U.S. Department of Labor

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

BRB No. 18-0335 BLA

DAVID MITCHELL Claimant-Respondent v. HARLAN CUMBERLAND COAL COMPANY and EMPLOYERS INSURANCE OF WAUSAU C/O LIBERTY MUTUAL INSURANCE GROUP Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/07/2019 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Cody F. Fox (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-05495) of Administrative Law Judge John P. Sellers, III, rendered on a subsequent claim filed on August 7, 2014,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant has complicated pneumoconiosis, thereby invoking the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 411(c)(3) of the Act.[2] 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In light of the parties' stipulation that claimant has sixteen years of coal mine employment, he is entitled to the presumption that his complicated pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b). The administrative law judge found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in failing to consider whether claimant worked in conditions that were substantially similar to those in underground mines,[3] and in finding complicated pneumoconiosis established. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial

[1] Claimant filed an initial claim on September 3, 2003, which was denied by Administrative Law Judge Ralph A. Romano on May 10, 2009, for failure to establish any element of entitlement. Director's Exhibit 1. The Board affirmed Judge Romano's decision on September 21, 2010. *Id*.

[2] Claimant thus established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established sixteen years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3. We also reject employer's assertion that the administrative law judge did not make a proper determination as to whether claimant's coal mine employment was either underground or in dust conditions substantially similar to those underground. That determination is necessary for invocation of the Section 411(c)(4) rebuttable presumption, 30 U.S.C. §921(c)(4), but not invocation of the Section 411(c)(3) irrebuttable presumption, 30 U.S.C. §921(c)(3), or the presumption at 20 C.F.R. §718.203(b).

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).

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large 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, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

If claimant establishes complicated pneumoconiosis, he must then establish that the disease arose out of coal mine employment. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22, n.21 *(*1976); *The Daniels Co. v. Mitchell*, 479 F.3d 321, 337 (4th Cir. 2007). If he has at least ten years of coal mine employment, however, the burden shifts to employer to disprove this fact. 30 U.S.C. §921(c)(1); 20 C.F.R. §718.203(b).

X-ray Evidence

The administrative law judge considered nine interpretations of five x-rays taken on May 20, 2014, October 22, 2014, August 26, 2015, March 10, 2016, and March 23, 2017.[5]

[4] Because claimant's last coal mine employment was in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Hearing Transcript at 15.

[5] Dr. DePonte, dually qualified as a B reader and Board-certified radiologist, read the May 20, 2014 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Seaman, also dually qualified, read it as negative for complicated pneumoconiosis. Director's Exhibits 14, 16. Drs. DePonte and Alexander, both dually qualified, read the October 22, 2014 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Tarver, also dually qualified, read the film as negative for complicated pneumoconiosis. Director's Exhibits 11, 15, 17. Dr. Tarver read the August 26, 2015 x-ray as negative for complicated pneumoconiosis and there are no other readings of that film. Employer's Exhibit 1. Dr. Wolfe, dually qualified, read the March 10, 2016 x-ray as negative for complicated pneumoconiosis and there are no other readings of that film. Employer's

All interpreting physicians agree claimant has simple pneumoconiosis, but disagree as to whether he has complicated pneumoconiosis. The administrative law judge found the May 20, 2014 x-ray "inconclusive" for complicated pneumoconiosis, the October 22, 2014 x-ray positive for complicated pneumoconiosis, the August 26, 2015 and March 10, 2106 x-rays negative for complicated pneumoconiosis, and the March 23, 2017 x-ray positive for complicated pneumoconiosis. Decision and Order at 16-17.

Employer asserts the administrative law judge erred in relying on a "head count" of the readings to find the October 22, 2014 x-ray positive for complicated pneumoconiosis.[6] Employer's Brief at 5. We disagree. The administrative law judge performed a quantitative and qualitative analysis of the three conflicting readings of that film, properly taking into consideration both the number of readings and the relative qualifications of the interpreting physicians. *See* 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993). Because the three interpreting physicians were equally qualified as B readers and Board-certified radiologists, he permissibly credited the preponderance of the positive readings. *See Woodward*, 991 F.2d at 321; *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003). We therefore affirm the administrative law judge's determination that the October 22, 2014 x-ray is positive. Decision and Order at 17.

We further reject employer's contention that the administrative law judge erred in finding the March 23, 2017 x-ray positive for complicated pneumoconiosis. Employer's Brief at 6. The administrative law judge rationally resolved the conflict in the readings based on the radiological qualifications of the physicians. *See Staton*, 65 F.3d at 59; *Woodward*, 991 F.2d at 321. He permissibly credited Dr. DePonte's positive interpretation for complicated pneumoconiosis over Dr. Fino's negative reading, based on her "superior qualifications" as a dually qualified physician, while Dr. Fino is not dually qualified.[7] *See Staton*, 65 F.3d at 59; Decision and Order at 17.

Exhibit 2. Dr. DePonte read the March 23, 2017 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Fino, a B reader, read it as negative for complicated pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 17.

[6] Employer states that "claimant is allowed to submit a reading in 'rebuttal' of the positive reading obtained by the [Department of Labor], which helped give claimant a numerical superiority of readings." Employer's Brief at 4. Employer does not challenge, however, the admission of claimant's evidence into the record. *See* 20 C.F.R. §725.414; *J.V.S.* [*Stowers*] *v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-83 (2008).

[7] Employer maintains that Dr. Fino's x-ray reading is more credible based on his review of claimant's medical records, but concedes the administrative law judge may rely

Weighing the x-ray evidence as a whole, the administrative law judge gave greatest weight to the March 23, 2017 x-ray, noting pneumoconiosis is a progressive and irreversible disease and the film "is a year more recent than its predecessor." Decision and Order at 17. Employer's general contention that the "majority" of the x-rays are negative for complicated pneumoconiosis is rejected, as the administrative law judge found one was inconclusive, two were negative, and two were positive. While employer also generally asserts that the x-rays are at best in equipoise, it raises no specific allegation of error with regard to the administrative law judge's rationale for giving controlling weight to the March 23, 2017 x-ray, based on the progressive and irreversible nature of the disease. Employer's Brief at 7; *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014). The Board must limit its review to contentions of error specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Thus, we affirm the administrative law judge's finding that claimant established complicated pneumoconiosis pursuant to 20 C.F.R. 718.304(a).

CT Scan and Medical Opinion Evidence

Relevant to 20 C.F.R. §718.304(c), the administrative law judge noted that a March 6, 2013 CT scan reported findings associated with sarcoidosis or a possible neoplasm. Decision and Order at 18; Claimant's Exhibit 5. Because the CT scan is "silent regarding the existence of pneumoconiosis," he found it "does not assist [claimant] in proving he has [complicated] pneumoconiosis, but it does not weigh against him, either." Decision and Order at 18. We reject employer's assertion that this CT scan undermines a finding of complicated pneumoconiosis, as an administrative law judge may permissibly conclude that a treatment x-ray or CT scan that is silent as to the existence of pneumoconiosis does not weigh against the presence of the disease. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). We therefore affirm the administrative law judge's finding that the CT scan evidence neither establishes nor disproves complicated pneumoconiosis. Decision and Order at 18.

The administrative law judge also weighed the opinions of Drs. Ajjarapu, Fino, and Dahhan. Decision and Order at 6-10. Dr. Ajjarapu examined claimant as part of the Department of Labor complete pulmonary evaluation on October 22, 2014, and diagnosed simple clinical pneumoconiosis and complicated pneumoconiosis. Director's Exhibit 11. Dr. Fino examined claimant on August 26, 2015, and diagnosed "simple coal worker's

---

on the radiological qualifications of the readers in resolving conflicts in the x-ray readings. Employer's Brief at 6.

pneumoconiosis" but stated he "cannot rule out sarcoidosis" based on claimant's elevated Angiotensin Converting Enzyme (ACE) levels. Director's Exhibit 13. Dr. Dahhan examined claimant on April 27, 2016, and reviewed medical records. Employer's Exhibit 2. He opined claimant does not have complicated pneumoconiosis, relying on Dr. Wolfe's interpretation of the April 10, 2016 x-ray as showing only simple pneumoconiosis. *Id*. He also opined claimant may have sarcoidosis based on elevated ACE levels. *Id*.

The administrative law judge gave little weight to the opinions of Drs. Fino and Dahhan, and found Dr. Ajjarapu's opinion better reasoned and supported by the objective evidence. Decision and Order at 21. Contrary to employer's contention, we see no error in the administrative law judge's credibility determinations. He noted that while Dr. Fino purported to have reviewed all x-rays in the record in excluding a diagnosis of complicated pneumoconiosis, he "did not specifically address Dr. DePonte's positive reading" of the March 23, 2017 x-ray, which the administrative law judge found positive and entitled to "the most weight."[8] Decision and Order at 20. The administrative law judge also permissibly found Dr. Fino's and Dr. Dahhan's opinions less persuasive because they "failed to explain why a confirmed diagnosis of sarcoidosis would [necessarily] exclude the possibility of a diagnosis of [complicated] pneumoconiosis, as both physicians seemed to imply." Decision and Order at 21; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

We also reject employer's assertion that Dr. Ajjarapu's opinion is insufficient to establish complicated pneumoconiosis at 20 C.F.R. §718.304(c) because it is based solely on Dr. DePonte's positive reading for complicated pneumoconiosis of the October 22, 2014 x-ray. Employer's Brief at 10. Contrary to employer's characterization, the administrative law judge noted that, in addition to relying on Dr. DePonte's positive reading, Dr. Ajjarapu examined claimant and based her opinion on "her review of other medical evidence in the record," including Dr. Fino's report. Decision and Order at 7, 21; Director's Exhibit 11. Moreover, to the extent the administrative law judge credited Dr. DePonte's reading in finding the October 22, 2014 x-ray positive for complicated pneumoconiosis, employer has not explained how Dr. Ajjarapu's reliance thereon undermines her opinion. *See King v. Consolidation Coal Co.*, 8 BLR 1-262, 1-265 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985) (administrative law judge may credit medical opinions that are better supported by the objective evidence).

[8] The administrative law judge reiterated that Dr. DePonte has "greater qualifications in readings x-rays" than Dr. Fino because she is dually qualified. Decision and Order at 20.

The determination of whether a medical opinion is adequately reasoned and documented is for the administrative law judge as the factfinder, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc), and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge's finding that claimant established complicated pneumoconiosis based on Dr. Ajjarapu's opinion at 20 C.F.R. §718.304(c).[9] *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33-34; Decision and Order at 23.

We also affirm as supported by substantial evidence the administrative law judge's finding, based on his consideration of all the relevant evidence together, that claimant established complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and a change in an applicable condition of entitlement under 20 C.F.R. §725.309. *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33-34; Decision and Order at 23. We further affirm, as unchallenged on appeal, the administrative law judge's finding that employer did not rebut the presumption that claimant's complicated pneumoconiosis arose out of his coal mine employment under 20 C.F.R. §718.203(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15.

[9] Moreover, any error by the administrative law judge in finding that claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(c) would be harmless, since Dr. Ajjarapu diagnosed complicated pneumoconiosis and we have affirmed the administrative law judge's determination that there is no credible contrary medical opinion to outweigh the positive x-ray evidence at 20 C.F.R. §718.304(a). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge