BRB No. 94-3851 BLA

KENNETH HORNSBY )
)
Claimant-Petitioner )
)
v. )
)
WESTMORELAND COAL COMPANY ) )
DATE ISSUED:
Employer-Respondent )
)
)
DIRECTOR, OFFICE OF WORKERS' )
COMPENSATION PROGRAMS, UNITED )
STATES DEPARTMENT OF LABOR )
)
Party-In-Interest ) DECISION and ORDER

Appeal of the Decision and Order of Joel R. Williams, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (93-BLA-1712) of Administrative Law Judge Joel R. Williams denying benefits on a claim filed pursuant to the

[1]Claimant is Kenneth Hornsby, the miner, who filed a claim for benefits on November 28, 1973. Director's Exhibit 1.

provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case is before the Board for the fourth time. Initially, Administrative Law Judge Joseph M. May found that claimant established more than ten years of qualifying coal mine employment and invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). The administrative law judge then found that employer failed to establish rebuttal pursuant to 20 C.F.R. §727.203(b) and, accordingly, awarded benefits. On appeal, the

Board vacated the administrative law judge's findings pursuant to subsection (b)(2) and remanded the case for further findings. *Hornsby v. Westmoreland Coal Co.*, BRB No. 83-0281 BLA (May 2, 1986)(unpub.).

On remand, Administrative Law Judge Arthur C. White found that employer established rebuttal pursuant to subsection (b)(2). Accordingly, benefits were denied. On appeal, the Board vacated the administrative law judge's findings pursuant to subsection (b)(2) and remanded the case for consideration of rebuttal pursuant to subsection (b)(3). *Hornsby v. Westmoreland Coal Co.*, BRB No. 86-2774 BLA-R (Aug. 26, 1988)(unpub.).

On remand, Judge White applied intervening case law, *see Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988), and found that claimant established invocation of the presumption at 20 C.F.R. §410.490(b) and that employer failed to establish rebuttal pursuant to Section 410.490(c). Accordingly, benefits were awarded. On appeal, the Board vacated the administrative law judge's findings pursuant to Section 410.490 and again remanded the case for findings pursuant to Section 727.203(b)(3). *Hornsby v. Westmoreland Coal Co.*, BRB No. 89-0278 BLA (Dec. 27, 1991)(unpub.).

On remand, Judge White found that employer established rebuttal pursuant to Section 727.203(b)(3). Accordingly, benefits were denied. Following claimant's request for modification, Judge Williams found that claimant failed to establish entitlement pursuant to Section 411(c)(3) and, thus, a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding the evidence of complicated pneumoconiosis to be equally probative. Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Claimant contends that the record does not support the administrative law judge's conclusion that true doubt exists as to whether claimant suffers from

complicated pneumoconiosis. Claimant's Brief at 4-9. Claimant argues that the administrative law judge's characterization of the medical opinions as equally probative is "factually misleading" because fourteen of the twenty-one opinions are "emphatically positive" regarding the existence of complicated pneumoconiosis. Claimant's Brief at 6. Claimant also asserts that the overwhelming opinion evidence cannot be dismissed "simply because" there is conflicting evidence, citing *Director, OWCP v. Greenwich Collieries* [Ondecko], U.S. , 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Claimant's Brief at 8-9.

Claimant's argument has merit. The administrative law judge determined that the issue in this case was whether claimant established a mistake in a determination of fact pursuant to Section 725.310 by establishing the existence of complicated pneumoconiosis and entitlement to benefits pursuant to Section 411(c)(3). Decision and Order at 2. The administrative law judge further stated that he would "concentrate on the evidence which has been added in connection with the modification petition. This includes over 100 interpretations, mostly by B-readers, of approximately a dozen x-ray and two CT scans of [claimant's] chest taken between May 20, 1968 and June 3, 1993." Decision and Order at 2-3. The administrative law judge then stated: "In lieu of itemizing this x-ray evidence, I consider it sufficient to focus on the following narrative reports, testimony and/or depositions of radiologist[s] and pulmonary specialist[s] which I believe presents a fair representation of the conflicting medical opinions of record." Decision and Order at 3.

The administrative law judge then considered the medical opinions of twenty-one physicians, twelve of whom stated that claimant has complicated pneumoconiosis. Director's Exhibits 15, 17, 53, 114-115, 119, 127; Claimant's Exhibit 1; Employer's Exhibits 1-5. Of the remaining nine opinions, three physicians stated that claimant does not have complicated pneumoconiosis and six did not clearly state whether claimant has complicated pneumoconiosis or some other disease. Director's Exhibits 15, 53, 119, 127; Employer's Exhibits 1-3, 5.

Upon weighing these opinions, the administrative law judge assigned less weight to Dr. Morgan's opinion that claimant has complicated pneumoconiosis because the administrative law judge found the opinion to be based on a faulty or unsupported understanding as to the nature and extent of claimant's coal mine employment. Decision and Order at 16. However, the administrative appears to have mischaracterized Dr. Morgan's opinion, which, if credited, could establish that a diagnosis of complicated pneumoconiosis is possible with six years of coal dust exposure. The administrative law judge found that Dr. Morgan stated that claimant had ten to seventeen years of coal mine employment prior to 1970, when the record

supports eight years of coal mine employment prior to 1970. Decision and Order at 16-17. While the administrative law judge is correct that the record supports only eight years of coal mine employment prior to 1970, he does not explain how the discrepancy between eight years and ten years is significant. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Thus, because the record does not support the administrative law judge's reasons for discrediting Dr. Morgan's opinion, we vacate his weighing of this opinion. *See Ridings v. C & C Coal Co. Inc.*, 6 BLR 1-227 (1983).

The administrative law judge next stated: "Nevertheless, even with discounting Dr. Morgan's opinion, there remains considerable disagreement among the physicians in this case with opposite positions being taken by equally well-qualified medical experts." Decision and Order at 17. The administrative law judge noted that, where x-ray evidence is in conflict, consideration shall be given to the readers' qualifications and that "this case does not rest strictly on x-ray findings but on other relevant medical evidence as well." Decision and Order at 17. The administrative law judge then stated:

> It has been suggested that a lung biopsy would offer the best means of reaching an accurate diagnosis in this case. It has been suggested also that this invasive procedure is contraindicated for the claimant at this point in time. Thus, a definitive diagnosis can not be reached and the record leaves the possibility of the large opacities reportedly found in the claimant's lungs to be due to complicated pneumoconiosis, tuberculosis, histoplasmosis or some other condition. I find that the evidence in this case clearly presents one of those rare situations referred to in *Grizzle*...where the evidence in support of and against entitlement is equally probative and equally persuasive, i.e., where the evidence presents a `true doubt'.

Decision and Order at 17. The administrative law judge concluded that because true doubt cannot be resolved in claimant's favor, claimant had not met his burden of proof. Decision and Order at 17-18.

However, the record contains eleven opinions by physicians whose diagnoses of complicated pneumoconiosis were not discredited by the administrative law judge, three opinions by physicians who opined that claimant did not have complicated pneumoconiosis, and six opinions which were equivocal. The administrative law judge did not accord the negative opinions greater weight. Decision and Order at 2-18.

Because the administrative law judge did not discredit the opinions of any of the physicians who diagnosed complicated pneumoconiosis, erred in discrediting Dr. Morgan's opinion, and did not give reasons for assigning greater weight to the opinions of the physicians who opined that claimant did not have complicated pneumoconiosis, *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984), we hold that the administrative law judge's finding that the medical opinion evidence is equally probative is not supported by substantial evidence, *see Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Thus, we vacate the administrative law judge's finding pursuant to Section 718.304 and remand the case for reconsideration of the evidence in light of his statement that although employer contested claimant's entitlement previously, it now contends that the preponderance of the medical evidence establishes that claimant had complicated pneumoconiosis prior to 1970 and thus employer is not liable for benefits. Decision and Order at 2.

If on remand the administrative law judge finds complicated pneumoconiosis established, he must then consider the date of onset of the complicated pneumoconiosis. *See generally Swanson v. R.G.Johnson Co.*, 15 BLR 1-49 (1991). Further, if the administrative law judge finds the evidence insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304, the administrative law judge must then consider rebuttal pursuant to Section 727.203(b)(3) in light of the additional evidence submitted with claimant's petition for modification. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge