U.S. Department of Labor

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

BRB No. 20-0098 BLA

ARLEY MOORE (Widow of CLINTON MOORE)	)	
Claimant-Respondent	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 02/17/2021
Employer-Petitioner	)	
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.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge Theresa C. Timlin's Decision and Order Awarding Benefits (2018-BLA-05239) rendered on a claim filed pursuant to the

Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on August 5, 2016.[1]

The parties stipulated that the Miner had 22 years of coal mine employment. *See* Tr. at 6. The administrative law judge found Claimant established the Miner had complicated pneumoconiosis and therefore invoked the irrebuttable presumption of death due to pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). *See* 20 C.F.R. §718.304. Because the Miner worked in coal mine employment for more than ten years, she found Claimant entitled to the rebuttable presumption that his pneumoconiosis arose out of his coal mine employment under 20 C.F.R. §718.203(b).[2] See Decision and Order at 19. She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer contends the administrative law judge erred in finding Claimant established the Miner had complicated pneumoconiosis and therefore invoked the irrebuttable presumption that the Miner's death was due to pneumoconiosis. Claimant filed a response brief, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation, has not filed a response brief.

The 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 Associates, Inc*., 380 U.S. 359 (1965).

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[1] The Miner died on March 18, 2016. The death certificate identifies congestive heart failure as the cause of death, with contributing causes of atrial fibrillation, coronary artery disease and hypertension. Director's Exhibit 7. He filed two claims for benefits during his lifetime, in 1986 and 1999, but was not awarded benefits and did not appeal. The medical evidence from the Miner's prior denied claims was not admitted into evidence. *See* Decision and Order at 6.

[2] Section 718.203(b) provides a rebuttable presumption that a miner who suffered from pneumoconiosis and who worked for at least ten years in coal mine employment is entitled to a rebuttable presumption that his pneumoconiosis arose out of his coal mine employment.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

Claimant is entitled to survivor's benefits if she establishes the Miner's death was due to pneumoconiosis. 20 C.F.R. §718.205. Under Section 411(c)(3), as implemented by 20 C.F.R. §718.304, there is 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 chest x-ray, yielded one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yielded massive lesions in the lung; or (C) when diagnosed by other means, was a condition which would have yielded results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c). The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption at 20 C.F.R. §718.304. The administrative law judge must examine all relevant evidence, resolve any conflicts, and make a finding of fact. *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250 (4th Cir. 2000). Claimant must also establish by direct proof or presumption that the miner's pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203; *see Daniels Co. v. Mitchell*, 479 F.3d 321 (4th Cir. 2007).

The administrative law judge concluded the x-ray evidence does not establish complicated pneumoconiosis. *See* Decision and Order at 9. She then reviewed the medical reports.

Dr. Cinco, a Board-certified pathologist, performed the autopsy and identified bilateral anthracotic macular and micronodular lesions and a localized conglomerate anthrasilicotic nodule in the left lung measuring 1.7 cm. DX 16 at 4. Dr. Caffrey, also a Board-certified pathologist, reviewed the slides Dr. Cinco prepared but did not identify any lesion that was 1.7 cm in diameter. EX 1 at 4. On Slide 14 (where Dr. Cinco noted the 1.7 cm nodule), Dr. Caffrey observed two smaller pneumoconiotic lesions, one measuring 8 x 4 mm and the other 3 mm. *See* Decision and Order at 15; EX 1 at 4.

Although Dr. Cinco did not specifically use the terms "complicated pneumoconiosis" or "progressive massive fibrosis," the administrative law judge found his identification of a conglomerate anthrasilicotic lesion constitutes pneumoconiosis, *see* 20 C.F.R. §718.201(a), and the 1.7 cm lesion would appear to be 1.0 cm in size or greater if viewed on an x-ray. *See* 20 C.F.R. §718.304(c); Decision and Order at 16-17. Further, she found Dr. Caffrey did not fully explain why his findings differed from Dr. Cinco's and his critique – that Dr. Cinco did not discuss the 1.7 cm lesion in his "gross description" – failed to consider the whole of Dr. Cinco's report wherein he specifically identified a lesion measuring 1.7 cm and identified it as "conglomerate anthracosilicotic nodules (1.7 cm)." *Id.* at 15. She thus found Dr. Caffrey's critiques of Dr. Cinco's report unpersuasive and concluded Dr. Cinco's report is entitled to greater weight. *See id*. at 16.

The administrative law judge also discredited Dr. Tuteur's statement that the Miner did not have complicated pneumoconiosis because it was conclusory and Dr. Tuteur did not comment on the size of the nodule Dr. Cinco identified.[4] Decision and Order at 17-18; Employer's Exhibits 12, 13. She found the Miner's treatment records focused on the Miner's cardiac problems but generally did not address whether he had pneumoconiosis at all and therefore were of little value in determining whether the Miner had complicated pneumoconiosis. *See* Decision and Order at 18. Giving greatest weight to Dr. Cinco's autopsy report, she concluded the preponderance of the evidence establishes the Miner had complicated pneumoconiosis, thereby entitling Claimant to the irrebuttable presumption of death due to pneumoconiosis. *See id.* at 19.

Employer contends the administrative law judge erred in finding Dr. Cinco's report establishes complicated pneumoconiosis because Dr. Cinco did not identify the 1.7 cm lesion as pneumoconiotic but described it as "conglomerate anthracosilicotic nodules." We reject Employer's contention. The statute itself does not identify complicated pneumoconiosis by name. *See Scarbro*, 220 F.3d at 256. Moreover, the regulation includes anthracosilicosis, anthracosis, and anthrosilicosis within the definition of pneumoconiosis. *See* 20 C.F.R. §718.201. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has specifically stated the "focus should be on the descriptive facts and opinions of a doctor and not upon whether his use of some medical term of art jibes with the [administrative law judge's] use of some legal term of art." *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 761 (4th Cir. 1999). The administrative law judge's conclusion that Dr. Cinco's identification of an anthracosilicotic nodule of 1.7 cm. constituted complicated pneumoconiosis is affirmed as supported by substantial evidence and consistent with law. *See Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130 (4th Cir. 1989); *Bueno v. Director, OWCP*, 7 BLR 1-337 (1984).

Employer also contends the administrative law judge's equivalency determination, i.e., her finding that the 1.7 cm opacity on autopsy would show up on x-ray as greater than one centimeter, is not supported by the evidence. We disagree. Contrary to Employer's contention, the administrative law judge did not state Dr. Caffrey observed a 1.7 cm lesion. As the administrative law judge properly noted, Dr. Caffrey agreed that a lesion of 1.7 cm on a biopsy slide would appear as a large opacity on an x-ray.[5] *See* EX 11 at 13. The

[4] Dr. Tuteur reviewed both Dr. Cinco's and Dr. Caffrey's reports.

[5] Employer's counsel asked Dr. Caffrey, "[If] . . . [the Miner] had a nodule greater than 1 centimeter or 1.7 centimeters as described by Dr. Cinco [on autopsy], would you expect that to show up on imaging studies?" Employer's Exhibit 11 at 13. He replied,

administrative law judge accepted Dr. Cinco's identification of the 1.7 cm lesion and permissibly relied on Dr. Caffrey's statement as medical evidence to establish that the lesion would appear as an opacity of greater than one centimeter if viewed on an x-ray. *See Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999). The administrative law judge's equivalency determination is supported by substantial evidence and is affirmed.

Moreover, contrary to Employer's contentions, the administrative law judge also permissibly gave little weight to the Miner's treatment records on the issue of complicated pneumoconiosis because they focused on his cardiac problems and were largely silent on whether he suffered from pneumoconiosis.[6] The Board may not reweigh the evidence or substitute its views for those of the administrative law judge. *See Doss v. Director, OWCP*, 53 F.3d 654 (4th Cir. 1995); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge's finding that the Miner suffered from complicated pneumoconiosis is supported by substantial evidence in the record and is affirmed. We therefore affirm the administrative law judge's finding that Claimant invoked the irrebuttable presumption that the Miner's death was due to pneumoconiosis. *See Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236 (2003).

"Definitely, yes, because any lesion over 1 centimeter on X-ray should be identified as a large opacity by a competent radiologist[.]" *Id.*

[6] While we agree with Employer that the administrative law judge erred in rejecting the x-rays contained in Claimant's treatment records because they were not interpreted in accordance with the ILO classification system, *see J.V.S. [Stowers] v. Arch of W. VA*, 24 BLR 1-78, 1-89 (2008); 20 C.F.R. §718.101(b), we reject its assertion that this error requires remand. Employer has not demonstrated that consideration of the x-rays in Claimant's treatment records would change the result nor has it refuted the administrative law judge's conclusion that the treatment records are "of negligible value" as they focus on Claimant's other medical conditions while the autopsy evidence clearly establishes the Miner had pneumoconiosis. Decision and Order at 18. Employer has not provided any reason why the treatment x-rays should be given greater weight than the autopsy evidence given the Board's recognition that autopsy evidence generally is the most reliable evidence for determining the existence of pneumoconiosis. *See Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). For these reasons, we are satisfied that any error the administrative law judge may have made in excluding the x-rays in the treatment records is harmless and does not require remand. *See Larioni v. Director, OWCP*, 6 BLR 1-276, 1-278 (1984).

We also affirm, as unchallenged on appeal, the administrative law judge's determination that Claimant invoked and Employer did not rebut the presumption that the Miner's pneumoconiosis arose out of his coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); 20 C.F.R. §718.203(b). Therefore, as Claimant established all elements of entitlement, we affirm the award of benefits. *W. Va. CWP Fund v. Bender*, 782 F.3d 129 (4th Cir. 2015).

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge