U.S. Department of Labor

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

BRB No. 16-0376 BLA

STANLEY RAY TACKETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ICG KNOTT COUNTY, LLC	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH/CHARTIS	)	DATE ISSUED: 05/15/2017
	)	
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 Larry W. Price, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak, Prestonsburg, Kentucky, for claimant.

James M. Kennedy (Baird and Baird), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-0164) of Administrative Law Judge Larry W. Price, rendered on a claim filed on October 18, 2010, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge accepted the parties' stipulation that claimant has thirty years of underground coal mine employment and also found that claimant established the existence of simple clinical pneumoconiosis. Based on his further determination that claimant suffers from complicated pneumoconiosis, the administrative law judge found that claimant was entitled invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge further found that claimant established that his complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203, and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in weighing the x-ray evidence, and did not consider the record as a whole, prior to finding that claimant has complicated pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response brief in this appeal.[1]

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.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act 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), as implemented by 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

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[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established thirty years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8; Hearing Transcript at 5.

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

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). 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 Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89, 21 BLR 2-615, 2-626-29 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered seven interpretations of four x-rays. The x-rays dated December 1, 2010, August 7, 2012, September 27, 2012 x-rays were each read as positive for simple pneumoconiosis and negative for complicated pneumoconiosis.[3] Director's Exhibit 24; Employer's Exhibits 2, 3, 4. The most recent x-ray, dated February 11, 2015, was read by Drs. Crum and Seaman, each of whom is dually qualified as a Board-certified radiologist and B reader, as positive for both simple and complicated pneumoconiosis, Category A. Claimant's Exhibits 1, 5. However, Dr. Meyer, who is also dually qualified, read the February 11, 2015 x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Employer's Exhibit 13. Finding that "the positive readings by Dr. Crum and Dr. Seaman "overwhelm Dr. Meyer's negative [reading]," the administrative law judge concluded that the x-ray evidence is "preponderantly" positive for complicated pneumoconiosis. Decision and Order at 10.

Pursuant to 20 C.F.R §718.304(c),[4] the administrative law judge found that the CT scan evidence was negative and that the three medical reports, by Drs. Ammisetty, Rosenberg, and Jarboe, diagnosed simple but not complicated pneumoconiosis. Decision and Order at 11-12; Director's Exhibits 10, 24; Employer's Exhibits 5-8. Considering the evidence together, the administrative law judge credited the February 11, 2015 x-ray as establishing complicated pneumoconiosis over the contrary evidence. *Id.* at 12. Thus,

[3] The December 1, 2010 x-ray was read twice, by Dr. Rasmussen, a B reader, and Dr. Tarver, who is dually qualified as a Board-certified radiologist and B reader, as positive for simple pneumoconiosis. Director's Exhibit 24; Employer's Exhibit 4. The September 22, 2011 x-ray was read once by Dr. West, who is a dually qualified radiologist, as positive for simple pneumoconiosis. Employer's Exhibit 2. The September 27, 2012 x-ray was read once by Dr. Halbert, also a dually qualified radiologist, as positive for simple pneumoconiosis. Employer's Exhibit 3.

[4] There is no biopsy evidence for consideration pursuant to 20 C.F.R. §718.304(b).

the administrative law judge determined that claimant was entitled to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304.

Employer contends that the administrative law judge did not adequately explain the weight accorded to the x-ray evidence. With regard to the February 11, 2015 x-ray, employer states that it "urged the [administrative law judge] in its post-hearing brief to consider prestigious academic appointments in radiology when resolving the conflicts in the chest x-ray readings." Employer's Brief at 10. Employer asserts that academic credentials "may not compel an outcome, but they merit meaningful consideration when the [administrative law judge] resolves the conflicts in the chest x-ray readings." *Id.* at 12. Employer's arguments have merit, in part.

The regulation at 20 C.F.R. §718.202(a)(1) specifically provides that "[a] chest X-ray . . . may form the basis for a finding of the existence of pneumoconiosis" and, in cases "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 20 C.F.R. §718.202(a)(1). Further, "[t]he adjudicator should consider any relevant factor in assessing a physician's credibility, and each party may prove or refute the relevance of that factor." 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000), *citing Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993). A physician's professorship in radiology is one such relevant factor. *Worhach*, 17 BLR at 1-108; *Melnick*, 16 BLR at 1-37.

Because the administrative law judge did not indicate that he gave consideration to all of the radiological credentials of the physicians in rendering his findings at 20 C.F.R. §718.304(a), his Decision and Order does not satisfy the Administrative Procedure Act (the APA),[5] as it does not address the weight accorded all of the relevant evidence. *See* 5 U.S.C. §557(c)(3)(A); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore vacate the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis, based on the x-ray evidence at 20 C.F.R. §718.304(a), and remand the case for further consideration under this subsection.

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[5] The Administrative Procedure Act, 5 U.S.C. §§500-596, as incorporated into the Act by 30 U.S.C. §932(a), 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. . . ." 5 U.S.C. §557(c)(3)(A).

On remand, the administrative law judge must explain the weight accorded the conflicting readings of the February 11, 2015 x-ray, taking into account all of the relevant radiological qualifications of each physician. While the administrative law judge may give greater weight to the interpretations of a physician based upon his professorship in radiology, he is not required to do so. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting); *Bateman v. E. Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003). Rather, the administrative law judge has discretion to determine the weight to accord Dr. Meyer's credentials and is required only to explain his findings in accordance with the APA. *See Staton v. Norfolk & W. Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Wojtowicz*, 12 BLR at 1-165.

Additionally, in the interest of judicial economy, we reject employer's argument that the administrative law judge did not properly consider the contrary evidence and improperly relied on the most recent x-ray in determining whether claimant has complicated pneumoconiosis. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge may accord greater weight to more recent x-ray evidence, provided that it is not inconsistent with the premises that pneumoconiosis is a progressive disease and those who suffer from it do not get better. *Woodward v. Director, OWCP*, 991 F.2d 314, 319-320, 17 BLR 2-77, 2-84-85 (6th Cir. 1993), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 1167, 21 BLR 2-73, 2-82 (6th Cir. 1997). In this case, we see no error in the administrative law judge's rationale that the most recent x-ray of February 11, 2015, if determined to be positive for complicated pneumoconiosis on remand, is more probative of claimant's condition and is sufficient to satisfy claimant's burden of proof. *See Woodward*, 991 F.2d at 319-320, 17 BLR at 2-84-85; *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc). The administrative law judge correctly noted that the negative evidence for complicated pneumoconiosis predates the February 11, 2015 x-ray by "nearly three years and longer." Decision and Order at 12. Specifically, the most recent negative x-ray is dated September 27, 2012, and the most recent negative CT scan is also dated September 27, 2012. Employer's Exhibits 3, 8. Drs. Ammisetty, Rosenberg, and Jarboe opined that claimant has simple coal worker's pneumoconiosis based on x-rays and CT scans taken in 2009, 2010, 2011 and 2012. Decision and Order at 11-2; Director's Exhibit 10; Employer's Exhibits 5, 8. Thus, contrary to employer's argument, if the administrative law judge concludes on remand that the February 11, 2015 x-ray is

positive for complicated pneumoconiosis, he may rationally accord less weight to the contrary evidence.[6] *See Woodward*, 991 F.2d at 319-20, 17 BLR at 2-84-85.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded 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

[6] The administrative law judge correctly observed that "no physician [who has authored a medical opinion in this case] has had the benefit of considering [c]laimant's most recent [x]-ray from February 2015." Decision and Order at 12.