furthermore, the administrative law judge is instructed to set forth his findings on remand in detail, including the underlying rationale for his decision, as required by the Administrative Procedure Act,[5] 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.

[5] The Administrative Procedure Act provides that every adjudicatory decision must include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

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