U.S. Department of Labor

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

BRB No. 18-0546 BLA

JOE A. HICKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MILL BRANCH COAL CORPORATION	)	
	)	
and	)	DATE ISSUED: 11/25/2019
	)	
OLD REPUBLIC GENERAL INSURANCE CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Joe A. Hicks, St. Paul, Virginia.[1]

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on claimant's behalf that the Board review the administrative law judge's decision, but she is not representing claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Daniel Colbert (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2016-BLA-05672) of Administrative Law Judge Morris D. Davis rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on September 20, 2013.[2] Director's Exhibit 3.

The administrative law judge found claimant had at least thirty years of underground coal mine employment[3] and that the new evidence establishes a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found claimant established a change in an applicable condition of entitlement and invoked the presumption that he is totally disabled due to pneumoconiosis.[4] 30 U.S.C.

[2] Claimant filed three prior claims. The district director denied the most recent prior claim on June 21, 2011 for failure to establish total disability. Director's Exhibit 1.

[3] The record reflects claimant's coal mine employment occurred in Virginia. Director's Exhibit 5; Decision and Order at 4. 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).

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where he establishes at least fifteen years of underground or substantially similar surface 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.

§921(c)(4)(2012); 20 C.F.R. §725.309(c); Decision and Order at 18. The administrative law judge found employer rebutted the presumption, however, and denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer/carrier (employer) responds in support of the denial. The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge erred in finding employer rebutted the Section 411(c)(4) presumption.[5]

In an appeal filed by claimant without the assistance of counsel, the Board considers whether the decision and order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the findings of the administrative law judge if they are 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).

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption,[6] the burden shifted to employer to establish he has neither legal nor clinical pneumoconiosis,[7] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law

[5] The Board dismissed the Director's cross-appeal at her request. *Hicks v. Mill Branch Coal Corp.*, BRB No. 18-0546 BLA-A (May 22, 2019) (unpub.) (Order).

[6] Because employer does not challenge the administrative law judge's finding that claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, 30 U.S.C. §921(c)(4), it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 18.

[7] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*. 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).

judge found employer established claimant has neither legal nor clinical pneumoconiosis and therefore rebutted the Section 411(c)(4) presumption. Decision and Order at 23, 26.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, employer must demonstrate claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see Smith*, 880 F.3d at 699; *Minich*, 25 BLR at 1-159. The administrative law judge considered the medical opinions of Drs. Ajjarapu, Rosenberg, and McSharry. Decision and Order at 23.

Dr. Ajjarapu opined claimant has legal pneumoconiosis in the form of chronic bronchitis due to cigarette smoking and coal mine dust exposure. Director's Exhibit 14. Dr. Rosenberg opined claimant does not have legal pneumoconiosis, but instead has severe hypoxemia and obstructive lung disease due to rheumatoid arthritis and cigarette smoking. Director's Exhibit 16; Employer's Exhibits 3, 9. Similarly, Dr. McSharry opined claimant does not have legal pneumoconiosis, but has severe hypoxemia due to rheumatoid arthritis, and an obstructive impairment due to cigarette smoking. Employer's Exhibits 1, 8. The administrative law judge found Drs. Rosenberg and McSharry "better qualified than Dr. Ajjarapu to provide expert opinions on lung diseases, including legal pneumoconiosis" and found their opinions better reasoned and documented. Decision and Order at 24.

In crediting the opinions of Drs. McSharry and Rosenberg, the administrative law judge focused exclusively on their opinion that claimant's disabling hypoxemia is due to rheumatoid arthritis. Decision and Order at 24-25. He failed to consider whether the physicians credibly explained why rheumatoid arthritis was the sole cause of claimant's disabling blood gas impairment and why claimant's thirty years of underground coal mine dust exposure did not significantly contribute to, or substantially aggravate, his hypoxemia. 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see 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).

Additionally, we agree with the Director that the administrative law judge failed to consider whether Drs. Rosenberg and McSharry rebutted the presumption that claimant's chronic obstructive pulmonary disease is legal pneumoconiosis. Director's Brief at 2. The administrative law judge found the pulmonary function studies established total disability and both physicians agreed claimant has obstructive lung disease based on those studies. Decision and Order at 18; Director's Exhibit 16; Employer's Exhibits 1, 3, 8, 9. Because the administrative law judge did not consider whether employer established that claimant's hypoxemia and obstructive lung disease were not "significantly related to, or substantially

aggravated by, dust exposure in coal mine employment," we vacate the administrative law judge's finding that employer established claimant does not have legal pneumoconiosis. *See* 20 C.F.R. §§718.305(d)(1)(i)(A), 718.201(a)(2). We therefore vacate the determination employer rebutted the Section 411(c)(4) presumption.

Clinical Pneumoconiosis

The administrative law judge considered treatment notes and records, medical opinions, and seven interpretations of four chest x-rays. Dr. Alexander, a dually-qualified Board certified radiologist and B reader, interpreted the August 13, 2013 x-ray as positive for pneumoconiosis. Director's Exhibit 15. No other physician read that x-ray. Therefore, the administrative law judge found the August 13, 2013 x-ray did not assist employer in rebutting clinical pneumoconiosis. Decision and Order at 21.

Drs. DePonte and Miller, dually-qualified radiologists, interpreted the October 29, 2013 x-ray as positive for pneumoconiosis but Dr. Shipley, also dually qualified, interpreted it as negative. Director's Exhibits 14, 16; Claimant's Exhibit 3. Because the physicians who reviewed the October 29, 2013 x-ray were all equally qualified, the administrative law judge found the x-ray did not assist employer. Decision and Order at 21; 20 C.F.R. §718.202(a)(1).

Dr. DePonte read the May 14, 2014 x-ray as positive for pneumoconiosis with a profusion rating of 1/0 while Dr. Rosenberg, a B reader, interpreted it as negative. Director's Exhibit 16; Claimant's Exhibit 1. Based upon Dr. DePonte's superior radiological qualifications, the administrative law judge found the May 14, 2014 x-ray did not assist employer. Decision and Order at 21.

Finally, the administrative law judge found the January 25, 2017 x-ray that Dr. McSharry read as showing "[n]o definite lesions of pneumoconiosis" did not assist employer because Dr. McSharry neither reported his findings on the ILO form nor offered any evidence he relied on the standards set forth in the regulation.[8] Employer's Exhibit 1; Decision and Order at 21. The administrative law judge therefore found the x-ray evidence as a whole "[did] not assist employer in meeting its burden to rebut the presumption that Claimant has clinical pneumoconiosis." Decision and Order at 21.

[8] The administrative law judge further noted Dr. McSharry is neither a Board-certified radiologist nor a B reader. 20 C.F.R. §718.102(h); Decision and Order at 21.

When comparing the x-ray evidence with the x-rays and CT scans found in claimant's treatment records,[9] however, the administrative law judge found the August 13, 2013, October 29, 2013, and May 14, 2014 x-rays were outweighed by more probative contemporaneous evidence. Decision and Order at 22. Based upon Dr. Rosenberg's uncontradicted opinion, the administrative law judge permissibly found that CT scans are medically acceptable diagnostic tools which provide a more accurate assessment of clinical pneumoconiosis than x-rays. *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 135-36 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc); Decision and Order at 16 n.18, 22; Employer's Exhibit 3. The administrative law judge therefore permissibly found the positive x-rays dated August 13, 2013 and October 29, 2013 were rebutted by Dr. DePonte's interpretation of the contemporaneous CT scan dated August 23, 2013,[10] in which she diagnosed a pleural effusion but did not opine claimant has pneumoconiosis. *Webber*, 23 BLR at 135-36; *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984); Decision and Order at 22; Claimant's Exhibit 9.

The administrative law judge also found he could not give any substantial weight to the remaining May 14, 2014 x-ray because although Dr. DePonte interpreted the film as positive for pneumoconiosis, her "1/0" profusion rating meant that she also considered reading the film as negative and Dr. Rosenberg read the film as negative. Decision and Order at 22; Claimant's Exhibit 1; Director's Exhibit 16. Moreover, the administrative law judge permissibly found Dr. DePonte's interpretation of the more probative August 23, 2013 CT scan, in which she did not diagnose pneumoconiosis, called her x-ray reading into question. *Webber*, 23 BLR at 135-36; Decision and Order at 22; Claimant's Exhibit 9. Finally, the administrative law judge permissibly found Dr. DePonte's findings were

[9] The administrative law judge accurately noted that the only diagnosis of pneumoconiosis in claimant's treatment records was from Dr. Greenfield, but found the physician did not provide any support for his diagnosis and determined there is no objective evidence of pneumoconiosis in the treatment records. Decision and Order at 21. The administrative law judge also noted claimant underwent a fine needle aspiration of an area of pleural nodularity in his right lung as part of his medical treatment. *Id.*; Claimant's Exhibit 5. The slides prepared from the aspirate revealed primarily blood and fibrin, but the pathologist also noted some areas of black particulate matter compatible with coal dust. Decision and Order at 21; Claimant's Exhibit 5. However, the physician did not diagnose pneumoconiosis. Claimant's Exhibit 5.

[10] Dr. DePonte read a CT scan dated June 12, 2011 as showing pleural effusion and nonspecific numerous tiny bilateral pleural-based nodules. Claimant's Exhibit 9. She also interpreted an August 23, 2013 CT scan as showing partial reaccumulation of the right pleural effusion with atelectasis versus pleural thickening in the right lower lobe. *Id.*

further called into question by her failure to diagnose pneumoconiosis when interpreting contemporaneous x-rays taken on January 17, 2014 and on April 17, 2014 as part of claimant's treatment.[11] *Marra,* 7 BLR at 1-218-19; Decision and Order at 22; Claimant's Exhibit 9.

The administrative law judge also considered the medical opinions of Drs. Ajjarapu, Rosenberg, and McSharry. Dr. Ajjarapu opined claimant's x-ray changes are due to clinical pneumoconiosis. Director's Exhibit 14. Drs. Rosenberg and McSharry opined claimant does not have clinical pneumoconiosis and his x-ray changes are due to rheumatoid arthritis. Director's Exhibit 16; Employer's Exhibits 1, 3, 8, 9. The administrative law judge permissibly found the opinions of Drs. Rosenberg and McSharry entitled to greater weight, because they are better qualified and they considered and relied upon more extensive and a broader range of evidence than Dr. Ajjarapu, including the more probative CT scan evidence. *See Hicks,* 138 F.3d at 536; *Akers,* 131 F.3d at 441; Decision and Order at 22-23.

Based upon his consideration of all the evidence, the administrative law judge found employer established that claimant does not have clinical pneumoconiosis by a preponderance of the evidence. Decision and Order at 23. As substantial evidence supports this determination, we affirm it. 20 C.F.R. §718.305(d)(1)(i)(B); *see Stark,* 9 BLR at 1-37.

Remand Instructions

On remand, the administrative law judge must reconsider whether employer has rebutted the presumed existence of legal pneumoconiosis. When weighing the opinions of Drs. Rosenberg and McSharry on this issue, the administrative law judge must consider the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. In so doing, he must set forth his findings in detail, including the underlying rationale. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C.

[11] Dr. DePonte interpreted the January 17, 2014 x-ray as showing a slightly larger pleural effusion with the remainder of the chest unchanged. Claimant's Exhibit 9; Employer's Exhibit 4. She read the April 17, 2014 x-ray as showing a moderate pleural effusion and mild interstitial changes with slight nodularity in the left lung. Employer's Exhibit 4. Review of the record reflects that Dr. DePonte also read x-rays dated March 14, 2001, April 6, 2001, June 12, 2011, February 20, 2012, and October 9, 2013, but made no findings of pneumoconiosis. Director's Exhibit 16; Claimant's Exhibit 9; Employer's Exhibit 4.

§932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). The administrative law judge must address both claimant's hypoxemia and obstructive lung disease, and whether employer established that neither is legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A).

If the administrative law judge determines that employer has established claimant does not have legal pneumoconiosis, employer will have rebutted the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. If he finds employer has not rebutted the presumed fact of legal pneumoconiosis, he must consider whether employer has established that no part of claimant's total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge