U.S. Department of Labor

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

BRB No. 18-0606 BLA

LARRY H. McCAULEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DLR MINING, INCORPORATED	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 11/12/2019
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-06038) of Administrative Law Judge Drew A. Swank pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on June 26, 2015.[1]

The administrative law judge determined employer is the responsible operator and accepted the parties' stipulation that claimant has thirty years of underground coal mine employment and clinical pneumoconiosis. He also found claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. Therefore, he found claimant invoked the irrebuttable presumption he is totally disabled due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. The administrative law judge further found claimant established his complicated pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding it is the responsible operator and in finding claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis. Claimant responds in support of the administrative law judge's findings. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the award of benefits, but agrees with employer that the case must be remanded for the administrative law judge to explain his responsible operator finding.[2]

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[1] This is claimant's third claim for benefits. His most recent prior claim, filed on November 28, 2000, was denied by the district director on January 17, 2001 for failure to establish any element of entitlement. Director's Exhibit 2. Claimant did not take any further action before filing his current claim. Director's Exhibit 4.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding claimant had thirty years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 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, 1-2 (1986) (en banc).

Complicated Pneumoconiosis

Section 411(c)(3) of the Act and its implementing regulation, 20 C.F.R. §718.304, establish an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering or suffered 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;[4] (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 yield the result in (a) or (b). Any diagnosis by other means must be made in accordance with acceptable medical procedures. 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, 287 (4th Cir. 2010); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306,

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 2, 3, 5.

[4] The opacities must be classified as Category A, B, or C in accordance with the classification system established in Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses. 20 C.F.R. §718.102(d); *see also* 20 C.F.R. §718.202 (standards for x-rays and effect of interpretations by physicians).

1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991) (en banc); *Truitt v. North Am. Coal Corp*., 2 BLR 1-99 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp*., 626 F.2d 1137 (3d Cir. 1980).

The administrative law judge found the biopsy and medical opinion evidence support a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(b), (c), while the x-ray evidence does not, 20 C.F.R. §718.304(a). Decision and Order at 9-10. Specifically, he found Drs. Perper and Cohen credibly diagnosed complicated pneumoconiosis based on a lung biopsy taken on April 24, 2014 of a right upper lobe nodule that was resected from claimant's lung.[5] Decision and Order at 9-13; Director's Exhibits 22, 24. Weighing all relevant evidence together, the administrative law judge found claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. Decision and Order at 13.

Employer does not contest that the biopsy and medical opinion evidence establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(b), (c). Decision and Order at 10-11. We therefore affirm that finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Rather, employer argues that because claimant's lesion of complicated pneumoconiosis was surgically removed before he filed his current claim, he

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[5] On April 24, 2014, Dr. Abbas performed a wedge resection of claimant's right upper lobe. Dr. Chung, a pathologist, examined the tissue and diagnosed an "anthracosilicotic nodule" measuring 1.4 x 1.3 x 0.8 centimeters. Director's Exhibit 23. The administrative law judge found Dr. Chung's opinion supports a finding that claimant has or had complicated pneumoconiosis. Decision and Order at 10-11. Dr. Perper reviewed the pathology evidence, including the tissue slides, and diagnosed complicated pneumoconiosis. He stated "the lesions were larger than seem [sic] on the lung slides, because some of the nodules were only partially excised." Director's Exhibit 22 at 19. Dr. Cohen reviewed the medical record, including Dr. Chung's report, and similarly diagnosed complicated pneumoconiosis. Director's Exhibit 24. Dr. Swedarsky also reviewed the medical record, including Dr. Chung's report, and agreed the resected lesion was complicated pneumoconiosis. Director's Exhibit 25 at 7. He added, however, that because there is no post-surgery objective evidence of residual or active complicated pneumoconiosis, claimant does not still have the disease. Director's Exhibit 25 at 10. The administrative law judge credited the opinions of Drs. Perper and Cohen as well-reasoned and documented, and discredited Dr. Swedarsky's opinion as unpersuasive. Decision and Order at 13. He also considered the opinion of Dr. Ranavaya and the medical treatment records, neither of which addresses the existence or absence of complicated pneumoconiosis. *Id*. at 13.

is precluded from invoking the irrebuttable presumption of total disability due to pneumoconiosis. Employer's Brief at 15-16. The Director responds, asserting surgical excision of claimant's complicated pneumoconiosis does not defeat his entitlement. Director's Brief at 3. We agree with the Director.

The statute and the regulations expressly provide that the irrebuttable presumption may be invoked by biopsy evidence. 30 U.S.C. §921(c)(3)(B); 20 C.F.R. §718.304(b). This provision would be rendered useless if there had to be other qualifying evidence that complicated pneumoconiosis existed after the biopsy excised the lesion of complicated pneumoconiosis.[6] Moreover, the regulation applicable to biopsy evidence states that a "negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis," but "where positive findings are obtained on biopsy, the results will constitute evidence of the presence of pneumoconiosis." 20 C.F.R. §718.106. Further, once the irrebuttable presumption is invoked, it is not necessary to otherwise establish entitlement; the question is solely whether the requirements for the irrebuttable presumption have been satisfied. *See Swanson v. R.G. Johnson Co.*, 15 BLR 1-49, 1-51 (1991) (liability for benefits is established as of the date of determination of complicated pneumoconiosis); *Williams v. Director, OWCP*, 13 BLR 1-18, 1-30 (1989) (where a claimant is found entitled to the irrebuttable presumption, benefits commence as of first credible evidence of complicated pneumoconiosis); *Justus v. J & L Coal Co.*, 3 BLR 1-185, 1-189 (1981) ("[A] miner who establishes the existence of complicated pneumoconiosis is irrebuttably presumed totally disabled due to pneumoconiosis as of the month complicated pneumoconiosis is established, even though the [miner] may still be working.").

As the administrative law judge correctly determined, neither the Act nor the regulations require a claimant to also prove that residual complicated pneumoconiosis remains after the biopsy, and employer cited no authority imposing that requirement.[7]

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[6] Of course, evidence relating to the *credibility* of a diagnosis by biopsy is a different matter. Here, the administrative law judge found the biopsy evidence and the medical opinions interpreting it credibly established the 1.4 centimeter lesion was complicated pneumoconiosis. Moreover, as set forth above, this finding is unchallenged.

[7] Employer states that "it is not alleging claimant's pneumoconiosis is cured." Employer's Brief at 15. Indeed, upon reviewing the histopathological slides from claimant's lung wedge biopsy, Dr. Perper noted that "some of the nodules were only partially excised," Director's Exhibit 22 at 19, and in his operative report, Dr. Abbas observed that "the whole lung was completely black in color and was thickened." Director's Exhibit 23.

Decision and Order at 25. Thus, we reject employer's contention to the contrary and affirm the administrative law judge's findings that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) and is entitled to benefits commencing April 1, 2014.[8] 20 C.F.R. §725.503(b); *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-184 (1989); Decision and Order at 13. We also affirm his unchallenged finding that claimant's complicated pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14-15.

Furthermore, we affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and the award of benefits. Decision and Order at 13.

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner" for at least one year.[9] 20 C.F.R. §§725.494(c), 725.495(a)(1). Employer argues the administrative law judge erred in finding it is the responsible operator without addressing its argument that Samuel E. Beni more recently employed claimant for at least one year.[10] Employer's Brief at 6-15. We agree.

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[8] In view of the disposition of this case on the merits, we need not address the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See* 20 C.F.R. §718.305; Decision and Order at 7.

[9] In addition, the evidence must establish that the miner's disability or death arose out of employment with that operator; the entity was an operator after June 30, 1973; the miner's employment included at least one working day after December 31, 1969; and the operator is financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

[10] The Director, Office of Workers' Compensation Programs (the Director), concedes that employer contested its liability before the district director. Director's Brief at 1. Before the administrative law judge, employer filed an April 9, 2018 motion to be dismissed as the responsible operator, arguing another operator employed claimant more recently. On May 11, 2018, the administrative law judge denied employer's motion because it was opposed by the Director, without addressing the substance of employer's

After summarizing the regulations, the administrative law judge summarily concluded that, "[b]ased on the totality of the evidence, . . . employer is the properly designated responsible operator." Decision and Order at 5. Although he cited to several record exhibits, he did not explain his determination that employer was the properly designated responsible operator, or otherwise address employer's contention. Thus, as employer and the Director assert, the administrative law judge's analysis does not comport with the Administrative Procedure Act, which provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore vacate his finding that employer is the responsible operator, and remand the case for further consideration. On remand, the administrative law judge must consider whether employer met its burden to prove that Samuel E. Beni more recently employed claimant for one year and possesses sufficient assets to secure the payment of benefits. *See* 20 C.F.R. §725.495(c)(2).

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argument. *See* Administrative Law Judge's May 11, 2018 Order, *referencing* the Director's May 7, 2018 Motion for Partial Summary Decision. Employer again contested its liability at the hearing, Hearing Tr. at 6, and reiterated its arguments in its post-hearing brief.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge