U.S. Department of Labor

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

BRB No. 19-0032 BLA

CAROLYN YATES o/b/o JOHNNY M. YATES	)	
Claimant-Respondent	)	
v.	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 12/19/2019
and	)	
PITTSTON COMPANY	)	
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 William T. Barto, Administrative Law Judge, United States Department of Labor.

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05526) of Administrative Law Judge William T. Barto rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on April 20, 2015.[1]

The administrative law judge accepted employer's concession to twenty-seven years of underground coal mine employment and found claimant established the miner had a totally disabling respiratory or pulmonary impairment. The administrative law judge therefore determined claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] He further found employer did not rebut the presumption and awarded benefits.

On appeal, employer contends the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief.[3]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C.

[1] Claimant is the miner's widow; the miner died on January 23, 2017. Claimant's Exhibit 17. Claimant is pursuing the miner's claim on behalf of his estate. Administrative Law Judge's Exhibit 6; Hearing Transcript at 6.

[2] Under Section 411(c)(4) of the Act, a miner is presumed to be totally disabled due to pneumoconiosis if he has at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] We affirm, as unchallenged by employer on appeal, the administrative law judge's findings that claimant established twenty-seven years of qualifying coal mine employment, a totally disabling respiratory impairment, and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 10.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 7.

§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).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish the miner had neither legal nor clinical pneumoconiosis,[5] or "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)(i), (ii). The administrative law judge found employer failed to establish rebuttal by either method.

Clinical Pneumoconiosis

In finding employer did not disprove clinical pneumoconiosis, the administrative law judge considered interpretations of x-rays dated April 2, 2015, April 29, 2015, and September 23, 2015. Dr. Alexander, dually-qualified as a Board-certified radiologist and B reader, interpreted the April 2, 2015 x-ray and the September 23, 2015 digital x-ray as positive for pneumoconiosis, while Dr. Wolfe, also dually-qualified, interpreted both x-rays as negative. Director's Exhibits 34, 39, 42; Claimant's Exhibit 1. Drs. Miller and DePonte, both dually-qualified, interpreted the April 29, 2015 x-ray as positive for pneumoconiosis, while Dr. Wolfe and Dr. Ranavaya, a B reader, interpreted it as negative. Director's Exhibits 12, 13, 35; Claimant's Exhibit 2.

The administrative law judge determined the April 2, 2015 and September 23, 2015 x-rays are in equipoise because two dually-qualified radiologists read them as positive and two dually-qualified radiologists read them as negative. Decision and Order at 11. The administrative law judge accorded greater weight to the opinions of dually-qualified readers when finding the April 29, 2015 x-ray positive for pneumoconiosis. *Id*. Weighing the x-ray evidence as a whole, and in light of his findings that one x-ray is positive for pneumoconiosis and two are in equipoise, the administrative law judge found employer did not satisfy its burden to disprove clinical pneumoconiosis. *Id*.

Employer asserts Dr. Alexander's positive readings of the April 2, 2015 and September 23, 2015 x-rays, and Dr. Miller's positive reading of the April 29, 2015 x-ray,

[5] 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).

are equivocal and entitled to less weight because the physicians read them as 1/0. According to employer, this classification denotes that Drs. Alexander and Miller "seriously considered" reading these x-rays as negative for pneumoconiosis. Employer's Brief at 5-6, *quoting ILO Guidelines for the use of the ILO International Classification of Radiographs of Pneumoconiosis*. With respect to the April 29, 2015 x-ray, employer asserts the administrative law judge erred in resolving the conflict between negative and positive interpretations by "counting heads alone." *Id*. at 6, *citing Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016). Employer therefore contends this x-ray is "at most" in equipoise. Lastly, employer argues the administrative law judge erred in failing to consider and weigh readings of x-rays in the treatment records from Johnston Memorial Hospital, which were read as showing "clear" lungs. Employer's Brief at 6-7. Employer's arguments lack merit.

Employer's allegation that Drs. Alexander and Miller "seriously considered" the films they reviewed to be negative is unavailing, because each physician gave a reading of 1/0 under the ILO classification system, which the administrative law judge permissibly treated as positive for pneumoconiosis. 20 C.F.R. §718.202(a)(1). As employer raises no other arguments with respect to the administrative law judge's weighing of the April 2, 2015 and September 23, 2015 x-rays, we affirm his finding they are in equipoise. *See Addison*, 831 F.3d at 256; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998).

We also reject employer's contention the administrative law judge based his finding that the April 29, 2015 x-ray is positive solely on the number of positive readings. Rather, the administrative law judge considered the radiological qualifications of the physicians, in addition to the number of positive and negative readings, and permissibly accorded greater weight to the readings from dually-qualified radiologists.[6] *See Addison*, 831 F.3d at 256; *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003). Furthermore, employer has not explained how a finding that the readings of the April 29, 2015 x-ray are in equipoise would alter the administrative law judge's determination that the x-ray evidence as a whole does not affirmatively establish the absence of clinical

[6] We reject employer's contention that the interpretations of the April 29, 2015 x-ray are in equipoise based on *Sea "B" Mining Co. v. Addison*, 831 F.3d 244 (4th Cir. 2016). In *Addison*, the court held an administrative law judge "may not base a decision on the numerical superiority of the same items of evidence" and indicated its concern with "resolving the conflict of medical opinion *solely* on the basis of the number of physicians supporting the respective parties." *Addison*, 831 F.3d at 256, *quoting Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997) (emphasis added). In the current case, the administrative law judge considered the qualifications of the physicians interpreting the April 29, 2015 x-ray, in addition to the number of physicians classifying the x-ray as either positive or negative.

pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011); *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference."). We therefore affirm the administrative law judge's finding that the April 29, 2015 x-ray is positive for pneumoconiosis.

Regarding the x-ray readings in the miner's treatment records, although we agree that the administrative law judge should have considered this evidence, any error by omission is harmless.[7] *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996), *modified on recon.*, 21 BLR 1-52 (1997); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 11, 14; Director's Exhibit 39; Claimant's Exhibits 9-18; Employer's Exhibit 1. As previously indicated, when weighing the readings of the x-rays obtained in conjunction with the miner's claim for benefits, the administrative law judge permissibly accorded greatest weight to the readings of dually-qualified radiologists. *See discussion supra at 4*. The qualifications of the physicians who interpreted the treatment record x-rays are not of record. *See* Director's Exhibit 39. Under these circumstances, employer has not adequately explained how consideration of the treatment record x-ray readings, which are silent as to the presence of pneumoconiosis and which were taken for unrelated treatment, would alter the administrative law judge's permissible finding that the x-ray evidence is insufficient to establish the absence of clinical pneumoconiosis. *See Shinseki*, 556 U.S. at 413. Thus, we affirm the administrative law judge's determination the x-ray evidence does not support employer's burden to affirmatively prove the miner did not have clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B).

We also reject employer's assertion that the administrative law judge did not give proper weight to the negative readings of CT scans taken to monitor the size of a pulmonary nodule in the miner's right lower lung. The administrative law judge considered interpretations of five CT scans, dated August 5, 2008, February 9, 2009, April 11, 2012, April 22, 2014, and March 29, 2016, noting that only the report of the most recent CT scan contained a reference to pneumoconiosis.[8] Decision and Order at 13-14; Claimant's

[7] Employer identifies three x-rays dated April 11, 2012, April 28, 2014, and September 2, 2014. Director's Exhibit 39. Dr. McReynolds read the April 11, 2012 x-ray as showing clear lungs and old granulomatous disease. *Id*. Dr. Mullens read both of the 2014 x-rays as showing clear lungs with mild elevation of the right hemidiaphragm. *Id*.

[8] Dr. Van der Westhurzen interpreted the August 5, 2008 CT scan as revealing a noncalcified 1.7 cm nodule in the right lower lobe (RLL), granulomatous calcifications, and calcific coronary artery disease (CAD). Claimant's Exhibit 6. Dr. Saadeh read the February 9, 2009 CT scan as revealing elevation of the right hemi-diaphragm, stable nodules throughout the lungs with 1.6 cm nodule in RLL. Claimant's Exhibit 7. Dr.

Exhibits 6-8. He also noted Dr. Sargent read the February 9, 2009, April 11, 2012, April 22, 2014, and March 29, 2016 CT scans as negative for pneumoconiosis.[9] Decision and Order at 12, 13-14; Director's Exhibit 39; Claimant's Exhibits 6, 7, 8; Employer's Exhibit 6. We affirm, as rational and supported by substantial evidence, the administrative law judge's finding that he could not fully assess the credibility of the CT scan evidence because, unlike the x-ray readers, the qualifications of the CT scan readers to detect pneumoconiosis are not of record.[10] *See Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (en banc); Decision and Order at 13-14. We therefore affirm the administrative law judge's finding the x-ray evidence was more persuasive than the CT scan evidence

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McReynolds read the April 11, 2012 CT scan as reflecting old granulomatous disease and a 1.5 cm nodule in the RLL. Director's Exhibit 39. Dr. Biosca read the April 22, 2014 CT scan as revealing an unidentified nodule in the RLL and prior granulomatous disease. *Id.* Dr. Ramakrishnan read the March 29, 2016 CT scan as revealing a 1.5 cm nodule in the RLL, CAD, and lymphadenopathy "suggesting changes from exposure-related pneumoconiosis." Claimant's Exhibit 8.

[9] The administrative law judge indicated that Dr. McSharry also provided "readings of the CT scans." Decision and Order at 14. Dr. McSharry's report reveals, however, that he reviewed the CT scan interpretations in the miner's treatment records rather than rendering his own interpretations of the CT scans. Employer's Exhibit 3. This error is harmless as it did not affect the administrative law judge's determination that the x-ray evidence was entitled to more weight than the CT scan evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). In addition, because Dr. McSharry did not read the CT scans, employer's argument that the administrative law judge failed to properly address his qualifications when weighing the CT scan evidence is without merit. Employer's Brief at 10-11.

[10] Employer correctly observes the administrative law judge did not address Dr. Sargent's status as a B reader, or his statement that his training in pulmonary medicine included the interpretation of CT scans. Employer's Brief at 10-11. However, the administrative law judge rationally accorded diminished weight to Dr. Sargent's CT scan readings on the ground that he did not address conflicting x-ray interpretations from dually-qualified readers. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 13. In addition, because employer points to no evidence that Dr. Sargent received instruction or demonstrated his proficiency in diagnosing clinical pneumoconiosis by CT scan, any error by the administrative law judge is harmless. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Larioni*, 6 BLR at 1-1278.

We further affirm the administrative law judge's finding that the medical opinion evidence is insufficient to rebut clinical pneumoconiosis. He permissibly determined Dr. Ajjarapu's diagnosis of simple pneumoconiosis was poorly documented as it was based solely on her own examination. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 13. In addition, he acted within his discretion in discrediting the opinions of Drs. Sargent and McSharry that clinical pneumoconiosis is absent as poorly reasoned because neither physician "fully explained his opinion in light of the mixed x-ray readings by dually-qualified readers." Decision and Order at 13; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). In light of the administrative law judge's permissible weighing of each category of evidence, we affirm his determination that the evidence of record as a whole does not rebut clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); *see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000).

Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis.

Disability Causation

The administrative law judge next considered whether 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). He found that the opinions of Drs. Sargent and McSharry that the miner was not disabled due to pneumoconiosis were neither well-reasoned nor well documented. Decision and Order at 20. Employer contends the administrative law judge erred in failing to explain why these opinions were insufficient to satisfy its burden of proof on rebuttal of disability causation.[11] Employer's Brief at 11-19. We disagree.

Drs. Sargent and McSharry concluded that obesity and an elevated diaphragm are the most probable causes of the miner's pulmonary impairment. Employer's Exhibits 3, 4, 5, 6. Although the administrative law judge found "both physicians credibly explained how these conditions can cause pulmonary restriction," he rationally discredited their opinions because "simply citing to the most probable or significant causes of an

[11] Contrary to employer's argument, the administrative law judge considered the opinions of the miner's treating physicians, and noted that they "repeatedly diagnosed" obesity and an elevated hemi-diaphragm along with other illnesses. Decision and Order at 19; Employer's Brief at 18.

impairment" did not exclude pneumoconiosis as an additional or contributing cause of the impairment. Decision and Order at 19-20; *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673 n.4 (4th Cir. 2017); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Employer's Exhibits 3, 4, 5, 6. Thus, we affirm the administrative law judge's determination employer failed to establish that no part of the miner's total respiratory or pulmonary disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge