U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0388 BLA

WILLIAM J. RISING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EIGHTY-FOUR MINING COMPANY	)	DATE ISSUED: 06/28/2016
	)	
and	)	
	)	
ROCHESTER & PITTSBURGH COAL 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 on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Lynda Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for claimant.

Norman A. Coliane (Thompson, Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Maia S. Fisher, Acting Associate Solicitor of Labor, 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 appeals the Decision and Order on Remand Awarding Benefits (2012-BLA-6019) of Administrative Law Judge Drew A. Swank, rendered on a claim filed on September 22, 2010, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time. The Board previously affirmed, as unchallenged by the parties, the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] *Rising v. Eighty-Four Mining Co.*, BRB No. 14-0119 BLA, slip op. at 2 n.3 (Sept. 12, 2014) (unpub.). Addressing employer's arguments on rebuttal, the Board affirmed the administrative law judge's finding that a preponderance of the analog x-ray evidence is positive for clinical pneumoconiosis. *Id.* at 4. However, the Board held that the administrative law judge erred in failing to consider all of the evidence relevant to whether employer disproved the existence of clinical pneumoconiosis, and whether employer established that claimant's disability was not due to pneumoconiosis.[2] *Id.* at 4-

[1] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption of total disability due to pneumoconiosis, if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and also suffers from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305. In his Decision and Order Awarding Benefits, issued on December 13, 2013, the administrative law judge found that claimant satisfied the requirements for invocation of the presumption, based on the filing date of the claim and his determinations that claimant had at least fifteen years of qualifying coal mine employment and established total disability, based on the arterial blood gas study evidence pursuant to 20 C.F.R. §718.204(b)(2)(ii). *Rising v. Eighty-Four Mining Co.*, BRB No. 14-0119 BLA, slip op. at 4, 15-16 (Sept. 12, 2014) (unpub.).

[2] The Board noted that, in addition to the analog x-ray evidence, the record contains the following evidence relevant to the existence of clinical pneumoconiosis: two interpretations of a digital x-ray taken on January 2, 2013; interpretations of three CT scans taken on May 8, 2008, January 12, 2009, and May 6, 2011; claimant's treatment records, including the results of a 1994 lung biopsy; and medical opinions by Drs. Fino, Renn, Celko, Rasmussen, and Cohen. *Rising*, slip op. at 4.

5. Thus, the Board vacated the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption, vacated the award of benefits, and remanded the case for further consideration. *Id*. at 5-6.

On June 12, 2015, the administrative law judge issued his Decision and Order on Remand Awarding Benefits, which is the subject of the current appeal. The administrative law judge weighed all of the evidence together and found that employer failed to disprove that claimant has clinical pneumoconiosis or that his disability was due to clinical pneumoconiosis.[3] The administrative law judge concluded that employer failed to rebut the Section 411(c)(4) presumption and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in finding that it did not disprove that claimant has clinical pneumoconiosis. Claimant and the Director, Office of Workers' Compensation Programs, each respond, urging affirmance of the award of benefits.

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.[4] 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).

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal[5] nor clinical[6] pneumoconiosis, or by

[3] The administrative law judge concluded that it was not necessary for him to address whether employer disproved the existence of legal pneumoconiosis. Decision and Order on Remand at 11.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[5] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation also provides that "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).

establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting).

On remand, the administrative law judge noted that the Board affirmed his determination that the analog x-ray evidence supports a finding of simple, clinical pneumoconiosis. Decision and Order on Remand at 4. The administrative law judge determined that the digital x-ray readings, CT scan readings, and medical opinions were in equipoise, while the biopsy evidence "favors [e]mployer in disproving the existence of clinical pneumoconiosis." *Id*. at 6. Taking into consideration all of the evidence, the administrative law judge concluded that employer failed to satisfy its burden to disprove the existence of clinical pneumoconiosis, by a preponderance of the evidence, and was unable to rebut the presumption under 20 C.F.R. §718.305(d)(1)(i), the first method of rebuttal. *Id*. at 11. The administrative law judge also found that employer failed to establish the second method of rebuttal by disproving the causal relationship between claimant's disability and pneumoconiosis under 20 C.F.R. §718.305(d)(1)(ii). *Id*. at 11-15.

Employer contends that the administrative law judge erred in his consideration of the CT scan evidence.[7] We disagree. The administrative law judge considered six

---

[6] Clinical pneumoconiosis is defined as:

> [T]hose 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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[7] The administrative law judge considered two readings of a digital x-ray taken on January 2, 2013. The first reading was positive for pneumoconiosis by Dr. Smith, dually qualified as a Board-certified radiologist and B reader, and the second reading was negative by Dr. Meyer, also dually qualified. Decision and Order on Remand at 5; Claimant's Exhibit 6; Employer's Exhibit 8. The administrative law judge determined that the digital x-ray evidence "does not favor either party" as it was "in equipoise."

interpretations of three CT scans dated May 8, 2008, January 12, 2009, and May 6, 2011. Decision and Order on Remand at 5-6. Each CT scan was read once by Dr. Cohen, a Board-certified internist and B reader, as positive for pneumoconiosis, and once by Dr. Meyer, a Board-certified radiologist and B reader, as negative for pneumoconiosis. Director's Exhibits 10, 16; Employer's Exhibits 1, 2; Claimant's Exhibit 1. The administrative law judge gave equal weight to the positive and negative readings because he found both Dr. Cohen and Dr. Meyer to be "extremely well qualified," and concluded that the CT scan evidence was in equipoise. Decision and Order on Remand at 6.

Citing *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 893, 22 BLR 2-409, 2-422 (7th Cir. 2002), employer argues that the administrative law judge erred in giving equal weight to Dr. Cohen's CT scan reading, in comparison to Dr. Meyer's CT scan reading, because "Dr. Cohen is not a radiologist and the record does not disclose that he has any particular expertise in the interpretation of CTs."[8] Employer's Brief in Support of Petition for Review at 17. Employer distinguishes Dr. Meyer from Dr. Cohen, based on Dr. Meyer's credentials as a Board-certified radiologist and B reader, and Dr. Meyer's statement that he interprets "approximately 20-30 chest CT scans per week, including high resolution . . . radiographs . . . and lecture[s] nationally on the interpretation of chest CT scans, interstitial lung disease and pneumoconiosis." *Id*. at 18, *quoting* Employer's Exhibit 5.

In *Stein*, the United States Court of Appeals for the Seventh Circuit held that an administrative law judge acted within his discretion in giving less weight to the sole

---

Decision and Order on Remand at 5. We affirm the administrative law judge's finding with regard to the digital x-ray, as it is not challenged by employer. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[8] Employer also argues that the administrative law judge erred in crediting Dr. Cohen's positive analog x-ray reading because he is not a radiologist. Employer's Brief in Support of Petition for Review at 16. The Board rejected this same argument in the prior appeal and affirmed the administrative law judge's finding that the analog x-ray evidence is supportive of clinical pneumoconiosis. *Rising*, slip op. at 4 (citations omitted). Because employer has not shown that the Board's prior decision was clearly erroneous, or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior holding. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990); *Rising*, slip op. at 4; Employer's Brief in Support of Petition For Review at 16.

negative reading of a CT scan by employer's physician, as the doctor was "neither a *qualified B reader* nor a radiologist." *Stein*, 294 F.3d at 894, 22 BLR at 2-424. The court further observed that "nothing in this record conclusively establishes that [employer's physician] has any experience or training with reading CT scans for the presence of legal pneumoconiosis (as opposed to other occupational diseases) or for the purposes of diagnosis (as opposed to treatment)." *Id*. The Director asserts that, contrary to employer's suggestion, the court in *Stein* "never ruled that a radiologist is better-credentialed than a non-radiologist" for the interpretation of CT scans. Director's Brief at 2 n.2. The Director also notes that the Seventh Circuit's decision in *Stein* is not binding precedent in this case, which arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *Id*.

We conclude that this case may be distinguished from *Stein*. Unlike the doctor in *Stein*, Dr. Cohen has radiological training in the identification of pneumoconiosis. Although Dr. Cohen is not a radiologist, the administrative law judge observed correctly that he is a B reader and is "[B]oard-certified in internal medicine with sub-specialties in pulmonary diseases and critical care."[9] Decision and Order on Remand at 5; *see* Claimant's Exhibit 1. Thus, we hold that the administrative law judge acted within his discretion in finding that the conflicting CT scan readings by Drs. Meyer and Cohen were entitled to equal probative weight, and we affirm his finding that employer did not rebut

---

[9] Dr. Cohen also provided the following deposition testimony:

> Q. As a pulmonary physician, do you receive any training in interpretation of x-rays or CT scans?
>
> A. We do.

Claimant's Exhibit 7 at 4-5.

> Q. As a treating pulmonologist, Doctor, do you read your own CT scans and make treatment decisions based on your interpretation, or do you rely solely on the readings of hospital radiologists?
>
> A. I rely on my own readings. I love my radiological colleagues, and I, on occasion, will consult them. But as a chest physician, I feel very, very confident to read and interpret chest images. I'm much less confident on images of the head or the belly or other areas, but for the chest, I rely on my own readings.

Claimant's Exhibit 7 at 14-15.

the presumed existence of clinical pneumoconiosis, based on the CT scan evidence. *See Soubik v. Director, OWCP*, 366 F.3d 226, 233, 23 BLR 2-85, 2-97 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 584, 21 BLR 2-215, 2-234 (3d Cir. 1997); *see also Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 25 BLR 2-405, 2-424 (7th Cir. 2013) (holding that where the administrative law judge properly considered the qualifications of the physicians reading the miner's x-rays and CT scans, there was nothing inherently wrong with the finding that the evidence was equally balanced).

In weighing the medical opinion evidence, the administrative law judge noted that Drs. Celko and Rasmussen diagnosed clinical pneumoconiosis, while Drs. Fino and Renn did not.[10] Decision and Order on Remand at 10. The administrative law judge considered the medical opinion evidence to be in "in equipoise" because the physicians each had "excellent qualifications and provided well-documented and well-reasoned medical opinions." *Id*. Employer asserts, however, that the administrative law judge's finding is not rational because it "does not comport with his previous analysis of this evidence, as set forth in his original Decision and Order dated December 13, 2013." Employer's Brief in Support of Petition for Review at 19. Employer notes that Dr. Celko's opinion was given less weight by the administrative law judge in the prior decision because Dr. Celko did not review all of the available evidence. *Id*. Therefore, employer asserts that Dr. Celko's opinion should not have been credited by the administrative law judge on remand, as supporting Dr. Rasmussen's opinion in a manner to create a balance in the evidence. *Id*. Employer also contends that "Dr. Celko's opinion should have been given little or no weight," because he "is not a pulmonologist," and "did not have the opportunity to review CT reports or other pertinent evidence in the record[,]" including the biopsy evidence showing desquamative interstitial pneumonitis. *Id*. Employer further argues that the administrative law judge erred in crediting Dr. Rasmussen's opinion because he is not a Board-certified pulmonologist, whereas Drs. Fino and Renn are Board-certified pulmonologists. *Id*. at 20. Employer's arguments are rejected as without merit.

Because the Board vacated the administrative law judge's prior Decision and Order, and his finding on the issue of clinical pneumoconiosis, the administrative law judge was authorized to reweigh all of the evidence relevant to whether employer satisfied its burden to rebut the presumption. *See Lane v. Union Carbide Corp.*, 105 F.3d

[10] The administrative law judge also considered Dr. Cohen's opinion, but found it "unclear because [Dr. Cohen] stated that [c]laimant has 'disabling coal worker's pneumoconiosis' and did not explain whether he diagnosed clinical or legal pneumoconiosis, or both." Decision and Order on Remand at 10, *quoting* Claimant's Exhibit 1.

166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997); *Dale v. Wilder Coal Co.*, 8 BLR 1-119, 1-120 (1985). As the Board specifically remanded the case for the administrative law judge to render findings with respect to the medical opinion evidence on the issue of clinical pneumoconiosis, *see Rising*, slip op. at 5, the Board's role in this appeal is to consider whether the administrative law judge's credibility findings on remand are rational and supported by substantial evidence. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Contrary to employer's contention, in considering Dr. Celko's opinion on remand as to the existence of clinical pneumoconiosis, the administrative law judge was not required to assign less weight to Dr. Celko's opinion because he did not review as much evidence as the other physicians. The administrative law judge permissibly concluded that Dr. Celko's opinion was reasoned and documented, based on Dr. Celko's examination of claimant, the physical findings he made, the documentation he reviewed and the explanations he gave for his opinion. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order on Remand at 9-10.

Furthermore, to the extent that employer contends that the administrative law judge is required to accord greater weight to its medical experts, based solely on their qualifications as Board-certified pulmonologists, this argument is rejected. An administrative law judge may accord greater weight to a physician's opinion, based on his or her credentials, but is not required to do so. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993); *Clark*, 12 BLR at 1-154 (1989) (en banc); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988). In this case, the administrative law judge discussed the qualifications of each physician of record. Although he recognized that Drs. Fino and Renn are Board-certified in pulmonary medicine, he correctly found that Dr. Celko is "[B]oard-certified in internal medicine," "contributed to several publications," and "previously taught at the Community College of Allegheny County." Decision and Order on Remand at 9, *citing* Director's Exhibit 10. In addition, the administrative law judge noted that Dr. Rasmussen was a "B-reader and [was] [B]oard-certified in internal medicine," "work[ed] at the Rheumatology & Pulmonary Clinic in Beckley, West Virginia," "serve[d] as an adjunct Clinical Instructor of Respiratory Therapy at the College of West Virginia," and "published numerous articles on black lung diseases." Decision and Order on Remand at 9, *citing* Director's Exhibit 16. As the trier-of-fact, the administrative law judge has broad discretion to assess the qualifications of the physicians and determine the credibility of the evidence. *Clark*, 12 BLR at 1-155.

Because we see no error in the administrative law judge's decision to accord equal weight to the medical opinions, we affirm his finding that employer did not disprove the existence of clinical pneumoconiosis based on the medical opinion evidence. *See*

Balsavage, 295 F.3d at 396, 22 BLR at 2-394; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge's finding that employer did not rebut the presumed existence of pneumoconiosis under the first method of rebuttal at 20 C.F.R. §718.305(d)(1)(i). As employer raises no other challenges on appeal, *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983), we affirm the administrative law judge's determination that employer did not disprove the presumed fact of disability causation under the second method of rebuttal at C.F.R. §718.305(d)(1)(ii). We therefore affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(d)(1)(i), (ii); *Bender*, 782 F.3d at 137; *Minich*, 25 BLR at 1-150.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge