U.S. Department of Labor

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

BRB No. 18-0318 BLA

ORVILLE G. BLANKENSHIP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARMAN DEVELOPMENT CORPORATION	)	
	)	
	)	DATE ISSUED: 06/27/2019
and	)	
	)	
SECURITY INSURANCE COMPANY OF HARTFORD	)	
	)	
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 Modification of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Modification (2016-BLA-05738) of Administrative Law Judge Lee J. Romero, Jr., awarding benefits on a subsequent claim filed on January 16, 2007,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge accepted employer's concession that claimant has complicated pneumoconiosis and invoked the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The only contested issue before the administrative law judge was the onset date of claimant's complicated pneumoconiosis and thus the date for the commencement of benefits. The administrative law judge found that the evidence did not establish when claimant's simple pneumoconiosis progressed to complicated pneumoconiosis and awarded benefits commencing as of January 2007, the month in which he filed his subsequent claim.

On appeal, employer argues that the administrative law judge erred in awarding benefits as of January 2007. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Claimant filed an initial claim on June 2, 2004, which was denied by the district director because he did not establish total disability. Director's Exhibit 1. He filed his subsequent claim on January 16, 2007. Director's Exhibit 3. The district director denied benefits on September 12, 2007. Director's Exhibit 30. Claimant filed three subsequent requests for modification that were also denied. Director's Exhibits 34, 59, 64, 141, 142, 160. His current modification request was filed on May 5, 2014. Director's Exhibit 182.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant has complicated pneumoconiosis and established entitlement to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 5 n.5.

[3] The record reflects that claimant's most recent coal mine employment was in Virginia. Director's Exhibit 7 at 5. 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).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The commencement date for benefits is the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-184 (1989). Where a miner suffers from complicated pneumoconiosis, the fact-finder must consider whether the evidence establishes the date of onset of the disease. *See Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989). If not, the commencement date is the month in which the claim was filed, unless the evidence establishes that claimant had only simple pneumoconiosis for any period subsequent to the date of filing. In that case, the date for the commencement of benefits follows the period of simple pneumoconiosis. *Williams*, 13 BLR at 1-30; 20 C.F.R. §725.503(b). In a subsequent claim, however, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

The administrative law judge considered x-rays, CT scans, treatment records, and medical opinions relevant to the onset date of claimant's complicated pneumoconiosis. Decision and Order on Modification at 51. He found claimant established complicated pneumoconiosis pursuant to a February 16, 2007 x-ray and that "the evidence of record does not reflect when [c]laimant's simple pneumoconiosis became complicated pneumoconiosis." *Id*. Thus, the administrative law judge awarded benefits commencing January 2007, the month in which claimant filed his subsequent claim. *Id*.

Employer asserts that the administrative law judge erred in finding the February 16, 2007 x-ray to be positive for complicated pneumoconiosis.[4] Employer's Brief at 4. Employer generally contends there is "no conclusive" evidence of complicated pneumoconiosis until May 23, 2013, when claimant was examined by Dr. Rosenberg at employer's request. Employer's Brief at 8. Employer's argument is without merit.

Dr. Poulos, dually qualified as a B reader and Board-certified radiologist, read the February 16, 2007 x-ray as positive for simple pneumoconiosis only, while Drs. DePonte and Alexander, also dually qualified, read the same film as positive for both simple and

[4] Overall, the administrative law judge considered thirty readings of twelve x-rays taken between February 2007 and March 2017. He found the preponderance of the x-rays positive for both simple and complicated pneumoconiosis, and that the complicated pneumoconiosis was present as of February 16, 2007. Decision and Order on Modification at 9-21. There is no evidence disputing that claimant had a mass in his upper right lung as of February 2007, which was greater than one centimeter in diameter. 20 C.F.R. §718.304(a).

complicated pneumoconiosis, with a Category A large opacity in the upper right lung. Director's Exhibits 10, 104, 116. Drs. Scatarige and Scott, also dually qualified, read the February 16, 2007 x-ray as negative for both simple and complicated pneumoconiosis. Director's Exhibits 134, 135. Dr. Scatarige opined that claimant had peripheral nodules in the right upper lung compatible with tuberculosis but not complicated pneumoconiosis, based on the location of the nodules and their asymmetry. Director's Exhibit 134. Dr. Scott also opined that claimant had peripheral nodules in the upper right lung zone "probably" due to tuberculosis or histoplasmosis. Director's Exhibit 135.

The administrative law judge permissibly found the negative readings for complicated pneumoconiosis by Drs. Scatarige and Scott were speculative because no evidence indicates claimant had been treated for either tuberculosis or histoplasmosis. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287 (4th Cir. 2010) (an administrative law judge may discount negative x-ray readings where there is no evidence of the alternative diagnoses for large masses present on the x-rays). The administrative law judge also permissibly found neither physician adequately explained his opinion. *See also Milburn Colliery Co. v. Hick*s, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Relying on the two positive readings by Drs. DePonte and Alexander, the administrative law judge permissibly found the February 16, 2007 x-ray positive for complicated pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992). Analyzing the conflicting readings of the next four x-rays, dated November 21, 2008, March 7, 2009, September 1, 2009, and November 9, 2009, he again permissibly discounted the negative readings by physicians who gave unsupported alternative causes for the large masses, and thus found those x-rays positive for complicated pneumoconiosis. *See Cox*, 602 F.3d at 287; Decision and Order on Modification at 9-10, 13-17. We therefore reject employer's argument that claimant's x-rays can only be described as "in equipoise" for complicated pneumoconiosis before May 23, 2013.[5] Employer's Brief at 7. Substantial evidence supports the administrative law judge's finding that the x-rays establish complicated pneumoconiosis as early as February 16, 2007, and the Board is not

[5] The administrative law judge did find that two x-rays, taken on May 15, 2010 and March 17, 2012, were in equipoise for complicated pneumoconiosis, but that finding did not affect his determination that the overall weight of the x-ray evidence was positive for complicated pneumoconiosis, with the disease present as early as February 2007. Decision and Order on Modification at 17-18, 20-21. Employer agrees that the next x-ray, dated May 23, 2013 and read by Dr. Rosenberg, was positive for complicated pneumoconiosis. Employer's Brief at 8. Therefore, we need not discuss the administrative law judge's analysis of the remaining x-rays. Decision and Order on Modification at 19-20.

empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Because we affirm the administrative law judge's finding that claimant established complicated pneumoconiosis as of the February 16, 2007 x-ray, we see no error in his conclusion that the evidence does not establish when claimant's simple pneumoconiosis became complicated pneumoconiosis.[6] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012); Decision and Order on Modification at 51. Claimant's simple pneumoconiosis would have progressed to complicated pneumoconiosis some time before the February 16, 2007 x-ray, and there is no evidence in the record that he had only simple pneumoconiosis at any time after the filing date of his claim one month earlier in January 2007. *Williams*, 13 BLR at 1-30; 20 C.F.R. §725.503(b). We therefore affirm the administrative law judge's determination that benefits commence as of January 2007, the month in which claimant filed his subsequent claim.[7] *See Lykins*, 12 BLR at 1-184; *Williams*, 13 BLR at 1-30.

[6] The administrative law judge noted that claimant's complicated pneumoconiosis progressed from a two-centimeter, Category A opacity in 2007 to a Category B opacity by 2017. Decision and Order on Modification at 20, 51. He also noted that Dr. Baker diagnosed claimant with complicated pneumoconiosis on August 8, 2008, and that the treatment records and CT scans neither established nor refuted that claimant had complicated pneumoconiosis. *Id*. at 51. We affirm the administrative law judge's findings with regard to the medical opinions, CT scans, and treatment records as they are unchallenged. *See Skrack*, 6 BLR at 1-711.

[7] Pursuant to 20 C.F.R. §725.503(d), in a modification proceeding an administrative law judge may award benefits that predate the original denial only if modification is based on a mistake in a determination of fact. *See* 20 C.F.R. §725.503(d)(1). To the extent the award is based on a change in conditions, benefits are payable "beginning with the month of onset of total disability due to pneumoconiosis . . . provided that no benefits shall be payable for any month prior to the effective date of the most recent denial of the claim by a district director or administrative law judge." 20 C.F.R. §725.503(d)(2). Although not specifically stated in the Decision and Order on Modification, it is apparent from the administrative law judge's analysis that claimant established modification based on a mistake in a determination of fact. Thus, the administrative law judge permissibly awarded benefits as of the month in which claimant filed his subsequent claim. *See* 20 C.F.R. §725.503(b),(d). Further, employer does not raise any arguments with respect to whether the commencement date should be based on a mistake in a determination of fact versus a change in conditions. *See Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order on Modification is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge