U.S. Department of Labor

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

BRB No. 19-0200 BLA

RODNEY L. SEXTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ENTERPRISE MINING COMPANY LLC	)	DATE ISSUED: 03/27/2020
	)	
and	)	
	)	
CHARTIS CASUALTY COMPANY	)	
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Cameron Blair and Andrew L. Kenney (Fogle Keller Walker PLLC), Lexington, Kentucky, for employer.

Edward Waldman (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: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-05554) of Administrative Law Judge John P. Sellers, III, rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on February 11, 2016.

Because employer challenged the timeliness of the claim in a pre-hearing motion, the administrative law judge rejected its argument that a medical opinion submitted in conjunction with a withdrawn claim triggered the running of the three-year limitations period in 20 C.F.R. §725.308. On the merits, he credited claimant with thirty-two years of coal mine employment, based on employer's stipulation, and found claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.304. The administrative law judge awarded benefits accordingly.

On appeal, employer argues the administrative law judge erred in finding claimant timely filed the claim and claimant established complicated pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging affirmance of the administrative law judge's finding that the claim was timely filed.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order Awarding Benefits must be affirmed if it is supported by substantial evidence, rational, and in accordance with applicable law.[1] 33 U.S.C. §921(b)(3), as incorporated 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).

[1] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibits 7, 8; Hearing Transcript at 13.

I. Timeliness of the Claim

"Any claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). The medical determination must have "been communicated to the miner or a person responsible for the care of the miner" and a rebuttable presumption provides that every claim is timely filed. 20 C.F.R. §725.308(a), (c). To rebut this presumption, employer must show, by a preponderance of the evidence, that the claim was filed more than three years after a medical determination of total disability due to pneumoconiosis was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a); *see Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594-95, 25 BLR 2-273, 2-282 (6th Cir. 2013).

Claimant filed a claim for benefits on April 28, 2011.[2] Administrative Law Judge's Exhibit 5. Dr. Baker examined claimant at the request of the Department of Labor and completed Form CM-988, Medical History and Examination for Coal Workers' Pneumoconiosis. He diagnosed coal workers' pneumoconiosis with progressive massive fibrosis, chronic obstructive pulmonary disease, chronic bronchitis, and mild resting arterial hypoxemia. *Id.* He indicated coal dust exposure caused the coal workers' pneumoconiosis with progressive massive fibrosis, while coal dust exposure and cigarette smoking caused claimant's remaining conditions. *Id.* He also opined claimant was totally disabled.[3] *Id.*

The district director issued a Schedule for Submission of Additional Evidence to the parties on August 4, 2011, detailing Dr. Baker's report. Administrative Law Judge's Exhibit 5, Attachment 1. On November 8, 2011, the district director issued a Proposed Decision and Order denying benefits. Claimant filed a request to withdraw his claim, which the district director granted on November 18, 2011. Claimant filed a second claim

[2] The record of the 2011 claim is not in the record of the current claim. In its motion to dismiss the current claim as untimely, employer detailed the procedural history of the 2011 claim and attached Dr. Baker's report and the district director's Schedule for the Submission of Additional Evidence. Administrative Law Judge Exhibit 5.

[3] In a narrative report of the examination, Dr. Baker indicated "presumptive evidence" suggests the large nodule he observed on claimant's x-ray was complicated pneumoconiosis but "[t]he only way to prove this is to do a lung biopsy[.]" Administrative Law Judge Exhibit 5. He further commented: "[i]f the 1 centimeter nodule in the upper right lobe is progressive massive fibrosis, then [claimant] would be considered totally disabled from working in the coal mining industry. The etiology of this is unclear." *Id.*

on June 10, 2015, but later requested withdrawal which the district director granted on November 10, 2015.[4] *Id*. Claimant took no action until filing the current claim on February 11, 2016. Director's Exhibit 4.

After the current claim was transferred to the Office of Administrative Law Judges for hearing, employer filed a motion requesting dismissal of the claim as untimely filed, arguing Dr. Baker's 2011 medical opinion triggered the running of the three-year limitations period. Administrative Law Judge Exhibit 5. The administrative law judge denied employer's motion in his Decision and Order Awarding Benefits, rejecting employer's allegation that the withdrawal of the 2011 claim prevented resetting the three-year time limit and that Dr. Baker communicated to claimant a diagnosis of total disability due to pneumoconiosis. Decision and Order at 7-8.

Employer alleges on appeal that the administrative law judge erred in finding the withdrawal of claimant's 2011 claim reset the three-year limitations period and that Dr. Baker's opinion is unreasoned and was not communicated to claimant. Employer's Brief at 6-8. The Director responds, maintaining the administrative law judge rationally determined Dr. Baker's diagnosis was "insufficiently definite" as to the cause of claimant's total disability to trigger the running of the limitations period and employer did not establish it was communicated to claimant. Director's Brief at 5-6.

We affirm, as within his discretion and supported by substantial evidence, the administrative law judge's finding that employer failed to establish Dr. Baker communicated a diagnosis of total disability due to pneumoconiosis to claimant. Dr. Baker's narrative report states only the lesion presumptively was complicated pneumoconiosis, but more testing was needed to confirm that; without confirmation, the etiology of the nodule remained "unclear." Administrative Law Judge Exhibit 5. In addition to determining the existence of the disease, the additional testing also would determine whether claimant was disabled by it. *Id.* Whether Dr. Baker's report is well-reasoned thus is immaterial: by its plain language it is not "a medical determination of total disability due to pneumoconiosis" – it is a statement that claimant needed more testing to make those determinations. *Brigance*, 718 F.3d at 593 (statutory language requires a "*diagnosis* of total disability due to pneumoconiosis by a physician trained in internal and pulmonary medicine") (emphasis added).

Claimant's testimony regarding his communication with Dr. Baker does not change this analysis. Claimant testified he first read Dr. Baker's report during his deposition, although he received it two to three weeks after Dr. Baker examined him on May 7, 2011.

[4] The record of the 2015 claim is not in the record of the current claim.

Administrative Law Judge Exhibit 5, Attachment 1 at 24-25. Claimant had the following exchange with employer's counsel:

> Q: Do you recall [Dr. Baker] informing you that you were totally disabled due to your black lung?
>
> A: Well he didn't put it in that type of words. But what he did tell me, he looked at me right in the face and eyes, just like you and me here, he said you'll never work again because you're not able to work. He said don't even think about going to work. I guess he just read a little bit better than I did you know. His exact words, he was looking at me right in the face and eyes. He said you're not ever going back to work.
>
> Q: And did he say that you weren't going back to work because of your black lung?
>
> A: Because of my disability he said and so, you know, I went to several doctors and they all tell me the same thing. You're never going back to work.
>
> . . .
>
> Q: To your recollection did Dr. Baker tell you that you were disabled because of your black lung in 2011?
>
> A: Well Dr. Baker isn't the only one told me I would be disabled . . .
>
> . . .
>
> Q: Mr. Sexton, do you remember what exactly Dr. Baker told you?
>
> A: He, you know, he said this. He said you're never going to work again because of your lungs. But I did not know that he was going to write it up being, you know, disabled or whatever, disabled with my lungs you know. I didn't know he was going to write it up that way.

Id. at 15-17. Nowhere does claimant state Dr. Baker told him he was totally disabled by pneumoconiosis. Instead, based on this testimony, the administrative law judge permissibly concluded employer "has failed in its burden to demonstrate that Dr. Baker communicated to the [c]laimant that he was totally disabled due to pneumoconiosis, as opposed to his 'lungs.'" *Id*. at 17; *see Brigance*, 718 F.3d at 594; *Arch of Ky., Inc. v.*

Director, OWCP [*Hatfield*], 556 F.3d 472, 483 (6th Cir. 2009); *McClanahan*, 25 BLR at 1-175. We therefore affirm the administrative law judge's finding that employer failed to rebut the presumption that the current claim was timely filed. 20 C.F.R. §725.308(a).

II. Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation at 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering 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 a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption. The administrative law judge must examine all 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, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33 (1991) (en banc).

A. X-ray Evidence

The administrative law judge considered eight readings of four x-rays dated April 29, 2016, July 24, 2017, March 26, 2018, and March 29, 2018. Decision and Order at 9-10. Drs. Crum and DePonte, dually-qualified as Board-certified radiologists and B-readers each read the April 29, 2016 x-ray as showing a Category "A" large opacity. Director's Exhibits 14, 21. Drs. Meyer and Tarver, both dually-qualified, read the July 24, 2017 x-ray as positive for simple pneumoconiosis only. Employer's Exhibits 1, 2. Dr. Crum identified a Category "A" large opacity in addition to simple pneumoconiosis on the March 26, 2018 x-ray, while Dr. Adcock, also dually-qualified, read the x-ray as positive for simple pneumoconiosis only. Claimant's Exhibit 2; Employer's Exhibit 4. Dr. Crum interpreted the March 29, 2018 x-ray as positive for simple pneumoconiosis and reflecting a Category "A" large opacity, while Dr. Adcock read the x-ray as positive for simple pneumoconiosis only. Claimant's Exhibit 3; Employer's Exhibit 5.

The administrative law judge determined the April 29, 2016 x-ray is positive for complicated pneumoconiosis in light of the uncontradicted readings of Drs. Crum and DePonte. Decision and Order at 15. He found the July 24, 2017 x-ray is positive for simple pneumoconiosis but negative for complicated pneumoconiosis based on the uncontradicted readings of Drs. Meyer and Tarver. *Id*. Because the conclusions of Drs. Crum and Adcock,

both dually-qualified physicians, differed as to the presence of large opacities on the March 26, 2018 and March 29, 2018 x-rays, the administrative law judge found them inconclusive as to complicated pneumoconiosis. *Id*. at 15-16. Based on these determinations, the administrative law judge concluded the x-ray evidence as a whole is inconclusive as to the presence of complicated pneumoconiosis. *Id*.

B. Other Evidence

The administrative law judge next considered the medical reports of Dr. Green, who examined claimant on April 29, 2016, March 26, 2018, and March 29, 2018.[5] Director's Exhibit 14; Claimant's Exhibits 2-3. In conjunction with his examinations, Dr. Green reviewed claimant's employment and smoking histories, obtained chest x-rays, and performed pulmonary function and blood gas studies. *Id*. In each report, Dr. Green diagnosed complicated pneumoconiosis and chronic obstructive pulmonary disease. *Id*.

The administrative law judge found Dr. Green's medical reports to be well-documented and well-reasoned, and concluded his uncontradicted medical opinion "weighs in favor of a finding of complicated pneumoconiosis" at 20 C.F.R. §718.304(c). Decision and Order at 17-18. He further determined, based on a weighing of all of the evidence, that Dr. Green's opinion sufficiently established complicated pneumoconiosis. *Id*. at 18. Employer contends the administrative law judge erred in crediting Dr. Green's opinion as well-documented and well-reasoned when he based his diagnosis of complicated pneumoconiosis solely on the positive x-ray interpretations of Drs. Crum and DePonte. Employer's Brief at 9-10. We disagree.

Contrary to employer's contention, the administrative law judge acknowledged that Dr. Green referenced only the positive x-ray readings from Drs. Crum and DePonte in determining the chest x-rays taken in conjunction with his examinations of claimant are positive for complicated pneumoconiosis. Decision and Order at 17-18. He rationally found, however, that Dr. Green did not base his ultimate conclusion that claimant has complicated pneumoconiosis solely on these x-ray readings. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305-06 (6th Cir. 2005). As the administrative law judge noted, Dr. Green also referred to: the April 29, 2016 x-ray the administrative law judge

[5] The record does not contain any biopsy or autopsy evidence relevant to 20 C.F.R. §718.304(b).

found positive for complicated pneumoconiosis;[6] claimant's thirty-two year history of coal mine employment; pulmonary function studies consistent with small airways disease, underlying airways dysfunction and airflow obstruction; and blood gas studies indicating resting hypoxemia and mild hypoxemia with exercise. Decision and Order at 18-19; Director's Exhibit 14; Claimant's Exhibits 2-3. Regarding his weighing of Dr. Green's opinion with the x-ray evidence, the administrative law judge permissibly determined that inconclusive radiological imaging "is not the equivalent of negative" readings and "does not preclude the weight of the evidence from establishing complicated pneumoconiosis."[7] Decision and Order at 17; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002). We therefore affirm the administrative law judge's finding claimant established complicated pneumoconiosis and invocation of the irrebuttable presumption of total disability due to pneumoconiosis.[8] 20 C.F.R. §718.304; Decision and Order at 19.

[6] Drs. DePonte and Crum provided uncontradicted readings of the April 29, 2016 x-ray as showing a 3/2 profusion of small opacities and a Category "A" large opacity. Director's Exhibits 14, 21.

[7] We reject employer's argument that the administrative law judge erred in relying on *Whitaker Coal Corp. v. Osborne*, 526 F. Appx. 567 (6th Cir. 2013) to find that Dr. Green's opinion was not outweighed by the x-ray evidence. Employer's Brief at 9-10. Employer maintains that unlike the physician in *Osborne*, Dr. Green did not review the entirety of the x-ray evidence and explain how it corroborated his diagnosis of complicated pneumoconiosis. *Id*. Contrary to employer's assertion, the administrative law judge appropriately cited *Osborne* for the general proposition that inconclusive x-ray evidence does not necessarily conflict with a medical opinion diagnosing complicated pneumoconiosis. Decision and Order at 18-19.

[8] We affirm as unchallenged by employer on appeal the administrative law judge's finding claimant invoked the rebuttable presumption that his complicated pneumoconiosis arose out of his coal mine employment and employer failed to rebut it. 20 C.F.R. §718.203(b); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711; *The Daniels Co. v. Mitchell*, 479 F.3d 321, 337 (4th Cir. 2007); Decision and Order at 20.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge