U.S. Department of Labor

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

BRB No. 19-0329 BLA

JOHN F. HATFIELD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RHINO EASTERN, LLC	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 07/02/2020
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest		

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer/Carrier.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal the Decision and Order Awarding Benefits (2017-BLA-06028) of Administrative Law Judge Drew A. Swank rendered on a claim filed on August 28, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge determined Employer is the responsible operator and accepted the parties' stipulation that Claimant has at least twenty-seven years of coal mine employment. The administrative law judge found Claimant established complicated pneumoconiosis and thus invoked the irrebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The administrative law judge further found Claimant established his complicated pneumoconiosis arose out of his coal mine employment and awarded benefits commencing August 2015, the month in which Claimant filed his claim. 20 C.F.R. §§718.203(b), 725.503.

On appeal, Employer argues the administrative law judge failed to properly consider the parties' post-hearing briefs. It contends the administrative law judge erred in finding it is the responsible operator and Claimant established complicated pneumoconiosis. It further argues the administrative law judge erred in determining the commencement date for benefits. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, asserting the administrative law judge did not adequately address Employer's contention it is not the responsible operator.[1]

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.[2] 33 U.S.C. §921(b)(3), as incorporated

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding Claimant established at least twenty-seven years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant's coal mine employment occurred in West Virginia.

into the Act 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 an abuse of discretion. *McClanahan v. Brem Coal Co.*, 25 BLR 1-171, 1-175 (2016); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-236 (2007) (en banc).

Briefing Schedule

Employer argues the administrative law judge erred in finding the parties did not timely submit post-hearing briefs. Employer's Brief at 8. We disagree.

At the hearing, the administrative law judge gave the parties until February 11, 2019, to submit post-hearing briefs. Hearing Transcript at 40. He specifically advised that briefs had to be received *in his office* by February 11, 2019, and suggested the parties submit them by facsimile in order to meet the filing deadline. *Id*. After the hearing, the administrative law judge granted the parties' joint motion to extend the briefing deadline until March 10, 2019. *See* January 9, 2019 Order. Employer mailed its brief on March 8, 2019, and it was date-stamped as received by the administrative law judge on March 25, 2019. Claimant did not mail his brief until March 11, 2019. Because the parties did not comply with the administrative law judge's deadline for filing post-hearing briefs, we reject Employer's contention of error. *See McClanahan*, 25 BLR at 1-175 (2016); *Keener*, 23 BLR at 1-236.

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner" for at least one year.[3] 20 C.F.R. §§725.494(c), 725.495(a)(1). Employer asserts the administrative law judge failed to properly address whether Claimant worked for another coal mine operator for a cumulative period of one year after he worked for Employer. Employer's Brief at 6. We agree.

See Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 7; Hearing Transcript at 32-33.

[3] In addition, the evidence must establish that the miner's disability or death arose out of coal mine employment with that operator; the entity was an operator after June 30, 1973; the miner's employment included at least one working day after December 31, 1969; and the operator is financially capable of assuming liability for the payment of benefits, either through its own assets or insurance. 20 C.F.R. §725.494(a)-(e).

After summarizing the regulations, the administrative law judge summarily concluded, "[b]ased on the totality of the evidence, the undersigned finds that Employer is the properly designated responsible operator." Decision and Order at 5 *citing* Director's Exhibits 2, 7, 9, 10.[4] Although he cited to several record exhibits, the administrative law judge did not explain his determination that Employer was the properly designated responsible operator or otherwise address Employer's contention, raised before the district director and at the hearing before the administrative law judge, that it is not the last coal mine operator to employ Claimant for a cumulative period of one year. Director's Exhibit 28 (Operator Response to Notice of Claim);[5] Hearing Transcript at 5-6. Thus, as Employer and the Director assert, the administrative law judge's analysis does not comport with the Administrative Procedure Act, which provides 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). We therefore vacate his finding that Employer is the responsible operator and remand the case for further consideration.[6] *See Wojtowicz*, 12 BLR at 1-165; Decision and Order at 5.

[4] Director's Exhibit 2 is Claimant's application for benefits, indicating he was still working in August 2015. Director's Exhibit 7 is Claimant's employment history form, indicating he worked for Employer from August 2013 to January 2015, and for Patriot from January 2015 onward. Director's Exhibit 9 consists of W-2 forms for 2011 and 2012. Director's Exhibit 10 contains Claimant's Social Security Administration earnings records. *Id*. at 4.

[5] The Director notes that in the Proposed Decision and Order, the district director incorrectly found Employer had not timely controverted the Notice of Claim. Director's Brief at 2 n.2.

[6] Although the Director agrees the case must be remanded because the administrative law judge made no findings for the Board to review, she maintains Employer is the properly designated responsible operator. Director's Brief at 6. The Director objects to consideration of Claimant's "hearing testimony for liability purposes" as Employer "did not specifically list [Claimant] as a witness who would address liability issues." *Id*. at 3 n.3. She asserts that "absent extraordinary circumstances, his testimony cannot be considered by the [administrative law judge] for purposes of deciding [Employer's] liability." *Id.*, *citing* 20 C.F.R. §§ 725.414(c); 725.457(c)(1). The administrative law judge shall consider this issue in the first instance.

Complicated Pneumoconiosis

Section 411(c)(3) of the Act and its implementing regulation, 20 C.F.R. §718.304, establish an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering or 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 the result in (a) or (b). The administrative law judge must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether Claimant has invoked the irrebuttable presumption. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The administrative law judge considered six readings of five x-rays. Decision and Order at 10. He noted all of the physicians who interpreted the x-rays are Board-certified radiologists and B readers, except for Dr. Zaldivar who is a B reader only. *Id*. He further noted that all of the physicians found simple pneumoconiosis. *Id*.

Dr. Crum read the October 13, 2015 x-ray positive for complicated pneumoconiosis, Category A, whereas Dr. Tarver interpreted it as negative for the disease. Director's Exhibits 19, 38. Dr. Zaldivar, "a non-radiologist," was the only physician to read the June 15, 2016 x-ray and found it negative for complicated pneumoconiosis. Decision and Order at 11; *see* Director's Exhibit 45. Similarly, Dr. Adcock read the July 19, 2016 x-ray as negative for complicated pneumoconiosis and there were no other readings of the film. Employer's Exhibit 8. Dr. Crum read the September 13, 2018 x-ray as positive for complicated pneumoconiosis, Category B, and Dr. DePonte read the October 13, 2018 x-rays as positive for complicated pneumoconiosis, Category B. Claimant's Exhibits 1, 2. No other physicians read the 2018 x-rays.

The administrative law judge found the October 13, 2015 x-ray in equipoise based on the equal number of positive and negative readings by equally-qualified physicians. Decision and Order at 11. Considering the x-ray evidence as a whole, he found Claimant established complicated pneumoconiosis because "both a majority of the Board-certified [r]adiologist readings and most recent readings [are] positive for complicated coal workers' pneumoconiosis." *Id*.

Although Employer generally contends the x-ray evidence is in equipoise,[7] it does not explain why the administrative law judge's method of resolving the conflict in the readings was erroneous. The Board's scope of review requires a party challenging the Decision and Order below to address why substantial evidence does not support the result reached or the Decision and Order is contrary to law. *See* 20 C.F.R. §§802.211 (b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445,446 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Because the administrative law judge permissibly conducted both a qualitative and quantitative analysis of the x-ray evidence, taking into consideration the physicians' qualifications, the chronology of the evidence, and the number of readings of each film, we affirm his finding Claimant established complicated pneumoconiosis based on the x-ray evidence. 20 C.F.R. §718.304(a); Decision and Order at 10; *see* 20 C.F.R. §718.202(a)(1); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 255-56 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992) (reasonable to find later x-rays more probative if they show the miner's condition has worsened); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003); Decision and Order at 11.

The administrative law judge also found the biopsy, CT scan, and medical opinion evidence supports a finding that Claimant has complicated pneumoconiosis.[8] 20 C.F.R. §718.304(b), (c); Decision and Order at 12-14; Director's Exhibits 19, 45; Claimant's Exhibits 1, 2; Employer's Exhibits 7, 9. As Employer does not challenge the administrative law judge's findings, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] Employer states "[t]he x-ray evidence is at best in equipoise as there are three (3) readings for simple pneumoconiosis and three (3) readings for complicated pneumoconiosis," with the October 13. 2015 x-ray in equipoise. Employer Brief at 6-7. It further contends "the June 15, 2016 and July 19, 2016 x-rays would cancel out the September 13, 2018 and October 13, 2018 [x-rays], making the evidence in equipoise." *Id*. at 7.

[8] The administrative law judge noted Claimant underwent a lung biopsy on January 10, 2017, which showed complicated coal workers' pneumoconiosis. Decision and Order at 12; Claimant's Exhibit 2. He further noted a CT scan dated September 29, 2017, was interpreted as showing progressive massive fibrosis or complicated pneumoconiosis. Claimant's Exhibit 3. The administrative law judge also credited the opinions of Drs. Raj and Harris that Claimant has complicated pneumoconiosis, over the contrary opinions of Drs. Vuskovich and Zaldivar. Decision and Order at 14; Director's Exhibits 19, 45; Claimant's Exhibits 1, 2; Employer's Exhibits 7, 9.

Because the administrative law judge considered all relevant evidence in finding Claimant has complicated pneumoconiosis, we affirm his determination. *See Cox*, 602 F.3d at 283; *Melnick*, 16 BLR at 1-33-34. We further affirm, as unchallenged, the administrative law judge's finding that Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack*, 6 BLR at 1-711; Decision and Order at 15. Consequently, we affirm the administrative law judge's finding Claimant invoked the irrebuttable presumption and therefore the award of benefits. 20 C.F.R. §718.304.

Commencement Date

The commencement date for benefits is the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-184 (1989). Where a miner suffers from complicated pneumoconiosis, the fact-finder must consider whether the evidence establishes the date of onset of the disease. *See Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989). If not, the commencement date is the month in which the claim was filed, unless the evidence establishes Claimant had only simple pneumoconiosis for any period subsequent to the date of filing. *Id*. In that case, the date for the commencement of benefits comes after the period of simple pneumoconiosis. *Id*.; *see also* 20 C.F.R. §725.503(b).

The administrative law judge found "none of the medical experts whose reports have been considered address a specific onset date of total disability." Decision and Order at 17. Thus, he determined benefits should commence as of August 2015, the month in which Claimant filed his claim. *Id*. Employer argues the administrative law judge's commencement date finding is erroneous because Claimant was still working when he filed his claim. Employer's Brief at 7, *citing* 20 C.F.R. §725.504. We disagree.

A miner who invokes the irrebuttable presumption is entitled to commencement of benefits pursuant to 20 C.F.R. §725.503 regardless of whether the miner is still working in coal mine employment.[9] 20 C.F.R. §725.504(a), (b); s*ee McCauley v. DLR Mining, Inc.*,

[9] The applicable regulation cited by Employer contradicts its assertion and provides:

> (a) In the case of a claimant who is employed as a miner . . . at the time of a final determination of such miner's eligibility for benefits, no benefits shall be payable unless:
>
> (1) The miner's eligibility is established under section 411(c)(3) of the Act . . . .

BLR , BRB No. 18-0606 BLA, slip op. at 5 (Nov. 12, 2019), *citing Justus v. J & L Coal Co.*, 3 BLR 1-185, 1-189 (1981). As Employer raises no other arguments, we affirm the administrative law judge's finding that benefits commence as of August 2105. Decision and Order at 17.

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.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

(b) If the eligibility of a working miner is established under section 411(c)(3) of the Act, benefits shall be payable as is otherwise provided in this part. . . .

20 C.F.R. §725.504(a), (b).