U.S. Department of Labor

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

BRB No. 16-0617 BLA

THOMAS EDWARD WELLS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL OF KENTUCKY, INCORPORATED	)	DATE ISSUED: 08/07/2017
	)	
	)	
Employer-Petitioner	)	
	)	
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 Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Jennifer L. Feldman (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-05746) of Administrative Law Judge Patrick M. Rosenow, rendered on a subsequent miner's claim filed on September 7, 2011, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge found that claimant established 14.95 years of underground coal mine employment and the existence of both simple and complicated pneumoconiosis. The administrative law judge therefore determined that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.304 and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[2] The administrative law judge further found that claimant invoked the presumption that his complicated pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b) and that employer failed to rebut this presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis, thereby invoking the irrebuttable presumption at 20 C.F.R. §718.304. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the

[1] Claimant filed his initial claim for benefits on March 15, 2001, which was denied by the district director on March 13, 2002, because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant filed a timely request for modification on November 19, 2002, which was denied by the district director on February 14, 2003. *Id*. Claimant did not take any further action until he filed the current subsequent claim.

[2] When a miner 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 at least "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(c). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). In this case, because the prior claim was denied for failure to establish any element of entitlement, claimant was required to establish at least one element of entitlement to obtain a merits review of his subsequent claim. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); Decision and Order at 26.

Director), has also responded and asserts that the administrative law judge's findings are supported by substantial evidence.[3]

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.[4] 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).

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering 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 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 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 Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89, 21 BLR 2-615, 2-626-29 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc). Here, the administrative law judge properly found complicated pneumoconiosis based on the x-ray evidence at subsection (a) and that the other medical evidence of record did not outweigh that finding.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that: claimant established the existence of simple clinical pneumoconiosis at 20 C.F.R. §718.202(a); claimant invoked the presumption that his clinical pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b); and employer did not rebut the presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 23, 27 n.93.

[4] Because the record reflects that claimant's last coal mine employment was in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

I. 20 C.F.R. § 718.304(a) X-ray Evidence

The administrative law judge considered eight interpretations of five x-rays and found that the preponderance of the x-ray evidence is sufficient to establish complicated pneumoconiosis, based on the positive interpretations by physicians who are dually-qualified as Board-certified radiologists and B readers. 20 C.F.R. § 718.304(a); Decision and Order at 20-23. Employer raises two arguments on appeal: 1) the administrative law judge erred in crediting Dr. Crum's positive reading of the September 11, 2012 x-ray for complicated pneumoconiosis over Dr. Rosenberg's negative reading of the same x-ray; and 2) the administrative law judge erred in finding that Dr. Crum's readings of the x-rays dated May 16, 2015 and June 29, 2015 are positive for complicated pneumoconiosis. These arguments lack merit.

When x-ray reports conflict, consideration must be given to the radiological qualifications of the readers. 20 C.F.R. § 718.202(a)(1). More weight may be given to physicians who are dually-qualified as Board-certified radiologists and B readers than to those who are only B readers. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (en banc). The administrative law judge permissibly accorded greater weight to Dr. Crum's reading of the September 11, 2012 x-ray because he is dually-qualified, while Dr. Rosenberg is only a B reader.[5] *Id.*; Decision and Order at 22; Claimant's Exhibit 3; Employer's Exhibit 3. We therefore affirm the administrative law judge's finding that the September 11, 2012 x-ray is positive for complicated pneumoconiosis.

We further reject employer's assertion that Dr. Crum's readings of the May 16, 2015 and June 29, 2015 x-rays are not definitive diagnoses of complicated pneumoconiosis because his checking of the box for Category B large opacities on Department of Labor (DOL) Form CM-933 is merely "*consistent with and not diagnostic* of pneumoconiosis." Employer's Brief at 18; *see* Claimant's Exhibits 1, 2. As noted, complicated pneumoconiosis can be established by a chest x-ray that "yields one or more

[5] The case cited by employer in support of its argument, *Whitman v. Califano*, 617 F.2d 1055 (4th Cir. 1980), is not relevant. *Whitman* involved a claim filed before the promulgation of 20 C.F.R. Part 718, when the applicable quality standards did not acknowledge Board certification as a radiologist as a qualification to be addressed when considering whether the existence of pneumoconiosis was established by x-ray evidence. *Compare* 20 C.F.R. §§718.102(e), 718.202(a)(1) *and* 20 C.F.R. §§410.428, 410.490(b)(1)(i) (1978). Accordingly, the decision in *Whitman* discusses only the comparative weighing of x-ray readings performed by B readers, and not, as is relevant here, Board-certified radiologists.

large opacities" that are "classified as Category A, B, or C, in accordance with the [International Labour Organization (ILO)] classification system." 20 C.F.R. §718.304(a). Because Form CM-933 duplicates the relevant ILO classification system, the administrative law judge did not err in crediting Dr. Crum's checking of the boxes for Category B large opacities as unequivocal diagnoses of complicated pneumoconiosis. *See Hensley v. Dixie Fuel Co.*, BRB No. 10-0363 BLA, slip op. at 7 (Mar. 30, 2011) (unpub.) (Because the physician specifically identified parenchymal abnormalities consistent with pneumoconiosis on the ILO classification form and classified the opacities in accordance with 20 C.F.R. §718.102(b), the administrative law judge properly considered his reading to be positive for pneumoconiosis.).

We also reject employer's argument that Dr. Crum's reading of the 2015 x-rays are equivocal because he recommended comparison to other films to rule out neoplasm. The determination of whether an opinion is equivocal is a matter for the administrative law judge to determine in his role as fact-finder. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1073, 25 BLR 2-431, 2-450 (6th Cir. 2013); Claimant's Exhibits 1, 2. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). In this case, the administrative law judge rationally concluded that Dr. Crum's statements did not detract from his diagnoses of complicated pneumoconiosis because "he was acting in a medically responsible manner and exercising an abundance of caution," and "he specifically marked the box identifying the presence of large Category B opacities consistent with pneumoconiosis." Decision and Order at 22; *see Fagg*, 12 BLR at 1-79.

Similarly, the administrative law judge was not required to discredit the positive interpretation of the June 29, 2015 x-ray based on Dr. Crum's written comment that the x-ray findings "*may be* suggestive of complicated pneumoconiosis." Claimant's Exhibit 2 (emphasis added). The administrative law judge permissibly found that Dr. Crum provided an unequivocal diagnosis of complicated pneumoconiosis on the grounds that it was consistent with his previous interpretations[6] and he "specifically marked the box indicating the presence of Category B large opacities consistent with pneumoconiosis." Decision and Order at 22-23; *see Ogle*, 737 F.3d at 1073, 25 BLR at 2-445 (An administrative law judge's assignment of probative weight to evidence is proper when the administrative law judge sets forth a reasonable basis for his determination.). Because employer has not raised any additional arguments regarding the administrative law

[6] Dr. Crum read the October 3, 2011 and September 11, 2012 x-rays as containing Category B large opacities and noted that these findings are "consistent with complicated pneumoconiosis." Claimant's Exhibit 3.

judge's weighing of the x-ray evidence, we affirm the administrative law judge's finding that it establishes the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a).

II. 20 C.F.R. §718.304(c) and the Evidence as a Whole

The administrative law judge found that the other medical evidence in this case did not outweigh the chest x-ray evidence proving complicated pneumoconiosis. Employer contends that the administrative law judge substituted his opinion for those of the medical experts by according little probative weight to the reports discussing the procedures that Dr. Saha performed on claimant on February 17, 2000, which included a bronchoscopy, a left thoracotomy, and a biopsy of the left lower lobe of claimant's lung.[7] Employer also asserts that the administrative law judge erred when he "summarily dismissed" the opinions of Drs. Rosenberg and Jarboe because they relied on information from these procedures to exclude a diagnosis of complicated pneumoconiosis. Employer's Brief at 20. Employer further alleges that the administrative law judge erred in concluding that the x-ray evidence of complicated pneumoconiosis was more probative than the other evidence of record. These contentions are without merit.

Citing DOL's recognition that pneumoconiosis is a latent and progressive disease, the administrative law judge permissibly determined that evidence from the procedures Dr. Saha performed in 2000, which predates the denial of claimant's previous claims, was entitled to little weight because it is not "relevant to the existence of complicated pneumoconiosis first demonstrated in the interpretation of the significantly more recent [October 3, 2011] chest x-ray." Decision and Order at 26-27 n.89; *see* 20 C.F.R. §718.201(c); *Woodward v. Director, OWCP*, 991 F.2d 314, 319, 17 BLR 2-77, 2-84 (6th Cir. 1993) (An administrative law judge permissibly accords greater weight to more recent evidence when that evidence is consistent with the principle that pneumoconiosis is a latent and progressive disease.). Consequently, the administrative law judge also reasonably gave little weight to the opinions of Drs. Rosenberg and Jarboe to the extent

[7] Employer generally contends that the administrative law judge erred in disregarding "the biopsy included in the medical treatment records as not relevant." Employer's Brief at 20. To the extent employer intends to argue that the administrative law judge failed to consider the biopsy, there is no merit to employer's assertion. The administrative law judge considered the biopsy along with the other treatment records from 2000, but gave it little weight in light of the more probative value he assigned to the more recent evidence of record. Decision and Order at 24.

that they based their exclusion of complicated pneumoconiosis on evidence from the procedures performed in 2000.[8] *See Fagg*, 12 BLR at 1-79; Decision and Order at 24-26.

We therefore affirm the administrative law judge's finding that, when weighing the evidence as a whole, claimant established the existence of complicated pneumoconiosis by the newly submitted x-ray evidence. *See Gray*, 176 F.3d at 388-89, 21 BLR at 2-626-29. We further affirm the administrative law judge's determinations that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, and established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); *Melnick*, 16 BLR at 1-33.

[8] In a report dated October 1, 2012, Dr. Rosenberg stated, "it should be appreciated that tissue obtained at the time of [claimant's] thoracotomy revealed scarring without any associated coal mine dust deposition." Employer's Exhibit 3. Dr. Jarboe noted in a report dated June 8, 2015 that "the biopsy did show a fibrotic reaction with anthracotic pigment," but "the most likely explanation for the fibrosis is a resolving or healing pneumonitis." Employer's Exhibit 4. At his deposition on October 15, 2015, Dr. Jarboe testified that the mass in claimant's lung in 2000 "was an organized pneumonia" and that there was "nothing to say this man had coal workers' pneumoconiosis, other than to say that he had anthracotic pigment." Employer's Exhibit 5 at 21, 23.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge