U.S. Department of Labor

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

BRB No. 15-0433 BLA

CHESTER C. HAWKINS, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND FORK CONSTRUCTION, LIMITED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 09/23/2016
	)	
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 Austin and Victoria S. Herman (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Solicitor of Labor; Maia Fisher, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the

Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier appeals the Decision and Order Awarding Benefits (2011-BLA-5156) of Administrative Law Judge Drew A. Swank, rendered on a claim filed on January 14, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Based on the filing date of the claim, and his determinations that claimant established 25.72 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge also found that employer failed to rebut the presumption and he awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in failing to weigh the contrary probative evidence prior to finding that claimant established total disability based on the pulmonary function tests. Employer also argues that the administrative law judge applied the wrong rebuttal standard and erred in rejecting the opinions of its medical experts. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, in a limited response, contends that the administrative law judge's conclusion that claimant established total disability is supported by substantial evidence.[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,

[1] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[2] The administrative law judge's finding of 25.72 years of underground coal mine employment is affirmed, as unchallenged on appeal. Decision and Order at 5; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and in accordance with applicable law.[3] 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).

I. Invocation of the Section 411(c)(4) Presumption - Total Disability

The regulations provide that a miner shall be considered totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner from performing his usual coal mine work, and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies showing values equal to or less than those listed in Appendix B to 20 C.F.R Part 718; 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C to 20 C.F.R. Part 718; 3) the miner has pneumoconiosis and is shown by the evidence to suffer from cor pulmonale with right-sided congestive heart failure; or 4) a physician exercising reasoned medical judgment concludes that the miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv). If total disability has been established under one or more subsections, the administrative law judge must weigh the evidence supportive of a finding of total disability against the contrary probative evidence to determine whether total disability has been established by a preponderance of the evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987).

Considering whether claimant could establish total disability under 20 C.F.R. §718.204(b)(2)(i), the administrative law judge prepared a chart summarizing the results of five pulmonary function tests, dated April 5, 2010, June 30, 2010, August 23, 2011, January 3, 2012, and February 15, 2012. Decision and Order at 16; Director's Exhibit 12; Claimant's Exhibits 5, 6; Employer's Exhibits 1, 7, 4. Each of the studies had qualifying values for total disability prior to the use of a bronchodilator. *Id.* The February 15, 2012 study had qualifying values after use of a bronchodilator, and the remaining four studies had non-qualifying values after the use of a bronchodilator.[4] *Id.*

The administrative law judge stated, "*while in the majority of cases only the post-bronchodilator examination would qualify*, in the most recent study of February 15, 2012,

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

[4] A "qualifying" pulmonary function test yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" test exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

both the pre- and post-bronchodilator examinations qualified" for total disability. Decision and Order at 17 (emphasis added). The administrative law judge concluded that claimant was totally disabled based on a preponderance of the qualifying tests, including the most recent test. He further found that the qualifying pulmonary function study evidence "triggers the presumption" at Section 411(c)(4). *Id*. at 17. The administrative law judge did not render any findings pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iv), and proceeded to consider whether employer rebutted the presumption.

Initially, we note that the administrative law judge misstated that a majority of post-bronchodilator results is qualifying when his chart accurately reflects that all of the pre-bronchodilator results qualify and only one post-bronchodilator test is qualifying for total disability. Decision and Order at 17. Based on the correct summation of the evidence in the chart, we affirm the administrative law judge's conclusion that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), as each of the five tests had qualifying pre-bronchodilator values, and the administrative law judge properly noted that the most recent test of February 15, 2012 was qualifying, before and after the use of a bronchodilator.

Employer contends that the case should be remanded for the administrative law judge to render specific findings under 20 C.F.R. §718.204(b)(2)(ii)-(iv), and then to weigh all of the evidence together, prior to finding that claimant is totally disabled. The Director maintains that remand is unnecessary because there is no contrary probative evidence sufficient to outweigh the qualifying pulmonary function studies.[5]

Although the Director's argument may have merit, the regulations state that the Board "is not empowered to engage in a *de novo* proceeding or unrestricted review of a

[5] The Director, Office of Workers' Compensation Programs (the Director), points out that all of the pulmonary function tests had qualifying values, before the use of a bronchodilator, and that the Department of Labor has cautioned against reliance on post-bronchodilator results in determining total disability. Director's Brief at 3, *citing* 45. Fed. Reg. 13682 (1980). The Director further states that "the miner's most recent 2012 blood gas studies while non-qualifying, revealed mild to moderately severe hypoxemia." Director's Brief at 3, *citing* Claimant's Exhibit 6; Employer's Exhibit 18. Additionally, the Director notes that "[t]he medical opinions of record either diagnose a totally disabling respiratory or pulmonary impairment . . . or state only that [claimant] is able to do his usual coal mine work if his respiratory or pulmonary impairment was adequately treated," as evidenced by claimant's responsiveness to a bronchodilator. Director's Brief at 3. Because the regulations do not impose a requirement that claimant be on medication prior to a finding that he is totally disabled from performing his usual coal mine work, the Director contends that the medical opinions of Drs. Zaldivar and Bellotte do not refute that claimant is totally disabled. *Id*.

case" and is only authorized to review the administrative law judge's findings of fact and conclusions of law. 20 C.F.R. §802.301. When an administrative law judge does not make the necessary findings of fact, the proper course is to remand the case, as the Board lacks the authority to render factual findings to fill in gaps in the administrative law judge's opinion. *Director, OWCP, v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Circ. 1983). Furthermore, because we remand this case on other grounds, as discussed *infra*, it is appropriate for the administrative law judge to render in the first instance the necessary findings with respect to total disability. *Id*.; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). On remand, the administrative law judge is instructed to weigh any contrary probative evidence under 20 C.F.R. §718.204(b)(2)(ii)-(iv) against his finding of total disability as established by 20 C.F.R. §718.204(b)(2)(i). *See Fields*, 10 BLR 1-19 at 20-21; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

II. 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,[6] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 154-56 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge found that claimant does not have clinical pneumoconiosis but that he established the existence of legal pneumoconiosis through "the operation of a legal presumption." Decision and Order at 18. The administrative law judge stated that the single issue to be determined on rebuttal was whether claimant's "total disability arises from his coal workers' pneumoconiosis." *Id*. The administrative

[6] "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 dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

law judge specifically determined that the opinions of Drs. Zaldivar[7] and Bellotte[8] were not sufficient to "rebut the presumption that coal workers' pneumoconiosis is a 'substantially contributing cause to [c]laimant's total pulmonary or respiratory disability." *Id*. at 21; Employer's Exhibits 1, 19, 7, 14, 18. The administrative law judge explained:

> Based upon a review of the expert medical opinions, the undersigned finds that [e]mployer has not rebutted the legal presumption that coal workers' pneumoconiosis is a "substantially contributing cause" to [c]laimant's total pulmonary or respiratory disability contained at 20 C.F.R. § 718.305 . . . Doctors Rasmussen, Zaldivar and Bellotte are in all probability correct in their assessments that [c]laimant has untreated or at least undertreated asthma. Unfortunately for the persuasiveness of their opinions in rebutting the presumption that [c]laimant's legal coal workers' pneumoconiosis was a "substantially contributing cause" to his total respiratory or pulmonary disability, the *Preamble* to the regulations, whether rightly or wrongly, directly links coal dust to chronic obstructive lung disease which includes chronic bronchitis, emphysema, and *asthma*. While Employer's experts cite various medical studies on asthma, addressing inter alia how asthma is caused by or exacerbated by smoking, none, however, appear to contradict the Preamble and definitively or directly state that coal dust exposure cannot cause or contribute to asthma. Absent specific references to medical studies that supersede the possibly outdated medical information contained in the Preamble with regard to asthma and coal dust, Drs. Rasmussen's, Zaldivar's and Bellotte's opinions are rendered less persuasive due to their conflict with the Preamble.

[7] Dr. Zaldivar opined that claimant's "pulmonary impairment is the result of undertreated asthma compounded by the effects of smoking." Employer's Exhibit 1. Dr. Zaldivar discussed medical articles explaining how the lungs undergo "remodeling" from the effects of asthma and smoking. *Id*.

[8] Dr. Bellotte opined that claimant suffers from asthma and that "[h]is coal mining exposure has not contributed in any material way" to his impairment/disability. Employer's Exhibits 7, 18. Dr. Bellotte stated that claimant's "obesity, hypertension, diabetes, mental problems, arthritis, polypharmacy, hyperlipidemia, GERDS, [a]sthma, and [t]obacco [a]buse, [and] orthopedic problems are the reasons for his disability." Employer's Exhibit 18.

Decision and Order at 25.[9] Thus, the administrative law judge found that employer did not establish rebuttal of the Section 411(c)(4) presumption by disproving the causal relationship between claimant's respiratory disability and his presumed legal pneumoconiosis. *Id*. at 18.

Employer contends that the administrative law judge applied the wrong rebuttal standard and erred in rejecting, as contrary to the preamble, the opinions of Drs. Zaldivar and Bellotte that asthma is not caused by coal dust exposure. Employer further contends that the administrative law judge selectively analyzed Dr. Bellotte's opinion by focusing on his explanation of why asthma is not caused by coal dust exposure while not addressing his specific statements that claimant's respiratory impairment is due to other causes such as the effects of a hiatal hernia, gastroesophageal reflux (GERDS) and cardiac disease. Employer's arguments have merit, in part.

We conclude that the administrative law judge's use of an incorrect rebuttal standard cannot be affirmed in this case. Initially, the administrative law judge erred in failing to address 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 dust exposure. *Minich*, 25 BLR at 154-56. Indeed, the administrative law judge made no finding as to whether employer disproved the existence of legal pneumoconiosis. In addressing the issue of whether employer disproved the presumed fact of disability causation, the administrative law judge found that the medical evidence failed to establish that "[c]laimant's legal pneumoconiosis [was] a 'substantially contributing cause' of his total pulmonary or respiratory disability." Decision and Order at 18. However, pursuant to 20 C.F.R. §718.305(d)(ii), the correct

[9] The administrative law judge referenced the inclusion of asthma as a chronic obstructive pulmonary disease in the preamble to the regulations. Decision and Order at 18 n.17. In particular, the administrative law judge noted that, in relevant part, the preamble states:

> The term "chronic obstructive pulmonary disease" (COPD) includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema and asthma. Airflow limitation and shortness of breath are features of COPD, and lung function testing is used to establish its presence. Clinical studies, pathological findings, and scientific evidence regarding the cellular mechanisms of lung injury link, in a substantial way, coal mine dust exposure to pulmonary impairment and chronic obstructive lung disease.

65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000).

standard to be applied with respect to causation 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." *Bender*, 782 F.3d at 137; *Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66; *Minich*, 25 BLR at 154-56.

Because we are unable to discern the extent to which the administrative law judge's reliance on an incorrect rebuttal standard affected his credibility determinations under the particular facts of this case, we vacate administrative law judge's award of benefits and his finding that employer failed to rebut the presumed fact of disability causation pursuant to 20 C.F.R. §718.305(d)(ii). We remand the case for the administrative law judge to properly determine whether employer rebutted the presumed facts of clinical and legal pneumoconiosis[10] and to apply the proper standard in determining whether employer has rebutted the presumption of disability causation.

In the interest of judicial economy, we reject employer's additional argument that the administrative law judge erred in failing to require claimant to establish that his asthma arose out of coal mine employment. Because claimant invoked the Section 411(c)(4) presumption, claimant's asthma is presumed to be legal pneumoconiosis. In order to rebut the presumption with respect to claimant's asthma, employer must prove that claimant does not have legal pneumoconiosis by establishing that claimant's asthma is not significantly related to, or substantially aggravated by, coal dust exposure. 20 C.F.R. §§718.201(b); 718.305(d)(1)(i)(A); *Minich*, 25 BLR at 154-56. Furthermore, contrary to employer's contention, the administrative law judge has discretion on remand to conclude that Drs. Zaldivar and Bellotte expressed views regarding asthma that are inconsistent with the preamble. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 341-42, 20 BLR 2-246, 2-255-56 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); Employer's Exhibit 8 at 29.

In summary, if the administrative law judge determines that claimant has invoked the Section 411(c)(4) presumption after weighing any contrary probative evidence under 20 C.F.R. §718.204(b)(2)(ii)-(iv), we instruct the administrative law judge on remand to consider whether employer has disproved the existence of legal pneumoconiosis by affirmatively establishing that claimant's respiratory condition/impairment is not

[10] The administrative law judge initially found that claimant failed to establish the existence of clinical pneumoconiosis. However, as the administrative law judge determined that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, he erred in failing to consider whether employer met its burden to affirmatively establish that claimant does not have clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B).

"significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(b); 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 154-56. The administrative law judge also must determine whether employer has affirmatively established that claimant does not have clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); *Minich*, 25 BLR at 154-56.

If he finds that employer has not rebutted the presumption under 718.305(d)(i) by disproving the existence of both legal and clinical pneumoconiosis, the administrative law judge must then consider whether employer has rebutted the presumed fact of disability causation 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). In rendering his findings on remand, the administrative law judge must determine whether the medical opinions are reasoned and documented and further explain the basis for his credibility determinations in accordance with the Administrative Procedure Act.[11] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

[11] The Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq*., as incorporated into the Act by 30 U.S.C. §932(a), requires that every adjudicatory decision be accompanied by 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge