U.S. Department of Labor

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

BRB No. 18-0438 BLA

SUSAN FOLDEN (o/b/o of DAVID A. FOLDEN, SR.) Claimant-Respondent v. SLAB FORK COAL COMPANY 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: 07/17/2019 DECISION and ORDER

Appeal of the Decision and Order of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Kathy L. Snyder and Andrea Berg (Jackson Kelly, PLLC), Morgantown, West Virginia, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2014-BLA-05129) of Administrative Law Judge Dana Rosen, awarding benefits 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[1] filed on July 21, 2010. In a Proposed Decision and Order dated April 11, 2012, the district director denied benefits. The miner thereafter requested modification, which the district director denied on September 11, 2013. Pursuant to the miner's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing.

After crediting the miner with eleven years of coal mine employment,[2] the administrative law judge found the new evidence established the miner had clinical and legal pneumoconiosis.[3] 20 C.F.R. §718.202(a). She therefore found that the miner established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Considering the claim on the merits, the administrative law judge found the miner totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c), and

[1] The miner's initial claim, filed on May 11, 2005, was denied by an administrative law judge on June 26, 2007 because the miner failed to establish the existence of pneumoconiosis. Director's Exhibit 1. The Board and the United States Court of Appeals for the Fourth Circuit affirmed. *D.F.* [*Folden*] *v. Slab Fork Coal Co.*, BRB No. 07-0836 BLA (June 24, 2008) (unpub.); *Folden v. Slab Fork Coal Co.*, No. 08-1927 (4th Cir. May 1, 2009) (unpub.).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where the evidence establishes at least fifteen years of underground or substantially similar coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Because the administrative law judge credited the miner with less than fifteen years of coal mine employment, she found that he was not entitled to the Section 411(c)(4) presumption.

[3] "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). "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). A disease "arising out of coal mine employment" includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

awarded benefits.[4]

On appeal, employer contends the administrative law judge erred in finding the miner had clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Neither claimant[5] nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[6]

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.[7] 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, 363 (1965).

Where no statutory presumptions apply, a miner must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits.[8] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989);

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[4] The administrative law judge also found the evidence established the miner died due to pneumoconiosis. Decision and Order at 64-66. However, because there was no survivor's claim before her, the administrative law judge's finding was not necessary.

[5] The miner died on September 26, 2015. Claimant's Exhibit 8. Claimant, the miner's surviving spouse, is pursuing the claim. Decision and Order at 4.

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[7] The miner's coal mine employment was in West Virginia. Hearing Transcript at 30. Accordingly, this case arises within the jurisdiction 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).

[8] The administrative law judge found the district director made a mistake in a determination of fact in finding the evidence did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §725.310. We note the administrative law judge was not required to consider whether the evidence was sufficient to establish modification of the district director's denial of the miner's subsequent claim. The Board has held that an

Trent v. Director, OWCP, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Pneumoconiosis

The administrative law judge considered ten interpretations of four x-rays taken on November 9, 2011, February 8, 2012, January 21, 2013, and June 26, 2014 in determining the existence of clinical pneumoconiosis. Although she found the interpretations of the February 8, 2012 and June 26, 2014 x-rays to be "in equipoise," she found the November 9, 2011 and January 21, 2013 x-rays were positive for pneumoconiosis. Decision and Order at 51-54. She therefore found the x-ray evidence established clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Employer contends t the administrative law judge erred in finding the November 9, 2011 and January 21, 2013 x-rays supportive of a finding of clinical pneumoconiosis. Employer's Brief at 5, 9-11. For the reasons set forth below, we agree.

Dr. Forehand, a B reader, conducted the Department of Labor (DOL)-sponsored pulmonary evaluation of the miner. As part of that evaluation, he interpreted the November 9, 2011 x-ray as positive for pneumoconiosis. Director's Exhibit 14. Dr. Miller, a B reader and Board-certified radiologist, also interpreted the x-ray as positive for pneumoconiosis. Director's Exhibit 14; Claimant's Exhibit 5. Because both physicians rendered positive interpretations, the administrative law judge found it supported a finding of pneumoconiosis. Decision and Order at 51.

Employer notes that the administrative law judge did not consider Dr. Wolfe's negative interpretation the x-ray,[9] however, which it submitted as part of its rebuttal evidence. Administrative Law Judge's Exhibit 2; Director's Exhibit 26. An administrative law judge is required to consider all relevant evidence in the record. 30 U.S.C.

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administrative law judge is not required to make a preliminary determination regarding whether a claimant has established a basis for modification of the district director's denial of benefits before reaching the merits of entitlement. Rather, 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 (1992); *Kott v. Director, OWCP*¸ 17 BLR 1-9, 1-12 (1992). The administrative law judge, therefore, was authorized to address the merits of the miner's subsequent claim without first addressing whether the evidence was sufficient to establish modification of the district director's denial of the claim.

[9] Dr. Wolfe is dually qualified as a B reader and Board-certified radiologist. Director's Exhibit 26.

§923(b). Consequently, the administrative law judge erred in not considering Dr. Wolfe's negative interpretation.[10]

Additionally, we agree with employer that the administrative law judge erred in her consideration of the January 21, 2013 x-ray. The record contains two interpretations: Dr. Alexander, a B reader and Board-certified radiologist, read the x-ray as positive for pneumoconiosis; Dr. Meyer, an equally qualified physician, interpreted it as negative. Claimant's Exhibit 1; Employer's Exhibit 11. The administrative law judge accorded "no weight" to Dr. Meyer's interpretation because the doctor classified the film quality as level "3." Decision and Order at 53.

The regulations do not provide that an x-ray must be of optimal quality, rather it must "be of suitable quality for proper classification of pneumoconiosis." 20 C.F.R. §718.102(a). Notably, Dr. Meyer did not indicate that the film was unsuitable for classification of the disease.[11] Employer's Exhibit 11. In light of the above-referenced errors,[12] we vacate the administrative law judge's finding that the x-ray evidence

[10] Employer also accurately notes that the administrative law judge did not consider Dr. Cappiello's interpretation of a March 4, 2013 x-ray contained in the miner's treatment records. Employer's Brief at 5-6; Employer's Exhibit 16 at 15-16. Dr. Cappiello interpreted a March 14, 2013 x-ray as revealing underlying fibrosis and "a large emphysematous bulla." *Id.*

[11] Dr. Alexander also classified the January 21, 2013 x-ray as having a film quality that was of less than optimal quality, giving the film a "2." Claimant's Exhibit 1. But Dr. Alexander, like Dr. Meyer, did not indicate that the x-ray was unsuitable for diagnosing pneumoconiosis. *Id.*

[12] Employer also contends that the additional radiological credentials of Drs. Meyer and Tarver entitle their interpretations to greater weight. Along with other credentials, employer notes that the doctors are Professors of Radiology and members of the Society of Thoracic Radiology. Employer's Brief at 7-8. While these additional qualifications do not mandate that their opinions be accorded the greatest weight, the administrative law judge should consider them on remand (as well as those of the other physicians), as they may be relevant in her consideration of the relative qualifications of all the physicians of record. *See Chaffin v. Peter Cave Coal Co*., 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *see also 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).

established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and remand the case for further consideration.

Employer also argues the administrative law judge erred in finding the medical opinion evidence established clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). To establish legal pneumoconiosis, claimant must demonstrate that he has a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Dr. Zaldivar opined that the miner did not have either clinical or legal pneumoconiosis. Director's Exhibit 26; Employer's Exhibit 22. But, as employer accurately notes, in addressing this issue, the administrative law judge did not consider his February 19, 2012 medical report and May 8, 2017 deposition testimony. Employer submitted both as part of its affirmative case. Administrative Law Judge's Exhibit 2. Because the administrative law judge failed to consider this relevant evidence, we must vacate her finding that the medical opinions established clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and remand for further consideration. *See* 30 U.S.C. §923(b).

We also agree with employer the administrative law judge erred in her consideration of the opinions of the miner's treating physicians, Drs. Smith and Remines. Each submitted letters dated January 6, 2017 containing the following identical statement:

> I am writing this letter to verify the medical condition of my former patient, [the miner]. [He] was diagnosed with bullous emphysema and chronic airway obstruction. Although I do not have definitive documentation, I feel his lung disorders were a result of exposure to coal and tobacco.

Claimant's Exhibits 9, 10.

After noting that emphysema and chronic obstructive pulmonary disease are coal mine related diseases that fall within the definition of pneumoconiosis, the administrative law judge found the opinions of Drs. Smith and Remines well-reasoned and entitled to "controlling weight." Decision and Order at 57. The administrative law judge erred, however, by failing to address the specific reasons the doctors attributed the miner's ailments to coal mine dust exposure.[13] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524,

[13] We also agree with employer the administrative law judge erred in her consideration of Dr. Forehand's opinion. Dr. Forehand diagnosed clinical pneumoconiosis and legal pneumoconiosis in the form of obstructive lung disease due to coal mine dust exposure and smoking. Director's Exhibit 14; Employer's Exhibit 10. Although the administrative law judge found that Dr. Forehand's diagnosis of "coal workers' pneumoconiosis was entitled to significant weight," Decision and Order at 58, she did not

533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Moreover, the administrative law judge erred in presuming that emphysema and chronic obstructive pulmonary disease are "coal mine dust related diseases and fall within the definition of pneumoconiosis."[14] Decision and Order at 59. Because the evidence did not establish at least fifteen years of qualifying coal mine employment, the miner did not invoke the Section 411(c)(4) presumption and, thus, was not entitled to a presumption that he had pneumoconiosis. Consequently, the administrative law judge was required to address whether the miner established that his emphysema and chronic airway obstruction were "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994); *Trent*, 11 BLR at 1-27.

On remand, when reconsidering whether the medical opinion evidence establishes the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Moreover, on remand, the administrative law judge must weigh all of the relevant evidence together under 20 C.F.R. §718.202(a) to determine

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address the doctor's underlying documentation. She also did not address the doctor's basis for attributing the miner's obstructive lung disease to his coal mine dust exposure. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

[14] The administrative law judge made a similar improper presumption in her consideration of the CT scans, noting that the CT scans showing evidence of emphysema and chronic obstructive pulmonary disease (COPD) were evidence of pneumoconiosis, because those diagnoses "are coal mine dust related diseases." Decision and Order at 55. Employer also accurately notes that the administrative law judge did not address CT scans taken on May 8, 2007, December 29, 2010, March 14, 2013, December 4, 2014, and March 6, 2015. Dr. Ahmed interpreted the May 8, 2007 CT scan as revealing COPD. Employer's Exhibit 4 at 21. Dr. Vaughn interpreted the December 29, 2010 CT scan as revealing moderate to severe emphysema. Employer's Exhibit 3 at 3-4. Dr. Valiveti interpreted the March 14, 2013 CT scan as revealing chronic fibrotic changes with emphysema. Employer's Exhibit 16 at 14-15. Dr. Cappiello interpreted the December 4, 2014 CT scan as revealing "atelectasis/infiltrate/bronchiectasis" and findings that "may represent small emphysematous bulla." *Id.* at 3-4. Dr. Groten interpreted the March 6, 2015 CT scan as revealing likely chronic atelectasis or scarring. Employer's Exhibit 17 at 47-48.

whether the miner suffered from clinical or legal pneumoconiosis. *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 211 (4th Cir. 2000).

Disability Causation

Employer also challenges the administrative law judge's disability causation finding pursuant to 20 C.F.R. §718.204(c). Pneumoconiosis is a "substantially contributing cause" of a miner's total disability if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii). Although the administrative law judge initially set forth the correct burden of proof in this case, Decision and Order at 72, she subsequently shifted the burden of proof to employer to "adequately explain why pneumoconiosis was not at least a partial cause of the miner's respiratory or pulmonary disability." *Id.* at 73. She ultimately determined that employer failed to establish that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis." *Id*. Because the miner did not invoke the Section 411(c)(4) presumption, he was not entitled to the presumed fact of disability causation. Consequently, the administrative law judge was required to address whether the miner satisfied this burden to establish that pneumoconiosis was a substantially contributing cause of his total disability. *See Ondecko*, 512 U.S. at 280-81; *Trent*, 11 BLR at 1-27. Because the administrative law judge improperly shifted the burden to employer to prove the miner's total disability was not due to pneumoconiosis, we must vacate her finding that the medical opinion evidence established this element of entitlement and remand this case for further consideration.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and 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

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge