U.S. Department of Labor

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

BRB No. 20-0035 BLA

RICHARD W. BRASHEAR Claimant-Petitioner v. SCOTTS BRANCH COMPANY (MC MINING, LLC), 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: 11/13/2020 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Richard W. Brashear, Neon, Kentucky.

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] Administrative Law Judge Joseph E. Kane's Decision and Order Denying Benefits (2014-BLA-05197) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on January 10, 2013.[2]

The administrative law judge found Claimant did not establish complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Because the administrative law judge credited Claimant with only ten years of coal mine employment,[3] he also found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2018). The administrative law judge further found the evidence did not establish pneumoconiosis, 20 C.F.R. §718.202(a), and therefore denied benefits.

On appeal, Claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Benefits Review Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the

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[1] Diane Jenkins, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on Claimant's behalf, that the Board review the administrative law judge's decision, but Ms. Jenkins is not representing Claimant on appeal. *See Shelton v. Claude v. Keen Trucking Co*., 19 BLR 1-88 (1995) (Order).

[2] Claimant filed previous claims in 2005 and 2008. Director's Exhibits 1, 2. The district director denied the most recent 2008 claim on November 18, 2008 because Claimant did not establish any element of entitlement. Director's Exhibit 2.

[3] The Benefits Review 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); Hearing Transcript at 18.

[4] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

administrative law judge's Decision and Order 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 (1965).

The Section 411(c)(3) Presumption

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: (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. None of Claimant's x-rays were interpreted as positive for complicated pneumoconiosis, and the record does not contain any biopsy evidence. There are also no CT scans and no medical diagnoses of complicated pneumoconiosis. Consequently, the administrative law judge accurately found no evidence of complicated pneumoconiosis. Decision and Order at 7. We therefore affirm the administrative law judge's finding that Claimant did not invoke the Section 411(c)(4) presumption.

The Section 411(c)(4) Presumption

Claimant has never alleged that he worked for the fifteen or more years of coal mine employment required to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. On his previous 2005 and 2008 applications for benefits, Claimant alleged only ten years of coal mine employment. Director's Exhibit 1 at 152, 2 at 155. On his current application for benefits, Claimant alleged only twelve years of coal mine employment. Director's Exhibit 4 at 1. We therefore affirm the administrative law judge's finding that Claimant did not invoke the Section 411(c)(4) presumption.

Entitlement Under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions, 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Clinical Pneumoconiosis

In addressing the issue of clinical pneumoconiosis,[5] the administrative law judge considered six interpretations of three x-rays taken on February 11, 2013, April 8, 2013 and March 8, 2016. Although Dr. DePonte, a Board-certified radiologist and B reader, interpreted the February 11, 2013 x-ray as positive for pneumoconiosis, Director's Exhibit 13, Dr. Wolfe, an equally qualified physician, interpreted it as negative for the disease. Director's Exhibit 40. Because equally-qualified physicians disagreed, the administrative law judge permissibly found the interpretations of the x-ray "in equipoise." *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984); Decision and Order at 7.

Dr. Miller, a Board-certified radiologist, and Dr. Broudy, a B reader, interpreted the April 8, 2013 x-ray as negative for pneumoconiosis. Director's Exhibit 19; Employer's Exhibit 3. The administrative law judge therefore found this x-ray negative for the disease. Decision and Order at 7.

Although Dr. DePonte interpreted the March 8, 2016 x-ray as positive for pneumoconiosis, Claimant's Exhibit 2, Dr. Adcock, an equally qualified physician, interpreted it as negative for the disease. Employer's Exhibit 1. Because equally qualified physicians disagreed as to whether the x-ray revealed pneumoconiosis, the administrative law judge permissibly found the interpretations of the x-ray "in equipoise." *See Sheckler*7 BLR at 1-131; Decision and Order at 7.

Having found the interpretations of two x-rays "in equipoise" and one negative for pneumoconiosis, the administrative law judge found the x-rays did not establish clinical pneumoconiosis. Decision and Order at 7. Because it is supported by substantial evidence, we affirm the administrative law judge's finding. 20 C.F.R. §718.202(a)(1).

We also affirm the administrative law judge's finding Claimant did not establish the existence of pneumoconiosis based on biopsy evidence, as the record contains no such evidence. 20 C.F.R. §718.202(a)(2); Decision and Order at 7.

The administrative law judge next considered the medical opinions of Drs. Habre, Broudy and Westerfield. While Dr. Habre diagnosed clinical pneumoconiosis, Director's Exhibit 13, Drs. Broudy and Westerfield opined that Claimant does not have the disease.

[5] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Director's Exhibit 17; Employer's Exhibit 3. The administrative law judge accurately noted Dr. Habre's diagnosis of clinical pneumoconiosis was based on Dr. DePonte's positive interpretation of the February 11, 2013 x-ray. Decision and Order at 10; Director's Exhibit 13. He permissibly accorded less weight to Dr. Habre's diagnosis because it conflicted with his finding that the x-ray evidence in this claim does not establish pneumoconiosis.[6] *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514 (6th Cir. 2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 10-11.

The administrative law judge also considered Claimant's treatment records from St. Charles Breathing Center. Claimant underwent a "breathing test" on March 8, 2016 and a "black lung physical" on May 3, 2016. Claimant's Exhibit 8 at 6, 10. In the May 3, 2016 report, Dr. Dean diagnosed coal workers' pneumoconiosis. *Id.* at 9. However, because Dr. Dean did not provide a basis for her diagnosis,[7] the administrative law judge permissibly found her diagnosis not sufficiently reasoned. *See Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 12.

Because no other physician diagnosed clinical pneumoconiosis, we affirm the administrative law judge's finding that the medical opinions did not establish clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4).

Legal Pneumoconiosis

"Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). In order to establish legal pneumoconiosis, Claimant must prove that he had a "chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[6] As discussed *supra*, the administrative law judge permissibly found the interpretations of the February 11, 2013 x-ray relied upon by Dr. Habre to be "in equipoise" regarding the existence of pneumoconiosis.

[7] A treatment plan set forth in the May 3, 2016 report references an x-ray interpreted as positive for pneumoconiosis (1/0) by a B reader. Claimant's Exhibit 8 at 9. The reference is apparently to Dr. DePonte's positive interpretation of Claimant's March 8, 2016 x-ray. (Dr. Deponte's report indicates the March 8, 2016 x-ray was taken at "St. Charles Community Health Clinic." Claimant's Exhibit 2.) As discussed *supra*, the administrative law judge permissibly found the interpretations of the May 8, 2016 x-ray to be "in equipoise."

Dr. Habre diagnosed legal pneumoconiosis in the form of chronic bronchitis due to both coal mine dust exposure and smoking. Director's Exhibit 13 at 35. Dr. Habre explained that Claimant's January 11, 2013 pulmonary function study revealed a moderate obstructive airflow impairment due to both coal mine dust exposure and smoking. *Id.* Dr. Broudy reviewed both Dr. Habre's pulmonary function study results as well as improved non-qualifying results[8] from a subsequent pulmonary function study he conducted on April 9, 2013. Director's Exhibit 20. Dr. Broudy opined the April 9, 2013 pulmonary function study showed only a mild restrictive ventilatory defect due to obesity, with no evidence of obstruction. Director's Exhibits 14, 20. Dr. Broudy therefore opined Claimant does not have legal pneumoconiosis. *Id.* The administrative law judge permissibly accorded Dr. Broudy's opinion the greatest weight because he conducted a more comprehensive review of the medical evidence.[9] *See Rowe*, 710 F.2d at 255; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984). Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical opinions did not establish legal pneumoconiosis. 20 C.F.R. §718.202(a)(4).

Because the medical evidence of record does not establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.[10] *See Trent*, 11 BLR at 1-27.

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[8] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[9] The administrative law judge also found Dr. Broudy's opinion supported by Dr. Westerfield's opinion. Decision and Order at 11. Dr. Westerfield reviewed the results of both the January 11, 2013 and April 9, 2013 pulmonary function studies. Director's Exhibits 16, 18. He opined that Claimant does not have legal pneumoconiosis. *Id.* Dr. Westerfield attributed Claimant's respiratory impairment to cigarette smoking and obesity. *Id.*

[10] In light of our affirmance of the administrative law judge's finding that the evidence did not establish pneumoconiosis, the administrative law judge's error in not addressing whether Claimant established a change in an applicable condition of entitlement was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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