U.S. Department of Labor

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

BRB No. 15-0368 BLA

WILLIAM H. HARLESS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ANCHOR MINING INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 05/24/2016
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawloski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2012-BLA-05922) of Administrative Law Judge Adele Higgins Odegard awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-904 (2012) (the Act). This case involves a subsequent claim filed on September 16, 2011.[1]

After crediting claimant with over fifteen years of qualifying coal mine employment,[2] the administrative law judge found that the new evidence did not establish that the claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Because claimant failed to establish that he is totally disabled, the administrative law judge found that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). However, the administrative law judge found that the new evidence established the existence of complicated pneumoconiosis, thereby enabling claimant to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge, therefore, found that claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2011 claim on the merits. The administrative law judge found that the evidence, as a whole, established invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304. The administrative law judge further found that claimant's complicated pneumoconiosis arose

[1] Claimant filed a previous claim on December 9, 2003. Director's Exhibit 1. An administrative law judge denied the claim on November 16, 2007, because the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). Director's Exhibit 1.

[2] The record reflects that claimant's last coal mine employment was in West 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 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Employer also contends that the administrative law judge erred in finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he failed to establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(c).

[4] Because no party challenges the administrative law judge's finding that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Section 411(c)(3) Presumption – 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 claimant is totally disabled due to pneumoconiosis if the miner was 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 United States Court of Appeals for the Fourth Circuit has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition that is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, 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 2-1143, 1145-46 (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 banc).

Section 718.304(a)

Relevant to 20 C.F.R. §718.304(a), the administrative law judge considered three interpretations of a new x-ray dated November 10, 2011. Drs. Shipley and Meyer, each dually qualified as a B reader and Board-certified radiologist, and Dr. Rasmussen, a B reader, interpreted the x-ray as positive for simple pneumoconiosis (profusion 1/2), but negative for complicated pneumoconiosis. Director's Exhibit 11; Employer's Exhibits 1, 2. The administrative law judge, therefore, found that, while the x-ray evidence established "a severe degree" of simple pneumoconiosis,[5] it did not establish the

[5] The administrative law judge accurately noted that employer conceded that claimant suffers from clinical pneumoconiosis. Decision and Order at 2 n.2, 18; Employer's Post-Hearing Brief at 5.

existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Decision and Order at 13.

Section 718.204(c)

The administrative law judge found that the record also contains relevant evidence to consider pursuant to 20 C.F.R. §718.304(c). Specifically, the administrative law judge considered three interpretations of a CT scan taken on February 8, 2012. Dr. Ahmed, a Board-certified radiologist and B reader, interpreted the CT scan as positive for complicated pneumoconiosis, stating that:

> Changes are consistent with complicated pneumoconiosis. Multiple, spiculated, larger than 1-centimeter nodules are noted in both lung fields, in addition to interstitial fibronodular changes of simple pneumoconiosis. Malignancy cannot be excluded.

Claimant's Exhibit 1.

Two equally qualified physicians, Drs. Scott and Wheeler, interpreted the CT scan as negative for complicated pneumoconiosis. Dr. Wheeler found that the "[n]odules and small mass are granulomatous disease and not [coal workers' pneumoconiosis] because [the] pattern is asymmetrical . . . ." Employer's Exhibit 3. Dr. Scott indicated that there was "[n]o background of small opacities," and that the changes were "probably healed histoplasmosis." Employer's Exhibit 4.

In evaluating the conflicting interpretations of the February 8, 2012 CT scan, the administrative law judge accorded less weight to the interpretations of Drs. Wheeler and Scott because they did not find that the CT scan revealed simple pneumoconiosis. Decision and Order at 18. The administrative law judge, therefore, credited Dr. Ahmed's positive interpretation for complicated pneumoconiosis, and found that the CT scan evidence established the existence of complicated pneumoconiosis. Decision and Order at 17, 19.

Employer argues that the administrative law judge erred by failing to consider Dr. Ahmed's comment on his CT scan interpretation that a malignancy could not be excluded. Employer's Brief at 10. We agree. The administrative law judge erred by failing to consider Dr. Ahmed's comment, as it has a direct bearing on whether the abnormalities appearing on the CT scan are, in fact, the manifestation of a "chronic dust disease," or the result of another disease process. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; *Melnick*, 16 BLR at 1-37. On remand, the administrative law judge should consider whether Dr. Ahmed's comment constitutes an alternative diagnosis, thereby

calling into question his diagnosis of complicated pneumoconiosis, or merely represents an additional diagnosis of cancer. We, therefore, vacate the administrative law judge's finding that the CT scan evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c), and remand the case for further consideration.

In the interest of judicial economy, we will address employer's contention that the administrative law judge also erred in finding that the abnormalities identified by Dr. Ahmed in the upper lobes of claimant's lungs on the CT scan would produce opacities greater than one centimeter in diameter on an x-ray. In this case, Dr. Ahmed found that claimant's February 8, 2012 CT scan revealed "[m]ultiple larger than 1-centimeter nodules consistent with *complicated pneumoconiosis, category A*." Claimant's Exhibit 1 (emphasis added). As employer notes, it appears that the administrative law judge's equivalency determination was based on Dr. Ahmed's description of the abnormalities on the CT scan as Category A opacities.[6] Employer's Brief at 7. The administrative law judge, however, failed to provide a specific explanation for why she found Dr. Ahmed's description sufficient to satisfy the equivalency determination set forth in *Blankenship.* Consequently, the administrative law judge's analysis does not comply with the Administrative Procedure Act (APA), which provides that every adjudicatory decision must be accompanied by 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, should the administrative law judge, on remand, determine that Dr. Ahmed's positive interpretation for complicated pneumoconiosis is not undermined by his comment regarding malignancy, she should provide a basis for her equivalency determination.

We reject, however, employer's contention that the administrative law judge erred in finding the CT scan evidence more probative than the x-ray evidence. In assessing the

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[6] The administrative law judge set forth the definition of a category A large opacity:

> The ILO standards define a large opacity as an opacity with the longest dimension exceeding 10 mm. The definition of a category A opacity is one large opacity with its longest dimension up to about 50 mm, or several opacities with the sum of their longest dimensions not exceeding about 50 mm.

Decision and Order at 17 n.19.

weight to be accorded the CT scan evidence, the administrative law judge permissibly relied on Dr. Wiot's statement that CT scan evidence "can be beneficial in recognizing complicated pneumoconiosis when it is not evident on . . . routine chest x-rays." Decision and Order at 19 n.25; Director's Exhibit 1. The administrative law judge further permissibly found that the growth of claimant's lung abnormalities between the time of the November 10, 2011 x-ray and the February 8, 2012 CT scan is consistent with the recognition in the regulations that pneumoconiosis is a progressive disease. Decision and Order at 19, citing 20 C.F.R. §718.201(c).

In summary, if the administrative law judge, on remand, again finds that the evidence establishes the existence of complicated pneumoconiosis, claimant will be entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, and entitled to benefits.[7] Conversely, if the administrative law judge finds that the evidence does not establish the existence of complicated pneumoconiosis, claimant, having failed to establish total disability pursuant to 20 C.F.R. §718.204(b), will not be entitled to benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

[7] If the administrative law judge finds that the new evidence establishes the existence of complicated pneumoconiosis, claimant will have established a change in an applicable element of entitlement pursuant to 20 C.F.R. §725.309(c).

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

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge