U.S. Department of Labor

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

BRB No. 17-0453 BLA

LARRY R. WILSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ROCKHOUSE CREEK DEVELOPMENT	)	DATE ISSUED: 05/30/2018
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	
	)	
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.

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

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05372) 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 January 9, 2014.

The administrative law judge found that the x-ray evidence established the existence of simple clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). He further found that claimant had at least twenty-nine years of underground coal mine employment[1] and a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2), and therefore was entitled to the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge found that employer failed to rebut the presumption and awarded benefits accordingly.

On appeal, employer challenges the administrative law judge's finding that it failed to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[3]

[1] The administrative law judge found that claimant had at least thirty-eight years of coal mine employment in total, including at least twenty-nine years of underground coal mine employment. Decision and Order at 4.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and has a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established thirty-eight years of coal mine employment, including at least twenty-nine years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) and, therefore, invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14.

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).

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 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)(i), (ii).

After determining that claimant established the existence of clinical pneumoconiosis by chest x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge found that claimant is totally disabled and thus invoked the Section 411(c)(4) presumption.[6] Decision and Order at 9, 13, 14. Then, under the heading "Cause of Total Disability," the administrative law judge quoted the "substantially contributing cause" standard under which a claimant must establish disability causation pursuant to 20 C.F.R. §718.204(c)(1), when claimant does *not* have the benefit of the Section 411(c)(4) presumption. *Id*. at 13. Additionally, the administrative law judge stated

[4] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 4; Hearing Transcript at 21. 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, 1-202 (1989) (en banc).

[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). This definition encompasses any chronic pulmonary disease or respiratory or pulmonary 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).

[6] The administrative law judge also found that claimant's clinical pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b). Decision and Order at 9-10.

that employer could rebut the presumption by establishing that claimant does not have pneumoconiosis, or that his disability does not arise out of coal mine employment. *Id*. at 14. The administrative law judge then stated that, "[a]s the issue of whether [claimant] ha[s] coal workers' pneumoconiosis was determined in Section II, *supra*, 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." *Id*.

We agree with employer that the administrative law judge erred in failing to properly address whether it disproved the existence of pneumoconiosis before determining whether it disproved the presumed fact of disability causation. Before considering whether employer has established that no part of claimant's total respiratory disability was caused by pneumoconiosis, an administrative law judge must first determine whether employer has established that claimant does not have either legal pneumoconiosis or clinical pneumoconiosis, as defined in 20 C.F.R. §718.201(a)(2), (b). *See* 20 C.F.R. §718.305(d)(1)(i); *Griffith v. Terry Eagle Coal Co.* BLR , BRB No. 16-0587 BLA (Sept. 6, 2017) (pub.).

Here, the administrative law judge also failed to make a proper finding on the existence of clinical pneumoconiosis, with the burden of proof on employer to disprove the disease. At 20 C.F.R. §718.202(a)(1), the administrative law judge summarized nine readings of four x-rays (five positive and four negative readings) and found that the "totality of the evidence," including the readers' qualifications and two negative computed tomography (CT) scan readings,[7] established clinical pneumoconiosis because a "majority of the X-ray readings were positive . . . ." Decision and Order at 9. The administrative law judge failed to explain how he considered the individual x-rays and factored in the physicians' radiological qualifications. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992) (holding that it is error for an administrative law judge to rely on a head count of the physicians providing assessments, rather than on a qualitative analysis of their opinions); *see also Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 25 BLR 2-779 (4th Cir. 2016). Further, the administrative law judge did not consider the other evidence relevant to the existence of clinical pneumoconiosis, including the

[7] Dr. Meyer read two computed tomography (CT) scans dated December 26, 2012 and May 27, 2014. He stated that CT scans are more sensitive than x-rays for detecting pulmonary parenchymal abnormalities and that neither CT scan showed any findings of coal workers' pneumoconiosis. Employer's Exhibit 7.

biopsy[8] and medical opinion evidence submitted pursuant to 20 C.F.R. §718.202(a)(2), (4), or explain what weight he accorded to the negative CT scans.

Further, the administrative law judge failed to consider whether employer satisfied its burden to disprove legal pneumoconiosis by establishing that claimant does not have "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b).

Therefore, we vacate the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. On remand, the administrative law judge is instructed to begin his rebuttal analysis by considering whether employer disproved the existence of legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b); 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting). The administrative law judge must then determine whether employer has established that claimant does not have clinical pneumoconiosis, taking into consideration all relevant evidence. *See* 20 C.F.R. §718.305(d)(1)(i)(B); *Minich*, 25 BLR at 1-159.

If the administrative law judge finds that employer has met its burden to disprove both legal and clinical pneumoconiosis by a preponderance of the evidence, employer will have 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); *Minich*, 25 BLR at 1-159.

[8] The record reflects that claimant underwent an open lung biopsy in 2013. Claimant's Exhibit 1; Director's Exhibit 16. Dr. Oesterling reviewed the pathology slides and opined that they did not show evidence of legal or clinical pneumoconiosis. Employer's Exhibit 5.

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

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge