U.S. Department of Labor

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

BRB No. 19-0410 BLA

DAVID SHORT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITE FLAME ENERGY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 09/09/2020
BRICKSTREET MUTUAL INSURANCE	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for Claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for Employer/carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge Peter B. Silvain, Jr.'s Decision and Order Denying Benefits (2017-BLA-05337) 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 miner's claim filed on January 27, 2016.

The administrative law judge credited Claimant with at least twenty-three years of surface coal mine employment and found that, because the evidence did not establish complicated pneumoconiosis, Claimant 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 Claimant further failed to establish total disability, an essential element of entitlement, the administrative law judge found he did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] or establish entitlement to benefits independent of a statutory presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.204(b)(2). He therefore denied benefits.

On appeal, Claimant challenges the administrative law judge's findings that he did not establish complicated pneumoconiosis or total disability. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive 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 evidence, and in accordance with applicable law.[2] 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).

---

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

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Hearing Transcript at 26.

Invocation of the Section 411(c)(3) Presumption

Section 411(c)(3) of the Act 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 an opacity 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 reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. 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); *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).

The administrative law judge considered three interpretations of two x-rays dated April 28, 2016, and August 15, 2016, and found they did not establish complicated pneumoconiosis.[3] 20 C.F.R. §718.304(a); Decision and Order at 17-18; Director's Exhibits 10, 13; Employer's Exhibit 1. He further found the biopsy evidence did not establish the presence of complicated pneumoconiosis.[4] 20 C.F.R. §718.304(b); Decision and Order at 18-19; Director's Exhibit 12. Because these findings are unchallenged, we affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] Dr. Forehand, a B reader, interpreted the April 28, 2016 x-ray as negative for clinical pneumoconiosis. Director's Exhibit 10. Dr. Crum, a dually qualified Board-certified radiologist and B reader, read the August 15, 2016 x-ray as positive for both simple clinical pneumoconiosis and Category "A" complicated pneumoconiosis; Dr. Seaman, also dually qualified, read this x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibit 13; Employer's Exhibit 1. Based on Dr. Forehand's uncontradicted reading, the administrative law judge found the April 28, 2016 x-ray negative for complicated pneumoconiosis. He found the August 15, 2016 x-ray inconclusive as to the presence of complicated pneumoconiosis given the conflicting readings of two equally qualified physicians. Decision and Order at 18.

[4] Claimant underwent a biopsy of a lung mass on October 24, 2012. As the administrative law judge summarized, the pathologist, Dr. Sigdel, concluded the biopsy was negative for malignancy and did not describe the presence or absence of massive lesions. Decision and Order at 7-8, 19; Director's Exhibit 12 at 11.

The administrative law judge next considered six readings of four computed tomography (CT) scans performed on October 10, 2012, January 8, 2013, April 15, 2014, and January 26, 2016. Dr. Akers concluded the October 10, 2012 CT scan indicated a right apical nodule measuring 1.7 centimeters. Director's Exhibit 11 at 17-18. Dr. Tarver, a Board-certified radiologist and B reader, interpreted the same CT scan as reflecting a large right upper lobe nodule measuring 1.4 centimeters consistent with complicated coal workers' pneumoconiosis. Claimant's Exhibit 4. Dr. Siegler indicated the January 8, 2013 CT scan showed a 1.5 centimeter nodule in the right upper lobe, Director's Exhibit 11 at 8, and Dr. Cochrane concluded the April 15, 2014 CT scan documented a 1.5 centimeter benign nodule in the right pulmonary apex. Director's Exhibit 12 at 6-7. Dr. Gibson read the January 26, 2016 CT scan as indicating a 1.6 centimeter right upper lobe nodule which "may represent pneumoconiosis with early progressive massive fibrosis, among multiple other etiologies." Director's Exhibit 12 at 5. Dr. Tarver read the same CT scan as reflecting a large opacity in the right upper lobe measuring 1.5 centimeters consistent with complicated coal workers' pneumoconiosis. Claimant's Exhibit 3. The administrative law judge found each CT scan insufficient to establish complicated pneumoconiosis because none of the interpretations specifically indicated whether the identified abnormality would appear as an opacity of greater than one centimeter if observed on a chest x-ray.[5] 20 C.F.R. §718.304(c); Decision and Order at 19-21; *see Scarbro* 220 F.3d at 255-56; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999).

Claimant argues the administrative law judge applied an incorrect legal standard in finding Drs. Akers, Tarver, Gibson, and Siegler did not "unequivocally conclude" the CT scans would reflect opacities larger than one centimeter if viewed on an x-ray. Claimant's Brief at 6-11. We disagree. The Fourth Circuit, which has jurisdiction over this case, has held an administrative law judge must determine whether a condition diagnosed by biopsy or autopsy under 20 C.F.R. §718.304(b) or by other means under 20 C.F.R. §718.304(c) would show as a greater than one centimeter opacity on x-ray. *See Scarbro*, 220 F.3d at 255-56; *Blankenship*, 177 F.3d at 243. Further, the court has recognized that a diagnosis of "massive lesions", standing alone, can satisfy the "statutory ground" for invocation of the irrebuttable presumption. *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365 (4th Cir. 2006).

[5] The administrative law judge also found Dr. Akers, Dr. Siegler, and Dr. Cochrane did not specify whether the nodule they detected in the right upper lobe on the October 12, 2012, January 8, 2013, and April 15, 2014 CT scans constituted a chronic dust disease of the lung. Decision and Order at 19-20; Director's Exhibits 11 at 8, 17-18 and 12 at 6-7. He further found Dr. Gibson's CT scan reading equivocal because Dr. Gibson stated the lung nodule "may" be progressive massive fibrosis, but could also have "multiple other etiologies." Decision and Order at 20, *quoting* Director's Exhibit 12 at 6.

The administrative law judge accurately found none of the CT scan readers opined as to whether the opacity they viewed on Claimant's CT scans would appear on x-ray as greater than one centimeter. Decision and Order at 19-21. Thus, he applied the correct standard when he found Claimant's CT scans did not establish complicated pneumoconiosis. *See Scarbro*, 220 F.3d at 255-56; Decision and Order at 19-21; Director's Exhibits 11 at 8, 17; 12 at 5, 6, 11; Claimant's Exhibits 3, 4.

Claimant also argues the administrative law judge erred in finding Dr. Tarver did not render an equivalency determination. Claimant's Brief at 10. We disagree. Dr. Tarver reviewed the October 10, 2012 and January 26, 2016 CT scans. After interpreting both CT scans as consistent with complicated coal workers' pneumoconiosis, Dr. Tarver indicated "CT scans are more sensitive than chest x[-]ray[s] for detection and characterization of pulmonary and parenchymal abnormalities," and may be useful in determining the presence of simple and complicated pneumoconiosis. Claimant's Exhibits 3 at 1; 4 at 1. These statements do not constitute an equivalency determination, as they do not address whether the opacity identified on the CT scans would appear as a greater than one centimeter opacity if observed on an x-ray. *See Scarbro*, 220 F.3d at 255-56. Therefore, we affirm the administrative law judge's finding that the CT scan evidence does not support a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 21.

Claimant further asserts the administrative law judge erred in discrediting Dr. Shweihat's opinion that he has complicated pneumoconiosis and erred in crediting Dr. Forehand's contrary opinion. Claimant's Brief at 12-14. Dr. Shweihat treated Claimant from September 2012 to January 2016 and diagnosed him with coal workers' pneumoconiosis and progressive massive fibrosis based on his physical examination of Claimant, the CT scans, and the biopsy. Director's Exhibits 11 at 27; 12 at 12. Dr. Forehand opined Claimant has no evidence of active lung disease and no respiratory impairment based on a "clear" chest x-ray, normal pulmonary function study, and no arterial hypoxemia documented in a blood gas study. Director's Exhibit 10 at 13.

Contrary to Claimant's contention, the administrative law judge permissibly found Dr. Shweihat's opinion not well-reasoned. Dr. Shweihat indicated his diagnoses were based on the CT scan and biopsy evidence as well as his own examination. Director's Exhibit 11 at 28. As the administrative law judge found, the CT scan and biopsy evidence do not identify any massive lesions or other changes that would appear larger than one centimeter in diameter on x-ray, and they are therefore inconsistent with Dr. Shweihat's opinion that this evidence demonstrates the existence of complicated pneumoconiosis. *See Scarbro*, 220 F.3d at 255-56; Decision and Order at 21; Director's Exhibits 11, 12; Claimant's Exhibits 3, 4. The administrative law judge further found Dr. Shweihat did not explain how his treatment notes, which document no respiratory abnormalities on physical

examination and describe Claimant's pulmonary function testing as "showing normal flows," support his conclusion that Claimant has progressive massive fibrosis. Decision and Order at 22; Director's Exhibits 11 at 6, 11-12, 12 at 4, 12-13. Finding no clear basis for Dr. Shweihat's opinion, the administrative law judge permissibly discounted it as not well-documented or reasoned. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); 20 C.F.R. §718.104(d)(5); Decision and Order at 22-23. We therefore affirm the administrative law judge's finding the medical opinions do not support a finding of complicated pneumoconiosis.[6] 20 C.F.R. §718.304(c); Decision and Order at 23-24.

We likewise reject Claimant's assertion that the administrative law judge should have found the evidence as a whole, when weighed together, supports a finding of complicated pneumoconiosis. Claimant's Brief at 11-13. The administrative law judge found the preponderance of the x-rays, biopsy, CT scans, medical opinions, and treatment records[7] does not support a finding of complicated pneumoconiosis. Decision and Order at 24. Claimant's arguments are a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the administrative law judge's determination that the evidence, when weighed as a whole, does not establish complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c); Decision and Order at 24; *see Cox*, 602 F.3d at 285-87. Consequently, we affirm his finding that Claimant did not invoke the irrebuttable presumption.

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful

[6] Because we affirm the administrative law judge's decision to discount Dr. Shweihat's medical opinion, the only opinion containing a diagnosis of complicated pneumoconiosis, we need not address Claimant's allegations of error in the weight the administrative law judge accorded Dr. Forehand's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Claimant's Brief at 13.

[7] We affirm, as unchallenged on appeal, the administrative law judge's finding that the treatment records do not establish the presence of complicated pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 14-15, 24.

work.[8] *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence and determine whether the claimant established total disability by a preponderance of the evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Claimant underwent a pulmonary function study and arterial blood gas study on April 28, 2016, both of which the administrative law judge correctly found were non-qualifying.[9] The administrative law judge further found no evidence of cor pulmonale with right-sided congestive heart failure in the record. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 24, 26; Director's Exhibit 10 at 5, 9.

The administrative law judge next considered the medical opinions of Drs. Forehand and Shweihat. Dr. Forehand concluded Claimant does not have a respiratory impairment. Director's Exhibit 10. Dr. Shweihat indicated Claimant has "disabling symptoms" due to pneumoconiosis and stated there is "undeniable evidence" of pulmonary massive fibrosis and nodules in the lungs. Director's Exhibits 11, 12 at 13. The administrative law judge discounted Dr. Shweihat's opinion and noted Dr. Forehand's opinion would not support a finding of total disability. Decision and Order at 26-27. He therefore found the medical opinions did not establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 27. Weighing the evidence together, he concluded Claimant did not establish total disability and thus did not invoke the Section 411(c)(4) presumption. Decision and Order at 27 -28.

Claimant argues the administrative law judge erred in discrediting Dr. Shweihat's opinion. Claimant's Brief at 14-15. We disagree. The administrative law judge rationally

[8] The administrative law judge found Claimant's usual coal mine work as a blast hole driller required "at least moderate manual labor" because it required Claimant to perform maintenance work and lift parts weighing fifty pounds or more. Decision and Order at 24-25.

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

declined to credit Dr. Shweihat's opinion because it was based on a discredited diagnosis of complicated pneumoconiosis and because he did not identify what "disabling symptoms" he relied upon. *See Compton*, 211 F.3d at 211-12; Decision and Order at 26-27; Director's Exhibit 12 at 12. The administrative law judge further found that, "even assuming the Claimant's complaints of shortness of breath was the basis of Dr. Shweihat's opinion," Dr. Shweihat's opinion would still be unsupported because he did not explain how those symptoms would prevent Claimant from returning to his usual coal mine work. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 27; Director's Exhibit 12.

Contrary to Claimant's contention, the administrative law judge was not required to credit Dr. Shweihat's opinion as a treating physician after finding it undocumented and unreasoned. *See Akers*, 131 F.3d at 441; *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1039, 1097 (4th Cir. 1993); 20 C.F.R. §718.104(d)(5). We thus affirm the administrative law judge's findings that the medical opinions do not establish total disability and that the medical evidence overall does not support such a finding.[10] Decision and Order at 27-28. Because Claimant did not establish total disability, he did not invoke the Section 411(c)(4) presumption or establish a necessary element of entitlement under 20 C.F.R. Part 718. *See* 30 U.S.C. §921(c)(4); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

[10] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant's treatment record evidence does not establish total disability. *See Skrack*, 6 BLR at 1-711; Decision and Order at 27.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge