U.S. Department of Labor

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

BRB No. 17-0461 BLA

EUGENE F. ELKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DICKENSON-RUSSELL COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 07/05/2018
	)	
AIG PROPERTY CASUALTY COMPANY	)	
	)	
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 of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

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

Timothy W. Gresham and Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2013-BLA-05247) of Administrative Law Judge Morris D. Davis 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 October 25, 2011.[1]

After crediting claimant with twenty-five years of coal mine employment,[2] the administrative law judge accepted employer's concession that claimant suffers from simple clinical pneumoconiosis. The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). Considering the claim on its merits, the administrative law judge found that claimant has complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, thus invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The administrative law judge further found that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and he awarded benefits accordingly.

[1] Claimant initially filed a claim for benefits on March 24, 2004. Director's Exhibit 1. An administrative law judge denied the claim because he found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(b). *Id.* Upon review of claimant's appeal, the Board affirmed the finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b), and therefore affirmed the denial of benefits. *Elkins v. Dickenson Russell Coal Co.*, BRB No. 09-0390 BLA (Jan. 28, 2010) (unpub.).

[2] The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibit 4. 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).

On appeal, employer argues that the administrative law judge erred in finding that claimant has complicated pneumoconiosis. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond in support of the award of benefits.[3]

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).

Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields an opacity 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 reveal 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 weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-214, 2-117-18 (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

[3] Nine months after filing its brief in support of the petition for review, and seven months after the briefing schedule closed, employer moved to hold this case in abeyance and argued for the first time that the manner in which Department of Labor administrative law judges are appointed may violate the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer's Motion at 1-3. The Director, Office of Workers' Compensation Programs (the Director), responds that employer waived this argument by failing to raise it in its opening brief. We agree. Because employer did not raise the Appointments Clause issue in its opening brief, it waived the issue. *See Lucia v. SEC*, 585 U.S. , 2018 WL 3057893 at *8 (June 21, 2018) (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982).

banc). X-ray evidence that displays opacities greater than one centimeter in diameter loses its probative force only when other evidence affirmatively shows that the opacities are not there or are not what they appear to be. *E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000); *see also Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283-84, 24 BLR 2-269, 2-281-82 (4th Cir. 2010).

Section 718.304(a) – X-Rays

The administrative law judge considered five interpretations of three x-rays taken on July 19, 2011, December 4, 2011, and August 31, 2015. He properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 6-7.

Dr. DePonte, a B reader and Board-certified radiologist, interpreted the July 19, 2011 x-ray as positive for a Category A large opacity. Claimant's Exhibit 1. Because there are no other interpretations this x-ray, the administrative law judge found that it is positive for complicated pneumoconiosis. Decision and Order at 7.

While Dr. Scott, a B reader and Board-certified radiologist, interpreted the December 4, 2011 x-ray as negative for complicated pneumoconiosis, Employer's Exhibit 1, two equally qualified physicians, Drs. DePonte and Alexander, interpreted the x-ray as positive for a Category A large opacity. Director's Exhibits 11, 14. Because a majority of the best-qualified physicians rendered positive interpretations of the December 4, 2011 x-ray, the administrative law judge found that it is also positive for complicated pneumoconiosis. Decision and Order at 7-8.

Dr. Crum, a B reader and Board-certified radiologist, interpreted the August 31, 2015 x-ray as positive for a Category B large opacity. Claimant's Exhibit 7. Because there are no other interpretations of this x-ray, the administrative law judge found that it is positive for complicated pneumoconiosis. Decision and Order at 8.

Having found that all three of the x-rays are positive for complicated pneumoconiosis, the administrative law judge found that the x-ray evidence establishes the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Decision and Order at 8. Because it is unchallenged on appeal, we affirm the administrative law judge's finding that the x-ray evidence establishes the existence of complicated

pneumoconiosis pursuant to 20 C.F.R. §718.304(a).[4] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Section 718.304(c) – Medical Opinions

The administrative law judge considered the medical opinions of Drs. Fino and Castle, as well as interpretations of digital x-rays and CT scans. Director's Exhibit 16; Employer's Exhibit 7. Dr. Fino interpreted an April 19, 2012 digital x-ray as revealing "an oval type mass that looks like a pseudotumor."[5] Director's Exhibit 16. Dr. Fino also interpreted a March 11, 2008 CT scan as showing "the pseudotumor that [he] saw on the chest x-ray." *Id.* Dr. Fino opined that claimant does not have complicated pneumoconiosis:

> [Claimant] does have evidence of simple coal workers' pneumoconiosis on the chest x-ray. He does not have complicated pneumoconiosis. What I see on the chest x-ray and the CT scan is a thickening in the minor fissure that I believe is the pseudotumor. That is not complicated pneumoconiosis. Pseudotumors frequently develop in the minor fissure on the right.

Director's Exhibit 16 at 8.

Dr. Castle also reviewed digital x-rays and CT scans, agreeing with Dr. Wolfe's interpretation of a digital x-ray taken on June 12, 2013 as revealing a 1.7 cm. x 3.3 cm. pulmonary mass at the right lung base as a "possible tumor."[6] *Id.* Dr. Castle also

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[4] The administrative law judge noted that there was no biopsy evidence to consider pursuant to 20 C.F.R. §718.304(b). Decision and Order at 19.

[5] While Dr. Fino, a B reader, interpreted the April 19, 2012 digital x-ray as negative for complicated pneumoconiosis, Director's Exhibit 16, Dr. DePonte, a B reader and Board-certified radiologist, interpreted the digital x-ray as positive for a Category A large opacity. Claimant's Exhibit 3. The administrative law judge credited Dr. DePonte's positive interpretation over Dr. Fino's negative interpretation, based upon her superior radiological qualifications. Decision and Order at 17. The administrative law judge, therefore, found this digital x-ray positive for complicated pneumoconiosis. *Id.* Because it is unchallenged on appeal, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] Although Dr. Wolfe, a B reader and Board-certified radiologist, interpreted the June 12, 2013 digital x-ray as negative for complicated pneumoconiosis, the administrative law judge noted that Dr. Alexander, an equally qualified physician, interpreted the digital

interpreted CT scans taken on November 18, 2008 and November 27, 2012 as exhibiting a mass in the right lower zone. *Id.* Dr. Castle opined that the mass "did not have the appearance of a large opacity of pneumoconiosis based on the radiographic findings and location." *Id.* Dr. Castle opined that claimant does not have complicated pneumoconiosis:

> Several radiologists and B readers indicated the presence of a large A opacity. Other radiologists and B readers felt that complicated pneumoconiosis was not present. There was evidence of an infiltrate/mass present in the right lower lung zone which has been noted on chest x-rays for several years. The mass was located in the right lower zone which is a very atypical place for a large opacity of coal workers' pneumoconiosis. This mass was irregular in shape with significant hilar stranding as well as attachment to the pleura. It [is] my opinion that this most likely [does] not represent a large opacity of pneumoconiosis. This mass could possibly to [sic] be a tumor.
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> ***
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> The old records noted that [claimant] had a pneumonia in about 2006 which certainly could have left a scar resulting in this infiltrate/mass in the right lower zone. It would appear that this finding was present after he had the pneumonia, but not prior to that time. Therefore, it is my opinion . . . that [claimant] does have radiographic findings consistent with simple coal workers' pneumoconiosis. It is my opinion . . . that he most likely does not have radiographic findings of complicated coal workers' pneumoconiosis.

Employer's Exhibit 7 at 14-15.

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Fino and Castle. Decision and Order at 21-22. We disagree. The administrative law judge found that their opinions, setting forth alternative diagnoses for the large mass that they identified on digital x-rays and CT scans, were not adequately explained and therefore did not cause the x-ray evidence establishing a large opacity of complicated

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x-ray as positive for a Category A large opacity. Decision and Order at 17; Claimant's Exhibit 2; Employer's Exhibit 7. The administrative law judge found that this x-ray was "in equipoise" regarding the existence of complicated pneumoconiosis. Decision and Order at 17. Because it is unchallenged on appeal, we affirm this finding. *See Skrack*, 6 BLR at 1-710.

pneumoconiosis at 20 C.F.R. §718.304(a) to lose force. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284. The administrative law judge noted that Dr. Fino did not discuss "what a pseudotumor is or how he diagnosed it." Decision and Order at 21. He similarly noted that Dr. Castle opined that the mass "could possibly" be a tumor based on its location and shape, but that he failed to explain how this possibility eliminated a diagnosis of complicated pneumoconiosis. *Id.* Moreover, he observed that neither physician had the benefit of the results of the tests that Dr. Forehand conducted in 2014 that "were negative for cancer, lung cancer, and a host of other diseases."[7] *Id.* The administrative law judge therefore permissibly found that the opinions of Drs. Fino and Castle did not undercut the x-ray evidence establishing complicated pneumoconiosis. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101 (holding that x-ray evidence displaying opacities greater than one centimeter "can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be").

Weighing together all of the evidence under 20 C.F.R. §718.304(a),(c), the administrative law judge found that "the probative x-ray readings by dually qualified physicians that found complicated pneumoconiosis . . . outweigh the contrary x-ray readings and the medical opinions of Drs. Fino and Castle."[8] Decision and Order at 22. Employer argues that the administrative law judge shifted the burden to employer to establish the absence of complicated pneumoconiosis. Employer's Brief at 3-4. We reject employer's argument, as the administrative law judge made permissible credibility determinations, while maintaining the burden of proof on claimant to establish complicated pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). We therefore affirm the administrative law judge's finding that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *See Scarbro,* 220 F.3d at 255, 22 BLR at 2-100. Additionally, we

[7] Dr. Forehand reported that claimant tested negative for cancer, lung cancer, tuberculosis, sarcoidosis, histoplasmosis, Wegener's granulomatosis, aspergillosis, hypersensitivity pneumonitits, and rheumatoid lung disease. Claimant's Exhibit 5.

[8] We reject employer's contention that the administrative law judge erred in failing to consider negative CT scan interpretations submitted in the prior denied claim. Employer's Brief at 7. The administrative law judge noted that the record contains evidence submitted in connection with claimant's previous 2006 claim. However, he reasonably relied upon the more recent evidence, which he found more accurately reflects claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 5.

affirm, as unchallenged on appeal, the administrative law judge's finding that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Skrack*, 6 BLR at 1-711. We therefore affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge