U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0349 BLA

RICKEY W. VANDALL Claimant-Respondent v. MEADOW RIVER COAL COMPANY and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/28/2016 DECISION and ORDER

Appeal of the Decision and Order of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2011-BLA-5692) of

Administrative Law Judge Theresa C. Timlin awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on April 10, 2010.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with twenty-six and one-quarter years of qualifying coal mine employment,[3] and found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption set forth at Section 411(c)(4).[4] The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[5]

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[1] Claimant filed a previous claim on February 23, 2006. Director's Exhibit 1. An administrative law judge denied the claim on December 17, 2008, because the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 4; Hearing Transcript at 21. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Because claimant invoked the Section 411(c)(4) presumption, the administrative law judge found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption, and that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed 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).

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[6] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's 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)(ii). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 51, 53.

Employer argues that the administrative law judge erred in finding that it failed to disprove the existence of clinical pneumoconiosis. In addressing whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge initially considered the x-ray evidence. The administrative law judge considered interpretations of three new x-rays taken on August 23, 2010, May 23, 2011, and March 23, 2012. In her consideration of the x-ray evidence, the administrative law judge properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 22.

Drs. Ahmed and Alexander, each dually-qualified as a B reader and Board-certified radiologist, interpreted the August 23, 2010 x-ray as positive for pneumoconiosis. Claimant's Exhibits 2, 5. Drs. Shipley and Wiot, also dually-qualified physicians, interpreted the x-ray as negative for the disease.[7] Director's Exhibit 11;

[6] "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). "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).

[7] Dr. Navani, a B reader and Board-certified radiologist, reviewed the August 23, 2010 x-ray for quality only. Director's Exhibit 9.

Employer's Exhibit 7. In addition, Drs. Rasmussen and Gaziano, both B readers, interpreted the August 23, 2010 x-ray as positive for pneumoconiosis. Director's Exhibit 9; Claimant's Exhibit 8. The administrative law judge found that the positive x-ray interpretations outweighed the negative x-ray interpretations, and therefore found that the August 23, 2010 x-ray is positive for pneumoconiosis. Decision and Order at 23.

Drs. Ahmed and Alexander also interpreted the May 23, 2011 x-ray as positive for pneumoconiosis. Claimant's Exhibits 1, 4. Dr. Meyer, also a dually-qualified physician, and Dr. Zaldivar, a B reader, interpreted the x-ray as negative for the disease. Employer's Exhibits 1, 2. Because a majority of the best-qualified physicians rendered positive interpretations of the May 23, 2011 x-ray, the administrative law judge found that this x-ray is positive for pneumoconiosis.[8] Decision and Order at 22-23.

Finally, Dr. Castle, a B reader, interpreted the March 21, 2012 x-ray as negative for pneumoconiosis. Employer's Exhibit 4. There are no other interpretations of this x-ray in the record. The administrative law judge, therefore, found that this x-ray is negative for pneumoconiosis. Decision and Order at 22.

In weighing the three x-rays together, the administrative law judge found that:

> All three chest X-rays were taken relatively close in time (2010, 2011, and 2012). The positive interpretations of the 2010 and 2011 X-rays outweigh the one negative interpretation of the 2012 chest X-ray. I find that [e]mployer has not rebutted the presumption that [c]laimant has clinical pneumoconiosis through X-ray evidence.

Decision and Order at 23.

Employer initially contends that the administrative law judge erred in not considering whether the academic credentials of Drs. Wiot, Meyer, and Shipley entitled their x-ray interpretations to additional weight. Employer's Brief at 9. We disagree. While an administrative law judge is permitted to assign greater weight to the x-ray interpretation of one physician over another, based on their academic appointments, she is not required to do so. *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003).

[8] The administrative law judge also accorded less weight to Dr. Meyer's negative interpretation of the May 23, 2011 x-ray because the doctor commented that the emphysema seen on the x-ray was "characteristic of alpha one antitrypsin deficiency." Decision and Order at 23. The administrative law judge noted that no other physician attributed the irregularities on the x-ray to alpha one antitrypsin deficiency, and noted that there is no evidence in the record that claimant suffers from the condition. *Id.*

Here, employer fails to explain what aspects of their respective academic backgrounds entitle the x-ray interpretations of Drs. Wiot, Meyer, and Shipley to additional weight.[9] Moreover, even had employer pointed to particular academic appointments held by its physicians, fairness would dictate that the academic appointments of claimant's physicians be similarly reviewed.[10] *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

Employer next argues that, in finding the August 23, 2010 x-ray positive for pneumoconiosis, the administrative law judge improperly "engaged in a simple game of head-counting." Employer's Brief at 10. Because the administrative law judge stated that she gave the greatest weight to the views of dually qualified readers, there may be some merit to employer's position. However, even if the interpretations of the August 23, 2010 x-ray were weighed most favorably to employer (i.e., the positive interpretations of the B readers were excluded), the x-ray interpretations would be, at best, in equipoise, and consequently would not assist employer in establishing that claimant does not have clinical pneumoconiosis.[11] We therefore find that any error by the administrative law judge as to the weighing of this x-ray was harmless.

We also reject employer's contention that the administrative law judge erred in finding the May 23, 2011 x-ray to be positive for pneumoconiosis. Because a majority of the best qualified physicians interpreted the May 23, 2011 x-ray as positive for pneumoconiosis, the administrative law judge permissibly found that this x-ray is positive. *See White*, 23 BLR at 1-4-5; Decision and Order at 22-23.

Employer next argues that the administrative law judge "offered no . . . explanation for dismissing the most recent [x-ray] finding of no clinical

[9] Although employer asserts that Dr. Wiot is qualified as a C reader, a review of the record does not reveal any evidence of that status. Employer's Brief at 9.

[10] Both positive and negative interpretations were rendered by physicians who hold academic appointments. For example, while the record reveals that Dr. Wiot was a professor of Radiology at the University of Cincinnati, Director's Exhibit 1, the record also reveals that Dr. Alexander was an assistant professor of Radiology and Nuclear Medicine at the University of Maryland Medical System. Claimant's Exhibit 6.

[11] Moreover, taking the readings of the three x-rays together, without regard for the two B readers' opinions of the August 23 x-ray, more dually qualified readers rated the x-rays as positive for pneumoconiosis than the contrary, as the administrative law judge ultimately permissibly found.

pneumoconiosis." Employer's Brief at 12. We disagree. The administrative law judge found that the three x-rays taken in 2010, 2011, and 2012 are relatively close in time. Decision and Order at 23. Moreover, the administrative law judge noted that, while the two positive x-rays taken in 2010 and 2011 were interpreted by dually-qualified physicians, the negative 2012 x-ray was interpreted by a lesser qualified B reader. *Id.* The administrative law judge, therefore, permissibly found that the x-ray evidence was insufficient to carry employer's burden to establish that claimant does not have clinical pneumoconiosis. Decision and Order at 23. Because this finding is supported by substantial evidence,[12] it is affirmed.

Employer next argues that the administrative law judge erred in her consideration of the CT scan evidence. The record contains three CT scans taken on May 1, 2006, September 6, 2006, and October 13, 2010. Dr. Meyer, a B reader and Board-certified radiologist, interpreted the May 1, 2006 and September 6, 2006 CT scans as revealing emphysema and "rare centrilobular ground-glass nodules." Director's Exhibit 1. Dr. Ratcliff, whose radiological qualifications are not found in the record, interpreted the October 13, 2010 CT scan as revealing "4 mm pulmonary nodules involving the right lower and left upper lobes." Employer's Exhibit 3.

Neither Dr. Meyer nor Dr. Ratcliff specifically stated that the CT scan did not show pneumoconiosis. Dr. Ratcliff did not attribute the nodules he identified to any cause, and Dr. Meyer acknowledged that minimal coal workers' pneumoconiosis may have the appearance he noted. Consequently, the administrative law judge permissibly found that the CT scan evidence does not in and of itself rebut the existence of clinical pneumoconiosis. Because it is based upon substantial evidence, we affirm that finding.

Employer next contends that the administrative law judge erred in her consideration of the medical opinion evidence. Employer submitted the medical opinions of Drs. Castle and Zaldivar in support of its burden to disprove the existence of clinical pneumoconiosis. Although Drs. Castle and Zaldivar opined that claimant does not suffer from clinical pneumoconiosis, Employer's Exhibits 1, 4, 9, 10, the administrative law judge accurately noted that the doctors "failed to adequately consider the weight of the chest [x]-ray evidence." Decision and Order at 46. The administrative law judge

[12] The administrative law judge noted that the record contains x-ray evidence submitted in connection with claimant's previous 2006 claim. However, the administrative law judge reasonably relied upon the more recent evidence, which she found more accurately reflects claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 23-24.

permissibly discredited the opinions of Drs. Castle and Zaldivar because she found that they were inconsistent with the weight of the x-ray evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); Decision and Order at 45; Employer's Exhibits 1, 4, 9, 10. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence fails to establish that claimant does not have clinical pneumoconiosis.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to establish that claimant does not have clinical pneumoconiosis. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[13] 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Employer also asserts that the administrative law judge erred in failing to find that employer rebutted the Section 411(c)(4) presumption by establishing that "no part of the miner's 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)(ii). Employer specifically contends that the opinions of Drs. Castle and Zaldivar are sufficient to establish this second means of rebuttal. We disagree. The administrative law judge rationally discounted Dr. Zaldivar's opinion that claimant's disability was not due to pneumoconiosis because Dr. Zaldivar did not diagnose clinical pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis.[14] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th

[13] Therefore, we need not address employer's contentions of error regarding the administrative law judge's findings with respect to the existence of legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[14] Employer argues that Dr. Zaldivar salvaged the credibility of his disability causation opinion when he stated that he would have reached the same conclusion even assuming that claimant has clinical pneumoconiosis. Employer's Brief at 33. However, the Fourth Circuit has held that it is not enough for an expert simply to recite, without more, that his causation opinion would not change if a claimant had pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015). Rather, the Fourth Circuit has held that "such an alternative causation analysis, like any causation opinion, must be accompanied by some reasoned explanation - in this context, an explanation of *why* the expert would continue to believe that pneumoconiosis was not the cause of a miner's disability, even if pneumoconiosis were present." *Id.* In this case, Dr. Zaldivar provided no such explanation. Employer's Exhibit 10 at 32.

Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013).

The administrative law judge noted that Dr. Castle relied, in part, on the partial reversibility of claimant's impairment after bronchodilator administration to determine that clinical pneumoconiosis was not a cause of claimant's pulmonary impairment.[15] Decision and Order at 53. The administrative law judge found, as was within her discretion, that Dr. Castle did not adequately explain why the irreversible portion of claimant's obstructive pulmonary impairment[16] was not due, in part, to clinical pneumoconiosis.[17] *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 53. As the administrative law judge permissibly discounted the opinions of Drs. Zaldivar and Castle, we affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, and affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(1)(ii).

[15] Dr. Castle opined that when clinical pneumoconiosis causes impairment, it generally does so by causing a "mixed, irreversible, obstructive and restrictive ventilatory defect." Employer's Exhibit 4 at 20.

[16] As the administrative law judge accurately noted, all four of the new pulmonary function studies of record produced qualifying results both before and after the administration of a bronchodilator. Decision and Order at 53; Director's Exhibit 9; Claimant's Exhibit 8; Employer's Exhibits 1, 4. Dr. Castle did not address the significance of the residual disabling impairment remaining after the administration of a bronchodilator. Employer's Exhibit 4.

[17] Although the administrative law judge did not address Dr. Castle's failure to diagnose claimant with clinical pneumoconiosis, the Fourth Circuit has held that opinions, such as that of Dr. Castle, "that erroneously fail to diagnose pneumoconiosis may not be credited at all, unless an [administrative law judge] is able to identify specific and persuasive reasons for concluding that the doctor's judgment on the question of disability causation does not rest upon" the misdiagnosis. *Epling*, 783 F.3d at 505. Moreover, even if Dr. Castle's opinion had been credited, it could have carried only little weight in the administrative law judge's disability causation analysis. *Id.*

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge