U.S. Department of Labor

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

BRB Nos. 19-0019 BLA
and 19-0060 BLA

LINDA CORDLE (o/b/o and Widow of BUFORD W. CORDLE)	)	
Claimant-Respondent	)	
v.	)	
DOMINION COAL CORPORATION, Self-Insured by SUNCOKE ENERGY, INCORPORATED	)	DATE ISSUED: 01/29/2020
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 on the Miner's and Survivor's Claims of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

Cynthia Liao (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on the Miner's and Survivor's Claims (2015-BLA-05249, 2016-BLA-05439) of Administrative Law Judge Paul R. Almanza on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim[1] filed on February 22, 2013, and a survivor's claim filed on January 12, 2016.[2]

In a Proposed Decision and Order dated October 24, 2013, the district director denied benefits in the miner's claim. After the miner requested modification, the district director awarded benefits on November 7, 2014. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing.[3]

After crediting the miner with 33.25 years of underground coal mine employment,[4] the administrative law judge found the new evidence established complicated pneumoconiosis. He therefore found the miner invoked the irrebuttable presumption of

[1] The miner filed six previous claims, all of which were denied. Director's Exhibit 1. On August 13, 2008, the district director denied his most recent prior claim, filed on January 24, 2008, because the evidence did not establish the miner had a totally disabling respiratory impairment. Director's Exhibit 2.

[2] Employer's appeal in the miner's claim was assigned BRB No. 19-0019 BLA, and its appeal in the survivor's claim was assigned BRB No. 19-0060 BLA. By Order dated March 31, 2017, the Board consolidated these appeals for purposes of decision only.

[3] The miner died on December 20, 2015. Claimant's Exhibit 2. Claimant, the widow of the miner, is pursuing the miner's claim.

[4] The administrative law judge found that the miner's last coal mine employment occurred in Tennessee. Decision and Order Awarding Benefits at 4. However, the record reflects that the miner's last coal mine employment occurred in Virginia. Director's Exhibit 1 (Nov. 30, 2000 Hearing Transcript at 23). Accordingly, the Board will apply the law 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).

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 the applicable condition of entitlement. 20 C.F.R. §725.309(c). He further found the miner's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203(b), and awarded benefits. Based on the award in the miner's claim, he found claimant entitled to survivor's benefits pursuant to Section 422(*l*) of the Act.[5] 30 U.S.C. §932(*l*) (2012).

On appeal, employer argues the administrative law judge lacked the authority to decide the case because he had not been appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[6] Employer also argues the administrative law judge erred in finding the evidence established complicated pneumoconiosis and therefore erred in invoking the irrebuttable presumption of total disability due to pneumoconiosis. Consequently, employer argues the administrative law judge erred in finding claimant entitled to benefits under Section 422(*l*). Claimant responds in support of the award of benefits in both claims. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing the administrative law judge had authority to decide the case. Employer has filed separate reply briefs reiterating its previous contentions.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits on the Miner's and Survivor's Claims if it is rational, supported by substantial evidence, and in accordance

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[5] Section 422(*l*) provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

[6] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

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, 362 (1965).

Appointments Clause

Employer urges the Board to vacate the administrative law judge's Decision and Order Awarding Benefits on the Miner's and Survivor's Claims and remand the case for assignment to a different, constitutionally appointed administrative law judge for a new hearing pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). We agree with the Director that employer forfeited its Appointments Clause argument by failing to raise it when the case was before the administrative law judge. *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); *Powell v. Serv. Employees Int'l, Inc.*, BRBS , BRB No. 18-0557 (Aug. 8, 2019).

Lucia was decided three months before the administrative law judge issued his Decision and Order Awarding Benefits on the Miner's and Survivor's Claims, but employer failed to raise its arguments while the claim was before the administrative law judge. At that time, the administrative law judge could have addressed employer's arguments and, if appropriate, taken steps to have the case assigned for a new hearing before a new administrative law judge. *See Kiyuna v. Matson Terminals, Inc.*, BRBS , BRB No. 19-0103 at 4 (June 25, 2019). Instead, employer waited to raise the issue until after the administrative law judge issued an adverse decision. Because employer has not raised any basis for excusing its forfeiture of the issue, we reject its argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different administrative law judge.

The Miner's Claim

Where 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). The miner's prior claim was denied because he did not establish he had a totally disabling respiratory impairment. Director's Exhibit 2. Consequently, to obtain

review on the merits of his current claim, the miner had to submit new evidence establishing he is totally disabled.[7] 20 C.F.R. §§718.204(b)(2), 725.309(c).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation at 20 C.F.R. §718.304, establish an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he is suffering or suffered 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). *See* 20 C.F.R. §718.304.

In determining whether a claimant has invoked the irrebuttable presumption, the administrative law judge must consider all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The administrative law judge initially considered five interpretations of two new x-rays taken on June 12, 2013 and August 13, 2013, all rendered by physicians dually qualified as B readers and Board-certified radiologists. Drs. DePonte and Crum interpreted the June 12, 2013 x-ray as positive for a Category A large opacity. Director's Exhibits 14, 34. Although Dr. Seaman noted a "focal right middle lobe opacity," she interpreted the x-ray as negative for complicated pneumoconiosis. Director's Exhibit 17. Dr. Seaman commented that the right middle lobe opacity "could represent atelectasis or [an] infection . . . ." *Id.* Because a majority of the physicians interpreted the June 12, 2013 x-ray as positive for complicated pneumoconiosis, the administrative law judge found it positive for the disease. Decision and Order Awarding Benefits at 19.

Dr. DePonte also interpreted the August 9, 2013 x-ray. She identified a Category A large opacity in the right mid lung field along the minor fissure. Director's Exhibit 34.

[7] The administrative law judge found the miner established the district director made a mistake in a determination of fact in initially denying his 2013 subsequent claim. 20 C.F.R. §725.310; Decision and Order Awarding Benefits at 3-4. The administrative law judge should not have considered whether the evidence was sufficient to establish a basis for modification of the district director's denial of the miner's subsequent claim. Because the administrative law judge proceeds de novo, such a determination is subsumed into the administrative law judge's decision on the merits. *See Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14, 1-17-19 (1992).

She commented, however, that it "may represent [a] large opacity of [coal worker's pneumoconiosis] or fissural lesion such as pseudotumor." *Id.* Dr. Adcock interpreted the August 9, 2013 x-ray as negative for complicated pneumoconiosis. Director's Exhibit 16. Dr. Adock noted the presence of a "minor fissure pleural pseudotumor." *Id.* The administrative law judge found the August 9, 2013 x-ray "inconclusive" as to the existence of complicated pneumoconiosis. Decision and Order Awarding Benefits at 19.

Weighing the x-ray evidence, the administrative law judge noted that while Dr. Seaman did not identify a Category A large opacity on the August 9, 2013 film, she did note the presence of a right middle lobe capacity. Decision and Order Awarding Benefits at 19. The administrative law judge also noted that while Dr. DePonte "left open the possibility that the . . . large opacity in the right mid lung could be attributed to something other than complicated pneumoconiosis," she marked "Category A" on the x-ray form. *Id.* at 20. Based on that analysis, he concluded that three of the five x-ray readings indicate the miner had complicated pneumoconiosis. *Id.*

Employer argues the administrative law judge erred in his consideration of Dr. DePonte's x-ray interpretations. Employer's Brief at 15-17. We agree. The administrative law judge erred in failing to adequately explain how he considered and weighed Dr. DePonte's comment that the large opacity on the August 9, 2013 x-ray "may represent [a] . . . fissural lesion such as pseudotumor." A physician's comment that constitutes an alternative diagnosis could call into question the physician's diagnosis of a large opacity of pneumoconiosis. *Melnick*, 16 BLR at 1-37. While the radiologists generally agree the miner had a large mass in the right middle lobe of his lung, they offer different opinions as to whether the mass is a large opacity of complicated pneumoconiosis. The narrative reports of the radiologists have a direct bearing on whether the abnormalities appearing on the chest x-ray are a manifestation of a "chronic dust disease," as is necessary for a finding of complicated pneumoconiosis, or the result of another disease process. *See* 20 C.F.R. §718.304. The administrative law judge must therefore address whether Dr. DePonte's comment constitutes an alternative diagnosis, thereby calling into question her diagnosis of complicated pneumoconiosis.[8] *Melnick*, 16 BLR at 1-37.

[8] Once a miner establishes with chest x-ray evidence that his opacities are *properly* classified as Category A, B, or C in the ILO system, he need not normally present additional proof that his condition is a chronic dust disease. Such classification establishes pneumoconiosis, which, by definition, is a chronic dust disease. 30 U.S.C. § 902(b). Here, however, Dr. DePonte's notation that the opacity equally "may" represent coal worker's pneumoconiosis "or" a fissural lesion requires the administrative law judge to determine

We also agree with employer that Dr. DePonte's comment could affect the weight to be accorded to her opinion that the earlier June 12, 2013 x-ray revealed a Category A large opacity. Employer's Brief at 18; *Melnick*, 16 BLR at 1-37. We, therefore, vacate the administrative law judge's finding that the new x-ray evidence established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a) and remand the case for further consideration.

The miner's treatment records also contain interpretations of x-rays taken after the denial of the miner's prior claim on August 13, 2008.[9] Director's Exhibits 12, 13, 34; Claimant's Exhibit 1. Although the administrative law judge summarized many of these x-ray interpretations, Decision and Order Awarding Benefits at 14-17, he did not specifically address the alternative etiologies that some of the physicians provided for the large mass they reported seeing in the miner's right mid lung zone or explain how he weighed them in assessing whether the miner had complicated pneumoconiosis.[10] On remand, the administrative law judge should consider all interpretations of x-rays taken after August 13, 2008,[11] and determine whether the new x-ray evidence establishes complicated pneumoconiosis. 20 C.F.R. §718.304(a).

The administrative law judge next addressed whether the miner could establish complicated pneumoconiosis by "other means."[12] 20 C.F.R. §718.304(c). He considered

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whether she properly classified the opacity as Category A by more adequately weighing it with the other evidence of record.

[9] The miner's treatment records contain numerous interpretations of x-rays taken from 2013 through 2015.

[10] The administrative law judge found the "narrative x-rays . . . generally record evidence of a progressive lung disease that manifests in masses and opacities, including a large opacity in the right mid lobe." Decision and Order Awarding Benefits at 25. The issue before the administrative law judge is not only whether there is a "large opacity" in the miner's right mid lung zone, but whether the large mass is one of complicated pneumoconiosis. 20 C.F.R. §718.304(a).

[11] The administrative law judge erred in addressing Dr. Gallai's medical opinion along with the x-ray evidence at 20 C.F.R. §718.304(a). Decision and Order Awarding Benefits at 20. Because Dr. Gallai did not render any x-ray interpretations, his medical opinion is properly addressed at 20 C.F.R. §718.304(c).

[12] The record does not contain any autopsy evidence, or any evidence of a biopsy conducted since the denial of the miner's prior claim. 20 C.F.R. §718.304(b).

a range of other diagnostic evidence, including readings of new CT scans and new medical opinion evidence.[13] The administrative law judge found the "CT scans . . . generally record evidence of a progressive disease that manifests in masses and opacities, including a large opacity in the right mid lobe." Decision and Order Awarding Benefits at 25. Again, however, we agree with employer that the administrative law judge failed to explain how he resolved the conflict in the CT scan evidence regarding the nature of the large mass in the miner's right mid lung zone. Employer's Exhibit at 14. On remand, the administrative law judge is instructed to determine whether the CT scan evidence supports a finding of complicated pneumoconiosis.

The administrative law judge also considered the new medical opinions of Drs. Gallai and Tuteur, as well as the opinions of Dr. Robinette (contained in the miner's treatment records). Based on a review of the miner's x-ray and CT scan interpretations, Drs. Gallai and Robinette diagnosed progressive massive fibrosis. Director's Exhibit 14; Claimant's Exhibit 1. Although Dr. Tuteur also reviewed the x-ray and CT scan evidence, he opined the miner did not have progressive massive fibrosis. Employer's Exhibit 1. The administrative law judge noted that Dr. Gallai's diagnosis of progressive massive fibrosis was primarily based on Dr. DePonte's interpretation of the June 12, 2013 x-ray. Decision and Order Awarding Benefits at 20. The administrative law judge further found Dr. Robinette's diagnosis of progressive massive fibrosis was supported by the x-ray and CT scan evidence. *Id.* at 24. Conversely, he found Dr. Tuteur's opinion that the miner did not have progressive massive fibrosis not sufficiently reasoned. *Id.* at 21-23. The administrative law judge therefore found the medical opinion evidence supported a finding of complicated pneumoconiosis. *Id.* at 25. Because we must remand the case to the administrative law judge for reconsideration of the x-ray and CT scan evidence, we vacate

[13] The administrative law judge summarized Dr. Ramakrishnan's interpretations of a July 18, 2011 CT scan and a September 12, 2011 whole body PET CT scan. Decision and Order Awarding Benefits at 16. Dr. Ramakrishnan interpreted the July 18, 2011 CT scan as revealing a "mass-like area of consolidation in the right middle lobe." Claimant's Exhibit 1. He noted the "[f]indings may be infectious or inflammatory," but that a "neoplasm cannot be entirely excluded." *Id.* Dr. Ramakrishnan also identified a "mass-like area of consolidation in the right middle lobe" on the September 12, 2011 whole body PET CT scan. *Id.* He opined that although "[m]etastatic melanoma is a possibility," it was more likely "a secondary process, possible a secondary malignancy such as lymphoma" or "infectious and inflammatory processes like sarcoidosis." *Id.*

the administrative law judge finding regarding the new medical opinion evidence and instruct him to reconsider the new medical opinion evidence in light of those findings.[14]

On remand, the administrative law judge is instructed to weigh together all of the new evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester*, 993 F.2d at 1145-46; *Gollie*, 22 BLR at 1-311; *Melnick*, 16 BLR at 1-33-34. If he finds the new evidence establishes complicated pneumoconiosis, the miner will have established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). The administrative law judge would then be required to consider the miner's 2013 claim on the merits, based on a weighing of all of the evidence of record, including the evidence relevant to complicated pneumoconiosis submitted in connection with the miner's prior claims.[15] *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992). In rendering his Decision and Order on remand, the administrative law judge must explain the bases for all of his findings of fact and credibility determinations in accordance with the Administrative Procedure Act. 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).

Should the administrative law judge find claimant is not entitled to invoke the irrebuttable Section 411(c)(3) presumption, he must consider whether the evidence establishes a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). If the administrative law judge finds the evidence establishes total disability, claimant is entitled to invoke the Section 411(c)(4) presumption that the miner was totally disabled due to

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[14] We note that a mere restatement of an x-ray (or CT scan) is not a reasoned medical opinion. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). In evaluating the medical opinion evidence, the administrative law judge should address the credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See 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).

[15] Although the administrative law judge credited the most recent evidence as being consistent with the progressive nature of complicated pneumoconiosis, employer accurately notes that a large mass was identified on the miner's x-rays and CT scans dating back to the 1990s. Employer argues that this evidence establishes that the "long standing . . . abnormality in the right middle lobe of the miner's lungs" was "an old granulomatous disease, pneumonia, or atelectasis." Employer's Brief at 13. Moreover, the previously submitted evidence includes the results of a biopsy performed on September 14, 1998. 20 C.F.R. §718.304(b). The biopsy was conducted due to a concern that the density in the miner's right middle lobe might be a malignancy. Director's Exhibits 1, 2.

pneumoconiosis.[16] 30 U.S.C. §921(c)(4) (2012). If claimant invokes the presumption, the burden of proof shifts to employer to establish rebuttal of the presumption in accordance with the standards set forth at 20 C.F.R. §718.305(d)(1)(i),(ii). However, if the administrative law judge finds the evidence does not establish that the miner was totally disabled, he must deny benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

The Survivor's Claim

In light of our decision to vacate the administrative law judge's award of benefits in the miner's claim, we also vacate the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*). If the administrative law judge, on remand, again awards benefits in the miner's claim, claimant is automatically entitled to benefits in the survivor's claim pursuant to Section 422(*l*). *See* 30 U.S.C. §932(*l*). Should the administrative law judge deny benefits in the miner's claim,[17] he must consider whether claimant can establish entitlement to survivor's benefits pursuant to Section 411(c)(4)[18] or by establishing that the miner's death was due to pneumoconiosis under 20 C.F.R. Part 718. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on the Miner's and Survivor's Claims is affirmed in part and vacated in part, and

[16] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. The administrative law judge found the miner had 33.25 years of underground coal mine employment. Decision and Order Awarding Benefits at 8. We affirm this finding as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[17] If the administrative law judge, on remand, again awards benefits in the miner's claim, claimant is automatically entitled to benefits in the survivor's claim pursuant to Section 932(*l*). *See* 30 U.S.C. §932(*l*).

[18] On remand, if the administrative law judge finds that the evidence establishes that the miner was totally disabled at 20 C.F.R. §718.204(b)(2), claimant would invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. In that case, the administrative law judge would be required to address whether employer could establish rebuttal of the presumption in accordance with the standards set forth at 20 C.F.R. §718.305(d)(2)(i), (ii).

the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge