U.S. Department of Labor

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

BRB No. 16-0043 BLA

CURTIS CLARK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PERRY COUNTY COAL CORPORATION	)	DATE ISSUED: 10/31/2016
	)	
and	)	
	)	
GARLIFF COAL COMPANY C/O WELLS FARGO DISABILITY	)	
	)	
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 Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

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

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-05238) of Administrative Law Judge Peter B. Silvain, Jr., rendered on a subsequent claim filed on June 28, 2010, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with at least twenty-six years of underground coal mine employment, based on the stipulation of the parties, and found that claimant established the existence of simple clinical pneumoconiosis and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further determined that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 by proving that he has complicated pneumoconiosis. The administrative law judge concluded, therefore, that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 and demonstrated a change in an applicable condition of entitlement at 20 C.F.R. §725.309. 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.[2]

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

[1] Claimant filed his initial claim for benefits on April 26, 2007, which was denied by the district director on November 16, 2007, because claimant did not establish a totally disabling respiratory impairment. Director's Exhibit 1. Claimant did not take any further action before filing the current claim.

[2] We affirm, as unchallenged on appeal, the administrative law judge's crediting of claimant with at least twenty-six years of underground coal mine employment, and his findings that claimant established the existence of simple clinical pneumoconiosis and legal pneumoconiosis at 20 C.F.R. §718.202(a). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 4; Hearing Transcript at 20-21. Accordingly, this case arises within

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 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).

I. 20 C.F.R. §718.304(a)

The administrative law judge initially considered the x-ray evidence, which consists of ten interpretations of four analog films by physicians who are all dually-qualified as Board-certified radiologists and B readers. Decision and Order at 5, 16-19; Director's Exhibits 11, 13-15; Claimant's Exhibit 2-5; Employer's Exhibits 2-3. Based on his consideration of the quantity of positive and negative readings of each x-ray, and the qualifications of the readers, the administrative law judge found that the x-rays dated December 10, 2010, April 28, 2011, and March 12, 2012 are positive for complicated pneumoconiosis. Decision and Order at 17-18; Claimant's Exhibits 4-5; Employer's Exhibit 2. In contrast, the administrative law judge determined that the x-ray obtained on January 6, 2012 is in equipoise. Decision and Order at 18; Claimant's Exhibit 2; Employer's Exhibit 3. Considering all of the x-rays together, the administrative law judge concluded that "the x-ray evidence weighs in favor of establishing that the [c]laimant has . . . complicated pneumoconiosis." Decision and Order at 19.

Employer asserts that the administrative law judge did not properly weigh the x-ray evidence at 20 C.F.R. §718.304(a). Specifically, employer argues that the administrative law judge should have given more weight to the x-ray readings of Drs.

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the jurisdiction 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).

Shipley, Halbert, and Meyer, based on their superior qualifications. Employer cites Dr. Shipley's status as a professor of radiology and his "specific area[] of interest" in occupational lung diseases, and states, without elaboration, that Dr. Halbert has "impressive credentials." Employer's Brief at 13. Regarding Dr. Meyer, employer notes that he is a professor of radiology, committee member of radiological and imaging organizations, and manuscript reviewer for several journals.

Contrary to employer's contention, although an administrative law judge may give greater weight to the interpretations of a physician based upon qualifications in addition to Board certification in radiology and status as a B reader, the administrative law judge 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). Therefore, we reject employer's assertion that the interpretations of Drs. Shipley, Halbert, and Meyer are entitled to more weight on the basis of the additional credentials identified by employer. We also affirm, therefore, the administrative law judge's determination that the January 6, 2012 x-ray is inconclusive for complicated pneumoconiosis, as employer's sole argument with respect to this x-ray is that Dr. Meyer's interpretation was entitled to more weight based on his additional qualifications.[4] *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

We now turn to employer's allegations of error as they pertain to the other x-rays. Regarding the December 10, 2010 x-ray, the administrative law judge found that the positive interpretations for complicated pneumoconiosis by Drs. DePonte and Alexander outweighed the interpretation by Dr. Shipley who diagnosed only simple pneumoconiosis. Decision and Order at 16; Director's Exhibits 11, 13-14. Employer asserts that, although Drs. DePonte and Alexander both diagnosed Category A large opacities consistent with complicated pneumoconiosis, their classification of the profusion, shape, and distribution of the small opacities of simple pneumoconiosis reflected "quite a difference of opinion."[5] Employer's Brief at 12. Employer contends

[4] Drs. DePonte and Meyer provided conflicting interpretations of the January 6, 2012 x-ray. Claimant's Exhibit 2; Employer's Exhibit 3.

[5] In addition to a Category A large opacity, Dr. DePonte identified type q primary and type r secondary small opacities in claimant's mid and upper lung zones with a profusion of 1/0. Director's Exhibit 11. Dr. Alexander identified a Category A large

that the administrative law judge "never acknowledged or consider [sic] this divergence in opinion or what it may mean." *Id*. However, employer has not explained how any potential discrepancy in their classifications of the small opacities of simple pneumoconiosis renders their diagnoses of complicated pneumoconiosis unreliable. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"). Consequently, we affirm the administrative law judge's finding that the December 10, 2010 x-ray is positive for complicated pneumoconiosis, based on his determination that the positive readings by Drs. Alexander and DePonte outweighed the negative reading by Dr. Shipley.

Regarding the April 28, 2011 x-ray, the administrative law judge considered interpretations by Drs. Alexander, Crum, Halbert, and Shipley. He determined that the positive readings for complicated pneumoconiosis by Drs. Alexander and Crum outweighed the reading by Dr. Halbert, who diagnosed only simple pneumoconiosis. Decision and Order at 17-18; Claimant's Exhibits 4-5; Employer's Exhibit 2. The administrative law judge gave little weight to Dr. Shipley's interpretation of the x-ray as completely negative for pneumoconiosis because it is "speculative," contrary to the weight of the x-ray evidence as a whole, and in conflict with Dr. Shipley's reading of the December 10, 2010 x-ray as positive for simple pneumoconiosis. Decision and Order at 17-18; Director's Exhibit 14.

Employer maintains that the administrative law judge erred in crediting the readings by Drs. Alexander and Crum because the physicians "equivocated or expressed doubt since each recommended that the miner undergo further evaluation or see his personal physician." Employer's Brief at 14. Employer also contends that by noting that there was no evidence in the treatment records of another disease that could account for the large mass visible on the April 28, 2011 x-ray, the administrative law judge shifted the burden to employer to rule out the existence of complicated pneumoconiosis. We reject employer's allegations of error.

With respect to the administrative law judge's crediting of the x-ray interpretations of Drs. Alexander and Crum, it is well-established that assessments of the probative value of the medical evidence is committed to the administrative law judge's discretion in his role as fact-finder. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). The administrative law judge reasonably exercised his discretion in finding that Dr. Alexander's comment regarding further evaluation "does

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opacity, and type r primary and type q secondary small opacities in all of claimant's lung zones with a profusion of 2/2. Director's Exhibit 13.

not suggest he was questioning his diagnosis of complicated pneumoconiosis," because it was "not abnormal" for a radiologist to refer a patient to his treating physician "following a diagnosis of complicated pneumoconiosis."[6] Decision and Order at 17; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); Decision and Order at 17; Claimant's Exhibit 4. The administrative law judge also rationally determined that the lack of evidence of "other diseases that could have accounted for the large mass on [claimant's] lungs" undercut the suggestion that further evaluation would have identified a disease other than complicated pneumoconiosis. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129. These permissible rationales apply with equal force to the administrative law judge's weighing of Dr. Crum's positive reading for complicated pneumoconiosis. *Id*.

Furthermore, the administrative law judge did not shift the burden to employer to rule out complicated pneumoconiosis but, rather, merely indicated that Dr. Alexander's positive x-ray interpretation was uncontradicted by "evidence in the record demonstrating that the [c]laimant was suffering from other diseases that could have accounted for the large mass on his lungs." Decision and Order at 17; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Similarly, the administrative law judge rationally found that Dr. Shipley's negative interpretation of the April 28, 2011 x-ray for complicated pneumoconiosis was entitled to less weight because Dr. Shipley's speculation that the lesions seen on the x-ray were attributable to tuberculosis, cancer, or histoplasmosis was unsupported by the record.[7] *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287, 24 BLR 2-269, 2-286 (4th Cir. 2010); *Gray*, 176 F.3d at 387, 21 BLR at 2-624; Decision and Order at 17. We

[6] On the ILO form for the April 28, 2011 x-ray, Dr. Alexander checked the box indicating the presence of Category A large opacities. Claimant's Exhibit 4. In the comments section, he noted: "20 x 15 [millimeter] large opacity in [right] mid zone [consistent with] category A complicated [coal workers' pneumoconiosis], but further evaluation is recommended." *Id*. On the ILO form Dr. Crum completed for this x-ray, he checked the box for Category A large opacities and indicated in the comments section: "[m]ultiple areas of coalescence [and] large opacities suggesting complicated pneumoconiosis. Comparison to priors and [follow up] rec. to document stability." Claimant's Exhibit 5.

[7] Because the administrative law judge provided a valid rationale for discrediting Dr. Shipley's reading of the April 28, 2011 x-ray as negative for complicated pneumoconiosis, we need not address employer's additional allegations of error regarding the administrative law judge's weighing of this x-ray reading. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

affirm, therefore, the administrative law judge's determination that the April 28, 2011 x-ray is positive for complicated pneumoconiosis.

Finally, employer argues that the administrative law judge should have considered whether Dr. Alexander's comments on the ILO forms for the December 10, 2010 and April 28, 2011 x-rays recommending further evaluation of claimant's condition affected the credibility of his uncontradicted positive reading of the March 12, 2012 x-ray. As discussed *supra*, we find no merit in employer's allegation that the administrative law judge should have found that Dr. Alexander's comments detracted from the probative value of his positive readings of the earlier films, and also reject employer's contention with respect to the March 12, 2012 film. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553.

Based on our rejection of employer's challenges to the administrative law judge's weighing of the x-ray evidence, we affirm his finding that this evidence is sufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740, 25 BLR 2-675, 2-687 (6th Cir. 2014).

II. 20 C.F.R. §718.304(c)

A. CT Scans

The administrative law judge next considered the readings in claimant's treatment records of CT scans dated March 2, 2007 and September 26, 2007, as well as Dr. Meyer's reading of the March 2, 2007 scan.[8] Decision and Order at 19; Employer's Exhibits 9, 10. The administrative law judge observed that Dr. Patel, who interpreted the CT scans in claimant's treatment records, did not comment on the existence of pneumoconiosis in his readings. Decision and Order at 19. The administrative law judge determined that Dr. Meyer's interpretation of the March 2, 2007 CT scan as being consistent with simple pneumoconiosis "weighs in favor of establishing at least simple pneumoconiosis." *Id.*

Weighing the x-ray and CT scan evidence together, the administrative law judge explained that he gave less weight to the CT scan evidence because it was obtained in 2007 and was not as probative as the more recent evidence, given the latent and progressive nature of pneumoconiosis. Decision and Order at 23. Therefore, the administrative law judge concluded: "[b]ecause the CT scan evidence is outdated, that it

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

does not reveal complicated pneumoconiosis does not undermine my conclusion that the [c]laimant has complicated pneumoconiosis." *Id*.

Employer asserts that, contrary to the administrative law judge's findings, the CT scan evidence "refutes a diagnosis of complicated pneumoconiosis," as neither the readings in the treatment records nor the reading by Dr. Meyer is positive for complicated pneumoconiosis. Employer's Brief at 16. Employer also maintains that the administrative law judge erred in weighing the CT scan evidence and the x-ray evidence together and in finding that the CT scan evidence was entitled to less weight because it is less recent.

Employer's contentions are without merit. Consistent with 20 C.F.R. §718.304, the administrative law judge properly weighed the evidence relevant to subsections (a) and (c) together to determine whether claimant satisfied his burden to establish the existence of complicated pneumoconiosis by a preponderance of the evidence. *See Gray*, 176 F.3d at 388-89, 21 BLR at 2-626-29; *Melnick*, 16 BLR at 1-33. Moreover, the administrative law judge rationally found that the x-ray evidence is entitled to more weight than the CT scan evidence based on the recency of the x-ray evidence and the latent and progressive nature of pneumoconiosis. 20 C.F.R. §718.201(c); *see Crisp*, 866 F.2d at 185, 12 BLR at 2-129; Decision and Order at 23. Accordingly, we affirm the administrative law judge's findings.[9]

B. Medical Opinion Evidence

Upon considering the medical opinions of Drs. Splan, Defore, Gallai, Jarboe, and Vuskovich, the administrative law judge determined that the diagnoses of complicated pneumoconiosis by Drs. Defore and Gallai were entitled to greatest weight, as they are well-reasoned and consistent with the x-ray evidence. Decision and Order at 19-23; Director's Exhibit 11; Claimant's Exhibits 2-3. The administrative law judge discredited Dr. Splan's diagnosis of complicated pneumoconiosis because he relied on a positive interpretation of the January 6, 2012 x-ray, which the administrative law judge found inconclusive. Decision and Order at 20; Employer's Exhibit 2. The administrative law judge accorded diminished weight to Dr. Jarboe's opinion that complicated

[9] Because the administrative law judge provided a valid rationale for giving less weight to the CT scan evidence, we need not address employer's argument that the administrative law judge did not first render an explicit finding as to whether the readings of the treatment record CT scans by Dr. Patel and Dr. Meyer's reading of the March 2, 2007 scan "weighed against a finding of complicated [coal workers' pneumoconiosis]." Employer's Brief at 16; *see Kozele*, 6 BLR at 1-382 n.4 (1983).

pneumoconiosis is not present because he did not consider the most recent x-ray and medical opinion evidence. Decision and Order at 20; Employer's Exhibit 4. Finally, the administrative law judge gave little weight to Dr. Vuskovich's opinion ruling out complicated pneumoconiosis as neither well-reasoned nor well-documented. Decision and Order at 21-23; Employer's Exhibits 6-7.

Employer argues that the administrative law judge erred in crediting the diagnoses of complicated pneumoconiosis made by Drs. Splan, Defore, and Gallai. Employer maintains that because the physicians' findings were based solely on the x-ray evidence, they did not provide reasoned medical opinions. Employer's Brief at 17, *citing Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).[10]

Contrary to employer's assertion, the administrative law judge gave diminished weight to Dr. Splan's opinion because he relied on an x-ray that the administrative law judge found to be inconclusive. Decision and Order at 20. Concerning the opinions of Drs. Defore and Gallai, both physicians examined claimant, considered his occupational exposure history, and reviewed objective evidence in the form of pulmonary function studies, blood gas studies, and electrocardiograms, in addition to x-rays, in reaching the conclusion that claimant has complicated pneumoconiosis. Director's Exhibit 11; Claimant's Exhibit 3. Therefore, we affirm the administrative law judge's finding that the medical opinions of Drs. Defore and Gallai are sufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c), as within his discretion. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325-26 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

Employer has not raised any other allegations of error concerning the administrative law judge's findings on the issue of complicated pneumoconiosis. Consequently, we affirm the administrative law judge's determination, based upon a weighing of the evidence as a whole, that claimant established the existence of complicated pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.203(b),[11] 718.304, and a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

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[10] Employer has not challenged the administrative law judge's discrediting of the opinions of Drs. Jarboe and Vuskovich. Therefore, we affirm these findings. *See Skrack*, 6 BLR at 1-711.

[11] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is entitled to the presumption at 20 C.F.R. §718.203(b) that his pneumoconiosis arose out of his coal mine employment, and that employer did not rebut the presumption. *See Skrack*, 6 BLR at 1-711; Decision and Order at 24.

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