U.S. Department of Labor

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

BRB No. 17-0649 BLA

JAMES E. COFFEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	DATE ISSUED: 11/08/2018
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

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

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2013-BLA-05058) of Administrative Law Judge Morris D. Davis awarding benefits on a claim filed pursuant to the provisions

of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves claimant's request for modification of a claim filed on March 1, 2007.

In the initial decision dated March 19, 2009, Administrative Law Judge Richard T. Stansell-Gamm found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, he denied benefits.

Claimant timely requested modification on August 4, 2009. Director's Exhibit 55. After Judge Stansell-Gamm denied modification on November 18, 2011, claimant filed a second request for modification on May 15, 2012. Director's Exhibits 67, 68.

In a Decision and Order dated August 9, 2017, Administrative Law Judge Morris D. Davis (the administrative law judge) credited claimant with twenty-three years of coal mine employment,[1] and found that the new evidence establishes the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore found that claimant established a change in conditions pursuant to 20 C.F.R. §725.310. After finding that the x-ray evidence establishes the existence of simple clinical pneumoconiosis[2] pursuant to 20 C.F.R. §718.202(a), the administrative law judge found that the evidence also establishes the existence of complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge also found that claimant was entitled to the presumption that his complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, he awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant has complicated pneumoconiosis and that his complicated pneumoconiosis arose

[1] Claimant's coal mine employment was in Virginia. Hearing Transcript at 21-22, 34-35. 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).

[2] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

out of his coal mine employment. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[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, 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).

Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), establishes 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. In determining whether claimant has invoked the irrebuttable presumption, 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 (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).

X-Rays

Employer argues that the administrative law judge erred in finding that the x-ray evidence establishes the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). The administrative law judge considered fifteen interpretations of seven x-rays taken on December 7, 2006, May 17, 2007, November 14, 2007, August 22, 2008, September 20, 2010, July 25, 2014, and June 21, 2016.

Dr. DePonte, a B reader and Board-certified radiologist, interpreted the x-rays taken on December 7, 2006, May 17, 2007, August 22, 2008, and September 20, 2010 as positive for a Category A large opacity. Decision and Order at 25; Director's Exhibits 49, 60. Because each of these x-rays was also interpreted as negative for complicated

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence establishes that claimant has simple clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

pneumoconiosis by either Dr. Wiot or Dr. Scott, who are also dually-qualified physicians,[4] the administrative law judge permissibly found that these x-rays are "in equipoise" and, therefore, do not establish the presence or absence of complicated pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); *see also Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 734 (7th Cir. 2013) (holding that where the administrative law judge properly considered the qualifications of the physicians reading the miner's x-rays and CT scans, there was nothing "inherently wrong" with the finding that the evidence was equally balanced). Moreover, employer does not contest this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Drs. Alexander and Crum, each dually-qualified as a B reader and Board-certified radiologist, interpreted the November 14, 2007 x-ray as positive for a Category A large opacity, Director's Exhibit 49; Claimant's Exhibit 5, while Dr. Wiot, also a dually-qualified physician, and Dr. Hippensteel, a B reader, interpreted the x-ray as negative for complicated pneumoconiosis. Director's Exhibit 51. Because a majority of the best-qualified physicians interpreted the November 14, 2007 x-ray as revealing a Category A large opacity, the administrative law judge found that this x-ray was positive for complicated pneumoconiosis. Decision and Order at 25-26.

We reject employer's argument that the administrative law judge "erred in giving no weight at all to the most qualified reader, Dr. Wiot."[5] Employer's Brief at 11 n.5. The administrative law judge did not decline to give any weight to Dr. Wiot's reading, but instead permissibly found his opinion outweighed by those of Drs. Alexander and Crum who, like Dr. Wiot, are dually-qualified as B readers and Board certified radiologists.[6] *See*

[4] Dr. Wiot interpreted the December 7, 2006, May 17, 2007, and August 22, 2008 x-rays as negative for complicated pneumoconiosis while Dr. Scott interpreted the September 20, 2010 x-ray as negative for the disease. Director's Exhibits 29, 51, 60.

[5] Employer does not contest the administrative law judge's decision to give less weight to Dr. Hippensteel's reading because he is a B reader only. *Skrack*, 6 BLR at 1-711; Decision and Order at 25.

[6] Although employer has identified Dr. Wiot as having been a professor of radiology at the University of Cincinnati, employer has failed to explain how this professorship renders Dr. Wiot "one of the leading radiologists in the country," or why it entitles him to more weight than Dr. Crum or Dr. Alexander, who held a position an assistant professor of Radiology and Nuclear Medicine for the University of Maryland Medical System. Director's Exhibit 60. Furthermore, employer cites no evidence to support its contention

Sheckler v. Clinchfield Coal Co., 7 BLR 1-128 (1984). We also reject employer's argument that Dr. Alexander's x-ray reading is undermined by his recommendation that claimant undergo a CT scan to rule out a diagnosis of cancer. As the administrative law judge found, claimant underwent subsequent CT scans in 2008, 2009, and 2010, and "none of them reported the presence of cancer." Decision and Order at 25. Because a majority of dually-qualified physicians interpreted the November 14, 2007 x-ray as positive for a Category A large opacity, the administrative law judge permissibly found that this x-ray was positive for complicated pneumoconiosis. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004).

Dr. Shipley, a B reader and Board-certified radiologist, rendered the only interpretation of the July 25, 2014 x-ray. He noted that irregular nodular opacities in each upper zone corresponded to his findings on a prior CT scan taken on April 15, 2010. Employer's Exhibit 2. Dr. Shipley identified bilateral spiculated nodules on the April 15, 2010 CT scan, explaining: "While the bilateral upper spiculated nodules might otherwise be consistent with large opacities of pneumoconiosis, the absence of background small opacities make[s] them more likely to be the result of infectious disease, such as tuberculosis or fungal infection."[7] Employer's Exhibit 7. Dr. Shipley, therefore, opined that the "irregular nodular opacities" on the July 25, 2014 x-ray were also "most likely due to granulomatous disease, such as tuberculosis or fungal infection." Employer's Exhibit 2.

The administrative law judge correctly noted that the record does not contain any evidence that claimant was ever diagnosed with tuberculosis or a fungal infection. Decision and Order at 26. Because the record does not contain any evidence of the alternative diagnoses that Dr. Shipley suggested for the large opacities, the administrative law judge permissibly accorded less weight to the doctor's negative interpretation of the July 25, 2014 x-ray. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287 (4th Cir. 2010); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). Moreover, employer does not contest this finding. *Skrack*, 6 BLR at 1-711.

Finally, the administrative noted that Dr. DePonte interpreted the most recent x-ray, taken on June 21, 2016, as positive for a Category A large opacity. Decision and Order at 26; Claimant's Exhibit 1A. Because there are no other interpretations of this x-ray, the

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that Dr. Wiot was designated as "one of the original C readers" who "helped formulate the standards for the ILO classification system . . . ." Employer's Brief at 11 n.5.

[7] Dr. Shipley provided identical assessments of earlier CT scans taken on November 22, 2004, December 4, 2006 and April 15, 2008. Employer's Exhibits 5, 6, 8.

administrative law judge permissibly found that it is positive for complicated pneumoconiosis. *Id.* Furthermore, employer does not contest this finding. *Skrack*, 6 BLR at 1-711.

In summary, the administrative law judge permissibly found that four of the seven x-rays are in equipoise regarding the presence of a Category A large opacity; the x-rays taken on November 14, 2007 and June 21, 2016 are positive for Category A large opacities; and Dr. Shipley's negative interpretation of the July 25, 2014 x-ray is entitled to little weight because there is no evidence in the record to support the doctor's suggested alternative diagnoses. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence as a whole establishes the existence of complicated pneumoconiosis based on "the undisputed positive interpretation of the most recent x-ray by Dr. DePonte and the positive findings on the November 2007 x-ray due to the controlling weight afforded to the interpretations of Dr. Alexander and Dr. Crum." *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *see also Adkins*, 958 F.2d at 51-52; Decision and Order at 26.

CT Scans and Medical Opinions

Employer also argues that the administrative law judge erred in his consideration of the CT scan and medical opinion evidence pursuant to 20 C.F.R. §718.304(c).[8] Employer contends that the administrative law judge did not weigh or evaluate Dr. Shipley's negative interpretations of four CT scans taken on November 22, 2004, December 14, 2006, April 15, 2008, and April 15, 2010. Employer's Brief at 13. Contrary to employer's argument, the administrative law judge considered Dr. Shipley's CT scan readings in conjunction with the physician's x-ray interpretation, and permissibly found his reasoning to be unsupported. Decision and Order at 19, 25-27. The administrative law judge correctly noted that Dr. Shipley's reading of the July 25, 2014 x-ray states that his diagnoses of tuberculosis or fungal infection as the cause of claimant's nodular opacities "correspond to the findings" on his interpretation of the April 15, 2010 CT scan. Employer's Exhibit 2; Decision and Order at 19, 25. That CT scan, according to Dr. Shipley, revealed nodules that "might otherwise be consistent with large opacities of pneumoconiosis" but, like his July 25, 2014 x-ray reading, he ultimately concluded that they are "more likely to be the result of infectious granulomatous disease, such as tuberculosis or fungal infection."[9]

[8] The record does not contain any biopsy evidence. 20 C.F.R. §718.304(b).

[9] Dr. Shipley read all four CT scans on the same day and included in each report an identical diagnosis of "pulmonary nodules [that] might otherwise be consistent with large opacities of pneumoconiosis," but that are "more likely to be the result of infectious

Employer's Exhibit 7. As noted above, however, the administrative law judge permissibly rejected Dr. Shipley's alternative diagnoses, as there is no evidence in the record that claimant was ever diagnosed with tuberculosis or a fungal infection, which is a finding that employer does not contest.[10] *See Cox,* 602 F.3d at 287.

We also reject employer's contention that the administrative law judge erred in his consideration of Dr. Zaldivar's opinion.[11] Dr. Zaldivar explained that a "background of simple pneumoconiosis" is required before a diagnosis of complicated pneumoconiosis can be made. Employer's Exhibit 4 at 35. Based on his assessment that "most of the x-rays" have been read as negative for simple pneumoconiosis, Dr. Zaldivar opined that it was "extremely unlikely that the densities in the upper zones, which [had] remained stable over apparently close to a decade, could be the result of anything other than a previous infection." *Id.* at 10. Because the administrative law judge found that the x-ray evidence establishes the existence of simple clinical pneumoconiosis, a finding we have affirmed as unchallenged on appeal, he rationally found that "the basis for Dr. Zaldivar's opinion that the absence of a background of simple pneumoconiosis precluded a finding of complicated

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granulomatous disease, such as tuberculosis or fungal infection." Employer's Exhibits 5-8.

[10] We also reject employer's argument that the administrative law judge's rejection of Dr. Shipley's CT scan readings is "self-contradictive." Employer's Brief at 13. The administrative law judge's finding that Dr. Shipley provided an unchallenged attestation "to the quality of each of the CT scans and to the usefulness of CT technology" is separate and distinct from the issue of whether Dr. Shipley offered a reasoned opinion for his interpretation of those CT scans. *See* 20 C.F.R. §718.107(b) (The party submitting a CT scan "bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits.").

[11] The administrative law judge also considered Dr. Splan's diagnosis of complicated pneumoconiosis based on Dr. DePonte's December 2, 2011 and June 21, 2016 x-ray readings. Claimant's Exhibit 6. As we have affirmed the administrative law judge's finding that the x-ray evidence is positive for complicated pneumoconiosis and outweighs the negative CT scan readings, we reject employer's argument that Dr. Splan's opinion is undermined because he "relies only on Dr. DePonte's x-ray interpretation" and "ignores the CT scan results." Employer's Brief at 14. We thus affirm the administrative law judge's finding that Dr. Splan's opinion is "reasoned and supported by the objective medical evidence." *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); Decision and Order at 28.

pneumoconiosis" is contradicted by the x-ray evidence. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 28.

Weighing all of the evidence together, the administrative law judge found that it establishes the existence of complicated pneumoconiosis, thereby entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis. Decision and Order at 29. Because it is based upon substantial evidence, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.304.

Whether Pneumoconiosis Arose Out of Coal Mine Employment

Because the administrative law judge credited claimant with over ten years of coal mine employment, claimant is entitled to a rebuttable presumption that his complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Decision and Order at 30. The administrative law judge found that employer failed to rebut the presumption. *Id.*

Although employer generally contends that Dr. Zaldivar's opinion is sufficient to establish rebuttal of this presumption, employer does not attempt to explain how Dr. Zaldivar's opinion supports a finding that claimant's complicated pneumoconiosis did not arise out of his coal mine employment. Employer's Brief at 16-19. Rather, employer's argument focuses on the separate issue of whether Dr. Zaldivar's opinion establishes that claimant's asthma and chronic obstructive pulmonary disease are not related to his coal mine employment. Employer's Brief at 16-19; Employer's Exhibit 4. Since employer points to no evidence that could establish rebuttal, we affirm 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 pursuant to 20 C.F.R. §718.203(b).[12]

[12] We also affirm, as unchallenged on appeal, the administrative law judge's findings that the opinions of Drs. Hippensteel, Spagnolo, and Rosenberg do not rebut the presumption at 20 C.F.R. §718.203(b). *Skrack*, 6 BLR at 1-711; Decision and Order at 30.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge