U.S. Department of Labor

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

BRB No. 19-0225 BLA

BILLY J. SCALF Claimant-Respondent v. PONTIKI COAL CORPORATION and Self-Insured through MAPCO, INCORPORATED c/o ALLIANCE RESOURCE PARTNERS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/31/2020 DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

C. Phillip Wheeler, Jr. (Kirk Law Firm), Pikeville, Kentucky for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05172) of Administrative Law Judge Steven D. Bell on a claim filed on January 4, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with fourteen years of coal mine employment.[1] Because claimant did not have at least fifteen years of coal mine employment, the administrative law judge found he could not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). He found claimant established complicated pneumoconiosis and therefore invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). He further found claimant's complicated pneumoconiosis arose out of coal mine employment and awarded benefits. 20 C.F.R. §718.203.

On appeal, employer argues the administrative law judge erred in finding claimant invoked the irrebuttable presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law. 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, 362 (1965).

Section 411(c)(3) of the Act provides an irrebuttable presumption a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which:

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[1] Claimant's coal mine employment occurred in Kentucky. Director's Exhibit 6; Hearing Transcript at 10. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Under Section 411(c)(4) of the Act, claimant is entitled to a presumption he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

(a) when diagnosed by x-ray, yields one or more large 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, 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. In determining whether claimant has invoked the irrebuttable presumption, the administrative law judge must weigh together all evidence relevant to the presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge first considered six interpretations of two x-rays taken on April 7, 2016, and May 12, 2016. 20 C.F.R. §718.304(a); Decision and Order at 6. He noted he may consider the radiological qualifications of the physicians who render x-ray interpretations and assigned greater weight to those physicians who are dually-qualified as B-readers and Board-certified radiologists. *Id*. at 14. Drs. Kendell and Seaman, each dually-qualified radiologists, read the April 7, 2016 x-ray as positive for simple and complicated pneumoconiosis, Category A. Director's Exhibit 17; Claimant's Exhibit 1. Dr. Adcock, a dually-qualified radiologist, and Dr. Forehand, a B reader, read this x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibit 10; Employer's Exhibit 5. Relying on the preponderance of the readings from dually-qualified radiologists, the administrative law judge found this x-ray positive for complicated pneumoconiosis. Decision and Order at 14. Dr. Jarboe, a B reader, interpreted the May 12, 2016 x-ray as positive for simple and complicated pneumoconiosis, Category A, but Dr. Adcock read it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Employer's Exhibit 4; Claimant's Exhibit 2. Based on Dr. Adcock's superior credentials, the administrative law judge found this x-ray negative for complicated pneumoconiosis. Decision and Order at. 14. As he found one x-ray positive and one x-ray negative for complicated pneumoconiosis, the administrative law judge found the x-ray evidence in equipoise on the issue of complicated pneumoconiosis. *Id*.

The administrative law judge found there is no biopsy evidence, thus claimant cannot establish complicated pneumoconiosis by this subsection. 20 C.F.R. §718.304(b); Decision and Order at 13.

The administrative law judge then weighed Dr. Jarboe's opinion that claimant has complicated pneumoconiosis and Dr. Forehand's opinion that he does not.[3] 20 C.F.R. §718.304(c); Decision and Order at 15-16; Directors' Exhibit 10; Claimant's Exhibit 2. He

[3] The administrative law judge noted Drs. Vuskovich and Dahhan did not address the issue of complicated pneumoconiosis. Decision and Order at 15-16.

found Dr. Jarboe's opinion reasoned and documented because it was based on the doctor's own positive reading of the May 12, 2016 x-ray. Decision and Order at 15. He found Dr. Forehand's opinion reasoned because it was based on the doctors own negative reading of April 7, 2016 x-ray. *Id*. at 16. However, he discredited Dr. Forehand's opinion because the doctor did not consider "any of the x-ray interpretations that were positive for complicated pneumoconiosis" or address "the more recent x-ray, on which Dr. Jarboe's opinion was based." *Id*. Further, he noted Dr. Jarboe "is a [Board-certified] pulmonologist in addition to being a B reader whereas Dr. Forehand is a [Board-certified] allergist and immunologist." *Id*. Based on the foregoing analysis, he found claimant established complicated pneumoconiosis through the medical opinions. 20 C.F.R. §718.304(c). Weighing all the relevant evidence together, the administrative law judge found claimant established complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 16-17.

Employer argues the administrative law judge erred in crediting Dr. Jarboe's opinion. Employer's Brief at 4-6 (unpaginated). Employer's argument has merit. The administrative law judge's finding Dr. Jarboe's opinion that claimant has complicated pneumoconiosis reasoned and documented does not comply with the Administrative Procedure Act (APA).[4] Specifically, the administrative law judge did not adequately explain his basis for finding the doctor's diagnosis of complicated pneumoconiosis reasoned and documented, or address whether the doctor's opinion is just a restatement of his reading of the May 12, 2016 x-ray. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989) (mere restatement of an x-ray reading is not a reasoned medical opinion). Further, as discussed above, the administrative law judge found Dr. Jarboe's positive reading of the May 12, 2016 x-ray outweighed by Dr. Adcock's negative reading of the same x-ray based on Dr. Adcock's superior radiological credentials. Decision and Order at 14. He did not reconcile this finding with his conclusion that Dr. Jarboe's opinion is reasoned and documented. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Further, the administrative law judge did not apply the same level of scrutiny to the opinions of Drs. Jarboe and Forehand. He discredited Dr. Forehand's opinion because the doctor did not discuss the positive x-ray readings of record, including Dr. Jarboe's reading

[4] The Administrative Procedure Act (APA) 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 . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

of the May 12, 2016 x-ray.[5] Decision and Order at 15-16. The administrative law judge, however, did not address whether Dr. Jarboe adequately addressed the negative x-ray readings of record. Whether a physician's opinion is adequately reasoned is for the administrative law judge to determine. *Rowe*, 710 F.2d at 255. However, the administrative law judge must consider all of the relevant evidence and apply the same level of scrutiny in determining the credibility of the medical opinion evidence. 30 U.S.C. §923(b); *see Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999) (en banc). Based on these errors, we must vacate the administrative law judge's finding that Dr. Jarboe's opinion establishes complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 15-16. We must further vacate his conclusion that the evidence as a whole establishes complicated pneumoconiosis. *Id*. at 16.

On remand, the administrative law judge must reconsider whether the medical opinion evidence establishes complicated pneumoconiosis. 20 C.F.R. §718.304(c). In so doing, he must address the comparative credentials of the physicians, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255. If he finds the medical opinions establish complicated pneumoconiosis, he must then weigh together the evidence at subsections (a)-(c) together before determining whether claimant has invoked the irrebuttable presumption. *Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33 (1991). If he finds the evidence does not establish complicated pneumoconiosis, he should address whether claimant has established he is totally disabled due to pneumoconiosis without the aid of any statutory presumptions. 20 C.F.R. §718.204(b)(2), (c). He must also explain his findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

[5] Although the administrative law judge indicated this x-ray is the most recent x-ray, he also indicated the April 7, 2016 and May 12, 2016 x-rays are contemporaneous because they were "taken a month apart." Decision and Order at 16.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part[6] and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[6] The administrative law judge found claimant established clinical pneumoconiosis arising out of coal mine employment, but not legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203; Decision and Order at 16-17. We affirm, as unchallenged on appeal, his finding that claimant established clinical pneumoconiosis arising out of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16-17.