U.S. Department of Labor

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

BRB No. 19-0454 BLA

BILLY R. SALYER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONCEPT MINING, INCORPORATED	)	DATE ISSUED: 09/28/2020
	)	
and	)	
	)	
NEW HAMPSHIRE INSURANCE/AIG	)	
	)	
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 Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

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

Mark J. Grigoraci (Robinson & McElwee PLLC), Charleston, West Virginia, for Employer/Carrier.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Francine L. Applewhite's Decision and Order Granting Benefits (2017-BLA-05354) 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 December 15, 2014.

The administrative law judge accepted the parties' stipulations that Claimant worked 41.05 years in qualifying coal mine employment and has a totally disabling respiratory or pulmonary impairment. She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). She further determined Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, filed a limited response, arguing if the case is remanded, the administrative law judge should find Employer did not rebut the presumption that Claimant has clinical pneumoconiosis or is totally disabled due to clinical pneumoconiosis.[2]

The Benefit 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] Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged, the administrative law judge's determinations that Claimant established 41.05 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment and therefore invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-5; Hearing Transcript at 35-36.

evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis, or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii).

Clinical Pneumoconiosis

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). Employer argues the administrative law judge erred in finding it did not rebut the existence of the disease because she failed to consider Dr. Raj's opinion and because she did not give controlling weight to the x-ray interpretations of Drs. Meyer and Adcock despite their alleged "superior credentials." Employer's Brief at 6-7. Neither argument has merit.

Since Dr. Raj did not opine that Claimant does not suffer from clinical pneumoconiosis, his opinion cannot aid Employer in meeting its burden to disprove the disease. Dr. Raj testified "I am afraid that I can not [*sic*] determine if this patient has a diagnosis of clinical pneumoconiosis as this patient [*sic*] chest x ray results were reported positive for pneumoconiosis on occasion by some B reader[s] and negative for pneumoconiosis by other B readers." Claimant's Exhibit 3. Even if fully credited, his opinion does not support Employer's contention that Claimant does not have clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Any error in failing to consider it thus is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant's coal mine employment occurred in Virginia and West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

Nor has Employer demonstrated that Drs. Adcock and Meyer possess credentials requiring the administrative law judge to give their x-ray readings controlling weight. "A chest X-ray . . . may form the basis for a finding of the existence of pneumoconiosis" and, in cases "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting [them]." 20 C.F.R. §718.202(a)(1). Further, "[t]he adjudicator should consider any relevant factor in assessing a physician's credibility, and each party may prove or refute the relevance of that factor." 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000), *citing Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993).

The administrative law judge quantitatively and qualitatively evaluated each x-ray reading of record pursuant to the regulations. She noted Drs. Crum and Miller, dually-qualified as B readers and Board-certified radiologists, interpreted the January 16, 2015 x-ray as positive for clinical pneumoconiosis and Dr. Adcock, also dually-qualified, interpreted it as negative.[4] Director's Exhibit 18; Claimant's Exhibit 1; Employer's Exhibit 3. Dr. Crum interpreted the May 8, 2017 x-ray as positive; Dr. Meyer, also dually-qualified, interpreted it as negative. Claimant's Exhibit 2 and Employer's Exhibit 1. Dr. Dahhan, only a B reader, interpreted the June 19, 2018 x-ray as negative. Employer's Exhibit 2.

Giving more weight to the interpretations of dually-qualified readers, the administrative law judge found the January 16, 2015 x-ray positive for clinical pneumoconiosis and the interpretations of the May 8, 2017 x-ray in equipoise. Decision and Order at 6-7; Director's Exhibit 18; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 3. She further found the June 19, 2018 x-ray negative based on Dr. Dahhan's uncontradicted interpretation, but gave it less weight because he is not dually-qualified. Decision and Order at 7; Employer's Exhibit 2. She therefore found the overall x-ray evidence insufficient to rebut the presumption of clinical pneumoconiosis. Decision and Order at 7.

Without any elaboration or comparison to the qualifications of the other readers, Employer baldly asserts that the readings of Dr. Meyer and Dr. Adcock should have been given controlling weight due to Dr. Meyers' "affiliation" with the University of Wisconsin Hospital and his "numerous lectures and education on diagnostic radiology," and Dr. Adcock's "affiliations" with the Colorado Permanente Medical Group and the University of Colorado Health Sciences Center, as well as his "substantial experience with the

[4] Dr. Ranavaya interpreted the January 16, 2015 x-ray for quality purposes only. Director's Exhibit 18.

diagnosis of pneumoconiosis via radiology." Employer's Brief at 7; Employer's Post-Hearing Brief at 7.

We disagree. The administrative law judge has discretion to determine the weight to accord the physicians' credentials and is required only to provide "some reasoned explanation" for her findings. *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); *see Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Worhach*, 17 BLR at 1-108. The administrative law judge rationally found the x-ray readings of the dually-qualified radiologists, whom she deemed the most qualified to render an interpretation, are insufficient to rebut the presumption of the existence of clinical pneumoconiosis. Employer has not attempted to explain, either before the administrative law judge or on appeal, why Drs. Meyer and Adcock are more qualified than the other dually-qualified readers beyond its bare assertions.[5] Nor has Employer attempted to explain why any other unconsidered radiological qualifications they possess entitle their readings controlling weight. Thus, we affirm the administrative law judge's finding Employer did not rebut the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B).

Other than arguing that Claimant does not suffer from clinical pneumoconiosis, Employer has not argued at any point in this litigation that the disease plays no part in his disability. Employer's Brief at 5-12; Employer's Post-Hearing Brief at 6-10. We therefore further affirm the administrative law judge's finding Employer failed to rebut the Section 411(c)(4) presumption under 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 10-11. Even if Employer had so argued, it would have faced a particularly high burden. Where a physician erroneously fails to diagnose pneumoconiosis, his opinion as to causation "may not be credited at all" absent "specific and persuasive reasons" for concluding it is independent of the mistaken belief that the miner did not have the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015), *citing Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995). Even then, the opinion can only be assigned, at most, "little weight."[6] *See Epling*, 783 F.3d at 505.

[5] Any such superiority is not readily apparent. For example, we note -- among other things -- Dr. Crum is a practicing radiologist, on the faculty of two osteopathic schools of medicine, and a lecturer at an academy for physician's assistants; Dr. Miller is the Chief of Radiology at Bluefield Regional Medical Center. Director's Exhibit 18; Claimant's Exhibits 1, 2.

[6] Because we have affirmed Employer did not rebut the Section 411(c)(4) presumption concerning clinical pneumoconiosis, we need not address Employer's contentions concerning the administrative law judge's findings that it also did not rebut

legal pneumoconiosis or total disability due to legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge