U.S. Department of Labor

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

BRB No. 19-0482 BLA

RAYMOND R. COLLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KISER BROTHERS COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 09/23/2020
and	)	
	)	
EMPLOYERS INSURANCE OF WAUSAU c/o LIBERTY MUTUAL INSURANCE GROUP	)	
	)	
	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

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

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for Employer.
William M. Bush (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 JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Steven D. Bell's Decision and Order Awarding Benefits (2018-BLA-05852) 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 30, 2016.[1]

The administrative law judge noted Employer stipulated Claimant had fifteen years of underground coal mine employment. He next found Claimant established complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, establishing a change in the applicable condition of entitlement.[2] 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.304, 725.309. The

[1] Claimant filed a prior claim on September 23, 1992. Director's Exhibit 1. The district director denied the claim on March 22, 1993 because the evidence did not establish a totally disabling respiratory or pulmonary impairment. *Id.* After Claimant indicated that he wanted to withdraw his claim, the district director informed him that a withdrawal of the claim was not in his best interest. *Id.* The district director further informed Claimant that if he did not file an appeal within sixty days his claim would be closed. *Id.* Claimant did not file an appeal within the sixty days. *Id.* Although Claimant filed a second claim, he subsequently withdrew it. Director's Exhibit 2. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] When a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). To obtain review of the merits of his claim, Claimant had to establish total disability.

administrative law judge also found Claimant's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203.

On appeal, Employer argues the Section 411(c)(4) presumption is unconstitutional. Employer also contends the administrative law judge erred in finding the evidence established complicated pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response noting the Board should decline to entertain Employer's constitutional objection.[3]

The 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.[4] 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).

Constitutional Challenge

Employer initially objects to the application of the Section 411(c)(4) presumption, contending that Section 1556 of the Patient Protection and Affordable Care Act, which revived this provision, "violates Article II of the United States Constitution." *See* Pub. L. No. 111-148, §1556 (2010); Employer's Brief at 2. As noted by the Director, the administrative law judge did not award benefits based on the Section 411(c)(4) presumption. Director's Brief at 1 n.1. Employer's argument on appeal thus is moot.

The Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, establish an irrebuttable presumption that a claimant 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

[3] Because it is unchallenged on appeal, we affirm the administrative law judge's finding of fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] We 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 10.

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. The administrative law judge must weigh together the evidence at subsections (a), (b), and (c) before determining whether a claimant has invoked the irrebuttable presumption. *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).

Section 718.304(a)

The administrative law judge initially considered eight interpretations of five x-rays taken on November 4, 2011, January 26, 2017, September 14, 2017, October 31, 2018 and November 6, 2018. He accurately noted that all of the x-ray interpretations were rendered by physicians dually qualified as B-readers and Board-certified radiologists. Decision and Order at 6.

Dr. Meyer interpreted the November 4, 2011 x-ray as negative for complicated pneumoconiosis. Employer's Exhibit 2. Because there are no other interpretations, the administrative law judge found it negative. Decision and Order at 16. But he also found it did not reflect Claimant's current condition because it was taken eight years ago. *Id.*

Although Dr. DePonte interpreted the January 26, 2017 x-ray as positive for complicated pneumoconiosis, Director's Exhibit 14, Dr. Meyer interpreted it as negative. Employer's Exhibit 3. Because of their equal qualifications, the administrative law judge found it "inconclusive." Decision and Order at 16.

Dr. Kendall interpreted the September 14, 2017 x-ray as negative for complicated pneumoconiosis. Director's Exhibit 24. The administrative law judge noted, however, that his determination the x-ray was also negative for simple pneumoconiosis contradicted the other x-ray interpretations of record. Decision and Order at 16. He therefore found it "aberrant" and not entitled to any weight. *Id.*

Although Dr. Crum interpreted the October 31, 2018 and November 6, 2018 x-rays as positive for complicated pneumoconiosis, Claimant's Exhibits 1, 2, Dr. Meyer interpreted them as negative. Employer's Exhibits 5, 6. Because of their equal qualifications, the administrative law judge found the x-rays "inconclusive." Decision and Order at 16-17.

Based on all of the recent x-ray interpretations, the administrative law judge found the x-ray evidence inconclusive. Decision and Order at 17. We affirm this finding as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Section 718.304(c)

The administrative law judge also considered the medical opinions of Drs. Green, Nader, Raj, and Rosenberg.[5] While Drs. Green, Nader, and Raj diagnosed complicated pneumoconiosis, Director's Exhibits 14, 20; Claimant's Exhibits 1-2, Dr. Rosenberg opined Claimant does not have the disease. Employer's Exhibits 1, 4.

The administrative law judge found the diagnoses of complicated pneumoconiosis reasoned and documented because they were based on positive x-ray interpretations and further found they outweighed Dr. Rosenberg's contrary opinion. Decision and Order at 18.

In his initial report, Dr. Rosenberg relied on Dr. Kendall's negative interpretation of Claimant's September 14, 2017 x-ray and found Claimant did not have simple pneumoconiosis. Employer's Exhibit 1. Dr. Rosenberg subsequently reviewed the medical reports of Drs. Nader and Raj, including Dr. Crum's positive interpretations of Claimant's October 31, 2018 and November 6, 2018 x-rays. Employer's Exhibit 4. Although Dr. Rosenberg noted that Dr. Crum diagnosed complicated pneumoconiosis, he also stated Dr. Crum's findings had not been verified. *Id.*

The administrative law judge reasoned Dr. Rosenberg's "dismissal of clinical pneumoconiosis as a diagnosis appear[ed] to be based entirely on his finding that Dr. Crum's abnormal x-ray interpretations had not been verified." Decision and Order at 18. The administrative law judge thus found it "equivocal," noting Drs. DePonte and Meyer diagnosed simple and/or complicated pneumoconiosis. *Id.* He therefore found the opinions of Drs. Green, Nader, and Raj more persuasive than Dr. Rosenberg's contrary opinion, and established complicated pneumoconiosis. 20 C.F.R. §718.304(a).

Employer contends the administrative law judge erred. Employer's Brief at 3-4. We agree. As Employer accurately notes, the administrative law judge found the opinions diagnosing complicated pneumoconiosis were reasoned solely because they were based on x-ray interpretations but did not address that he simultaneously found the same x-rays to be "inconclusive."[6] We therefore vacate his finding that the opinions of Drs. Green, Nader,

[5] The administrative law judge found the record contains no biopsy evidence. 20 C.F.R. §718.304(b); Decision and Order at 15.

[6] Dr. Green based his diagnosis of complicated pneumoconiosis on Dr. DePonte's positive interpretation of the January 26, 2017 x-ray. Director's Exhibits 14, 20. Dr. Nader relied on Dr. Crum's positive interpretation of the October 31, 2018 x-ray and Dr. Raj relied on Dr. Crum's positive interpretation of the November 6, 2018 x-ray. Claimant's

and Raj were reasoned and sufficient to establish complicated pneumoconiosis. 20 C.F.R. §718.304(c). On remand, the administrative law judge must address whether their diagnoses are reasoned or whether they merely restate x-ray interpretations. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989) (mere restatement of an x-ray reading is not a reasoned medical opinion).

In light of the above, we vacate the administrative law judge's finding the new evidence established complicated pneumoconiosis and his finding of a change in the applicable condition of entitlement. 20 C.F.R. §§718.304; 725.309. On remand, the administrative law judge must reconsider whether the medical opinions establish complicated pneumoconiosis. 20 C.F.R. §718.304(c). If he finds the medical opinions establish complicated pneumoconiosis, he must then weigh them together with the x-rays to determine whether Claimant has established complicated pneumoconiosis. 20 C.F.R. §§718.304; *Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33 (1991).

If the administrative law judge finds the evidence does not establish complicated pneumoconiosis, he must address whether Claimant has established a totally disabling respiratory impairment. 20 C.F.R. §718.204(b). If so, Claimant will be entitled to invocation of the Section 411(c)(4) presumption.[7] 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. The administrative law judge must then determine whether Employer rebutted the presumption. If Claimant does not establish total disability, a requisite element of entitlement, the administrative law judge must deny benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Exhibits 1, 2. The administrative law judge found all three of these x-rays inconclusive as to the existence of pneumoconiosis. Decision and Order at 16-17.

[7] 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. The administrative law judge noted that Employer stipulated to fifteen years of underground coal mine employment. Decision and Order at 19.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge