U.S. Department of Labor

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

BRB No. 20-0182 BLA

ESTATE OF BARBARA LESTER (Widow of ARCHIE HILLARD LESTER)	)	
Claimant-Respondent	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 08/11/2021
and	)	
HEALTHSMART CASUALTY CLAIMS SOLUTIONS	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Samuel B. Petsonk, Beckley, West Virginia, for Claimant.

Joseph D. Halbert and Crystal L. Moore (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for Employer and its Carrier.

Before: BUZZARD, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Theresa C. Timlin's Decision and Order Awarding Benefits (2018-BLA-06063) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on December 28, 2015.[1]

The administrative law judge credited the Miner with at least ten years of coal mine employment. She found Claimant established complicated pneumoconiosis and thus invoked the irrebuttable presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

On appeal, Employer contends the administrative law judge erred in finding the Miner had complicated pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response.[2]

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, 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 & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner's death was due to pneumoconiosis if he suffered from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield

[1] Prior to the Miner's death on September 11, 2004, he filed four living miner's claims, all of which were denied. Director's Exhibit 12.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that the Miner had "ten or more" years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Living Miner's Claim 1.

a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. In determining whether Claimant has invoked the irrebuttable presumption, the administrative law judge must consider all evidence relevant to the presence or absence of complicated pneumoconiosis.[4] *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge found the x-ray and medical opinion evidence established the Miner had complicated pneumoconiosis, 20 C.F.R. §718.304(a), (c), and noted the record did not contain any biopsy or autopsy evidence, 20 C.F.R. §718.304(b). Decision and Order at 4-12. Weighing all the evidence together, she therefore determined Claimant invoked the irrebuttable presumption that the Miner's death was due to pneumoconiosis. *Id*. at 12.

Employer argues the administrative law judge failed to consider all relevant evidence of record and erred in weighing the x-ray and medical opinion evidence. Employer's Brief at 4-9. We disagree.

20 C.F.R. §718.304(a): X-Ray Evidence

The administrative law judge considered five interpretations of three x-rays dated August 6, 1984, April 12, 2001, and March 18, 2002. Decision and Order at 5-7; Director's Exhibit 1; Claimant's Exhibits 1, 2, 10; Employer's Exhibit 1. She found all the readers are dually qualified as Board-certified radiologists and B readers. Decision and Order at 5. Dr. Tarver interpreted the August 6, 1984 and April 12, 2001 x-rays as positive for simple and complicated pneumoconiosis with Category A large opacities. Claimant's Exhibits 1, 2. Dr. Wiot interpreted the same x-rays as positive for simple pneumoconiosis but did not identify any large opacities. Director's Exhibit 1; Employer's Exhibit 1. Dr. Smith interpreted the March 18, 2002 x-ray as positive for simple and complicated pneumoconiosis with Category A large opacities. Claimant's Exhibit 10. Employer was unable to submit a rebuttal reading of this x-ray because the film was lost and therefore unavailable for rereading. Hearing Tr. at 11, 15-17. Although the record of the Miner's prior disability claims contained additional x-rays, the administrative law judge did not consider them in weighing the x-ray evidence, explaining that "to do so would violate the evidentiary limitations at [20 C.F.R.] §725.414(a)" because both parties "submitted their allotted two affirmative X-rays." Decision and Order at 12. Because the readings of two x-rays were in equipoise and the most recent x-ray was positive for complicated

[4] The record contains no pathology or computed tomography scan evidence for consideration at 20 C.F.R. §718.304(b), (c).

pneumoconiosis, the administrative law judge found Claimant established the Miner had complicated pneumoconiosis at 20 C.F.R. §718.304(a). *Id.*; *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992).

Credentials of Dr. Smith

Employer asserts the administrative law judge erred in crediting Dr. Smith's positive reading of the March 18, 2002 x-ray because his credentials are unknown, as his curriculum vitae is not part of the record. Specifically, it alleges she erred in "assuming" Dr. Smith was a B reader at the time he read the x-ray. We disagree. The administrative law judge accurately noted Dr. Smith represented on the x-ray ILO form that he is a certified B reader and included a B reader number on the signed narrative accompanying that ILO form. Decision and Order at 5 n.6. The administrative law judge also observed that the National Institute for Occupational Safety and Health identified Dr. Smith as a B reader on January 9, 2020, when the administrative law judge last accessed the list of current B readers on its website. *Id*. Although the administrative law judge acknowledged that Dr. Smith's B reader status in January 2020 did not establish he was a B reader in 2002, she permissibly found this information supported his notation on the ILO form that he was a B reader. *Id.* Because the administrative law judge acted within her discretion in finding Dr. Smith qualified as a B reader, we affirm her determination. *United States Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 389 (4th Cir. 1999); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); Decision and Order at 5 n.6. We also affirm, as unchallenged, the administrative law judge's finding that Dr. Smith is a Board-certified radiologist. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5-6 n.6 (citing Director's Exhibit 33, the district director's Proposed Decision and Order identifying Dr. Smith as a Board-certified radiologist)); Claimant's Exhibit 10 (narrative x-ray findings completed on Associated Radiologists, Inc. letterhead).

X-Rays in Record of Miner's Prior Claims

Employer also contends the administrative law judge erred in failing to consider the x-ray readings contained in the record of the Miner's prior claims as part of the evidentiary record in the survivor's claim. Employer argues the Act's implementing regulations require that the record in a prior claim be merged with the record in a subsequent claim and considered by the administrative law judge. Employer's Brief at 5 (citing 20 C.F.R. §§725.309(c)(2), 725.456(d)). We disagree.

Although the regulation at 20 C.F.R. §725.309(c)(2) requires that "evidence submitted in connection with any prior claim must be made a part of the record in the

subsequent claim," this regulation applies only to subsequent claims filed by the same claimant. Employer's Brief at 5; *see Earl Patton Coal Co. v. Patton*, 848 F.2d 668, 672 (6th Cir. 1988) (careful reading of 20 C.F.R. §725.309(c) indicates it does not cover separate claims filed on behalf of the miner's estate and by an eligible survivor in her own right and on her own behalf). It does not apply to merge evidence in a miner's claim for disability benefits with a separately filed survivor's claim for death benefits, as the claims have distinct standards of proof and processing procedures under the Act. *See Patton*, 848 F.2d at 672; *see also, e.g.*, 30 U.S.C. §901(a) (purpose of the Act is to provide benefits "to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to the disease"); *compare* 20 C.F.R. §718.204 (criteria to establish disability in a miner's claim), *with* 20 C.F.R. §718.205 (criteria to establish a miner's death was due to pneumoconiosis in a survivor's claim); 20 C.F.R. §725.520 (providing the computation of benefits for living miner's and survivor's claims).

The Miner's spouse was not – and could not be – a party to the Miner's prior claims for disability benefits. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 221 (4th Cir. 2006) (unlike widows, "spouses of living miners . . . are not entitled to seek benefits under the Act"). As she filed this survivor's claim for death benefits on her own behalf after the Miner's death, her claim is wholly distinct and separate from the Miner's claims, and 20 C.F.R. §725.309(c)(2) does not automatically make the records from the Miner's claim part of this claim. Director's Exhibits 2, 12; *see Patton*, 848 F.2d at 672. Instead, the parties in a survivor's claim must designate the medical evidence from a prior living miner's claim as evidence, in accordance with the limitations of 20 C.F.R. §725.414, in order for it to be included in the record of the survivor's claim. *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2007) (en banc).

At the June 6, 2019 hearing, Employer submitted only the x-ray evidence it designated on its evidence summary form; it did not seek to designate any x-ray reports from the Miner's prior claims as evidence. Administrative Law Judge Exhibit 14; Hearing Tr. at 19. As the administrative law judge accurately identified and considered the five x-rays that the parties designated as evidence in the survivor's claim, she properly found the remaining undesignated x-rays from the Miner's prior claims were not properly before her for consideration. Decision and Order at 5-7, 12; Administrative Law Judge Exhibits 14, 15; Hearing Tr. at 7, 11, 19; *see* 20 C.F.R. §§725.413(d), 725.414(a). Further, as the administrative law judge gave more weight to the more recent x-ray evidence given the progressive nature of pneumoconiosis, Employer has not adequately explained how her failure to consider the older x-rays from the Miner's claims would have made a difference in the outcome of this case.[5] *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant

[5] Employer asserts "some of the prior claim x-rays are contemporaneous to those submitted by the parties." Employer's Brief at 7. However, there are no contemporaneous

must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 7.

Due Process

Employer next asserts the administrative law judge erred in admitting Dr. Smith's March 18, 2002 x-ray reading over its objection at the hearing because it did not have an opportunity to rebut the report, in violation of its due process rights. We disagree.

An administrative law judge is granted broad discretion in resolving procedural and evidentiary issues. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 620 (4th Cir. 2006); *Harris v. Old Ben Coal Co.*, 24 BLR 1-13, 1-17 n.1 (2007) (en banc recon.), *aff'g* 23 BLR 1-98 (2006) (en banc); *Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986). Thus a party seeking to overturn an administrative law judge's disposition of such an issue must establish an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

X-rays that comply with the Act's regulatory quality standards are admissible as evidence of the presence or absence of pneumoconiosis. 20 C.F.R. §§718.101(b), 718.102. The regulations state in relevant part that, "[w]here the chest X-ray of a deceased miner has been lost or destroyed, or is otherwise unavailable, a report of the chest X-ray submitted by any party may be considered in connection with the claim." 20 C.F.R. §718.102(g). In this case, the Miner died in 2004, and the parties agreed at the formal hearing that the March 18, 2002 x-ray was lost and unavailable to Employer for rereading in the survivor's claim.[6] Hearing Tr. at 11, 15-16. Based on the plain language of the regulation, Employer has not shown the administrative law judge abused her discretion.[7] 20 C.F.R. §718.102(g); *see Harris*, 23 BLR at 1-108.

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x-rays or films more recent than the positive March 18, 2002 x-ray. *See* Living Miner's Claims. The most recent x-ray readings from the Miner's claim, by Drs. Patel and Binns, are of the April 12, 2001 x-ray; the next most recent readings are of a July 25, 1997 x-ray. Living Miner's Claims 2, 4.

[6] Claimant's counsel indicated he was unable to locate the March 18, 2002 x-ray for submission to the Department of Labor for rereading, and both Claimant's counsel and Employer's counsel agreed that the x-ray was "unavailable" for rereading. Administrative Law Judge Exhibit 10; Hearing Tr. at 11, 15-16.

[7] Employer does not allege the March 18, 2002 x-ray report fails to satisfy the quality standards at 20 C.F.R. §718.102. Employer's Brief at 8-9. Further, the record

Moreover, in the absence of deliberate misconduct, "the mere failure to preserve evidence [from a prior black lung claim] – evidence that may be helpful to one or the other party in some hypothetical future proceeding – does not violate [a party's right to due process]." *Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (rejecting coal mine operator's argument that due process is violated whenever the Trust Fund loses or destroys evidence from a miner's prior claim). Instead, Employer must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim. *See Consol. Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000).

Employer also has not shown it was deprived of due process as it fails to address why it did not avail itself of the opportunity to depose and cross-examine Dr. Smith prior to the hearing, or to request the time after the hearing to do so.[8] *See Richardson v. Perales*, 402 U.S. 389, 410 (1971) (due process in administrative proceedings includes opportunity to cross-examine physician who provides probative report);[9] *Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 503 (4th Cir. 1999) (due process right to be heard at a meaningful time does not compel the defendant to avail himself of the opportunity to speak; it is a right to "choose . . . whether to appear or default, acquiesce or contest"). Based on these facts, Employer has not been deprived of the due process of law. *See Stanley*, 194 F.3d at 503.

Conclusion on X-ray Evidence

As Employer does not otherwise challenge the administrative law judge's weighing of the x-ray evidence, we affirm her finding that the March 18, 2002 x-ray is positive for complicated pneumoconiosis and her overall determination that Claimant established

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reflects Dr. Smith interpreted the x-ray in accordance with the ILO classification system and stated his qualifications on the report. Claimant's Exhibit 10.

[8] The hearing in this case occurred on June 6, 2019, and Employer was aware of the x-ray film's unavailability as of December 19, 2018. Administrative Law Judge Exhibit 10; Hearing Tr. at 1.

[9] In *Richardson v. Perales*, 402 U.S. 389 (1971), a claimant appealed the denial of his application for disability benefits. The Social Security Administration relied upon written medical reports to determine that the claimant was not disabled. The United States Supreme Court held that such reports could constitute substantial evidence in support of a non-disability finding, despite the lack of cross-examination, as the claimant had failed to exercise his right to subpoena the doctors who had written the reports. *Richardson*, 402 U.S. at 409-10.

complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Addison*, 831 F.3d at 256-57; *Adkins*, 958 F.2d at 52-53; Decision and Order at 7.

20 C.F.R. §718.304(c): Other Relevant Evidence

The administrative law judge next evaluated the Miner's death certificate and the medical opinions of Drs. Roberts, Go, and Zaldivar. Decision and Order at 7-12. Dr. Roberts, the Miner's treating physician from April 1988 until his death, prepared a medical report on December 18, 1990, diagnosing "diffuse pneumoconiosis" and emphysema. Claimant's Exhibit 7. Dr. Roberts also prepared the Miner's death certificate, which listed cardiac arrest and coronary artery disease as immediate causes of death, with pneumoconiosis, diabetes, and rheumatoid arthritis listed as "significant conditions contributing to death but not resulting in" it. Director's Exhibit 12. Dr. Go prepared a report dated January 2, 2019, based on his review of the medical evidence, and opined the Miner had complicated pneumoconiosis. Claimant's Exhibit 6. Dr. Zaldivar examined the Miner on April 2, 1986, and also reviewed objective tests and examination reports obtained in conjunction with the Miner's prior denied claims. He opined the Miner had simple pneumoconiosis only. Employer's Exhibit 1.

The administrative law judge gave "no weight" to Dr. Roberts's opinion and the Miner's death certificate because neither addressed the presence or absence of complicated pneumoconiosis.[10] Decision and Order at 10, 11. She found Dr. Go's opinion well-reasoned and supported by the positive x-ray evidence that she credited at 20 C.F.R. §718.204(a). She further found his opinion credible because he relied on a "reasonably accurate" history of the Miner's coal dust exposure,[11] and incorporated his knowledge of

[10] Based on the administrative law judge's specific finding, we reject Employer's contention that she gave "no consideration" to the Miner's death certificate. Employer's Brief at 7. Further, although Employer generally argues the Miner's death certificate is probative on the cause of the Miner's death, it does not identify any error with the administrative law judge's conclusion that the death certificate does not address the presence or absence of complicated pneumoconiosis. *Id.* We therefore affirm the administrative law judge's finding that the death certificate is entitled to no weight at 20 C.F.R. §718.304(c). *See generally* 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

[11] Dr. Go found the Miner had twelve to fifteen years of coal mine employment. Claimant's Exhibit 6.

the medical science about the development of complicated pneumoconiosis in explaining his opinion.[12] *Id*. at 11.

In contrast, the administrative law judge found Dr. Zaldivar's opinion that the Miner did not have complicated pneumoconiosis unpersuasive because he prepared his report almost twenty years prior to the Miner's death and thus "could not accurately capture the state of [the] Miner's pulmonary condition at the time of his death." Decision and Order at 10. She further noted Dr. Zaldivar did not review the x-ray evidence that was positive for complicated pneumoconiosis, including Dr. Smith's credited x-ray interpretation, and "did not demonstrate his understanding of the extent of [the] Miner's coal mine dust exposure." *Id*. at 10-11. The administrative law judge therefore found the evidence supports a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(c). *Id*. at 11-12.

Employer argues the administrative law judge erred in crediting Dr. Go's opinion to the extent that he relied on Dr. Smith's "unreliable" positive interpretation of the March 18, 2002 x-ray. Employer's Brief at 9. Employer similarly asserts the administrative law judge irrationally discounted Dr. Zaldivar's opinion for failing to review the March 18, 2002 x-ray. *Id*. As we have affirmed the administrative law judge's determination to admit and credit Dr. Smith's March 18, 2002 x-ray report, we reject Employer's assertion of error. Furthermore, we affirm as unchallenged the administrative law judge's other reasons for crediting Dr. Go's opinion over Dr. Zaldivar's opinion. *See Skrack*, 6 BLR at 1-711. We therefore affirm the administrative law judge's determination that Claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(c). *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 9-11.

Weighing all the evidence together, the administrative law judge found Claimant established the existence of complicated pneumoconiosis. 20 C.F.R. §718.304. Because it is supported by substantial evidence, we affirm the administrative law judge's determination. *See Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 255-56; *Melnick*, 16 BLR at 1-33. We further affirm, as unchallenged, the administrative law judge's finding that the Miner's complicated pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(b). *Skrack*, 6 BLR at 1-711; *see The Daniels Co. v. Mitchell*, 479 F.3d 321, 337 (4th Cir. 2007); Decision and Order at 13. Thus, we affirm the administrative

[12] Dr. Go cited to medical articles indicating that "coal workers' pneumoconiosis may appear or progress even after exposure ceases" and "[o]ne-third of those that progressed to PMF [progressive massive fibrosis] did not even have simple pneumoconiosis at the time of their last examination before retiring from coal mining." Claimant's Exhibit 6.

law judge's finding that Claimant invoked the Section 411(c)(3) irrebuttable presumption that the Miner's death was due to pneumoconiosis.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge