U.S. Department of Labor

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

BRB No. 19-0545 BLA

RALPH BOYD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SIX B COAL COMPANY	)	
	)	
and	)	
	)	
ROCKWOOD INSURANCE COMPANY	)	
C/O VIRGINIA PROPERTY & CASUALTY	)	DATE ISSUED: 11/30/2020
INSURANCE GUARANTY ASSOCIATION	)	
	)	
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 Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

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

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for Employer and its Carrier.

Before: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Timothy J. McGrath's Decision and Order Awarding Benefits (2017-BLA-05277) rendered on a subsequent claim filed on August 24, 2015, pursuant to the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2018) (Act).[1]

The administrative law judge credited Claimant with twelve years of coal mine employment and accepted Employer's concession that Claimant has simple clinical pneumoconiosis. 20 C.F.R. §718.202(a). He therefore found Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). On the merits, the administrative law judge determined Claimant established complicated pneumoconiosis and thus 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) (2018); 20 C.F.R. §718.304. He further found Claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203(b), and awarded benefits. The administrative law judge also found that Claimant established entitlement under 20 C.F.R. Part 718 by establishing he has legal pneumoconiosis, a totally disabling respiratory or pulmonary impairment, and total disability due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), (c); Decision and Order at 32-40.

On appeal, Employer contends the administrative law judge erred in finding the evidence established complicated pneumoconiosis, total disability, and disability causation.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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

[1] Claimant previously filed a claim on June 25, 2001, which Administrative Law Judge William S. Colwell denied on July 21, 2008 because Claimant did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Administrative Law Judge Exhibits 2, 5.

[2] We affirm as unchallenged on appeal the administrative law judge's findings of twelve years of coal mine employment and a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

evidence, and in accordance with applicable law.[3] 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, 361-62 (1965).

Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers 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. In determining whether Claimant has invoked the irrebuttable presumption, the administrative law judge must consider all evidence relevant to the presence or absence of complicated pneumoconiosis.[4] *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

X-rays

The administrative law judge considered eleven interpretations of five x-rays rendered by physicians dually qualified as B-readers and Board-certified radiologists. Decision and Order at 27-29. Drs. Crum and DePonte read a September 11, 2015 x-ray as positive for simple and complicated pneumoconiosis with Category B large opacities while Dr. Wolfe interpreted it as positive for simple pneumoconiosis but negative for complicated

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 6; Hearing Transcript at 32, 48.

[4] The record contains no biopsy evidence. 20 C.F.R. §718.304(b). Although Claimant submitted a CT scan reading for consideration under 20 C.F.R. §718.304(c), the administrative law judge found he did not establish its medical acceptability or relevance. 20 C.F.R. §718.107(b). Additionally, the administrative law judge found that Claimant's medical treatment records did not weigh against a finding of complicated pneumoconiosis. Decision and Order at 31. As these findings are unchallenged, we affirm them. *See Skrack*, 6 BLR at 1-711.

pneumoconiosis.[5] Director's Exhibit 22 at 1; Claimant's Exhibit 6; Employer's Exhibit 1. Dr. Crum interpreted an April 21, 2016 x-ray as positive for simple and complicated pneumoconiosis with Category B large opacities while Dr. Tarver read it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibit 31 at 21; Administrative Law Judge Exhibit 6. Dr. Crum read a February 14, 2018 x-ray as positive for simple and complicated pneumoconiosis with Category A large opacities while Dr. Tarver read it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Claimant's Exhibit 7; Employer's Exhibit 13. Dr. Crum read a February 20, 2018 x-ray as positive for simple and complicated pneumoconiosis with Category B large opacities while Dr. Colella interpreted it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 16. Finally, Dr. Crum interpreted the March 12, 2018 x-ray as positive for simple and complicated pneumoconiosis with Category B large opacities while Dr. Colella read it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Claimant's Exhibit 5; Employer's Exhibit 17.

Weighing the conflicting readings of the September 11, 2015 x-ray, the administrative law judge accorded greater weight to Dr. DePonte's positive reading, as corroborated by Dr. Crum's reading. He explained that in addition to their qualifications as Board-certified radiologists and B readers, Drs. DePonte and Crum possessed relevant academic qualifications and rendered more detailed readings of the x-ray than did Dr. Wolfe. Additionally, he found that although Dr. Crum stated in the narrative portion of his x-ray report that the coalescence of bilateral large opacities "suggest[ed] complicated pneumoconiosis," the doctor's overall reading was not qualified or uncertain. Accordingly, the administrative law judge found the September 11, 2015 x-ray positive for complicated pneumoconiosis.

For the remaining four x-rays, the administrative law judge noted that Dr. Crum read each one as positive for either Category A or B large opacities, while either Dr. Tarver or Dr. Colella read each one as negative for complicated pneumoconiosis. The administrative law judge therefore found the April 21, 2016, February 14, 2018, February 20, 2018, and March 12, 2018 x-rays to be in equipoise. Decision and Order at 27-29. With one x-ray positive for complicated pneumoconiosis and the other four in equipoise,

[5] Dr. Gaziano reviewed the September 11, 2015 x-ray only to assess its quality. Director's Exhibit 23.

the administrative law judge found that the x-ray evidence established complicated pneumoconiosis.[6] 20 C.F.R. §718.304(a).

Employer contends the administrative law judge erred in finding the September 11, 2015 x-ray positive for complicated pneumoconiosis, asserting he improperly credited the interpretations of Drs. DePonte and Crum over that of Dr. Wolfe, and did not set forth the rationale underlying his determinations as the Administrative Procedure Act (APA) requires.[7] Employer's Brief at 9-12. We disagree.

Employer first asserts the administrative law judge improperly credited Dr. Crum's interpretation of the September 11, 2015 x-ray even though Dr. Crum qualified his interpretation by stating the large opacities he identified on the x-ray "suggest[ed] complicated pneumoconiosis." Employer's Brief at 10; Director's Exhibit 22 at 1. Contrary to Employer's contention, the administrative law judge permissibly concluded Dr. Crum's statements did not render his reading "qualified or uncertain." *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365-66 (4th Cir. 2006) (doctor's refusal to provide a definitive diagnosis is a sign of candor rather than equivocation); Decision and Order at 27. We likewise reject Employer's assertion that the administrative law judge erred in discrediting Dr. Wolfe's interpretation of the September 11, 2015 x-ray as less complete than those of Drs. Crum and DePonte. Employer's Brief at 11; Employer's Exhibit 1. As explained by the administrative law judge, while a diagnosis of an "other abnormality" is not a requirement to diagnose pneumoconiosis, that Drs. DePonte and Crum identified "other abnormalities," while Dr. Wolfe did not, suggests Dr. Wolfe's interpretation of the September 11, 2015 x-ray is less complete than those of Drs. DePonte and Crum. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 27. In rendering these findings, the administrative law judge set forth his underlying rationales in accordance with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 27.

[6] The administrative law judge also noted the existence of x-rays and other evidence from Claimant's prior filing but, due to its age, found it less probative than the evidence developed in connection with the present claim. Decision and Order at 25-26. This finding is unchallenged on appeal. *See Skrack*, 6 BLR 1-711.

[7] The Administrative Procedure Act (APA) provides every adjudicatory decision must include "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).

Employer further contends the administrative law improperly "counted heads" in finding the September 11, 2015 x-ray positive for complicated pneumoconiosis. Employer's Brief at 11-12. We disagree. The administrative law judge properly considered the number of x-ray interpretations along with the readers' qualifications, including teaching experience and length of practice,[8] and the findings set forth in their readings.[9] *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); *see also Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894, 898-99 (7th Cir. 2003); Decision and Order at 27. It is within the administrative law judge's discretion as fact-finder to weigh the credibility of the experts and the persuasiveness of their opinions. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). Because it is supported by substantial evidence, we affirm the administrative law judge's conclusion that the September 11, 2015 x-ray is positive for complicated pneumoconiosis as well as his finding that the x-ray evidence as a whole establishes complicated pneumoconiosis. 20 C.F.R. §718.304(a); *see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); Decision and Order at 29.

Medical Opinions

The administrative law judge considered the medical opinions of Drs. Everhart, Green, and Nader diagnosing complicated pneumoconiosis, Dr. Sargent's opinion that there was no evidence of complicated pneumoconiosis, and Dr. Basheda's opinion that Claimant's bilateral lung nodules could be coal workers' pneumoconiosis, old granulomatous disease, or rheumatoid nodules. Director's Exhibit 22, Claimant's Exhibits 2, 5, Director's Exhibit 32, Employer's Exhibits 13, 14. The administrative law judge

[8] The administrative law judge noted that, in addition to their qualifications as dually qualified radiologists, Dr. Crum is on the teaching faculties of LMU-Debusk College of Osteopathic Medicine and KYCOM-Kentucky College of Osteopathic Medicine, and Dr. DePonte has over thirty years in private practice, has been a consultant with the Black Lung Program at Washington and Lee University, and is on the teaching faculty at the Debusk College of Osteopathic Medicine. Decision and Order at 7 n.9, 7 n.11, 27; Director's Exhibit 22 at 3; Claimant's Exhibit 7 at 5.

[9] We likewise reject Employer's argument that the x-ray evidence, when considered as a whole, weighs against a finding of complicated pneumoconiosis because three of the five doctors who reviewed Claimant's x-rays concluded he did not have complicated pneumoconiosis. Employer's Brief at 12-13. Employer's argument is itself a request to engage in an improper "head count." *See Adkins v. Director, OWCP*, 958 F2d 49, 52 (4th Cir. 1992).

found that Dr. Everhart's diagnosis of "progressive massive fibrosis" supported a finding of complicated pneumoconiosis because it was based on the totality of the information before Dr. Everhart. In contrast, he found that because Drs. Green and Nader based their diagnoses solely on x-ray readings, their opinions did not provide independent support for a finding of complicated pneumoconiosis under 20 C.F.R. §718.304(c).[10] He also found that neither Dr. Sargent's opinion nor Dr. Basheda's opinion supported a finding of complicated pneumoconiosis, but Dr. Basheda's opinion, if credited, may be "relevant to finding an alternate source of the opacities found on the x-rays . . . ." Decision and Order at 30. Weighing the medical opinions together with all the other relevant evidence, the administrative law judge found the opinions suggesting other conditions as the source of the opacities "did not undermine the credibility of the positive X-ray finding of complicated pneumoconiosis," because he found the x-ray evidence to be "by far the most probative evidence of complicated pneumoconiosis on this record." Decision and Order at 31.

Without addressing the administrative law judge's analysis and weighing of the medical opinions, Employer contends that the administrative law judge failed to consider that the opacities seen on Claimant's x-rays could have been caused by rheumatoid arthritis rather than complicated pneumoconiosis. Employer's Brief at 13. Contrary to Employer's contention, the administrative law judge observed that Dr. Basheda provided multiple possible alternate diagnoses for the opacities seen on x-ray, including rheumatoid arthritis, and Dr. Nader indicated Claimant's history of rheumatoid arthritis was potentially concerning for Caplan Syndrome. Decision and Order at 30; Director's Exhibit 32 at 39; Claimant's Exhibit 2 at 3. The administrative law judge "considered Dr. Basheda's theory of granulomatous nodules and rheumatoid arthritis, as well as Dr. Nader's concern about the presence of Caplan Syndrome," as possible alternate explanations for the large opacities seen on x-ray but found the positive x-ray readings "by far the most probative evidence of complicated pneumoconiosis." Decision and Order at 31. Employer has not challenged the administrative law judge's determination that the x-ray evidence was the most

[10] The administrative law judge also noted Dr. Nader's comment that Claimant's "[l]arge 'B' [o]pacity with progressive massive fibrosis on his chest x-ray with [a] history of rheumatoid arthritis was concerning for Caplan syndrome in the setting of pneumoconiosis." Claimant's Exhibit 2 at 3. The administrative law judge inferred that Dr. Nader's references to rheumatoid arthritis and Caplan syndrome "may constitute an alternate explanation for the opacities detected on Claimant's x-rays." Decision and Order at 30 & n.30, *citing* Eduardo Mello De Capitani et al., *Rheumatoid pneumoconiosis (Caplan's syndrome) with a classical presentation*, J. Bras. Pneumol. 35(9): 942-46 (2009). The administrative law judge, however, found that Dr. Nader's comment did not undermine the more probative positive x-ray evidence of complicated pneumoconiosis. Decision and Order at 31.

probative evidence of complicated pneumoconiosis. We therefore affirm it, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983), and his rational finding that the opinions of Drs. Basheda and Nader did not affirmatively show that the large opacities seen on Claimant's x-rays were the result of a disease process unrelated to his coal mine dust exposure. *Scarbro*, 220 F.3d at 256; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532 n.9 (4th Cir. 1998).

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 31. Consequently, we affirm the administrative law judge's finding Claimant invoked the irrebuttable presumption and therefore is entitled to benefits.[11] 20 C.F.R. §718.304; Decision and Order at 31.

[11] Because we affirm the administrative law judge's finding that Claimant established entitlement to benefits by invoking the irrebuttable presumption, we need not address Employer's arguments relating to entitlement under 20 C.F.R. Part 718. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Additionally, because the administrative law judge did not apply the Section 411(c)(4) presumption of total disability due to pneumoconiosis, we need not address Employer's argument that the presumption cannot be applied because the Affordable Care Act (ACA), Public Law No. 111-148, §1556 (2010), which reinstated the presumption, is unconstitutional. Employer's Brief at 7-8.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge