U.S. Department of Labor

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

BRB No. 18-0041 BLA

RANDOLPH E. SHUPE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOSS FORK COAL COMPANY	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 11/27/2018
	)	
	)	
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 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.

Kendra R. Prince and John R. Sigmond (Penn, Stuart, & Eskridge), Abingdon, Virginia, for employer/carrier.

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

HALL, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order (2015-BLA-05782) 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 a claim filed on July 3, 2014.

After crediting claimant with 26.18 years of coal mine employment,[1] the administrative law judge found that the evidence does not establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Consequently, the administrative law judge found that claimant could not invoke the rebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). The administrative law judge found, however, that the evidence establishes that claimant has complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). 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. 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).

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[1] Claimant's coal mine employment was in West Virginia. Director's Exhibit 3; Hearing Transcript at 20. 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] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner has fifteen or more years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Because it is unchallenged on appeal, we affirm the administrative law judge's finding of 26.18 years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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 he has 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 eleven interpretations of five x-rays taken on September 4, 2014, November 20, 2014, August 26, 2015, May 14, 2016, and June 20, 2016.

Dr. Adcock interpreted the September 4, 2014 x-ray as positive for simple pneumoconiosis and negative for complicated pneumoconiosis, Employer's Exhibit 2, while Drs. Crum and DePonte interpreted the x-ray as positive for both simple pneumoconiosis and a Category A large opacity.[4] Director's Exhibits 11, 12. The administrative law judge found that Drs. Crum and DePonte "are consistent with respect to both small and large opacities, and they both noted a coalescence of small opacities that had not yet reached the stage where they could be classified under the ILO standards as large opacities." Decision and Order at 8; Director's Exhibits 11, 12. Conversely, the administrative law judge noted that Dr. Adcock "observed small opacities, but no coalescence and no large opacity." Decision and Order at 8; Employer's Exhibit 2. Because a majority of the equally qualified physicians interpreted the September 4, 2014 x-ray as positive for Category A large opacities, the administrative law judge found that it is positive for complicated pneumoconiosis. Decision and Order at 7-8.

[4] The administrative law judge accurately noted that the four physicians who interpreted claimant's x-rays, Drs. Crum, DePonte, Adcock, and Tarver, are all dually-qualified as B readers and Board-certified radiologists. Decision and Order at 6-7.

We reject employer's contention that the administrative law judge improperly relied on a "head count" to weigh the September 4, 2014 x-ray. Employer's Brief at 4-5. Contrary to employer's argument, the administrative law judge properly considered the number of x-ray interpretations, along with the readers' radiological qualifications and the details of the physicians' readings, in finding the x-ray to be positive for complicated pneumoconiosis. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); *see also Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894, 898-99 (7th Cir. 2003). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the September 4, 2014 x-ray is positive for complicated pneumoconiosis.

Employer also argues that the administrative law judge erred in his consideration of the remaining four x-rays taken on November 20, 2014, August 26, 2015, May 14, 2016, and June 20, 2016. Dr. Crum interpreted each of these x-rays as positive for a Category A large opacity. Director's Exhibit 14; Claimant's Exhibits 1, 4, 5. Conversely, Dr. Tarver interpreted the November 20, 2014 x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis, Director's Exhibit 11, while Dr. Adcock interpreted the August 26, 2015, May 14, 2016, and June 20, 2016 x-rays as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Employer's Exhibits 1, 8, 9. Although the administrative law judge found that these four x-rays are in equipoise, having been interpreted as both positive and negative for complicated pneumoconiosis by equally qualified readers, he ultimately found that, when he considered the x-ray evidence as a whole, several "factors . . . tip[ped] the scale" in favor of Dr. Crum's positive interpretations. Decision and Order at 8.

The administrative law judge first determined that the accuracy of Dr. Tarver's negative x-ray interpretation was called into question by the other x-ray evidence. Specifically, he found that Dr. Tarver's x-ray interpretation differed significantly from the ten remaining x-ray interpretations of record because Dr. Tarver noted a lesser profusion of small opacities of pneumoconiosis than the other physicians, and identified pneumoconiosis in only claimant's mid-lung zones, whereas the other physicians identified the disease in all six of claimant's lung zones.[5] Decision and Order at 8. Because Dr. Tarver's x-ray interpretation differed significantly from the other x-ray interpretations of

[5] As summarized by the administrative law judge, Dr. Tarver interpreted claimant's November 20, 2014 x-ray as revealing simple pneumoconiosis with a profusion of 1/2, in only the two middle lung zones. Director's Exhibit 11. Conversely, Drs. Crum, DePonte, and Adcock interpreted claimant's x-rays as revealing simple pneumoconiosis with a profusion ranging from 2/1 to 2/3, in all six lung zones. Director's Exhibits 11, 12, 14; Claimant's Exhibits 1, 4, 5; Employer's Exhibits 1, 2, 8, 9.

record, the administrative law judge permissibly found that it was "an outlier" and entitled to less weight. *See Adkins*, 958 F.2d at 52-53; Decision and Order at 8.

The administrative law judge next noted that Dr. Adcock provided differing interpretations of claimant's August 26, 2015, May 14, 2016, and June 20, 2016 x-rays, variously describing them as revealing a "1.5 cm non-pneumoconiotic opacity," a "longstanding stable non-pneumoconiotic pleuro-parenchymal scar," and a "stable right base pleuro-parenchymal scar/nodule." Decision and Order at 8. Conversely, he found that Dr. Crum's interpretations of these x-rays were consistent and supported by Dr. DePonte's findings.[6] *Id*. at 8-9. Consequently, the administrative law judge permissibly found that Dr. Crum's x-ray interpretations were more credible than those of Dr. Adcock. *See Addison*, 831 F.3d at 256-57; *Adkins*, 958 F.2d at 52-53; Decision and Order at 7-8. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence as a whole establishes that claimant has complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); Decision and Order at 8.

CT Scan and Medical Opinion Evidence

Employer also argues that the administrative law judge erred in his consideration of the CT scan evidence pursuant to 20 C.F.R. §718.304(c).[7] The record contains Dr. Adcock's interpretation of a CT scan taken on January 16, 2015. Although Dr. Adcock indicated that there were no large opacities of progressive massive fibrosis, he identified a "12 mm. irregular non-calcified nodule." Employer's Exhibit 3.

Employer argues that the administrative law judge failed to provide a reason for discrediting Dr. Adcock's CT scan reading. Employer's Brief at 11. We disagree. Although Dr. Adcock indicated that there were no large opacities of progressive massive fibrosis, the administrative law judge explained that he accorded less weight to Dr. Adcock's CT scan interpretation because the doctor did not provide a rationale for why the 12 mm. nodule was not complicated pneumoconiosis, or discuss the etiology of the

[6] The administrative law judge noted that Dr. Crum observed the coalescence of small opacities on each of the five x-rays that he interpreted, as did Dr. DePonte in her interpretation of the September 4, 2014 x-ray. Decision and Order at 8; Director's Exhibits 11, 12, 14; Claimant's Exhibits 1, 4, 5. Dr. Adcock, however, found the coalescence of small opacities on only one of the four x-rays that he interpreted, namely the May 14, 2016 x-ray. Employer's Exhibit 8.

[7] The record contains no biopsy evidence. 20 C.F.R. §718.304(b).

nodule.[8] *See Adkins*, 958 F.2d at 51-52; Decision and Order at 17. As employer does not challenge this credibility determination, it is affirmed.[9] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Weighing all of the evidence together, the administrative law judge found that the x-ray evidence was the most credible evidence, and was sufficient to satisfy claimant's burden to establish that he has complicated pneumoconiosis. Decision and Order at 18. The administrative law judge therefore found that claimant is entitled to the irrebuttable presumption that he is totally disabled due to pneumoconiosis. *Id.* Because it is based upon substantial evidence, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.304. *See Lester*, 993 F.2d at 1146; *Melnick*, 16 BLR at 1-37. We also affirm, as unchallenged on appeal, the administrative law judge's finding that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Skrack*, 6 BLR at 1-711.

[8] Contrary to employer's argument, the administrative law judge did not discredit Dr. Adcock's CT scan reading on the basis that CT scans cannot disprove the existence of legal pneumoconiosis. Employer's Brief at 11. Rather, the administrative law judge found that Dr. Adcock did not adequately explain his conclusion that claimant's CT scan is negative for complicated pneumoconiosis, which is a credibility determination that employer does not contest. Decision and Order at 17. Because he found Dr. Adcock's CT scan reading to be unpersuasive, the administrative law judge rationally determined that it does not undermine the five x-rays of record, which were credibly read as positive for complicated pneumoconiosis. *See E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 258 (4th Cir. 2000) (x-rays are "the most objective measure" of complicated pneumoconiosis; an x-ray's "probative force is not reduced" where the evidence under another prong does not credibly establish that the miner does not have the disease).

[9] The administrative law judge also considered the medical opinions of Drs. Sargent and Fino. Although both physicians opined that claimant does not suffer from complicated pneumoconiosis, the administrative law judge found that their opinions were not well-reasoned. Decision and Order at 17; Director's Exhibit 11; Employer's Exhibits 1, 10, 11. Because employer does not challenge these findings, they are affirmed. *See Skrack*, 6 BLR at 1-711.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

GREG J. BUZZARD
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, concurring and dissenting:

While I concur with the majority's affirmance of the administrative law judge's finding that the x-ray evidence establishes that claimant has complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), I respectfully dissent from the majority's decision to affirm the administrative law judge's weighing of Dr. Adcock's negative CT scan interpretation. I would hold that the administrative law judge's cursory determination that "there is no rationale or etiology in the CT scan report" does not comport with the requirements of 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."[10] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 17. I would instruct the administrative law judge to reconsider the CT scan

[10] The administrative law judge's statement also appears to have improperly shifted the burden of proof to employer to disprove the existence of complicated pneumoconiosis.

evidence pursuant to C.F.R. §718.304(c), and provide a clear explanation for the weight accorded to this evidence.

I also write separately to address the administrative law judge's reliance on *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885 (7th Cir. 2002) for the proposition that a negative CT scan is not conclusive evidence that a miner does not have pneumoconiosis. Decision and Order at 17. Over the years, this case has been mistakenly cited in support of the proposition that a negative CT scan cannot serve as conclusive evidence that a miner does not suffer from clinical or complicated pneumoconiosis. To be clear, the *Stein* case merely recognizes a position adopted by the Department of Labor in the preamble to the 2001 regulations; namely, that a negative CT scan is not conclusive evidence that a miner does not suffer from *legal pneumoconiosis*.[11] *Stein*, 294 F.3d at 890-91. Notably, neither *Stein*, nor any other case law, holds that a properly conducted CT scan cannot be used to negate the existence of *clinical pneumoconiosis* or *complicated pneumoconiosis*. But this case focuses on the issue of complicated pneumoconiosis, not the existence of legal pneumoconiosis; therefore, the administrative law judge's reliance upon *Stein* was misplaced.

RYAN GILLIGAN
Administrative Appeals Judge

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[11] The Department of Labor recognized that:

> For purposes of the Black Lung Benefits Act, "pneumoconiosis" includes any "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." A CT scan may provide reliable evidence in a particular claim that the miner does not have any evidence of the disease which can be detected by that particular diagnostic technique. The record, however, does not contain any medical evidence demonstrating the capacity of CT scans to rule out the existence of all diseases "arising out of coal mine employment." The Department therefore cannot accept the . . . position that a negative CT scan is self-sufficient evidence that the miner does not have "pneumoconiosis" for purposes of the statute.

65 Fed.Reg. 79,920, 79,945-46 (Dec. 20, 2000) (internal citations omitted).