U.S. Department of Labor

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

BRB No. 17-0331 BLA

DAVID R. GIBSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BUFFALO MINING COMPANY	)	
	)	
and	)	
	)	
PITTSTON COMPANY	)	DATE ISSUED: 03/30/2018
	)	
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 Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson Kelly, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05476) of Administrative Law Judge Drew A. Swank, rendered on a subsequent claim[1] filed on January 22, 2014, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

After crediting claimant with sixteen years of underground coal mine employment,[2] the administrative law judge found that the x-ray evidence established that claimant has complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), and that he therefore invoked the irrebuttable presumption that he is totally disabled due to pneumoconiosis provided 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.

On appeal, employer contends that the administrative law judge erred in finding that claimant has complicated pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.[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,

[1] Claimant's initial claim for benefits, filed on February 8, 1994, was denied by an administrative law judge on June 17, 1996, for failure to establish total disability. Director's Exhibit 1. The Board affirmed that decision in a Decision and Order issued on May 23, 1997, and denied claimant's motion for reconsideration on August 8, 1997. *Id*. Claimant's second claim, filed on April 25, 2011, was finally denied by the district director on February 6, 2012, for failure to establish total disability. Director's Exhibit 2.

[2] Claimant's coal mine employment was in West Virginia. Hearing Transcript at 15. 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).

[3] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant had sixteen years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

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 is suffering from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities 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 yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The administrative law judge must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c), before determining whether claimant has invoked the irrebuttable presumption. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283, 24 BLR 2-269, 2-280-81 (4th Cir. 2010); *E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56, 22 BLR 2-93, 2-100-01 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

In this case, the evidence relating to the existence of complicated pneumoconiosis consists of x-ray readings, medical opinions, and treatment records.[4] Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered a total of nine interpretations of three x-rays taken on February 20, 2014, September 10, 2014, and August 30, 2016. He noted that all five of the radiologists who interpreted the x-rays — Drs. Crum, Meyer, Seaman, Miller, and DePonte — are dually-qualified as B readers and Board-certified radiologists. Decision and Order at 8-9. Next, the administrative law judge stated that, "[i]n weighing X-ray evidence, a judge is not required to defer to the numerical superiority of X-ray evidence, although it is within his or her discretion to do so." *Id.* at 9 (*citing Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990) and *Edmiston v. F & R Coal*, 14 BLR 1-65 (1990)). He observed that five of the x-ray readings were positive for complicated pneumoconiosis, and four were negative.[5] *Id.* The administrative law judge concluded:

[4] The record contains no biopsy evidence. Therefore claimant cannot establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).

[5] Drs. Crum and Miller interpreted the February 20, 2014 x-ray as showing Category A large opacities consistent with pneumoconiosis, but Drs. Meyer and Seaman read it as negative for pneumoconiosis. Director's Exhibits 16, 38; Claimant's Exhibit 1; Employer's Exhibit 1. Drs. Crum and Seaman interpreted the September 10, 2014 x-ray as showing a Category A large opacity consistent with pneumoconiosis, but Dr. Meyer read

> Based upon the totality of the evidence, including the qualifications of the readers and the fact that the majority of X-ray readings indicated complicated coal workers' pneumoconiosis, the undersigned finds that Claimant has proven by a preponderance of the evidence that he has complicated coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Id. at 10. The administrative law judge then determined that claimant's pneumoconiosis arose out of his sixteen years of coal mine employment, based on the absence of any evidence from employer to rebut the presumption at 20 C.F.R. §718.203(b). *Id*. Finding that claimant established all of the elements of entitlement, the administrative law judge awarded benefits.[6] *Id*. at 12.

Employer argues that the administrative law judge erred in weighing the x-ray evidence pursuant to 20 C.F.R. §718.304(a) and failed to consider other evidence regarding the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). Employer's Brief at 7-20. We agree.

Although he wrote that his finding was based "upon the totality of the evidence," including the qualifications of the physicians who provided x-ray interpretations, the administrative law judge's decision does not reflect any qualitative analysis of the evidence. Decision and Order at 10. Contrary to the administrative law judge's apparent understanding, it was not within his discretion simply to "defer to the numerical superiority of X-ray evidence," as he did when he based his finding of complicated pneumoconiosis on the fact that the majority of x-ray interpretations were positive.[7] *Id*. at 9. It is

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it as negative for both complicated and simple pneumoconiosis. Director's Exhibits 31, 37; Claimant's Exhibit 4. Dr. Crum read the August 30, 2016 chest x-ray as showing a Category A large opacity, but Dr. DePonte read it as negative for pneumoconiosis. Claimant's Exhibit 3; Employer's Exhibit 2.

[6] Because he found that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, the administrative law judge found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(1), and a change in an applicable condition of entitlement since the denial of the prior claim pursuant to 20 C.F.R. §725.309(c). Decision and Order at 10-11.

[7] The administrative law judge cited *Edmiston v. F & R Coal*, 14 BLR 1-65 (1990) and *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990) as support for his view. To the extent those decisions permit an administrative law judge to rely solely on numerical superiority to resolve conflicting x-ray evidence, we note that they were issued before the Fourth Circuit held that making a finding based only on "counting heads" is "hollow" and

permissible to give *some* weight to the majority of interpretations, *see Sahara Coal Co. v. Fitts*, 39 F.3d 781, 782, 18 BLR 2-384, 2-386 (7th Cir. 1994), but an administrative law judge may not conclude that a miner has pneumoconiosis solely because more x-ray interpretations conclude that he does than conclude that he does not. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256, 25 BLR 2-779, 2-792-93 (4th Cir. 2016); *Sharpe v. Director, OWCP*, 495 F.3d 125, 134 n.16, 24 BLR 2-56, 2-70-71 n. 16 (4th Cir. 2007); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-273-74 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992). In addition to the number of positive and negative readings, the administrative law judge should consider the readers' qualifications[8] and, if they are not inconsistent with the progressive nature of pneumoconiosis, the dates of the x-rays. *See Adkins*, 958 F.2d at 51-52, 16 BLR at 2-64-66. The administrative law judge must then provide a reasoned explanation of his weighing of the evidence in light of those factors. *See Addison*, 831 F.3d at 256-57, 25 BLR at 793.

Moreover, employer notes that in addition to the x-ray readings, which use the International Labour Organization (ILO) classification system, Drs. Crum, Miller, Seaman, DePonte, and Meyer provided narrative findings in which they addressed the size, location, and possible causes of the large masses seen on the x-rays. Director's Exhibits 16, 31, 37, 38; Claimant's Exhibits 1, 3, 4; Employer's Exhibits 1, 2. We agree with employer that the administrative law judge erred by failing to consider the conflicting narrative reports of the radiologists, who agree that claimant has a large mass in the base of his right lung, but offer different opinions as to whether that mass is a large opacity of complicated pneumoconiosis.[9] The narrative reports have a direct bearing on whether the abnormalities

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"impermissible." *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-273-74 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992).

[8] Although all of the radiologists are dually-qualified, employer contends that they are not equally-qualified. Employer's Brief at 9, 13-14. In response, claimant asserts that employer's contention "boils down to quibbling and is without merit." Claimant's Brief at 8-10. We leave it to the administrative law judge to consider the parties' arguments.

[9] For example, although Dr. Crum noted that the February 20, 2014 x-ray showed Category A large opacities consistent with pneumoconiosis, he noted in his reading that the large opacities were "suggesting" complicated pneumoconiosis, and that comparison to prior or follow-up records would be needed to exclude a neoplasm. Director's Exhibit 16. Similarly, in his reading of the September 10, 2014 x-ray, Dr. Crum wrote that the findings "may represent complicated pneumoconiosis," and recommended comparison to prior or follow-up records. Director's Exhibit 31. In his interpretation of the September

appearing on the chest x-ray are a manifestation of a "chronic dust disease," as is necessary for a finding of complicated pneumoconiosis, or the result of another disease process. *See* 20 C.F.R. §718.304; *Melnick*, 16 BLR at 1-37.

Consequently, we must vacate the administrative law judge's determination that the x-ray evidence established complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

Finally, we also agree with employer that the administrative law judge erred by awarding benefits based solely upon the x-ray evidence under 20 C.F.R. §718.304(a), without considering other evidence relevant to determining the etiology of the masses in claimant's lungs, pursuant to 20 C.F.R. §718.304(c). *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-100-01; *Melnick*, 16 BLR at 1-37; Employer's Brief at 17-20. Specifically, the administrative law judge failed to consider the medical opinions of Drs. Johnson and Zaldivar, both of whom examined claimant, and treatment notes from Dr. Habre.[10] Director's Exhibits 16, 17, 41; Claimant's Exhibit 2.

In light of the errors discussed above, we vacate the administrative law judge's determination that claimant established that he has complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304. As a result, we also vacate the administrative law judge's findings that claimant established that his complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

On remand, the administrative law judge must consider all of the evidence regarding the existence of complicated pneumoconiosis, and then weigh together all of the evidence at subsections (a) and (c), before determining whether claimant has invoked the irrebuttable presumption. *See Cox*, 602 F.3d at 283, 24 BLR at 2-280-81; *Scarbro*, 220 F.3d at 255-56, 22 BLR at 2-100-01; *Melnick*, 16 BLR at 1-33. If the administrative law judge finds that claimant has complicated pneumoconiosis, he may reinstate his findings that claimant

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10, 2014 x-ray, Dr. Meyer opined that the mass in claimant's right lung base "may be neoplastic or inflammatory." Director's Exhibit 37.

[10] Dr. Johnson opined that claimant has simple and complicated pneumoconiosis, as well as legal pneumoconiosis, but Dr. Zaldivar concluded that he does not have any form of pneumoconiosis and that the large mass seen on x-rays "may be the result of a previous infection." Director's Exhibits 16, 17, 41. Dr. Habre, claimant's treating physician, opined that claimant suffers from coal workers' pneumoconiosis, although he did not specifically address the etiology of the large mass. Claimant's Exhibit 2.

invoked the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304, established that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309, and established entitlement to benefits. Should the administrative law judge determine that claimant has not established the existence of complicated pneumoconiosis, he must consider whether claimant can establish entitlement to benefits through the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4) (2012),[11] or

[11] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner has at least fifteen years of underground coal mine employment, as claimant does in this case, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

by establishing each element of entitlement under 20 C.F.R. Part 718. *See* 20 C.F.R. §§ 718.202, 718.203, 718.204. The administrative law judge must set forth his findings on remand in detail, including the underlying rationales, as required by the Administrative Procedure Act.[12] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[12] The Administrative Procedure Act provides that every adjudicatory decision must include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).