U.S. Department of Labor

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

BRB No. 16-0540 BLA

GERALDINE CLEVENGER (Widow of DONALD L. CLEVINGER) Claimant-Respondent v. E F & B COAL COMPANY and MERCANTILE INSURANCE MUTUAL, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/18/2017 DECISION and ORDER

Appeal of the Decision and Order on Remand of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Sarah M. Hurley (Nicholas C. Geale, Acting 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, BOGGS and GILLIGAN, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order (11-BLA-5679) of Administrative Law Judge Larry S. Merck awarding benefits 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 survivor's claim filed on March 30, 2010,[1] and is before the Board for the second time.

In the initial decision, the administrative law judge credited the miner with 17.75 years of underground coal mine employment,[2] and found that the evidence established that the miner suffered from a totally disabling respiratory or pulmonary 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 that the miner's death was due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further determined that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed, as unchallenged on appeal, the administrative law judge's finding that claimant established 17.75 years of underground coal mine employment. *Clevenger v. E F & B Coal Co.*, BRB No. 14-0387 BLA (Aug. 31, 2015) (unpub.) (Boggs, J., concurring & dissenting). However, the Board vacated the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* The Board, therefore, vacated

[1] Claimant is the surviving spouse of the miner, who died on February 3, 2010. Director's Exhibit 10.

[2] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 1-1412. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more 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 impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, and remanded the case for further consideration.[4] *Id.*

On remand, the administrative law judge found that the medical evidence established that the miner was totally disabled pursuant to Section 718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. The administrative law judge also reinstated his finding that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also urges the Board to reconsider its affirmance of the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption. Employer further contends that the administrative law judge erred in denying its motion to reopen the record on remand to allow it an opportunity to challenge the conclusions found in the Preamble to the 2001 regulatory revisions. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response in support of the administrative law judge's denial of employer's motion to reopen the record on remand.

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. 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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

Invocation of the Section 411(c)(4) Presumption

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and therefore erred in finding that claimant invoked the Section

[4] In the interest of judicial economy, the majority affirmed the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption. *Clevenger v. E F & B Coal Co.*, BRB No. 14-0387 BLA (Aug. 31, 2015) (unpub.) (Boggs, J., concurring & dissenting). The Board therefore instructed the administrative law judge that if he found, on remand, that claimant invoked the Section 411(c)(4) presumption, he could reinstate his finding that employer did not rebut the Section 411(c)(4) presumption, and award benefits. *Id.*

411(c)(4) presumption. In remanding the case for the administrative law judge to reconsider whether the evidence established that the miner was totally disabled from a pulmonary or respiratory impairment, the Board instructed the administrative law judge to "identify the miner's usual coal mine work and the physical demands of that job." *Clevenger*, BRB No. 14-0387 BLA, slip op. at 12. The Board further instructed the administrative law judge to "then address medical opinions that are phrased in terms of total disability, provide a medical assessment of physical abilities and/or identify exertional limitations, and make a finding as to whether the miner was totally disabled." *Id.*

Pursuant to the Board's remand instructions, the administrative law judge considered the evidence regarding the exertional requirements of the miner's usual coal mine employment. The administrative law judge found that the miner's usual coal mine employment as an underground electrician involved heavy labor. Decision and Order on Remand at 4-5. Based in part upon this determination, the administrative law judge found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[5] *Id.* at 5-7. Weighing all of the relevant evidence together, the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). *Id.* at 7. The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. *Id.*

Employer initially contends that the administrative law judge erred in finding that the miner's usual coal mine employment involved heavy labor. The administrative law judge accurately noted that the miner, in pursuing his 1986 claim, described his last job as "repairing miner, buggy, any equipment that went down." Decision and Order on Remand at 4; Director's Exhibit 1-1413. The administrative law judge next considered the miner's testimony during a 1989 hearing:

> [T]he miner stated that he "repaired and run [sic] equipment." As a repairman, [the miner] had to do a lot of lifting because "underground, you don't have nothing to lift with." He stated that he had to lift a motor that weighs 300 or 400 pounds on a miner. He would handle a 300 . . . pound piece of equipment by having someone help him and by using bars and

[5] In addressing whether the medical opinion evidence established total disability, the administrative law judge credited the opinions of Drs. Bush and Tuteur, determining that their opinions supported a finding that the miner suffered from a totally disabling pulmonary impairment. *Id.* at 5-6. The administrative law judge accorded little weight to the opinions of Drs. Crouch, Caffrey and DeLara because they failed to render an opinion on the extent of the miner's respiratory or pulmonary impairment. *Id.* at 5, 7.

> jacks. He would bolt up wheel units by hand, exerting force which was hard because the bolts were big. The miner stated that he had to lift all sorts of equipment, including tools, which had to be carried to the face to work on a piece of equipment because he didn't have a scoop with which to haul them. He said that he would have to walk anywhere from two to six to eight breaks to get to the face and described the breaks as sixty foot breaks. He explained that he had to bend, stoop, lift, push and pull. The miner said that he was unable to do his work because he "didn't have no wind" and had planned to quit two years before he did, but then his employer provided him with an electric cart so that he could move around and transport his tools and parts to the job site. Prior to having the golf cart, it would take him a long time to get to the face because he would have to stop and rest.

Decision and Order on Remand at 4 (exhibit numbers omitted).

The administrative law judge also considered the miner's testimony during a subsequent 1996 hearing:

> [T]he miner testified that his last job as a coal miner was as an electrician, working underground, and that he had been an electrician since working in the mines. He stated that the part of his job which was physically hard was lifting because he worked underground and could not use an end loader, and therefore, had to lift by hand. He was unable to estimate how many pounds he would have to lift, but when asked if it was over 50 pounds, he said that it was.

Decision and Order on Remand at 5 (exhibit numbers omitted).

Based upon the miner's unrefuted testimony and the Department of Labor's *Dictionary of Occupational Titles*,[6] the administrative law judge made a determination regarding the exertional requirements of the miner's usual coal mine employment:

> Although he was classified as an electrician and repairman, the miner testified that his job required heavy lifting of machinery up to 300 or 400 pounds. Heavy duty work is defined as exerting 50 to 100 pounds of force

[6] The administrative law judge took judicial notice of the Department of Labor's *Dictionary of Occupational Titles*, which he noted establishes that a mine electrician job (mine & quarry) has an exertional requirement of "medium" work, which requires exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Decision and Order on Remand at 5.

> occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly. Appendix C, Dictionary of Occupational Titles. Based upon the Dictionary of Occupational Titles and the miner's unrefuted testimony, I find that the miner's last coal mine employment as an underground electrician qualifies as heavy labor.

Decision and Order on Remand at 5.

Employer argues that the administrative law judge, in determining the exertional requirements of the miner's usual coal mine employment, "considered some, but not all, of the evidence," and "either failed to consider all of the evidence bearing on those demands or he failed to explain how he resolved conflicts in the proof." Employer's Brief at 16. Employer notes that the miner, as part of his 1986 claim, completed Form CM-913, a "Description of Coal Mine Work and Other Employment," wherein the miner indicated that his coal mine work only required him to stand for eight hours a day.[7] *Id.* at 5, 16; Director's Exhibit 1-1414. Although the administrative law judge considered this form, *see* Decision and Order on Remand at 4, he permissibly credited the miner's "unrefuted testimony" that his job as an underground electrician required him to perform additional duties, including lifting significant weight.[8] *See Miller v. Director, OWCP*, 7 BLR 1-693, 1-694 (1985) (holding that an administrative law judge is charged with determining the credibility of all witnesses).

Employer also argues that the administrative law judge erred in finding that the miner's usual coal mine work required heavy labor when "the record contains no evidence concerning how frequently [the miner] had to lift heavy weights or how much weight [the miner] lifted himself rather than with assistance." Employer's Brief at 16. The administrative law judge credited the miner's testimony that he had to lift over fifty pounds. Decision and Order on Remand at 5; Director's Exhibit 1-435. The administrative law judge also credited the miner's testimony that he had to lift equipment weighing 300 to 400 pounds with assistance. Decision and Order on Remand at 4;

[7] The miner did not complete the sections of Form CM-913 requesting information regarding how often and how much weight he was required to lift and carry. Director's Exhibit 1-1414.

[8] Employer alleges that the miner's testimony at the 1989 hearing regarding the exertional demands of his usual coal mine work differed from the miner's 1996 hearing testimony. Employer's Brief at 16. Because employer has not explained how the miner's testimony at the two hearings differs, and has not otherwise explained how the alleged difference was significant, we decline to address this contention. *See* 20 C.F.R. §§802.211, 802.301.

Director's Exhibit 1-1090. In addition, the administrative law judge found that the miner had to bend, stoop, lift, push and pull. Decision and Order on Remand at 4; Director's Exhibit 1-1091-92. Because it is supported by substantial evidence, we affirm the administrative law judge's characterization of the exertional requirements of the miner's usual coal mine employment as involving heavy labor.

Having found that the miner's usual coal mine employment involved heavy labor, the administrative law judge reconsidered whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge specifically reconsidered whether the opinions of Drs. Bush and Tuteur were sufficient to establish that the miner suffered from a totally disabling respiratory or pulmonary impairment. Dr. Bush opined that the miner appeared to have been totally disabled as a result of lung disease: idiopathic pulmonary fibrosis. Employer's Exhibit 29. The administrative law judge found that Dr. Bush had sufficient knowledge of the miner's usual coal mine work, based upon the doctor's review of the medical evidence. Decision and Order on Remand at 6. The administrative law judge specifically noted that Dr. Bush reviewed Dr. Tuteur's January 12, 2012 medical report, which "contains a description of the miner's employment, consisting of working underground repairing machinery and above ground at the tipple." *Id.* The administrative law judge also found that Dr. Bush's opinion was credible, and supported by evidence that the miner suffered from a pulmonary impairment that would have prevented him from engaging in his usual coal mine employment requiring heavy labor.[9] *Id.*

The administrative law judge also found Dr. Tuteur's opinion supportive of a finding of total disability:

> Dr. Tuteur did not explicitly state that the miner suffered from a totally disabling respiratory or pulmonary impairment prior to his death, only indicating that the miner suffered from "some degree" of pulmonary impairment. However, Dr. Tuteur did state that the miner was totally disabled at the time of his death coupled with his diagnosis of severe emphysema and his recognition that the miner's death was due to a clinical complication associated with a pulmonary process. Accordingly, I find that

[9] The administrative law judge relied on the fact that the miner's treatment records indicate that he was oxygen dependent because of his advanced lung disease. Decision and Order at 15; Decision and Order at 6; Employer's Exhibit 13. The administrative law judge also relied upon an affidavit completed by claimant, wherein she noted that the miner had to use a wheelchair over the last three years of his life because of shortness of breath, and eventually became bed ridden because of his breathing problems. *Id.*; Director's Exhibit 11.

> these statements coupled with his medical opinion that the miner was totally disabled at the time of his death supports [sic] an inference that the miner suffered from a totally disabling pulmonary or respiratory impairment prior to his death. Given that the complications which Dr. Tuteur outlined as being responsible for the miner's death were all pulmonary diagnoses such as interstitial pneumonitis, pneumonia, pulmonary emboli, and various forms of emphysema, which Dr. Tuteur categorized as severe, and that the miner's usual coal mine employment entailed heavy labor, I again accord full probative weight to Dr. Tuteur's opinion, but now find that that his opinion is sufficient to establish total disability at Section 718.204(b)(2)(iv).

Decision and Order on Remand at 6. The administrative law judge therefore found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer argues that Dr. Bush's opinion that the miner was totally disabled due to lung disease was not sufficiently reasoned. We disagree. The administrative law judge found that Dr. Bush based his conclusion that the miner had significant lung disease prior to his death "on the substantial amount of medical evidence he considered." Decision and Order at 16. Dr. Bush also opined that the miner's disabling impairment appeared to be caused by idiopathic pulmonary fibrosis, a conclusion that he based on his observation of the miner's autopsy slides. Director's Exhibit 29. We conclude that substantial evidence in the record supports the administrative law judge's determination that Dr. Bush's opinion is sufficiently reasoned to establish that the miner suffered from a totally disabling pulmonary impairment.[10] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-155.

Employer contends that the administrative law judge erred in relying upon Dr. Tuteur's opinion since "[n]othing in [the doctor's] report discloses that he was familiar with the specific tasks required of [the miner]." Employer's Brief at 19. We disagree. Contrary to employer's contention, the administrative law judge reasonably inferred that Dr. Tuteur adequately understood the exertional requirements of the miner's usual coal mine work, since Dr. Tuteur understood that the miner worked "underground repairing machinery." *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 2-552

[10] Employer argues that Dr. Bush's opinion is too equivocal to be credited. Employer's Brief at 16. The Board previously rejected this argument, holding that the administrative law judge's finding that Dr. Bush's opinion was "somewhat equivocal" did not foreclose the administrative law judge from giving it probative weight. *Clevenger*, BRB No. 14-0387 BLA, slip op. at 5.

(6th Cir. 2002) (explaining that where a certain position, such as an underground repairman, has a "precise meaning in the context of coal mining," an administrative law judge may rationally conclude that doctors adequately understand the demands of that job); Decision and Order on Remand at 6. Moreover, the administrative law judge determined that the miner's work as underground electrician/repairman in this case involved "heavy labor," not the "medium" work normally associated with the position. Decision and Order on Remand at 5. Thus, the administrative law judge reasonably inferred from Dr. Tuteur's entire opinion that he had a sufficient awareness of the duties of the miner's job as an underground electrician/repairman to assess whether the miner was totally disabled from a pulmonary standpoint.[11] *See Napier*, 301 F.3d at 713, 22 BLR at 2-552. Employer does not otherwise challenge the administrative law judge's inference that Dr. Tuteur's opinion supports a finding that the miner suffered from a totally disabling respiratory or pulmonary impairment at the time of his death. Decision and Order on Remand at 6. This finding is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Because it is supported by substantial evidence,[12] the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) is affirmed.

The administrative law judge weighed the medical opinion evidence with the pulmonary function study and blood gas study evidence, finding that, when weighed together, the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order on Remand at 7. Because employer does not allege any error in the administrative law judge's weighing of the evidence together at 20 C.F.R. §718.204(b)(2), this finding is affirmed. *Skrack*, 6 BLR at 1-711.

In light of our affirmance of the administrative law judge's finding that claimant established that the miner had over fifteen years of qualifying coal mine employment, and the finding that claimant established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law

[11] The administrative law judge found that Dr. Bush, based upon his review of Dr. Tuteur's 2012 medical report, also had a sufficient understanding of the requirements of the miner's work as an underground electrician. Decision and Order at 5-6.

[12] Employer generally contends that the administrative law judge "overlooks the significance of [the miner's] non-respiratory conditions that could have been responsible for his impairment." Employer's Brief at 17. Employer's argument is misplaced. Under the Department's regulations, the fact that a pulmonary impairment has a nonpulmonary origin does not preclude it from being considered in determining whether the miner is or was totally disabled due to pneumoconiosis. *See* 20 C.F.R. 718.204(a).

judge's finding that claimant invoked the rebuttable presumption at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

Employer also argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner did not suffer from legal pneumoconiosis. The Board previously rejected this contention. *Clevenger*, BRB No. 14-0387 BLA, slip op. at 7-10. As employer has not demonstrated any exception to the law of the case doctrine, we decline to address its argument. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). We also reject employer's contention that the administrative law judge denied employer a fair hearing by denying its motion to reopen the record on remand to allow it to challenge conclusions in the Preamble to the 2001 regulatory revisions. In denying employer's motion, the administrative law judge did not abuse his discretion in finding that employer had an adequate opportunity to develop evidence questioning the science relied upon in the Preamble when the case was initially before him. *Clark*, 12 BLR at 1-153; Decision and Order on Remand at 3.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

While I concur with the majority's affirmance of the administrative law judge's characterization of the exertional requirements of the miner's usual coal mine employment as involving heavy labor, I respectfully dissent from the majority's decision to affirm the administrative law judge's finding that the medical opinion evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Specifically, I disagree with the majority that the administrative law judge adequately considered whether Drs. Bush and Tuteur had a sufficient understanding of the exertional requirements of the miner's usual coal mine employment. Although Dr. Tuteur indicated that the miner's usual coal mine employment involved repairing machinery underground, and Dr. Bush reviewed Dr. Tuteur's description of the miner's coal mine employment, the administrative law judge erred in not determining whether

either doctor was aware of the exertional requirements of that job. *Cornett v. Benham Coal Co.*, 277 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000). Consequently, the administrative law judge's determination that the opinions of Drs. Bush and Tuteur are well-reasoned (as to whether the miner is totally disabled) lacks support. Because the administrative law judge failed to adequately address this issue, his analysis of the medical opinion evidence does not comport with the requirements of the Administrative Procedure Act (APA), which provide that every adjudicatory decision must 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), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). I therefore would vacate the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). I would remand the case to the administrative law judge to properly consider the relevant evidence and set forth explanations supporting his conclusions, in accordance with the requirements of the APA. *Id.*

Further, for the reasons I set forth at the time this case was remanded to the administrative law judge for further proceedings , I also would vacate the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. *Clevenger v. E F & B Coal Co.*, BRB No. 14-0387 BLA, slip op. at 13-16 (Aug. 31, 2015) (unpub.) (Boggs, J., concurring & dissenting).

JUDITH S. BOGGS
Administrative Appeals Judge