U.S. Department of Labor

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

BRB No. 19-0451 BLA

FARMER G. BAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KESCOAL, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 09/18/2020
	)	
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 Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Farmer G. Baker, Hazard, Kentucky.

Laura Metcoff Klaus (Greenberg Traurig, LLP) Washington, D.C., for Employer/Carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals Administrative Law Judge Christopher Larson's Decision and Order Denying Benefits (2017-BLA-05334) 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 September 14, 2015.[2]

Because the administrative law judge found the evidence did not establish the existence of complicated pneumoconiosis, he found 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). Because the administrative law judge credited Claimant with only five years of coal mine employment,[3] he also found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, the administrative law judge found Claimant established total disability and therefore established a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309(c). The administrative law judge found Claimant did not establish pneumoconiosis, however, and therefore denied benefits. 20 C.F.R. §718.202(a).

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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 Benefits Review 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 previously filed claims in 2007 and 2009. Director's Exhibits 1, 2. The district director denied Claimant's most recent claim on November 12, 2009, because he failed to establish any element of entitlement. Director's Exhibit 2.

[3] The 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); Director's Exhibit 20 at 13.

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's totally disabling respiratory or pulmonary impairment 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the 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 Board addresses whether substantial evidence supports the decision below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). 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. 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. In determining whether Claimant has invoked the irrebuttable presumption, the administrative law judge must weigh 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).

Dr. Seaman interpreted a computed tomography (CT) scan on November 2, 2015, as negative for complicated pneumoconiosis but showing a mass in the right upper lobe "concerning for primary lung malignancy."[5] Employer's Exhibits 2, 3.

Drs. DePonte and Alexander interpreted an October 19, 2015 x-ray as revealing a Category A large opacity[6] that could represent a malignancy or cancer. Director's Exhibit

[5] Dr. Seaman noted that the mass had increased in size from 3.1 cm on March 6, 2014, to approximately 4 cm on November 2, 2015. Employer's Exhibit 3.

[6] Dr. Alexander also interpreted an earlier x-ray taken on August 17, 2015. Although he did not identify a Category A large opacity on the film, he noted a "15 x 10 mm nodule" required further evaluation. Director's Exhibit 13. Dr. DePonte read this x-ray for quality purposes only, but noted the presence of nodular opacities in the right upper zone. Director's Exhibit 11. She cautioned that a malignancy should be excluded. *Id.* Dr.

11; Claimant's Exhibit 4. Dr. Tarver interpreted it as negative for pneumoconiosis, but revealing a mass in the right upper lung that "could represent lung cancer."[7] Director's Exhibit 14.

Subsequent treatment confirmed the mass the physicians identified was cancer. A right lung biopsy on November 11, 2015 revealed non-small cell carcinoma. Employer's Exhibit 1. Claimant subsequently underwent lung surgery in February of 2016; a malignant tumor was removed from his right upper lung. Hearing Transcript at 19; Employer's Exhibit 8 at 2.

In light of that confirmation, the administrative law judge found the interpretations of the October 19, 2015 x-ray rendered by Drs. Alexander and DePonte did not support a finding of complicated pneumoconiosis. Director's Exhibit 19. We affirm the administrative law judge's finding as supported by substantial evidence. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion.).

Dr. DePonte subsequently interpreted an August 23, 2016 x-ray as positive for simple and complicated pneumoconiosis.[8] Claimant's Exhibit 1. Because this x-ray was taken after Claimant's lung surgery, Dr. DePonte's identification of the large opacity was not based on her misidentification of Claimant's malignant lung tumor. But Dr. DePonte again provided an alternative explanation for the large opacity, noting the large mass could be attributable to scarring.[9] Claimant's Exhibit 1. Dr. Seaman interpreted the x-ray as containing "extensive post-surgical changes" but negative for both simple and complicated pneumoconiosis. Employer's Exhibit 10.

Seaman interpreted this x-ray as negative for pneumoconiosis, but containing a 3 cm mass in the right upper lung that he noted was "concerning for primary lung malignancy." *Id.*

[7] The administrative law judge accurately noted that all of the x-ray and CT scan interpretations were rendered by physicians dually qualified as B-readers and Board-certified radiologists. Decision and Order at 7-8, 19.

[8] Dr. DePonte noted the August 23, 2016 x-ray revealed a "partial right pneumonectomy with considerable scarring and distortion." Claimant's Exhibit 1.

[9] Although Dr. DePonte identified 13 mm and 70 mm masses in the right lung, she noted "scarring vs. large opacities of [coal workers' pneumoconiosis]." Claimant's Exhibit 1.

The administrative law judge did not directly address Dr. DePonte's August 23, 2016 x-ray interpretation when he considered whether the x-ray evidence established complicated pneumoconiosis. He addressed it when considering whether the evidence established simple pneumoconiosis, however, finding it "in equipoise" because two equally qualified physicians interpreted it as positive and negative. Decision and Order at 19. The same reasoning applies to the August 23, 2016 x-ray regarding the existence of complicated pneumoconiosis; it thus is insufficient to support a finding of the disease.

All the other post-surgical x-rays and CT scans are negative for complicated pneumoconiosis.[10] Because it is based on substantial evidence, we affirm the administrative law judge's finding that the evidence did not establish complicated pneumoconiosis.[11] Consequently, we affirm the administrative law judge's finding that Claimant failed to invoke the irrebuttable presumption that he is totally disabled due to pneumoconiosis. 20 C.F.R. §718.304.

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 2007 and 2009 applications for benefits, Claimant alleged only fourteen years and eleven years of coal mine employment, respectively. Director's Exhibit 1 at 40, 2 at 159. On his current application for benefits, Claimant alleged only twelve years of coal mine employment. Director's Exhibit 4 at 1. During a 2016 deposition, Claimant testified that he had eight to nine years of coal mine employment. Director's Exhibit 20. We therefore affirm the administrative law judge's finding that Claimant did not invoke the Section 411(c)(4) presumption.[12]

[10] Drs. Tarver and Seaman interpreted a December 15, 2016 x-ray as negative for complicated pneumoconiosis. Employer's Exhibits 5, 7. Dr. Seaman also interpreted CT scans taken on March 31, 2016 and September 9, 2016 as negative for the disease. Employer's Exhibits 4, 9.

[11] Although Dr. Ajjarapu diagnosed complicated pneumoconiosis, the administrative law judge found her diagnosis was based on Dr. DePonte's discredited positive interpretation of the October 19, 2015 x-ray, thus calling into question the reliability of her opinion. *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 20; Director's Exhibits 11, 16.

[12] Relying on Claimant's Social Security Administration (SSA) earnings record, the administrative law judge credited Claimant with twenty quarters (five years) of coal mine

Part 718 Entitlement

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).

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is necessary to support a finding of pneumoconiosis.

Clinical Pneumoconiosis

A chest x-ray may form the basis for a finding of the existence of clinical pneumoconiosis.[13] 20 C.F.R. §718.202(a)(1). The administrative law judge considered nine interpretations of four x-rays taken on August 17, 2015, October 19, 2015, August 23, 2016, and December 15, 2016. Decision and Order at 7-8. Although Dr. Alexander interpreted the August 17, 2015 x-ray as positive for pneumoconiosis, Director's Exhibit 13, Dr. Seaman interpreted it as negative. Employer's Exhibit 6. Because equally-qualified physicians[14] disagreed, the administrative law judge

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employment. Decision and Order at 5. Although the administrative law judge did not identify the specific quarters of coal mine employment he credited, we note that Claimant's SSA Earnings Statement lists only eleven years during which Claimant had any earnings from coal mine employment: 1976 (Pratt Brothers Coal Company), 1980 to 1981 (River Processing), 1982 (River Processing and Annaco), 1983 to 1987 (Kescoal), 1990 (Jayco Mining), and 2005 (P & P Construction). Director's Exhibit 7.

[13] "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).

[14] As previously noted, all of the physicians who interpreted Claimant's x-rays are dually qualified as B-readers and Board-certified radiologists.

permissibly found it "in equipoise." *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984); Decision and Order at 19.

Although Dr. Tarver interpreted the October 19, 2015 x-ray as negative for pneumoconiosis, Director's Exhibit 14, Drs. DePonte and Alexander interpreted it as positive for the disease. Director's Exhibit 11; Claimant's Exhibit 4. The administrative law judge therefore found this x-ray "slightly positive." Decision and Order at 19.

Although Dr. DePonte interpreted the August 23, 2016 x-ray as positive for pneumoconiosis, Claimant's Exhibit 1, Dr. Seaman interpreted it as negative. Employer's Exhibit 10. Because equally-qualified physicians disagreed, the administrative law judge permissibly found it "in equipoise." *See Sheckler*, 7 at 1-131; Decision and Order at 19.

Drs. Seaman and Tarver interpreted the December 15, 2016 x-ray as negative for pneumoconiosis. Employer's Exhibits 5, 7. The administrative law judge therefore found it negative for pneumoconiosis. Decision and Order at 19.

Having found two x-rays "in equipoise," one positive, and one negative, the administrative law judge found the x-ray evidence as a whole "in equipoise," and insufficient to support a finding of clinical pneumoconiosis. Decision and Order at 19. Because it is supported by substantial evidence, we affirm the administrative law judge's finding. 20 C.F.R. §718.202(a)(1).

The administrative law judge accurately noted that the only biopsy report of record did not contain a diagnosis of pneumoconiosis. Decision and Order at 6, 19; Employer's Exhibit 1. We therefore affirm his finding that the biopsy evidence did not establish pneumoconiosis. 20 C.F.R. §718.202(a)(2).

Dr. Ajjarapu diagnosed complicated pneumoconiosis. However, as previously noted, *see* p. 5 n.11, the administrative law judge found that her diagnosis was based on Dr. DePonte's discredited positive interpretation of the October 19, 2015 x-ray, thus calling into question the reliability of her opinion. *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 20; Director's Exhibits 11, 16.

The administrative law judge also considered Claimant's CT scan interpretations and treatment notes. He found the CT scan interpretations supported the absence of clinical pneumoconiosis.[15] Decision and Order at 22. Although the administrative law judge noted

[15] The record does not contain any CT scan interpretations supportive of a finding of clinical pneumoconiosis. Dr. Seaman interpreted CT scans taken on March 6, 2014,

the treatment notes contain diagnoses of clinical pneumoconiosis, he found the physicians did not provide any basis for their diagnoses, and therefore permissibly found them not sufficiently reasoned. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 22; Claimant's Exhibits 7-9.

Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the evidence did not establish clinical pneumoconiosis. 20 C.F.R. §718.202(a).

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). The definition includes "any 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).

The administrative law judge noted that Dr. Ajjarapu diagnosed legal pneumoconiosis in the form of chronic bronchitis due to coal mine dust exposure and cigarette smoking. Decision and Order at 20; Director's Exhibit 11 at 17. But he permissibly discredited her opinion because he found she based her diagnosis on an inaccurate smoking history[16] and did not discuss the extent of Claimant's coal mine dust exposure.[17] *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988) (administrative law judge may reject medical opinions that rely on an inaccurate smoking history); *Creech v. Benefits Review Board*, 841 F.2d 706, 709 (6th Cir. 1988) (administrative law judge may reject medical opinions that rely on an inaccurate work history); Decision and Order at 21. Because there is no other evidence supportive of a finding of legal pneumoconiosis, we

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November 2, 2015, March 31, 2016, and September 9, 2016 as negative for the disease. Employer's Exhibits 2-4, 9.

[16] Claimant testified that he began smoking at age 22 or 23 (1972 or 1973) before quitting in 2016 when he had surgery for lung cancer. Hearing Transcript at 20-21. He testified he smoked 1½ packs of cigarettes a day. *Id.* Based on this testimony, the administrative law judge found Claimant had a sixty pack-year smoking history. Decision and Order at 4. In contrast, the administrative law judge noted that Dr. Ajjarapu considered a thirteen pack-year smoking history in diagnosing legal pneumoconiosis. *Id.*; Director's Exhibit 11 at 24.

[17] Dr. Ajjarapu noted that Claimant "only documented [three] years of employment, but he says that he worked at other mines." Director's Exhibit 11 at 18.

affirm the administrative law judge's finding the medical opinions did not establish legal pneumoconiosis. 20 C.F.R. §718.202(a)(4).

Because Claimant did not establish pneumoconiosis, 20 C.F.R. §718.202(a), we affirm the administrative law judge's determination that Claimant did establish entitlement under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27.

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

MELISSA LIN JONES
Administrative Appeals Judge