U.S. Department of Labor

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

BRB No. 19-0111 BLA

GARY HORN Claimant-Respondent v. FIRE CREEK, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/28/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Carrie Bland, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05450) of Administrative Law Judge Carrie Bland on a claim filed pursuant

to 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 30, 2013.[1]

The administrative law judge found claimant established 16.96 years of qualifying coal mine employment, as the parties stipulated, and the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). She therefore found claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act[2] and established a change in an applicable condition of entitlement.[3]30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §725.309. She further found employer did not rebut the presumption and awarded benefits.

[1] Claimant filed his initial claim on September 13, 1996. The district director denied it by reason of abandonment. Decision and Order at 2; Director's Exhibit 23. The regulations provide that, "[f]or purposes of [20 C.F.R.] §725.309, a denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] 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 "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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied by reason of abandonment. Director's Exhibit23. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing any element of entitlement. 20 C.F.R. §725.309(c)(3), (4).

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

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order Awarding Benefits must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 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).

Rebuttal of the Section 411(c)(4) Presumption – Clinical Pneumoconiosis

Because claimant invoked the presumption of total disability due to pneumoconiosis, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[6] 20 C.F.R. §718.305(d)(2)(i), or that "no part of [his] 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)(2)(ii). The administrative law judge found employer failed to rebut clinical or legal pneumoconiosis, or disability causation.

Employer contends the administrative law judge erred in finding the x-ray evidence does not rebut clinical pneumoconiosis because she relied on whether the readers were

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 16.96 years of qualifying coal mine employment and has a totally disabling impairment. We further affirm the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Decision and Order at 5, 6, 15-16; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Decision and Order at 2 n.2; Director's Exhibit 6.

[6] "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).

dually qualified as Board-certified radiologists and B readers,[7] and employed a "mere headcount methodology." Employer's Brief at 9. Employer asserts she was required to assign dispositive weight to Dr. Shipley's negative reading of the January 30, 2013 x-ray and Drs. Shipley's and Meyer's negative interpretations of the October 11, 2013 x-ray based on their additional professional qualifications and academic positions. Employer's Brief at 9-10, 12-13. We disagree.

The administrative law judge weighed the x-ray evidence, consisting of nine interpretations of three x-rays. Decision and Order at 10-11. She found the January 30, 2013 x-ray, which Dr. Alexander read as positive and Dr. Shipley read as negative, inconclusive regarding the existence of pneumoconiosis because both physicians are dually-qualified. Decision and Order at 10; Director's Exhibit 13; Employer's Exhibit 3. She next addressed the October 11, 2013 x-ray, which Drs. DePonte, Alexander, and Miller read as positive, and Drs. Meyer and Shipley read as negative. Decision and Order at 9-10; Director's Exhibit 11; Claimant's Exhibits 1, 3; Employer's Exhibits 2, 4. Noting that each physician is dually-qualified, she found this x-ray positive for pneumoconiosis due to the preponderance of the positive readings by equally-qualified physicians. Decision and Order at 9-10. Lastly, the administrative law judge considered the June 19, 2014 x-ray, which was read as positive by Dr. Miller, a dually-qualified physician, and negative by Dr. Fino, a B reader. She found this x-ray positive, giving greater weight to Dr. Miller's reading due to his superior qualifications as compared to Dr. Fino. Decision and Order at 9-11; Employer's Exhibit 1; Claimant's Exhibit 2. As she found one x-ray inconclusive and the remaining two positive for pneumoconiosis, the administrative law judge found the overall weight of the x-ray evidence was positive for clinical pneumoconiosis. Decision and Order at 11.

Pursuant to 20 C.F.R. §718.202(a)(1), "where two or more X-ray reports are in conflict . . . consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 20 C.F.R. §718.202(a)(1). Contrary to employer's argument, the administrative law judge permissibly made a qualitative and quantitative judgment in finding the preponderance of readings from dually-qualified radiologists were positive for

[7] A "Board-certified radiologist" is a physician who has been certified by the American Board of Radiology as having particular expertise in the field of radiology. A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.102(e)(2)(i), (iii); 42 C.F.R. §37.51; *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A dually-qualified physician is a physician who is both a Board-certified radiologist and a B reader.

the disease. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992). The administrative law judge recognized that she may consider physicians' qualifications and training, and that she may accord "more evidentiary weight" to readings from physicians who have "greater expertise." Decision and Order at 8. Following this discussion, she permissibly assigned greater weight to the x-ray readings of Drs. Miller, Shipley, Alexander, DePonte and Meyer based on their status as Board-certified radiologists and B readers. Decision and Order at 10-11; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994); *Adkins*, 958 F.2d at 52. In contrast, she assigned lesser weight to Dr. Fino's reading because although he is a B reader, he is not a Board-certified radiologist.

Further, while an administrative law judge may rely on a reader's additional qualifications (such as teaching credentials or expertise demonstrated by lecturing and publishing articles) to accord greater weight to that physician's readings, she is not required to do so. *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 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting); *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *see also J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78, 1-90 n.13 (2008); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-65 (2004) (en banc). Thus, we reject employer's assertion the administrative law judge was required to give determinative weight to the readings from Drs. Shipley and Meyer based upon their academic status as professors of radiology and authors of articles. *See* Employer's Brief at 10; *Harris*, 23 BLR at 1-114.

Based on the foregoing, we reject employer's assertion that the administrative law judge relied on a mere head count and improperly weighed the physicians' qualifications. 20 C.F.R. §718.202(a)(1); *see generally Wensel v. Director, OWCP*, 888 F.2d 14 (3d Cir. 1989); *Dempsey*, 23 BLR at 1-65-66; *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (en banc); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). We therefore affirm, as supported by substantial evidence, her findings that the x-ray evidence as a whole was positive for pneumoconiosis and that employer therefore did not affirmatively disprove the existence of clinical pneumoconiosis by a preponderance of the chest x-ray evidence.[8] Decision and Order at 11; *see* 30 U.S.C.

[8] The administrative law judge correctly noted that there is no biopsy evidence for consideration at 20 C.F.R. §718.202(a)(2). Decision and Order at 11.

§921(c)(4); 20 C.F.R. §718.305(d)(1)(i)(B); *Adkins*, 958 F.2d at 52; *Rose v. Clinchfield Coal Co.*, 614 F.3d 936, 939 (4th Cir. 1980).

We further affirm the administrative law judge's finding that the medical opinion evidence does not disprove clinical pneumoconiosis. In so finding, she considered Drs. Ajjarapu's and Owens' opinions diagnosing clinical pneumoconiosis, and Dr. Fino's opinion that claimant does not have the disease.[9] Decision and Order at 14-15; Director's Exhibit 11; Claimant's Exhibit 5; Employer's Exhibit 1. The administrative law judge noted Dr. Fino relied on his negative reading of the June 19, 2014 x-ray,[10] which she found was positive for clinical pneumoconiosis. She permissibly discounted his opinion because it was inconsistent with her finding of clinical pneumoconiosis based on the preponderance of x-ray readings and thus was not well documented. Decision and Order at 14; *see generally Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 554-56 (4th Cir. 2013); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *see also Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (Traxler, C.J., dissenting); *Toler v. E. Associated Coal Corp.*, 43 F.3d 109 (4th Cir. 1995). As the administrative law judge permissibly discounted Dr. Fino's opinion regarding the existence of clinical pneumoconiosis, we affirm her conclusion employer did not disprove the existence of clinical pneumoconiosis based on the medical opinion evidence.[11] Decision and Order at 14. We further affirm her finding,

[9] The administrative law judge discussed and analyzed the physicians' reports in the context of determining whether employer rebutted the Section 411(c)(4) presumption by demonstrating through medical opinion evidence that claimant does not suffer from legal pneumoconiosis. Decision and Order at 11, 14, 15. Nevertheless, her analysis reflects that she considered the physicians' opinions on clinical pneumoconiosis, and her weighing of the medical opinion evidence in this regard is relevant to whether employer met its burden to disprove clinical pneumoconiosis.

[10] Dr. Fino stated in his July 3, 2014 report that "[t]here is no clinical pneumoconiosis because my reading of the chest x-ray was negative." Director's Exhibit 12.

[11] We need not address employer's bare assertion that the x-ray evidence should have been weighed with the "only CT scan interpretation of record," as employer has not identified the CT scan or explained how doing so would have made any difference. Employer's Brief at 13; *see Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

when weighing the evidence as a whole, that employer did not disprove claimant has clinical pneumoconiosis.[12] *Id*. at 15.

Finally, employer does not challenge the administrative law judge's finding that it failed to rebut the presumption by establishing that "no part of [claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis. . . ."[13] 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 502 (4th Cir. 2015); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155-56 (2015) (Boggs, J., concurring and dissenting); Decision and Order at 15-16. That finding is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Because claimant invoked the Section 411(c)(4) presumption and employer did not rebut it, claimant established entitlement to benefits.

[12] We need not address employer's arguments that the administrative law judge erred in finding it did not disprove legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A), because employer must rebut the existence of both legal *and* clinical pneumoconiosis to satisfy the first prong of rebuttal. 20 C.F.R. §718.305(d)(1)(i); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1277 (1984); Decision and Order at 6; Employer's Brief at 13-19.

[13] Employer expressly states it "is not rebutting the invocation of the 15 year presumption by the method provided at 20 C.F.R. §718.305(d)(2)(ii) which requires that no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis." Employer's Brief at 14-15. Rather, employer only "maintains that neither clinical nor legal pneumoconiosis are present in this claim under 20 C.F.R. §718.201." *Id.* at 15.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge