U.S. Department of Labor

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

BRB No. 18-0033 BLA

STANLEY RAY TACKETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ICG KNOTT COUNTY, LLC	)	DATE ISSUED: 02/26/2019
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH/CHARTIS	)	
	)	
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 on Remand Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery), Prestonsburg, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2011-BLA-06164) of Administrative Law Judge Larry W. Price rendered 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 claim filed on October 18, 2010 and is before the Board for the second time.

In the initial decision, the administrative law judge found claimant established thirty years of underground coal mine employment and the existence of complicated pneumoconiosis. Consequently, he found claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) and awarded benefits.

Pursuant to employer's appeal, the Board affirmed, as unchallenged, the administrative law judge's finding of thirty years of underground coal mine employment, but vacated his finding that claimant established complicated pneumoconiosis. *Tackett v. ICG Knott County, LLC*, BRB No. 16-0376, slip op. at 2 n.1, 4. (May 15, 2017) (unpub.). The Board held he failed to adequately consider all of the radiological credentials of the physicians in finding the February 11, 2015 x-ray, the most recent of record, established complicated pneumoconiosis at 20 C.F.R. §718.304(a). *Id*. at 4. Thus, the Board vacated the award of benefits and remanded the case for further consideration.[1] *Id*. at 6.

On remand, the administrative law judge again found claimant established complicated pneumoconiosis based on the x-ray evidence and awarded benefits.

On appeal, employer asserts the administrative law judge erred in finding the existence of complicated pneumoconiosis. Claimant responds in support of the award of

[1] The Board noted that there is no biopsy evidence for consideration at 20 C.F.R. §718.304(b) and the administrative law judge found, pursuant to 20 C.F.R. §718.304(c), that the computed tomography (CT) scan and medical opinion evidence did not establish complicated pneumoconiosis. *Tackett v. ICG Knott County, LLC*, BRB No. 16-0376, slip op. at 3 (May 15, 2017) (unpub.).

benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief concerning the merits of entitlement.[2]

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.[3] 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).

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[2] Employer moved to hold this case in abeyance pending a decision in *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *aff'd on reh'g*, 868 F.3d 1021 (Mem.) (2017), *cert. granted*, U.S. , 2018 WL 386565 (Jan. 12, 2018). The Supreme Court's subsequent decision rendered employer's motion moot. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). On August 29, 2018, employer filed a Motion to Remand this case to the Office of Administrative Law Judges for a new hearing before a different administrative law judge based on the Supreme Court's holding that the manner in which certain administrative law judges were appointed violates the Appointments Clause of the Constitution, Art. II §2, cl. 2. Employer's Motion to Remand at 1-2. The Director, Office of Workers' Compensation Programs (the Director), responds that employer waived this argument by failing to raise it when the case was initially before the Board.

We agree. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its opening brief). Nor does the exception recognized in *Jones Brothers v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018) apply as, unlike the Federal Mine Safety and Health Review Commission, the Board has the long-recognized authority to address an Appointments Clause issue if properly raised. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116-17 (6th Cir. 1984) (Congress vested the Board with the statutory power to decide substantive questions of law); *Duck v. Fluid Crane and Constr. Co.*, 36 BRBS 120, 121 n.4 (2002) (the Board "possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction"). We therefore deny employer's motion.

[3] Because claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction 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 3.

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). 20 C.F.R. §718.304; *see Gray v. SLC Coal Co.*, 176 F.3d 382, 386 (6th Cir. 1999). On remand, the administrative law judge found the most recent x-ray dated February 11, 2015 established complicated pneumoconiosis at subsection (a) and that the other medical evidence of record did not outweigh that finding. *Id.* at 389-90 (administrative law judge must consider "all relevant evidence" from each subsection).

As instructed by the Board, the administrative law judge reconsidered the conflicting interpretations of the February 11, 2015 x-ray, which Drs. Crum and Seaman, dually-qualified as Board-certified radiologists and B readers, read as positive for large opacities, and Dr. Meyer, also dually-qualified, read as negative for large opacities. Claimant's Exhibits 1, 5; Employer's Exhibit 13. The administrative law judge also considered that in addition to being a dually-qualified reader, Dr. Crum has fifteen years of experience in diagnostic radiology, is a lecturer at the Tennessee Academy of Physicians Assistants, and is on the teaching faculty at Kentucky College of Osteopathic Medicine and LMU-Debusk College of Osteopathic Medicine. Decision and Order on Remand at 2; Claimant's Exhibit 1. Dr. Meyer holds additional qualifications as a Professor of Radiology and Vice Chair of Finance and Business Development at the University of Wisconsin School of Medicine and Public Health; has authored or coauthored over eighty articles, book chapters and abstracts in radiology; and serves as an American Board of Radiology (ABR) oral board examiner and an item writer for the ABR Core Exam Committee on Thoracic Imaging 2009. *Id.*

The administrative law judge concluded:

> While an administrative law judge may give greater weight to the interpretations of a physician based upon his professorship in radiology, he is not required to do so. Balanced against Dr. Meyer's record of speaking, writing and being on committees, is Dr. Crum's [fifteen] years in diagnostic radiology in Prestonsburg, Kentucky, in the heart of coal mining country. Without more the Court might find these two opinions to be entitled to equal weight or even that Dr. Meyer's opinion is entitled to slightly greater weight. However, Dr. Crum's opinion is confirmed by that of Dr. Seaman – another dually[-]qualified radiologist. The Court would again find that the positive readings of complicated pneumoconiosis by Drs. Seaman and Crum

> overwhelm Dr. Meyer's negative reading. Accordingly, the Court finds the chest x-ray evidence is preponderantly positive for complicated pneumoconiosis.

Decision and Order on Remand at 3. Having previously found the February 11, 2015 x-ray the most probative evidence of record,[4] the administrative law judge found complicated pneumoconiosis established and awarded benefits. *See* 20 C.F.R. §718.304; Decision and Order on Remand at 3.

Employer argues the administrative law judge erred, asserting Dr. Crum's x-ray interpretation is speculative because he commented that it "could be confirmed with [a computed tomography scan of the] chest." Employer's Brief at 12. We disagree.

Dr. Crum interpreted the February 11, 2015 x-ray as positive for Category A large opacities, and noted in the comment section that he observed "Parenchymal disease with bilateral areas of coalescence consistent with pneumoconiosis – likely 1.2 cm large opacity mid [right] lung and 1.1 cm opacity mid [left] lung overlying [anterior] 5th rib." Claimant's Exhibit 1. A chest x-ray that "yields one or more large opacities" that are "classified as Category A, B, or C, in accordance with the [International Labour Organization (ILO)] classification system" can establish complicated pneumoconiosis in the absence of countervailing evidence. 20 C.F.R. §718.304(a).

As Dr. Crum simply expounded on his reading and did not identify any alternative or additional diagnoses for the Category A opacities, employer has not explained how his comment that his reading could be confirmed by a CT scan undermines his positive ILO classification.[5] *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991) (en banc) (recognizing comments that may constitute alternative diagnoses and thus call into question the diagnosis of Category A large opacities must be considered by the administrative law judge). Thus the administrative law judge rationally concluded that Dr.

[4] In the April 12, 2016 Decision and Order Awarding Benefits, the administrative law judge explained that "no physician has had the benefit of considering [c]laimant's most recent [x]-ray from February 2015" and that "the [x]-rays and CT scans upon which physician opinion is based [sic] predates the February 2015 [x]-ray by nearly three years or longer." Decision and Order Awarding Benefits at 12. The administrative law judge also noted that "[a]s a general rule, more weight is given to the most recent evidence because pneumoconiosis is a progressive and irreversible disease." *Id*. at 11.

[5] Notably, all of the CT scans are dated prior to the February 11, 2015 x-ray. Claimant's Exhibit 4; Employer's Exhibits 5, 11.

Crum interpreted the February 11, 2015 x-ray as positive for complicated pneumoconiosis. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1073, 25 BLR 2-431, 2-450 (6th Cir. 2013) (whether an opinion is equivocal is a matter for the administrative law judge to determine in his role as fact-finder); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989) (The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge.); Decision and Order at 2-3.

Nor is there merit to employer's assertion that the administrative law judge did not give proper weight to Dr. Meyer's contrary interpretation of the February 11, 2015 x-ray based on his credentials. Employer's Brief at 12. The administrative law judge correctly noted he was not required to give greater weight to Dr. Meyer's interpretation simply because he is a professor of radiology. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting); *Bateman v. E. Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003); Decision and Order at 3. Further, the administrative law judge permissibly found that, even if Dr. Meyer's interpretation is entitled to slightly greater weight based on his credentials, it still does not outweigh the interpretation of Dr. Crum, who has fifteen years of experience in diagnostic radiology in coal country, and whose reading is supported by Dr. Seaman.[6] *See Staton v. Norfolk & W. Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order on Remand at 3. Thus, we affirm the administrative law judge's finding that the February 11, 2015 x-ray is positive for complicated pneumoconiosis.

Finally, we reject employer's argument that, having found the February 11, 2015 x-ray positive for complicated pneumoconiosis, the administrative law judge failed to weigh it against the remaining x-rays, CT scans, and medical opinions.[7] Employer's Brief at 12-

[6] We note employer's concession that in addition to being a Board-certified radiologist and a B reader, Dr. Seaman is an Associate Professor of Radiology at Duke University. Employer's Brief at 5.

[7] Dr. Rasmussen, a B reader, and Drs. Tarver, West, and Halbert, Board-certified radiologists and B-readers, interpreted the December 1, 2010, September 22, 2011, and September 27, 2012 x-rays as positive for simple pneumoconiosis only. Director's Exhibit 24; Employer's Exhibits 2-4. The CT scans, dated September 22, 2011, March 21, 2012, and September 27, 2012, were read as only showing simple coal workers' pneumoconiosis. Claimant's Exhibit 4; Employer's Exhibits 5, 11. Similarly, Drs. Ammisetty, Rosenberg, and Jarboe agreed that claimant has simple coal workers' pneumoconiosis. Director's Exhibits 10, 24; Employer's Exhibits 5-8.

15. In the prior appeal, the Board held there was "no error in the administrative law judge's rationale that the most recent x-ray of February 11, 2015 . . . is more probative of claimant's condition [than the other evidence of record] and is sufficient to satisfy claimant's burden of proof." *Tackett*, slip op. at 5. Consequently, having found the February 11, 2015 x-ray positive for complicated pneumoconiosis, there was no need for the administrative law judge to weigh it against the contrary probative evidence a second time.

We therefore affirm the administrative law judge's findings that, on the evidence as a whole, claimant established the existence of complicated pneumoconiosis and invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *See Gray*, 176 F.3d at 388-89.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge