U.S. Department of Labor

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

BRB No. 19-0142 BLA

JEFFERY NOBLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOR-COAL, INCORPORATED c/o HUGHES GROUP	)	
	)	
and	)	
	)	
SECURITY INSURANCE COMPANY OF HARTFORD	)	DATE ISSUED: 02/18/2020
	)	
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 Jason A. Golden, 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/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05862) of Administrative Law Judge Jason A. Golden rendered on a subsequent claim filed on April 12, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge accepted the parties' stipulation of eleven years of coal mine employment. He found claimant established complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.304, 725.309. He further found claimant established his complicated pneumoconiosis arose out of coal mine employment, 20 C.F.R. §718.203(b), and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding claimant invoked the irrebuttable presumption. Employer asserts the administrative law judge did not consider all the relevant radiological evidence. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

Section 411(c)(3) of the Act provides an irrebuttable presumption a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter

[1] The district director denied claimant's most recent prior claim for failure to establish total disability. Director's Exhibit 2.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established eleven years of coal mine employment. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 6.

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, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In determining whether claimant has invoked the irrebuttable presumption, the administrative law judge must weigh together all evidence relevant to the presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge found the x-rays established complicated pneumoconiosis because three were positive for the disease, one was inconclusive as to its presence or absence, and none were negative. He found there was no biopsy evidence and determined that the CT scans and medical opinions diagnosing no complicated pneumoconiosis did not refute the positive x-ray evidence. Weighing all the evidence together, he concluded that claimant has complicated pneumoconiosis and invoked the irrebuttable presumption.

Evidentiary Challenge

Employer asserts the administrative law judge failed to properly consider Dr. Adcock's negative reading for complicated pneumoconiosis of the December 8, 2018 x-ray, which it first designated as evidence in its post-hearing brief. Employer's Brief at 4. We disagree.

On November 20, 2017, the administrative law judge instructed the parties to exchange their exhibit list twenty days before the hearing scheduled for February 22, 2018, and also complete an Evidence Summary Form for submission at the hearing. Notice of Hearing and Pre-Hearing Order at 3-4. At the hearing, the administrative law judge admitted Director's Exhibits 1 through 64 into the record without objection, subject to the mandatory evidentiary limitations. Hearing Transcript at 7; *see* 20 C.F.R. §725.414. Employer submitted its Evidence Summary Form and indicated it had no evidentiary changes or outstanding motions for consideration.[4] Hearing Transcript at 6, 11-12. Employer designated Dr. Dahhan's negative reading for complicated pneumoconiosis of a December 8, 2018 x-ray as affirmative evidence, as well as Dr. Broudy's negative reading for complicated pneumoconiosis of a January 8, 2018 x-ray. Employer's February 22, 2018 Evidence Summary Form. As rebuttal evidence, it designated Dr. Adcock's negative

[4] The administrative law judge permitted claimant to withdraw Dr. DePonte's reading of January 9, 2019 x-ray at the hearing. Hearing Transcript at 8-9.

readings for complicated pneumoconiosis of the July 8, 2016 and October 14, 2016 x-rays. *Id*.

In its post-hearing brief, filed on April 23, 2018, employer noted that the Director's Exhibits contained an x-ray reading from Dr. Adcock of the December 8, 2018 x-ray, Director's Exhibit 15. Employer's Post-Hearing Brief at 6 n.1. Employer stated that it withdrew Dr. Dahhan's negative reading of that x-ray as one of its two designated affirmative x-ray readings, Director's Exhibit 14, and instead re-designated Dr. Adcock's negative interpretation as one of its two affirmative x-ray readings. *Id*.

In his decision, the administrative law judge did not address employer's re-designation in its post-hearing brief and did not consider Dr. Adcock's reading. He relied on the evidence the parties' designated on their respective evidence summary forms and found claimant established complicated pneumoconiosis. Employer contends the case must be remanded because the administrative law judge relied on the "wrong x-ray reading" in finding claimant has complicated pneumoconiosis. Employer's Brief at 4. Employer's argument is without merit.

An administrative law judge exercises broad discretion in resolving procedural and evidentiary matters. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-153 (1989) (en banc). Thus, a party seeking to overturn an administrative law judge's disposition of a procedural or evidentiary issue must establish that the administrative law judge's action represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

Although employer submitted Dr. Adcock's x-ray reading to the district director and it is contained in the Director's Exhibits, it was subject to the evidentiary limitations which restrict parties to the submission of two affirmative x-ray readings and one rebuttal reading of each x-ray claimant designates or as part of the miner's Department-sponsored complete pulmonary evaluation. 20 C.F.R. §§725.414(b), 725.421(b)(4); *see Jordan v. Director, OWCP*, 892 F.2d 482, 487-88 (6th Cir. 1989) (parties are deemed to have constructive knowledge of published federal regulations). Employer does not contest that its attempt to designate Dr. Adcock's x-ray reading as affirmative evidence came well after the administrative law judge's deadline for the parties' exchange of Evidence Summary Forms twenty days prior to the hearing. Nor does employer explain why it waited until the submission of its post-hearing brief to notify the administrative law judge of its interest in re-designating its evidence to rely on Dr. Adcock's x-ray reading.[5] Based on these facts,

[5] Employer also did not attempt to argue good cause for permitting Dr. Adcock's reading be admitted in excess of the evidentiary limitations. 20 C.F.R. 725.456(b)(1).

employer has not shown that the administrative law judge abused his discretion in relying on employer's initial evidentiary designations on its Evidence Summary Form rather than its untimely re-designation in its post-hearing brief. *Blake*, 24 at 1-113; *Dempsey*, 23 BLR at 1-47; *Clark*, 12 BLR at 1-153. Thus, we reject employer's request to remand this case for consideration of Dr. Adcock's x-ray reading.[6]

Weighing of the X-ray Evidence

We also reject employer's challenge to the administrative law judge's weighing of the x-ray evidence the parties designated on their Evidence Summary Forms. Drs. DePonte and Crum, each dually qualified B readers and Board-certified radiologists, read the July 8, 2016 x-ray as positive for simple and complicated pneumoconiosis, Category A. Director's Exhibits 11; 12. Dr. Adcock, also dually qualified, read the same x-ray as positive only for simple pneumoconiosis. Employer's Exhibit 2. Relying on the preponderance of the readings from dually-qualified radiologists, the administrative law judge found the x-ray positive for complicated pneumoconiosis. Decision and Order at 8-9.

Dr. DePonte read the October 14, 2016 x-ray as positive for simple and complicated pneumoconiosis, Category A, while Dr. Adcock read it as positive only for simple pneumoconiosis. Director's Exhibit 12; Employer's Exhibit 3. The administrative law judge found the interpretations of the x-ray "inconclusive." Decision and Order at 9.

[6] Moreover, employer has not shown that any error in not permitting it to re-designate its evidence would have made any difference in this claim. The administrative law judge found that of the four x-rays in the record, three were positive for complicated pneumoconiosis, one was inconclusive as to its presence or absence, and none were negative. Decision and Order at 9-10. He gave equal weight to the readings from physicians dually-qualified as B readers and Board-certified radiologists. *Id*. at 8-9. Based on this permissible credibility determination (including giving equal weight to the readings from Drs. Crum and Adcock), even if Dr. Adcock's negative reading had been substituted for Dr. Dahhan's, the December 8, 2016 x-ray would be, at best, in equipoise, as it was read as positive by Dr. Crum, a dually qualified radiologist. Claimant still would have established complicated pneumoconiosis because of the four x-rays in the record, two would be positive, two would be equivocal, and none would be negative. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Dr. Crum read the December 8, 2016 x-ray as positive for simple and complicated pneumoconiosis, Category A, while Dr. Dahhan, a B reader, interpreted it as negative. Director's Exhibit 14; Claimant's Exhibit 1. Similarly, Dr. Crum read the January 8, 2018 x-ray as positive for simple and complicated pneumoconiosis, Category A, while Dr. Broudy, a B reader, interpreted it as negative. Claimant's Exhibit 2; Employer's Exhibit 1. Based on Dr. Crum's "superior credentials," the administrative law judge found the readings of both x-rays positive for complicated pneumoconiosis. Decision and Order at 8-9.

Considering the x-ray evidence as a whole, the administrative law judge found three x-rays positive for complicated pneumoconiosis, including the most recent film, one inconclusive, and none negative. Decision and Order at 9-20. Thus, he found claimant established complicated pneumoconiosis. 20 C.F.R. §718.204(a); Decision and Order at 10.

Employer contends the administrative law judge did not properly consider Dr. Lundberg's notation of a calcified lymph node on the July 8, 2016 x-ray or the treatment records documenting this condition. Employer asserts Dr. Lundberg's finding of "large [left] hilar calcification" is relevant to the credibility of the Category A opacities Drs. DePonte and Crum identified on that film. Employer's Brief at 3-4. Contrary to employer's contention, Dr. Lundberg interpreted the July 8, 2016 x-ray on behalf of the Department of Labor for quality purposes only. Director's Exhibit 11. The ILO form titled "Radiologic Quality Reading" does not include any method for classifying small or large opacities consistent with pneumoconiosis. 20 C.F.R. §718.102(b), (e); 20 C.F.R. §718.304(a); Director's Exhibit 11. Because Dr. Lundberg did not offer an opinion as to whether claimant has complicated pneumoconiosis, we reject employer's contention that the administrative law judge erred in not inferring Dr. Lundberg's quality reading constitutes a negative x-ray interpretation. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013).

Furthermore, the administrative law judge summarized the x-rays from Kentucky River Medical Center as showing a "stable reticulonodular pattern in the upper lobes bilaterally, a larger calcified aortopulmonary lymph node, a [three] centimeter mass due to old granulomatous disease, chronic obstructive pulmonary disease, a partially calcified ovoid mass, calcified left hilar lymph nodes, and no evidence of active disease." Decision and Order at 9; *citing* Employer's Exhibit 5 at 2, 6, 7. He also noted an x-ray from Baptist Health Lexington showed "granulomatous calcific scarring" and no active disease. Decision and Order at 9; Claimant's Exhibit 4 at 1. Contrary to employer's contention, the administrative law judge permissibly gave little weight to the treatment record x-rays because the qualifications of the interpreting physicians are unknown and they are silent regarding the presence or absence of pneumoconiosis. *See Director, OWCP v. Rowe*, 710

F.2d 251, 255 (6th Cir. 1983); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984) (administrative law judge is not required to find an x-ray that is silent on the existence of pneumoconiosis is a negative reading). We see no error in the administrative law judge's finding that the treatment record x-rays do not refute the ILO-classified x-rays from dually-qualified radiologists showing complicated pneumoconiosis. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012) (the administrative law judge's function is to weigh the evidence, draw appropriate inferences and determine credibility). Because employer raises no other allegations of error with regard to the administrative law judge's weighing of the x-ray evidence, we affirm his finding that claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(a).

Other Medical Evidence – 20 C.F.R. §718.304(c)

The administrative law judge noted that the treatment records include diagnoses of simple pneumoconiosis and chronic obstructive pulmonary disease. Decision and Order at 12. He permissibly found that while they do not establish the existence of complicated pneumoconiosis, they "do not weigh against" such a finding. *Id*.

The administrative law judge also considered readings of six CT scans. Decision and Order at 10-12. We reject employer's contention that he did not adequately consider that the CT scans do not show large opacities for complicated pneumoconiosis. The administrative law judge summarized the findings from each scan[7] and noted that, with the exception of Dr. Adcock, the readings were from radiologists with "unknown qualifications." Decision and Order at 11. He permissibly found that since all of the CT scans predate the x-rays, the x-rays showing complicated pneumoconiosis more accurately reflect claimant's current condition.[8] See *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); Decision and Order at 11. We therefore affirm the administrative

[7] The scans taken on March 22, 2006, March 3, 2007, November 23, 2007, April 30, 2008, and October 6, 2011, were read as showing a 2.5 centimeter calcified left hilar lymph node consistent with previous tuberculosis or granulomatous disease, increased interstitial markings, pleural scarring, chronic interstitial lung disease, and chronic obstructive pulmonary disease. Employer's Exhibit 5. Dr. Adcock read the December 18, 2014 CT scan as showing "[e]arly coalescence of nodules in the central upper lobes, but no large opacities" for complicated pneumoconiosis." Employer's Exhibit 4. He diagnosed simple pneumoconiosis and attributed the large calcified nodule to granulomatous disease. *Id.*

[8] The oldest positive x-ray was taken on July 8, 2016, and the most recent positive x-ray was taken on January 8, 2018. Decision and Order at 11.

law judge's finding that the earlier CT scans do not refute the more recent positive x-ray readings for complicated pneumoconiosis from dually-qualified radiologists. *See Id.; Rowe*, 710 F.2d at 255; Decision and Order at 11-12.

Finally, the administrative law judge noted that "all of the medical opinions were essentially based on the physicians' reviews of the x-ray and CT scan evidence." Decision and Order at 15. He permissibly rejected the opinions of Drs. Broudy and Dahhan that claimant does not have complicated pneumoconiosis because he gave little weight to their negative x-ray readings and found the x-ray evidence, as whole, positive for complicated pneumoconiosis.[9] *See Banks*, 690 F.3d at 489; *Rowe*, 710 F.2d at 255.

We affirm as supported by substantial evidence the administrative law judge's finding that when the evidence as a whole is weighed claimant established complicated pneumoconiosis. 30 C.F.R. §718.304; *Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33. We further affirm, as unchallenged, the administrative law judge's finding that claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R.§718.203; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15. Thus, we affirm the administrative law judge's determination that claimant invoked the irrebuttable presumption of total disability due pneumoconiosis and is entitled to benefits. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 16.

[9] We affirm, as unchallenged, the administrative law judge's crediting Dr. Raj's opinion that claimant has complicated pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 13, 15.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge