U.S. Department of Labor

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

BRB No. 18-0084 BLA

JOSEPH FLEMING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ABERRY COAL, INCORPORATED	)	DATE ISSUED: 02/07/2019
	)	
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 on Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for employer.[1]

[1] Employer's brief on appeal was submitted on employer's behalf by Kendra Prince of Penn, Stuart & Eskridge (Abingdon, Virginia), who represented employer at that time. Subsequently, John R. Sigmond of Penn, Stuart & Eskridge moved withdraw as employer's counsel, and notified the Board that defense of the claim was being transferred to James M. Poerio of Poerio & Walter, Inc. (Pittsburgh, Pennsylvania). By letter dated June 5, 2018, Mr. Poerio filed a Notice of Appearance with the Board, providing notification that his firm had been substituted as employer's counsel.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2012-BLA-05241) of Administrative Law Judge Daniel F. Solomon, 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 July 19, 2010,[2] and is before the Board for the third time.[3]

When this case was most recently before the Board, a majority of the Board's three-member panel affirmed the administrative law judge's finding that claimant had at least fifteen years of underground coal mine employment.[4] *Fleming v. Aberry Coal, Inc.*, BRB No. 14-0329 BLA, slip op. at 7 (July 31, 2015) (Boggs, J., dissenting) (unpub.). Because the Board had previously affirmed the administrative law judge's finding that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2),[5] the majority affirmed the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption.[6] *Id*. The majority also affirmed the

[2] Claimant's initial claim for benefits, filed on November 1, 1994, was denied by the district director on March 1, 1995 because he failed to establish any element of entitlement. Director's Exhibit 1.

[3] The Board set forth the complete procedural history of this case in its last decision. *Fleming v. Aberry Coal, Inc.*, BRB No. 14-0329 BLA, slip op. at 2-4 (July 31, 2015) (unpub.).

[4] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibits, 1, 4, 7. Accordingly, 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).

[5] Because claimant established that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), he established a change in one of the applicable conditions of entitlement. 20 C.F.R. §725.309(c).

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

administrative law judge's finding that employer failed to rebut the presumption and therefore affirmed the award of benefits. *Id.*

Pursuant to employer's appeal, the United States Court of Appeals for the Sixth Circuit reversed the administrative law judge's length of coal mine employment finding, holding that the evidence of record could not establish the fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption. *Aberry Coal, Inc. v. Fleming*, 843 F.3d 219, 224 (6th Cir. 2016), *amended on reh'g*, 847 F.3d 310, 311 (6th Cir. 2017). Thus, the Sixth Circuit remanded this case to the administrative law judge to address whether claimant could establish entitlement pursuant to 20 C.F.R. Part 718, without the benefit of the Section 411(c)(4) presumption. *Id*.

In a Decision and Order on Remand dated October 26, 2017, which is the subject of this appeal, the administrative law judge found that the x-ray evidence establishes the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). After finding that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b), the administrative law judge found that claimant is totally disabled due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, he awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the x-ray evidence establishes clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer also contends that the administrative law judge erred in not addressing all of the relevant evidence regarding the existence of clinical pneumoconiosis. Employer further contends that the administrative law judge erred in finding that claimant is totally disabled due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

To be entitled to benefits under the Act, claimant must establish that he has pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his totally disabling impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Claimant may establish the existence of pneumoconiosis by x-rays, autopsies or biopsies, operation of one the presumptions described in 20 C.F.R. §§718.304-306, or a physician's opinion. 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge must consider all of the relevant evidence and then weigh the evidence as a whole to determine if it establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 881 (6th Cir. 2012).

Clinical Pneumoconiosis

X-ray Evidence

The administrative law judge considered nine interpretations of four x-rays taken on January 14, 2011, May 20, 2011, January 16, 2012, and March 28, 2012. Drs. Alexander and Baker interpreted the January 14, 2011 x-ray as positive for pneumoconiosis; Dr. Wheeler interpreted it as negative. Director's Exhibits 12, 14, 16. Dr. Alexander interpreted the April 20, 2011 and March 28, 2012 x-rays as positive for pneumoconiosis; Dr. Scott interpreted the x-rays as negative. Claimant's Exhibits 1, 5; Employer's Exhibits 9, 10. Finally, Dr. DePonte interpreted the January 16, 2012 x-ray as positive for pneumoconiosis; Dr. Scott interpreted it as negative. Claimant's Exhibit 3; Employer's Exhibit 6.

The administrative law judge permissibly accorded greater weight to the interpretations by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); Decision and Order on Remand at 3. He accurately noted that, with the exception of Dr. Baker, each of the radiologists is dually qualified as a B reader and Board-certified radiologist. *Id.* Because each of the four x-rays was interpreted as both positive and negative for pneumoconiosis by the best qualified physicians, he initially noted that the x-ray evidence, on its face, was in equipoise. Decision and Order on Remand at 3. The administrative law judge, however, found that Dr. Scott's negative interpretations of the April 20, 2012, January 16, 2012 and March 28, 2012 x-rays were equivocal, and therefore entitled to less weight. *Id.* at 4. The administrative law judge also accorded less weight to Dr. Wheeler's negative interpretation of the January 14, 2011 x-ray because the doctor "suggested the film be redone because of quality purposes." *Id.* Because Dr. Alexander "unequivocally diagnosed pneumoconiosis," the administrative law judge found that his interpretations were the "most persuasive," and therefore found that the x-ray evidence establishes the existence of pneumoconiosis. *Id.* at 4.

Employer argues that the administrative law judge did not provide an adequate rationale for his determination that Dr. Scott's negative interpretations of the April 20,

2011, January 16, 2012 and March 28, 2012 x-rays were equivocal.[7] Employer's Brief at 10-12. We agree. The administrative law judge found Dr. Scott's x-ray interpretations equivocal because the physician noted the presence of other lung conditions on his reports. Decision and Order on Remand at 4. However, the administrative law judge did not explain how Dr. Scott's comments regarding the existence of other lung conditions had any impact on his determination that the films did not reveal any parenchymal abnormalities consistent with pneumoconiosis.[8] *See* Employer's Exhibits 6, 9, 10. The administrative law judge also did not adequately explain why Dr. Scott's identification of a 1.5 cm nodule of "possible cancer" at the left anterior third rib on the March 28, 2012 x-ray rendered his reading less credible than that of Dr. Alexander.[9] Although the administrative law judge accurately stated that there is no evidence in the record that claimant has cancer, he failed to account for the fact that Dr. Alexander similarly identified an "ill-defined density" at the

[7] With respect to the January 14, 2011 x-ray, employer asserts only that the administrative law judge "correctly found" it to be in equipoise. Employer's Brief at 9. Contrary to employer's statement, the administrative law judge's decision reflects that he found this x-ray to support claimant's burden, in light of his finding that Dr. Wheeler was equivocal when he "suggested that the film be redone because of quality purposes." Decision and Order on Remand at 4. Although this finding is unchallenged on appeal, we decline to affirm it at this juncture, as we are sending the claim back to a new administrative law judge who should be given an opportunity to evaluate the evidence and render his or her own findings.

[8] Dr. Scott reported "other abnormalities" consistent with an atherosclerotic aorta and emphysema on all three of his x-ray reports. Employer's Exhibits 6, 9, 10. Drs. Baker, Wheeler, Alexander and DePonte similarly interpreted claimant's x-rays as revealing an atherosclerotic aorta, emphysema, or both. Director's Exhibits 12, 14, 16; Claimant's Exhibits 1, 3, 5.

[9] The administrative law judge also noted that Dr. Scott accorded the March 28, 2012 x-ray a film quality of "2" due to scapular overlay. Decision and Order on Remand at 4; Employer's Exhibit 9. It is unclear whether he intended to accorded less weight to Dr. Scott's interpretation on this basis. We note, however, that the regulations do not require an x-ray film to be of optimal quality, but only that the film "must be of suitable quality for proper classification of pneumoconiosis. . . ." 20 C.F.R. §718.102(a); *Preston v. Director, OWCP*, 6 BLR 1-229, 1-233 (1984). In any event, Dr. Alexander also rated the March 28, 2012 film as having a film quality of "2" because of scapular overlay. Claimant's Exhibit 5.

anterior third rib and, like Dr. Scott, did not identify it as an opacity of pneumoconiosis.[10] Consequently, the administrative law judge's analysis of Dr. Scott's x-ray interpretations does not comport with the requirements of the Administrative Procedure Act, which provide that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

In light of the above-referenced errors, we must vacate the administrative law judge's finding that the x-ray evidence establishes the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §18.202(a)(1), and remand the case for further consideration.[11] On remand, the administrative law judge must consider the number of x-ray interpretations, the readers' qualifications, the dates of the films, and the actual reading when resolving the conflicting interpretations.[12] *See Staton*, 65 F.3d at 59; *Woodward*, 991 F.2d at 321; *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-154 (1989) (en banc).

Employer further argues that the administrative law judge erred in weighing the digital x-ray evidence under 20 C.F.R. §718.107. Employer's Brief at 12-13. Dr. Wheeler interpreted a digital x-ray taken on March 20, 2012.[13] Employer's Exhibit 1. Dr. Wheeler

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[10] Dr. Alexander identified the density as "possible scarring" and "recommend[ed] follow-up" while Dr. Scott identified it as "possible cancer" and "advise[d] CT." Claimant's Exhibit 5; Employer's Exhibit 9.

[11] We also agree with employer that the administrative law judge failed to explain his basis for finding that Dr. Alexander's positive x-ray interpretations were the "most persuasive." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); Decision and Order on Remand at 5.

[12] Contrary to employer's argument, the administrative law judge need not accord determinative weight to the negative x-ray interpretations by Drs. Scott and Wheeler based upon their additional qualification as professors of radiology. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *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). We also reject employer's contention that the positive interpretations of Drs. Alexander and Deponte are entitled to less weight because they are "barely qualifying [at] 1/0." Employer's Brief at 9. A classification of 1/0 is evidence of pneumoconiosis. *See* 20 C.F.R. §718.102(d)(1).

[13] Because Dr. Wheeler's reading of the March 20, 2012 digital x-ray occurred before May 19, 2014, it is considered "other medical evidence" pursuant to 20 C.F.R.

did not note any findings consistent with pneumoconiosis, opining that "masses in the lateral left mid and upper lung are not large opacities of pneumoconiosis because they are peripheral and there are no symmetrical small nodular infiltrates in [the] central mid and upper lungs." *Id.* Although the administrative law judge summarized claimant's argument that Dr. Wheeler's reading of the digital x-ray is "poorly documented," "uncertain," and "unreadable," the administrative law judge did not provide any rationale for agreeing with claimant's assessment other than his general statement that, "I agree."[14] Decision and Order on Remand at 5. We therefore remand for reconsideration of this evidence.[15]

Medical Opinion Evidence

Because we have vacated the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis, the administrative law judge's basis for discrediting the opinions of Drs. Dahhan and Rosenberg cannot stand. Moreover, the administrative law judge failed to address whether the medical opinions of Drs. Baker, Gallai, and Splan are sufficient to support a finding of clinical pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255-56 (6th Cir. 1983) (holding that it is the

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§718.107. *See* Black Lung Benefits Act Bulletin Nos. 14-08, 14-11. Dr. Wheeler indicated that the film was unreadable due to "improper position," with further explanation that, at the time he reviewed the digital x-ray, "NIOSH does not allow classifications of digital images but it has begun the process of accepting them probably later this year." Employer's Exhibit 1. Although the administrative law judge referred to the digital x-ray as "other" evidence, he failed to make a finding as to whether employer satisfied its burden under 20 C.F.R. §718.107(b) "to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." *See* Black Lung Benefits Act Bulletin Nos. 14-08, 14-11 (for claims filed before May 19, 2014, digital x-ray readings made before that date are evaluated under 20 C.F.R. §718.107).

[14] In a seeming contradiction, the administrative law judge subsequently summarized claimant's argument that Dr. Wheeler's digital x-ray reading is "poorly documented," "uncertain," and "unreadable," but stated that "I choose not to [rule for claimant] with respect to the [digital x-ray] evidence." Decision and Order on Remand at 5 n.3.

[15] Claimant was afforded an opportunity to submit a post-hearing rebuttal reading of the March 20, 2012 digital x-ray. "Due to a clerical error and the close proximity of the dates," claimant inadvertently had Dr. DePonte reread the March 28, 2012 analog x-ray, instead of the March 20, 2012 digital x-ray. Claimant's January 7, 2013 Post-Hearing Brief at 7 n.3; Claimant's Exhibit 6.

administrative law judge's duty to make factual determinations). On remand, the administrative law judge must consider all of the evidence relevant to clinical pneumoconiosis at 20 C.F.R §718.202(a)(1)-(4), and then weigh the evidence as a whole to determine if it establishes clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[16] *Hensley*, 700 F.3d at 881.

In light of our decision to vacate the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), we also vacate the administrative law judge's finding that the evidence establishes that claimant's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b).[17] Decision and Order on Remand at 6.

We also note that the administrative law judge did not address whether the medical opinion evidence establishes the existence of legal pneumoconiosis. Consequently, on remand, if the administrative law judge determines that claimant has properly raised the issue before him, he should also address whether the medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

[16] We reject employer's contention that the administrative law judge erred in his consideration of the biopsy evidence. 20 C.F.R. §718.202(a)(2). Dr. Caffrey opined that lung tissue obtained during a June 24, 2005 biopsy did not reveal any lesions of coal workers' pneumoconiosis. Employer's Exhibit 8. The administrative law judge permissibly accorded little weight to Dr. Caffrey's biopsy report because it was "old," and therefore not relevant to claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982); Decision and Order on Remand at 5.

[17] On remand, the administrative law judge must reconsider the length of claimant's coal mine employment. Although the administrative law judge observed that the Sixth Circuit had determined that claimant has fourteen years and two months of coal mine employment, this factual finding was based on the earlier Sixth Circuit's opinion which was later amended. *See* Decision and Order on Remand at 1; *Aberry Coal, Inc. v. Fleming*, 843 F.3d 219, 224 (6th Cir. 2016), *amended on reh'g*, 847 F.3d 310, 315-16 (6th Cir. 2017). The amended court opinion is limited in scope, holding only that the evidence is insufficient to establish the fifteen years necessary to invoke the Section 411(c)(4) presumption. *Fleming*, 847 F.3d at 311. If the administrative law judge, on remand, credits claimant with at least ten years of coal mine employment, claimant will be entitled to a rebuttable presumption that his pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b).

Total Disability Causation

Because the administrative law judge must reevaluate whether the evidence establishes the existence of pneumoconiosis, an analysis that could affect his weighing of the evidence on the issue of disability causation, we also vacate the administrative law judge's finding that the evidence establishes that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). On remand, in reconsidering this issue, the administrative law judge should address the physicians' respective credentials, the explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their opinions.[18] *See Rowe*, 710 F.2d at 255.[19]

On November 28, 2017, claimant's counsel filed an attorney fee application, requesting a fee for services performed during the previous appeal, BRB No. 14-0329 BLA, pursuant to 20 C.F.R. §802.203. We decline to consider claimant's counsel's request for legal fees at this time. Claimant's counsel is entitled to fees for services rendered while the case was pending before the Board only if there has been a successful prosecution of the claim. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993). In light of our decision to vacate the administrative law judge's award of benefits, there has not yet been a successful prosecution of this claim. If, on remand, the administrative law judge again awards benefits, claimant may submit a revised fee petition for attorney's fees for work performed before the Board in all appeals. 20 C.F.R. §802.203(c).

[18] Employer alleges that the medical opinions of Drs. Gallai and Splan lack credibility because they relied on inaccurate smoking and employment histories. On remand, the new administrative law judge should consider the accuracy of the information all of the physicians relied on in rendering their opinions with respect to the existence of pneumoconiosis and disability causation, and whether this affected the credibility of their opinions.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.[20]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

[20] In light of the retirement of Administrative Law Judge Daniel F. Solomon, this case will be reassigned on remand. Consequently, employer's request for reassignment of the case to a different administrative law judge is moot. However, we agree that the case deserves a fresh look from the new administrative law judge on remand.