U.S. Department of Labor

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

BRB No. 20-0101 BLA

ALAN D. CONLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ICG KNOTT COUNTY, LLC, c/o ARCH COAL, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 02/24/2021
UNDERWRITERS SAFETY & CLAIMS	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer/Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge John P. Sellers, III's Decision and Order Denying Benefits (2019-BLA-05090) rendered on a subsequent claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case concerns Claimant's second claim for benefits filed on December 14, 2017.[1]

After accepting the parties' stipulation that Claimant had 39 years of coal mine employment, the administrative law judge found Claimant did not establish complicated pneumoconiosis and was therefore not entitled to the irrebuttable presumption of total disability under 20 C.F.R. §718.304. He also found Claimant failed to establish a totally disabling respiratory or pulmonary impairment and consequently did not establish a change in an applicable condition of entitlement under 20 C.F.R. §725.309(c). He therefore denied benefits.

On appeal, Claimant challenges the denial of benefits, arguing the administrative law judge erred in finding he does not have complicated pneumoconiosis and is not entitled to the irrebuttable presumption of total disability. Employer and its Carrier (Employer) filed a response brief in support of the denial of benefits. The Director, Office of Workers' Compensation, has not filed a response.

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.[2] 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).

To be entitled to benefits under the Act, a claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 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-

[1] On March 2, 2016, the district director denied Claimant's first claim for benefits because he failed to establish he was totally disabled. *See* Director's Exhibit 1. Claimant took no further action until filing the present claim.

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3.

112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless he finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). The district director denied Claimant's prior claim because he failed to establish he is totally disabled by a respiratory or pulmonary impairment; therefore, Claimant had to establish this element of entitlement to obtain review of the merits of his claim.

Under 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, there is an irrebuttable presumption that a claimant is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray, yields 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, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield 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 found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Gray v. SLC Coal Co.*, 176 F.3d 382 (6th Cir. 1999).

The record contains seven substantive interpretations of three different x-rays.[3] Dr. Crum read the August 17, 2017 x-ray as positive for category A large opacities with 2/2 profusion "consistent with PMF," which the administrative law judge interpreted as meaning consistent with progressive massive fibrosis. *See* Director's Exhibit 14; Decision and Order at 8. Dr. Tarver read the same x-ray as negative for large opacities, however, identifying only small opacities with 1/1 profusion and thus finding only simple pneumoconiosis. *See* Employer's Exhibit 2. Drs. Alexander and Seaman read an x-ray taken on February 26, 2018, as indicating simple pneumoconiosis with only small opacities. *See* Director's Exhibits 10; 18. In contrast, Dr. Crum read this x-ray as positive

[3] Dr. DePonte read the February 26, 2018 x-ray for quality purposes only. *See* Director's Exhibit 12.

for category A large opacities with 2/1 profusion. *See* Director's Exhibit 15. Drs. Seaman and Tarver read the third x-ray, taken on June 13, 2018, as positive for small opacities but negative for large opacities. *See* Director's Exhibit 19; Employer's Exhibit 1.

The administrative law judge found the x-ray evidence fails to establish the existence of complicated pneumoconiosis. He noted Drs. Crum and Tarver are dually qualified, as B-readers and board-certified radiologists, and found their contradicting interpretations of the August 17, 2017 x-ray rendered the x-ray inconclusive for the disease. He concluded the February 26, 2018 x-ray was negative for complicated pneumoconiosis because the interpretations of Drs. Alexander and Seaman, who found only small opacities, outweighed Dr. Crum's reading. He also noted no physician interpreted the June 13, 2018 x-ray as positive for large opacities indicating complicated pneumoconiosis. Weighing the x-ray evidence as a whole, he found it does not support a finding of complicated pneumoconiosis. *See* Decision and Order at 9.

Claimant contends the administrative law judge erred by concluding the x-ray evidence does not support a finding of complicated pneumoconiosis, but he points to no error of law in the administrative law judge's decision. Claimant thus is asking the Board to simply reweigh the evidence, which we are not permitted to do; our inquiry is limited to determining whether substantial evidence supports the decision. *See Anderson*, 12 BLR at 1-113. As the fact-finder, the administrative law judge is granted broad discretion in evaluating the credibility of the evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). The administrative law judge accurately summarized the x-ray evidence and reasonably determined the five x-ray interpretations in which multiple physicians did not identify large opacities outweigh Dr. Crum's x-ray interpretations finding large opacities. We therefore affirm, as supported by substantial evidence, the administrative law judge's conclusion that the preponderance of the x-ray evidence does not establish complicated pneumoconiosis. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012).

The record also contains two interpretations of an August 30, 2017 computed tomography (CT) scan. In interpreting the CT scan, Dr. Crum noted "bilateral extensive pulmonary nodularity . . . highly consistent and classical in appearance for pneumoconiosis." Claimant's Exhibit 1. He observed a large opacity measuring 1.7 cm in the upper portion of the right lung, consistent with complicated pneumoconiosis. *Id.* He stated this large opacity would be the equivalent of a category A large opacity on a chest x-ray. *Id.* Dr. Tarver interpreted the same CT scan but found "no large masses," observing

only small 1 to 5 mm nodules in both lungs, consistent with simple pneumoconiosis.[4] Employer's Exhibit 3. The administrative law judge gave the opinions of Drs. Crum and Tarver equal weight because he found them to have comparable credentials. *See* Decision and Order at 11-12. Because they disagreed as to whether Claimant's CT scan showed large opacities consistent with complicated pneumoconiosis and he found no reason to credit either doctor's interpretation over the other, the administrative law judge concluded the CT scan evidence is inconclusive as to the existence of complicated pneumoconiosis.

Claimant argues the administrative law judge should have given greater weight to Dr. Crum's initial reading and rehabilitative report because they "are more thorough." Claimant's Brief at 7. We reject this contention. The administrative law judge acted within his discretion in assessing the weight to be given Dr. Crum's and Dr. Tarver's CT scan readings. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703 (6th Cir. 2002). He correctly noted Drs. Crum and Tarver are dually qualified and have comparable credentials. The administrative law judge rationally determined he could find no reason to credit one physician's reading over the other. We will not disturb an administrative law judge's credibility determinations where, as here, they are sufficiently reasoned and supported by the evidence. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1073 (6th Cir. 2013). We therefore affirm the administrative law judge's conclusion that the CT scan evidence is in equipoise and therefore does not establish complicated pneumoconiosis.

The administrative law judge also considered whether the medical opinion evidence, consisting of an opinion from Dr. Alam, established complicated pneumoconiosis. Claimant concedes Dr. Alam's opinion does not establish the existence of the disease.[5] *See* Claimant's Brief at 8. The administrative law judge reviewed all the evidence in the record and adequately explained his reasons in concluding the evidence does not support a finding of complicated pneumoconiosis. We affirm, as supported by substantial evidence, the administrative law judge's conclusion that Claimant did not establish complicated pneumoconiosis. Thus, we also affirm his determination that Claimant is not entitled to the irrebuttable presumption of total disability under 20 C.F.R. §718.304.

[4] Claimant submitted a rehabilitative report from Dr. Crum in response to Dr. Tarver's CT scan reading. Claimant's Exhibit 2. In this report, Dr. Crum generally reiterated his prior assessment. *See id.*

[5] Dr. Alam diagnosed Claimant with simple pneumoconiosis based on Dr. Alexander's interpretation of the February 26, 2018 x-ray. *See* Director's Exhibit 10. The administrative law judge gave Dr. Alam's opinion little weight because he did not thoroughly review Claimant's clinical history. *See* Decision and Order at 12.

We also affirm, as unchallenged on appeal, the administrative law judge's conclusion that Claimant did not establish he is totally disabled through any other means.[6] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Therefore, we affirm the administrative law judge's conclusion that Claimant did not establish a change in an applicable condition of entitlement under 20 C.F.R. §725.309 and, consequently, the denial of benefits.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[6] A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv).