U.S. Department of Labor

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

BRB No. 14-0178 BLA

VERNIE D. SALMONS (on behalf of FRANKIE J. SALMONS)	)	
Claimant-Petitioner	)	
v.	)	
H & J COAL COMPANY	)	DATE ISSUED: 02/27/2015
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (2011-BLA-6275) of Administrative Law Judge Richard A. Morgan, rendered on a miner's subsequent claim,[2]

[1] Claimant is the widow of the miner, Frankie J. Salmons, who died on August 11, 2012. Claimant's Exhibit 7.

[2] The miner filed an initial claim for benefits on March 23, 1993, which was denied on August 24, 1993, for failure to establish any element of entitlement. Director's

Exhibit 1. The miner filed the current subsequent claim on December 30, 2010. Director's Exhibit 3.

filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined that the miner was ineligible to invoke the rebuttable presumption of total disability due to pneumoconiosis under amended Section 411(c)(4), because he had 4.79 years of qualifying coal mine employment, rather than the fifteen years needed to qualify for the presumption.[3] The administrative law judge determined that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309. However, upon consideration of the merits of the claim, the administrative law judge found that the evidence was insufficient to establish that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the x-ray evidence was insufficient to establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that the administrative law judge erred in failing to give controlling weight to Dr. Gaziano's opinion relevant to the cause of the miner's respiratory disability pursuant to 20 C.F.R. §718.204(c).[4] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated into the

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[3] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes 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), as implemented by 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had 4.79 years of qualifying coal mine employment and is therefore, ineligible for the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 25.

[5] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 7. 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).

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 pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner was totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (en banc). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

In considering whether claimant established the existence of pneumoconiosis, the administrative law judge first weighed the x-ray evidence. He noted that "[r]eaders who are Board-certified radiologists and/or B-readers are classified as the most qualified." Decision and Order at 17. The administrative law judge summarized the credentials of the physicians who interpreted the x-ray evidence[6] and stated:

[6] The administrative law judge noted the following credentials with regard to each physician. Dr. Meyer is a Board-certified radiologist and B reader; Professor of Radiology at the University of Wisconsin and the Vice-Chairman of their radiology department; he currently interprets 40 to 50 CT scans per week and several hundred chest x-rays; trains medical residents; lectures nationally on the interpretation of pneumoconiosis and is the prior Section Head of Cardiothoracic Imaging at the University of Cincinnati. Decision and Order at 6; Employer's Exhibit 5. Dr. Shipley is a Board-certified radiologist and B reader; Chief of Radiology Service at the Veterans Administration Medical Center in Cincinnati, Ohio and Professor of Clinical Radiology at the University of Cincinnati. Decision and Order at 6; Employer's Exhibit 7. Dr. Alexander is a Board-certified radiologist and B reader, a former staff radiologist in Bluefield, West Virginia; a prior Assistant Professor of Radiology at the University of Maryland Medical System; and an independent consultant since 2001. Decision and Order at 6; Claimant's Exhibit 5. Dr. Miller is a Board-certified radiologist and B reader, and an attending radiologist at the Bluefield Regional Medical Center and BluRad, PLLC, also located in Bluefield, West Virginia. Decision and Order at 6; Claimant's Exhibit 6. Dr. Zaldivar is a B reader and is Board-certified in internal medicine, with subspecialties in pulmonary diseases, sleep disorders, and critical care; a Clinical Professor of Medicine at West Virginia University School of Medicine; Director of the Respiratory Therapy Department at the Charleston Area Medical Center; a Clinical Professor of Medicine at the West Virginia School of Osteopathic Medicine; and Director of the Sleep Center of the Charleston Area Medical Center. Decision and Order at 6; Employer's Exhibit 6. Dr. Gaziano is a B reader and is Board-certified in internal medicine and chest diseases; Chairman of Pulmonary Diseases and Director of the

> Based on the credentials set forth above, including board-certification, B-reader status, radiological experience and publications related to black lung and/or with miners, professorships, publications, and affiliation with a sizeable (teaching) hospital, I find Dr. Meyer the best qualified radiologist, Dr. Shipley the second-best qualified radiologist, Dr. Alexander the third-best qualified radiologist, Dr. Miller the fourth-best qualified radiologist, and Drs. Gaziano and Zaldivar equally the fifth-best qualified radiologists.

Id. The administrative law judge noted that there are seven readings of two x-rays, dated March 1, 2011 and July 18, 2012.[7] *Id*. at 5. Dr. Gaziano, a B reader, and Dr. Alexander, a dually qualified radiologist, read the March 1, 2011 x-ray as positive, while Dr. Meyer, also dually qualified, read it as negative. Director's Exhibit 13; Claimant's Exhibit 1; Employer's Exhibit 5. The administrative law judge concluded that the March 1, 2011 x-ray was negative because he considered Dr. Meyer to be better qualified than Drs. Alexander and Gaziano. Decision and Order at 17.

The July 18, 2012 x-ray was read as positive for pneumoconiosis by Dr. Alexander and Dr. Miller, also a dually qualified radiologist. Claimant's Exhibits 2, 3. The same film was read as negative by Dr. Shipley, a dually qualified radiologist, and by Dr. Zaldivar, a B reader. Employer's Exhibits 7, 6. The administrative law judge gave greatest weight to Dr. Shipley's interpretation, as he found him to be the better qualified doctor, and then noted that the interpretations were equally divided between positive and negative readings. Decision and Order at 17. Therefore, the administrative law judge determined that the July 18, 2012 film did not support a finding of pneumoconiosis. *Id*.

Claimant asserts that "while the administrative law judge set forth various information concerning each of the [interpreting physicians], the administrative law judge did not explain why such information would have resulted in Drs. Meyer and Shipley being more qualified to read an x-ray for the purpose of determining pneumoconiosis." Claimant's Brief at 9. Claimant maintains that he has established the existence of pneumoconiosis, based on the preponderance of the positive readings of the March 1,

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Respiratory Therapy Department at the Charleston Area Medical Center; a Clinical Professor of Medicine at West Virginia University; and a Clinical Instructor at the University of Charleston. Decision and Order at 6; Director's Exhibit 13.

[7] The administrative law judge noted that the record contains x-ray evidence from the miner's prior claim but, because it pre-dated evidence in the current claim by at least fifteen years, he did not consider the prior claim evidence to be probative. Decision and Order at 4, 14.

2011 x-ray, and based on the "superior qualifications of the positive readers" of the July 18, 2012 x-ray. *Id*. at 10. Claimant's arguments are rejected as they are without merit.

The regulation at 20 C.F.R. §718.202(a)(1) specifically provides that "[a] chest X-ray . . . may form the basis for a finding of the existence of pneumoconiosis," and, in cases "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 20 C.F.R. §718.202(a)(1). Further, an administrative law judge has discretion to give greater weight to the interpretations of a physician, based upon additional qualifications such as professorships in radiology. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991) (en banc); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-213 (1985).

In this case, the administrative law judge specifically identified the factors he relied on to rank the physicians and resolved the conflict in the x-ray evidence based on his consideration of their radiological qualifications. Decision and Order at 17. We affirm the administrative law judge's reliance on the negative readings of Drs. Meyer and Shipley because, in addition to their status as Board-certified radiologists and B readers, their respective resumes include *both* professorships in radiology and publications related to "black lung and/or miners," while the resumes of Drs. Alexander, Miller, Gaziano, and Zaldivar do not. Decision and Order at 17; *see* Director's Exhibit 13; Claimant's Exhibits 5, 6; Employer's Exhibits 5, 6, 7. Because there is substantial evidence in the record to support the administrative law judge's credibility determinations, we affirm the administrative law judge's reliance on Dr. Meyer's interpretation to find that the March 1, 2011 x-ray was negative and his conclusion that the July 18, 2002 x-ray did not support a finding of pneumoconiosis, based on Dr. Shipley's reading. *See Worhach*, 17 BLR at 1-108; *Melnick*, 16 BLR at 1-37. Consequently, we affirm the administrative law judge's finding that the x-ray evidence fails to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Worhach*, 17 BLR at 1-108.

As claimant has raised no specific allegations of error with regard to the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(4), they are affirmed. *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

The Board is not empowered to reweigh the evidence, nor substitute its inferences for those of the administrative law judge when the findings are supported by substantial evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because claimant failed to establish that the miner had pneumoconiosis, a requisite element of entitlement, we affirm the administrative law judge's denial of benefits on the miner's subsequent claim. *See Trent*, 11 BLR at 1-27.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge