U.S. Department of Labor

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

BRB No. 17-0565 BLA

DAVID L. DENTON Claimant-Respondent v. LITTLE J COAL COMPANY, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/05/2018 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Dana Rosen, 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.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05061) of Administrative Law Judge Dana Rosen 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 subsequent claim[1] filed on November 13, 2013.

After crediting claimant with eleven years and 27.72 days of coal mine employment,[2] the administrative law judge found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[3] She therefore found that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). Considering the claim on its merits, the administrative law judge found that claimant has clinical and legal pneumoconiosis,[4] and

[1] Claimant filed two prior claims for benefits, each of which was finally denied. Director's Exhibits 1-2. The most recent prior claim was denied by the district director because the evidence did not establish any element of entitlement. Director's Exhibit 2.

[2] Claimant's most recent coal mine employment was in Virginia. Director's Exhibit 5. Accordingly, the Board will apply the law 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).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where the evidence establishes fifteen or more years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Because the administrative law judge credited claimant with less than fifteen years of coal mine employment, she found that claimant was not entitled to the Section 411(c)(4) presumption.

[4] "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). "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). A disease "arising out of coal mine employment" includes "any chronic pulmonary disease or

that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(c).[5] Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant has clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a), and that his total disability is due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief. Employer has filed a reply brief, reiterating its arguments.[6]

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).

Where no statutory presumptions apply, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Employer contends that the administrative law judge erroneously provided claimant with a presumption that he has clinical and legal pneumoconiosis, and that his total disability is due to pneumoconiosis. Employer's Brief at 6-11, 26-28. As a result,

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respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[5] Further, the administrative law judge found that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b).

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and that he established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 47, 72.

employer asserts that the administrative law judge improperly shifted the burden to employer to disprove these elements of entitlement. *Id.* Employer's argument has merit.

Although the administrative law judge initially set forth the correct burden of proof in this case, Decision and Order at 46-47, she subsequently shifted the burden of proof to employer to disprove the relevant elements of entitlement. Specifically, the administrative law judge initially found that claimant was unable to establish clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), (2), based on the x-ray and pathology evidence, or establish pneumoconiosis at 20 C.F.R. §718.202(a)(3), because none of the presumptions in that subsection were applicable. *Id*. at 49-51.

However, in addressing whether the medical opinion evidence established pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge stated that employer "can rebut the presumption that [c]laimant suffer[s] from pneumoconiosis by well-reasoned, well-documented medical reports." Decision and Order at 51. After weighing the medical opinion evidence, the administrative law judge ultimately found that employer "failed to prove by a preponderance of the evidence that [c]laimant does not have clinical or legal pneumoconiosis." *Id*. at 63. In addressing the issue of total disability causation at 20 C.F.R. §718.204(c), the administrative law judge indicated that employer "must establish that the miner's disability is attributable exclusively to a cause or causes other than pneumoconiosis." *Id*. at 73. She stated that for employer to "make this required showing, an employer's expert must consider pneumoconiosis with all other possible causes (of disability) and adequately explain why pneumoconiosis was not at least a partial cause of the miner's respiratory or pulmonary disability." *Id*. (internal quotations omitted). She ultimately determined that employer "has not provided sufficient evidence that rules out pneumoconiosis as the cause of or a contributing factor to [c]laimant's total disability." *Id*. at 77.

Because the evidence did not establish at least fifteen years of qualifying coal mine employment, claimant did not invoke the Section 411(c)(4) presumption and, thus, was not entitled to the presumed facts of pneumoconiosis and disability causation. Consequently, the administrative law judge was required to address whether claimant satisfied his burden to establish all elements of entitlement under 20 C.F.R. Part 718. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994); *Trent*, 11 BLR at 1-27. Because the administrative law judge's statements indicate that she improperly shifted the burden to employer to prove that claimant does not have pneumoconiosis, and that his total disability is not due to pneumoconiosis, we must vacate the administrative law judge's finding that the medical opinion evidence established these elements of entitlement

pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c),[7] and remand this case for further consideration.

We instruct the administrative law judge to first reconsider whether claimant has satisfied his burden to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Trent*, 11 BLR at 1-27. In addressing whether claimant has established pneumoconiosis, the administrative law judge should render separate findings of fact with respect to whether claimant has clinical pneumoconiosis and whether he has legal pneumoconiosis. If reached, the administrative law judge should address whether claimant has established that pneumoconiosis is a "substantially contributing cause" of his total disability pursuant to 20 C.F.R. §718.204(c)(1).[8]

As the administrative law judge previously placed the burden of proof on employer to disprove these elements through medical opinion evidence, she must reconsider whether the medical opinion evidence establishes pneumoconiosis and disability causation, with the burden of proof properly allocated to claimant. When considering the medical opinion evidence, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions.[9] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). The administrative law judge must also explain her findings in compliance with the Administrative Procedure Act.[10] *See Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989).

[7] We also vacate the administrative law judge's finding that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b).

[8] Pneumoconiosis is a "substantially contributing cause" of a miner's total disability if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

[9] Because the administrative law judge's misapplication of the burden of proof in this case may have affected the weight she assigned the medical opinions, we decline to address employer's argument that the administrative law judge erred in rendering her credibility findings at 20 C.F.R. §§718.202(a)(4), 718.204(c).

[10] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis

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

JONATHAN ROLFE
Administrative Appeals Judge

therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).