U.S. Department of Labor

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

BRB No. 15-0527 BLA

FOREE MARTIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	DATE ISSUED: 08/22/2016
	)	
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 on Remand of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Joan B. Singleton, Bessemer, Alabama, for claimant.

John C. Webb, V (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals[1] the Decision and Order on Remand (2010-BLA-05305) of Administrative Law Judge Theresa C. Timlin awarding benefits on a miner's claim filed

[1] Employer initially filed its appeal on May 14, 2015, which the Board docketed as BRB No. 15-0288 BLA. Subsequently the Director, Office of Workers' Compensation Programs (the Director), informed the Board that employer had filed a motion for reconsideration with the Office of Administrative Law Judges. Consequently, by Order

pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case, involving claimant's request for modification of a subsequent claim filed on June 14, 2006,[2] is before the Board for the second time.

Relevant to the instant claim, in a Decision and Order dated August 4, 2008, Administrative Law Judge Adele Higgins Odegard found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(b). Director's Exhibit 61. Judge Odegard therefore found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and denied benefits. *Id.*

Claimant filed a request for modification on August 6, 2009. Director's Exhibits 62, 63. In a Decision and Order dated August 19, 2010, Administrative Law Judge Janice K. Bullard credited claimant with thirty-seven years and seven months of coal mine employment, of which at least fifteen years were in an underground coal mine. Considering the new evidence submitted on modification, in conjunction with the evidence submitted in this subsequent claim, Judge Bullard found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Consequently, Judge Bullard found that claimant established a change in conditions pursuant to 20 C.F.R. §725.310, and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Reviewing the merits of entitlement, however, despite correctly noting that claimant established the requisite elements to invoke the Section 411(c)(4)[3] presumption of total disability due to pneumoconiosis, the administrative law

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dated November 30, 2015, the Board dismissed employer's appeal as premature. *Martin v. Jim Walter Resources, Inc.*, BRB Nos. 15-0288 BLA and 15-0527 BLA (Nov. 30, 2015) (unpub.). Following the resolution of all matters before Administrative Law Judge Theresa C. Timlin (the administrative law judge), employer filed its current appeal on August 21, 2015, which the Board docketed as BRB No. 15-0527 BLA. The Board transferred all briefs and pleadings in BRB No. 15-0288 BLA to BRB No. 15-0527 BLA.

[2] Claimant filed nine prior claims, in 1987, 1988, 1990, 1991, 1993, 1995, 1996, 2001, and most recently, on May 22, 2003. Director's Exhibits 1-9. On April 13, 2004, the district director denied the 2003 claim because claimant failed to establish any of the elements of entitlement. Director's Exhibit 9. Claimant took no further action until he filed the current claim, his tenth, on June 14, 2006. Director's Exhibit 11.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years in underground coal mine employment, or in surface mine employment in conditions

judge did not invoke the presumption. Rather, Judge Bullard found that "[c]laimant must establish that the disability is due to pneumoconiosis." 2010 Decision and Order at 10. Judge Bullard then found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Judge Bullard therefore denied benefits.

In response to claimant's appeal, the Board affirmed Judge Bullard's determination that the Section 411(c)(4) presumption is applicable to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010. The Board vacated Judge Bullard's denial of benefits, however, holding that, contrary to Judge Bullard's finding, Section 411(c)(4) does not require claimant to prove that his disability is due to pneumoconiosis. Thus, the Board remanded the case for consideration of invocation, and rebuttal, pursuant to Section 411(c)(4). *Martin v. Jim Walter Resources, Inc*., BRB No. 10-0721 BLA (Aug. 26, 2011)(unpub.).

On remand, because Judge Bullard was unavailable, the case was reassigned to Judge Timlin (the administrative law judge). In a decision dated April 10, 2015, the administrative law judge found that because the evidence established more than fifteen years of underground coal mine employment, and that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), claimant invoked the Section 411(c)(4) presumption. The administrative law judge also found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits, commencing as of August 2009, which the administrative law judge characterized as being the date claimant filed his claim. *Id*. On reconsideration, in an order dated July 27, 2015, the administrative law judge clarified that the date for the commencement of benefits, August 2009, reflected the month and year in which claimant requested modification.

On appeal, employer challenges the administrative law judge's finding that it failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis or by proving that no part of claimant's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis. Claimant responds in support of the award, but asserts that the administrative law judge erred in her determination of the commencement date for benefits. Employer replies, reiterating its contentions on

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substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. *See* 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

appeal.[4] The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[5]

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.[6] 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 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,[7] 20 C.F.R. §718.305(d)(1)(i), 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

[4] In several briefs filed in response, and in reply, to employer's briefs on appeal, claimant's counsel states that claimant, the miner, is now deceased, and that his widow has been awarded survivor's benefits under the automatic entitlement provisions of Section 422(*l*) of the Act, 30 U.S.C. §932(*l*). Claimant's counsel raises several arguments pertaining to the payment of benefits in the survivor's claim. In response, employer urges the Board to strike these arguments or, in the alternative, to reject them. As the instant appeal pertains only to the miner's claim, and as a survivor's claim is not before the Board at this time, we decline to address any arguments by the parties regarding survivor's benefits. 20 C.F.R. §802.301(a).

[5] As employer concedes that the administrative law judge properly found that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, that finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Employer's Brief at 11.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as the record indicates that claimant's coal mine employment was in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 12.

[7] "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).

C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.[8]

Relevant to whether employer established that claimant does not have legal pneumoconiosis, the administrative law judge considered the 2007 medical opinion of Dr. Renn, submitted by employer in this subsequent claim, together with the 2009 opinion of Dr. Goldstein, submitted by employer in connection with claimant's request for modification. The administrative law judge noted that Dr. Renn opined that claimant does not have pneumoconiosis or a disabling respiratory impairment, but is impaired by chronic congestive heart failure and obesity. Decision and Order on Remand at 34; Director's Exhibit 49. The administrative law judge noted that Dr. Goldstein opined that claimant does not have pneumoconiosis, but suffers from a disabling pulmonary impairment that is directly related to congestive heart failure with involvement of the lungs.[9] Decision and Order on Remand at 34; Director's Exhibit 68. The administrative law judge found that the opinions of Drs. Renn and Goldstein were not sufficiently persuasive to rebut the Section 411(c)(4) presumption. Decision and Order on Remand at 33-34.

Employer argues that the administrative law judge erred in her consideration of the opinions of Drs. Renn and Goldstein, and that "the great weight of the evidence establishes that the [c]laimant's impairment is due entirely to his heart condition." Employer's Brief at 12. Contrary to employer's assertion, the administrative law judge

[8] In considering whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge combined her discussion of whether employer disproved the existence of legal pneumoconiosis, with her discussion of whether employer proved that no part of claimant's totally disabling respiratory impairment is due to pneumoconiosis. Decision and Order on Remand at 33-35. While these are two separate and distinct issues with two separate standards of proof, the administrative law judge's error in conflating her analysis ultimately is harmless, as she discredited employer's physicians on the grounds that they did not rationally explain their opinions. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Moreover, employer does not challenge this aspect of the administrative law judge's decision.

[9] The administrative law judge also considered Dr. Goldstein's 2007 report, submitted with the subsequent claim, and Dr. Goldstein's 1987, 1991, 1995, 1997, and 2003 reports, submitted in the prior claims. Decision and Order on Remand at 23-25, 29, 34. The administrative noted that, in contrast with his most recent 2009 opinion, in 2007 Dr. Goldstein opined that claimant did not have a pulmonary impairment, but was disabled from a cardiac condition, and in his earlier reports, Dr. Goldstein did not diagnose a disabling impairment from any cause. *Id.*

acted within her discretion in finding that the opinions of Drs. Renn and Goldstein are not well reasoned, because neither doctor adequately considered the possible role of coal mine dust exposure in claimant's impairment. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992, 23 BLR 2-213, 2-238 (11th Cir. 2004); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-375 (11th Cir. 1989) ("The question of whether [a] medical report is sufficiently documented and reasoned is one of credibility for the fact finder."); *see also Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015) (the evidence must affirmatively establish the absence of pneumoconiosis); Decision and Order on Remand at 34. Specifically, the administrative law judge permissibly found that Drs. Renn and Goldstein did not adequately explain why claimant's more than thirty-seven years of coal mine dust exposure did not contribute, along with claimant's cardiac disease and other conditions, to his overall cardiopulmonary function. *See Jones*, 386 F.3d at 992, 23 BLR at 2-238; *Jordan*, 876 F.2d at 1460, 12 BLR at 2-375; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order on Remand at 34. As the administrative law judge's basis for discrediting the opinions of Drs. Renn and Goldstein is rational and supported by substantial evidence, this finding is affirmed. *See Jones*, 386 F.3d at 992, 23 BLR at 2-238.

Because the opinions of Drs. Renn and Goldstein are the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis.[10] Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[11] *See* 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *Id.*

[10] We decline to address employer's contentions of error regarding the administrative law judge's consideration of the opinions of Drs. Hasson and Milko, as the opinions of these physicians do not assist employer in establishing rebuttal of the Section 411(c)(4) presumption. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 12.

[11] Thus, we need not address employer's contentions of error regarding the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278. Moreover, because we need not address the administrative law judge's findings regarding clinical pneumoconiosis, we decline to address employer's assertion that the administrative law judge erred in denying its motion to strike Dr. Loveless's reading of the July 24, 2009 x-ray. *Id.*

The administrative law judge next addressed whether employer established rebuttal by proving 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)(ii). The administrative law judge permissibly found that the same reasons for which she discredited the opinions of Drs. Renn and Goldstein that claimant does not suffer from legal pneumoconiosis, also undercut their opinions that claimant's disabling respiratory impairment was not caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Kennard*, 790 F.3d at 668; *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431,2-452 (6th Cir. 2013); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735, 25 BLR 2-405, 2-425 (7th Cir. 2013); Decision and Order at 34. As the opinions of Drs. Renn and Goldstein are the only opinions supportive of employer's burden, we affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, and we affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(2)(ii).

We next address claimant's challenge to the administrative law judge's determination of the date for the commencement of benefits. In her April 10, 2015 decision, after finding that she was unable to determine when claimant became totally disabled due to pneumoconiosis, the administrative law judge stated that benefits are payable as of August 2009, "the date claimant filed this claim." Decision and Order on Remand at 35-36. In her July 27, 2015 order on reconsideration, however, the administrative law judge clarified that August 2009 reflected the date claimant requested modification. Claimant asserts that the administrative law judge should have awarded benefits beginning with the month following the month of the last denial of benefits, issued by the district director on April 13, 2004, or, in the alternative, beginning June 2006, the month in which claimant filed this subsequent claim. We disagree.

Once entitlement to benefits is established, the date for their commencement is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). In a subsequent claim, such as this, the date for the commencement of benefits is determined as provided under 20 C.F.R. §725.503, with the additional rule that no benefits may be paid for any time period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

Additionally, where, as here, benefits are awarded pursuant to 20 C.F.R. §725.310, the basis for granting modification affects the determination of the date from which benefits commence. *Eifler v. Peabody Coal Co.*, 926 F.2d 663, 666, 15 BLR 2-1, 2-4 (7th Cir. 1991). If modification is based on a change in conditions, claimant is entitled to benefits as of the month he became totally disabled due to pneumoconiosis or, if that date is not ascertainable, as of the month in which he requested modification. 20 C.F.R. §725.503(d)(2). Thus, contrary to claimant's arguments, because the administrative law judge found that modification was based on a change in conditions, and that the record does not establish when claimant became totally disabled due to pneumoconiosis, she properly awarded benefits beginning August 2009, the date claimant requested modification.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.[12]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

[12] Finally, we note that claimant's counsel has filed a complete, itemized statement requesting a fee, pursuant to 20 C.F.R. §802.203, for services performed before the Board from May 16, 2015 to February 4, 2016 in the present appeal. However, a fee award is not enforceable, and the fee is not payable, until an award of benefits becomes final. *See* 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT) (7th Cir. 1982); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995). As the regulations provide that any party-in-interest may file a request for reconsideration of the Board's decision within thirty (30) days from the filing of such decision, 20 C.F.R. §802.407, we decline to address, as premature, the fee petition of claimant's counsel for work before the Board.