U.S. Department of Labor

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

BRB No. 16-0156 BLA

VIRGINIA REILLY o/b/o EDWARD J. REILLY	)	
Claimant-Respondent	)	
v.	)	
GIRARDVILLE COAL COMPANY, INCORPORATED	)	DATE ISSUED: 01/17/2017
and	)	
AMERICAN MINING 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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer/carrier.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Maia Fisher, 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 GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-05514) of Administrative Law Judge Scott R. Morris, rendered on a subsequent claim filed on January 14, 2013, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] Based on the stipulation of the parties, the administrative law judge credited the miner with 43.77 years of coal mine employment in conditions substantially similar to those in an underground mine. The administrative law judge also determined that claimant established that the miner had a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv) and, consequently, established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Therefore, the administrative law judge determined that claimant invoked 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), as implemented by 20 C.F.R. §718.305.[2] The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant established total disability and therefore erred in determining that claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Employer also asserts that if benefits are awarded, it is entitled to a credit based on a Compromise and Release Agreement entered into by the parties in the miner's state workers' compensation claim. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers'

[1] The miner filed an initial claim for benefits on June 30, 1973, which was denied by the district director on September 4, 1973. Director's Exhibit 1. The miner filed his first subsequent claim in September 1979, which was denied by the district director on June 26, 1980, because the miner did not establish that he had pneumoconiosis. *Id*. The miner did not take any further action before filing the current claim in 2013. The miner died on June 4, 2014, while this claim was pending. His surviving spouse is continuing to pursue the claim on behalf of his estate.

[2] Under Section 411(c)(4) of the Act, a miner's total disability is presumed to be due to pneumoconiosis if he or she had 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), as implemented by 20 C.F.R. §718.305(b).

Compensation Programs (the Director), filed a limited brief, indicating that the Board should decline to address employer's request for a credit, as that is a calculation that should be done by the district director.[3]

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

I. Invocation of the Section 411(c)(4) Presumption – 20 C.F.R. §718.204(b)(2)

Pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), the administrative law judge determined that claimant was unable to establish total disability based on the sole non-qualifying pulmonary function study and the sole non-qualifying blood gas study, both dated April 4, 2013.[5] Decision and Order at 8-9; Director's Exhibit 18. Additionally, the administrative law judge determined that there is no evidence in the record that the miner had cor pulmonale with right-sided congestive heart failure, and, therefore, concluded claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 9.

In weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge noted that both Drs. Rothfleisch and Lewis opined that the miner was totally disabled. Decision and Order at 11; Director's Exhibit 18; Claimant's

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had 43.77 years of coal mine employment in conditions substantially similar to an underground coal mine. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The record reflects that the miner's coal mine employment was in Pennsylvania. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[5] A "qualifying" pulmonary function study 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" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i). A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

Exhibit 1. The administrative law judge indicated that Dr. Rothfleisch's opinion is entitled to added weight because he is a pulmonologist, while Dr. Lewis is a family practitioner. Decision and Order at 11; Director's Exhibit 18; Claimant's Exhibit 2. The administrative law judge determined that Dr. Lewis's status as the miner's treating physician for seventeen years did not justify giving his opinion controlling weight because he did not identify specific objective evidence in support of his diagnoses. Decision and Order at 13; Claimant's Exhibit 1. The administrative law judge also stated that he gave reduced weight to the opinions of both physicians because, although they were aware that the miner's smoking ended "several decades ago," they relied on smoking histories that were less extensive than the fifteen pack-years that he found.[6] Decision and Order at 5, 13.

The administrative law judge concluded that the medical opinion evidence retained sufficient weight to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv), and to outweigh the contrary probative evidence of record. *Id.* at 13-14. He determined therefore that claimant established totally disability at 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and invocation of the Section 411(c)(4) presumption.

Employer argues that the administrative law judge's finding that Drs. Lewis and Rothfleisch diagnosed a totally disabling respiratory or pulmonary impairment is "not consistent with the actual reports of the doctors." Employer's Brief at 3. Employer also contends, "based on the results of the pulmonary function studies, Dr. Rothfleisch concluded that the miner did not meet the Department of Labor's criteria to establish total disability." *Id.* Finally, employer observes that the administrative law judge's finding that claimant proved that the miner was totally disabled "was not consistent with the findings made by the [d]istrict [d]irector, that [the miner's] disease did not cause a breathing impairment of sufficient degree to establish total disability within the meaning of the Act and [r]egulations." *Id.*

We hold that employer's allegations of error in the administrative law judge's weighing of the medical opinions under 20 C.F.R. §718.204(b)(2) have no merit. Contrary to employer's contention, the administrative law judge's determination that Dr.

[6] The administrative law judge further determined that Dr. Rothfleisch's opinion did not merit "normal probative weight" because he did not make it clear "how much of [m]iner's total disability was pulmonary-related versus non-cardiopulmonary-related." Decision and Order at 13. This finding is not relevant to the issue of total respiratory or pulmonary disability, but rather is relevant to whether employer is able to successfully rebut the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(d)(1)(ii); *W. Va. CWP Fund v. Bender*, 782 F.3d 129 (4th Cir. 2015).

Lewis and Dr. Rothfleisch both opined that the miner had a totally disabling respiratory or pulmonary impairment accurately reflects the content of their reports. In a letter submitted after the miner's death, Dr. Lewis stated, "[c]onsistent with his medical history and examinations . . . [the miner] *did indeed meet* the Federal Black Lung requirements of being totally disabled." Claimant's Exhibit 1 (emphasis added). Dr. Rothfleisch examined claimant on June 5, 2013, and completed Form CM-988, Medical History and Examination for Coal Workers' Pneumoconiosis. Director's Exhibit 18. In the space reserved for describing "the severity of the *pulmonary impairment*," Dr. Rothfleisch wrote, "severely impaired; unable to perform last [coal mine employment]." *Id.* (emphasis added). Asked to explain how the objective testing supported his disability assessment, Dr. Rothfleisch indicated, "both [the chest x-ray and *pulmonary function studies*] are *abnormal* and consistent with [coal workers' pneumoconiosis]."[7] *Id.* (emphasis added). Based on the statements of Drs. Lewis and Rothfleisch in their respective reports, the administrative law judge's finding that they opined that the miner suffered from a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2)(iv) is rational and supported by substantial evidence. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002).

Furthermore, to the extent that employer's statement that the administrative law judge's total disability finding conflicted with the district director's finding can be construed as an allegation of error, it has no merit. The district director's determinations are not binding on the administrative law judge, who must perform a *de novo* review of the evidence in order to determine whether entitlement to benefits has been established. *See* 20 C.F.R. §§725.351, 725.450, 725.452, 725.455(a); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-863 (1985).

Because we have rejected each of employer's allegations of error, we affirm the administrative law judge's determination that claimant established total disability at 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and invocation of the Section 411(c)(4) presumption.

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

[7] Employer's suggestion that non-qualifying pulmonary function studies preclude a physician from rendering a reasoned diagnosis of a totally disabling respiratory or pulmonary impairment is incorrect. The regulation at 20 C.F.R. §718.204(b)(2)(iv) explicitly provides that total disability can be established by a reasoned and documented medical opinion, "[w]here total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv).

Because employer has not challenged the administrative law judge's determination that it failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1), we affirm this finding and further affirm the award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

III. Compromise and Release Agreement

The Act requires that federal black lung benefits be reduced by the amount of state workers' compensation benefit payments for total or partial disability or death due to pneumoconiosis for periods during which federal benefits are also awarded. 30 U.S.C. §932(g), as implemented by 20 C.F.R. §§725.533(a)(1), 725.535(b); *see Harman Mining Co. v. Director, OWCP* [*Stewart*], 826 F.2d 1388, 1390, 10 BLR 2-291, 2-295-96 (4th Cir. 1987). Employer asserts that this provision has been triggered because the Compromise and Release Agreement, which was signed by both parties and approved by Pennsylvania Workers' Compensation Judge Wayne R. Rapkin on September 12, 2012, requires the payment of state black lung benefits for the same period as the award of federal black lung benefits. Employer maintains therefore that it is entitled to a credit for the benefits paid under this agreement.

As the Director asserts, any credit or offset is to be determined by the district director upon proof that the state compensation payments were for disability due to pneumoconiosis and for periods concurrent with the federal benefit payments. *See* 20 C.F.R. 20 C.F.R. §§725.533(a)(1), 725.535(b); *Stewart*, 826 F.2d at 1390, 10 BLR at 2-295-96. In light of the Board's affirmance of the award of benefits, employer must raise this issue with the district director to obtain the relief that it seeks.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge