U.S. Department of Labor

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

BRB No. 17-0052 BLA

JESSE JAMES WILDER Claimant-Respondent v. MANALAPAN MINING COMPANY and BRICKSTREET MUTUAL INSURANCE COMPANY, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/31/2017 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-05531) of Administrative Law Judge Theresa C. Timlin, rendered on a claim filed on September 10, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with more than twenty years of coal mine employment and found that the evidence was sufficient to establish the existence of complicated pneumoconiosis. Accordingly, the administrative law judge found that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 and awarded benefits.

On appeal, employer argues that the administrative law judge did not adequately explain her finding that the x-ray evidence established the existence of complicated pneumoconiosis. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.

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.[1] 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).

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 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). *See* 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically entitle claimant to the irrebuttable presumption. 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. *Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89, 21 BLR 2-615, 2-626-29 (6th Cir. 1999); *see*

[1] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's most recent coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

Westmoreland Coal Co. v. Cox, 602 F.3d 276, 287, 24 BLR 2-269, 2-286 (4th Cir. 2010); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

I. The X-ray Evidence

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered six interpretations of two x-rays dated October 4, 2012 and June 14, 2013.[2] Decision and Order at 5-6. Drs. Groten, Shipley and Ahmed, who are Board-certified radiologists and B readers, interpreted the October 4, 2012 x-ray as positive for complicated pneumoconiosis.[3] Director's Exhibits 8, 10; Employer's Exhibit 1. There are no negative readings of that film. Dr. Dahhan was the only physician to interpret the June 14, 2013 x-ray, and he indicated that it was positive for simple pneumoconiosis, but negative for complicated pneumoconiosis. Employer's Exhibit 1. The administrative law judge noted that Dr. Dahhan, is an A reader, but not a B reader nor a Board-certified radiologist.[4] Decision and Order at 7.

[2] The administrative law judge found that Dr. Barrett read the October 4, 2012 x-ray for quality purposes only. Decision and Order at 7; Director's Exhibit 8.

[3] Dr. Groten found simple pneumoconiosis, 2/3 r/u, and complicated pneumoconiosis, Category C. Director's Exhibit 8. He stated: "bilateral upper lobe masses identified which likely represent complicated pneumoconiosis type C; comparison with old films and follow-up with primary care physician is recommended to exclude an interval change." *Id*. Dr. Shipley found simple pneumoconiosis, 1/1 r/r, and complicated pneumoconiosis, Category B. Employer's Exhibit 1. Dr. Shipley stated that the radiological "[f]indings are *consistent with complicated coal workers' pneumoconiosis*" but he recommended clinical correlation "as there could be superimposed granulomatous infection such as tuberculosis." *Id.* (emphasis added). Dr. Ahmed found simple pneumoconiosis, 2/3 r/q, and complicated pneumoconiosis, Category B. Director's Exhibit 10. In the comments section of the ILO form, Dr. Ahmed noted: "bilateral pleural thickening; bilateral diaphragmatic pleural calcification; atherosclerotic aorta; coalescence of small pneumoconiotic nodules; bullae distortion of intrathoracic organs; chronic obstructive pulmonary disease; ill-defined heart borders; and possible cancer." *Id*.

[4] To become certified as a first or A reader, a physician (not necessarily a radiologist) must submit six sample x-rays from his or her own files to the Appalachian Laboratory for Occupational Safety and Health (ALOSH), consisting of two x-rays that are negative for pneumoconiosis, two x-rays showing simple pneumoconiosis, and two showing complicated pneumoconiosis. 42 C.F.R. §37.51(a)(2). As an alternative, the

In resolving the conflict in the x-ray evidence, the administrative law judge noted that "the most recent X-ray film took place only eight months after the first X-ray film" and "the physicians who interpreted the first X-ray as positive have superior credentials to Dr. Dahhan." Decision and Order at 7. Based on the "unanimity of the three dually qualified physicians that the X-ray evidence shows complicated pneumoconiosis," the administrative law judge concluded that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *Id.*

On appeal, employer challenges the sufficiency of claimant's evidence, asserting that the administrative law judge did not properly address the qualified nature of Dr. Groten's x-ray reading. Employer also asserts that the administrative law judge did not comply with the Administrative Procedure Act (APA),[5] to the extent her decision "includes a summary of Dr. Shipley's differential diagnostic concerns, but fails to explain why and how this impacted the analysis of what weight to accord Dr. Shipley's x-ray interpretation." Employer's Brief in Support of Petition for Review at 9. We reject employer's arguments.

The administrative law judge thoroughly summarized the readings by Drs. Groten, Shipley and Ahmed. Decision and Order at 5-6. The administrative law judge also specifically determined that there is "no evidence that claimant received treatment for any infectious or inflammatory diseases between October 2012 and June 2013," which would support an alternative etiology for the large opacities identified on the October 4, 2012 x-

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physician seeking an A rating can take a course approved by ALOSH in the classification systems for diagnosing pneumoconiosis. *Id*. A higher certification is a B reader, who is a physician who "has demonstrated ongoing proficiency in evaluating chest radiographs for pneumoconiosis and other diseases by taking and passing a specifically designed proficiency examination given on behalf of or by the National Institute for Occupational Safety and Health (NIOSH), and maintained that certification through the date the interpretation is made. 20 C.F.R. §718.102(e)(2)(iii); *see* 42 C.F.R. §37.52(b). A Board-certified radiologist is a physician who is "certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association." 20 C.F.R. §718.102(e)(2)(i).

[5] The Administrative Procedure Act requires that every adjudicatory decision 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. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

ray.[6] Decision and Order at 7; *see Cox*, 602 F.3d at 287, 24 BLR at 2-286; *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995). Accordingly, we conclude that the administrative law judge has satisfied the requirements of the APA and we affirm her reliance on Dr. Groten's identification of a Category C large opacity and Dr. Shipley's identification of a Category B large opacity in concluding that the October 4, 2012 x-ray is positive for complicated pneumoconiosis. *See Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803, 21 BLR 2-302, 2-311 (4th Cir. 1998); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 7. Furthermore, the administrative law judge permissibly assigned controlling weight to the October 4, 2012 x-ray, based on the physicians'superior in comparison to those of Dr. Dahhan. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-6-9 (1994); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20, 17 BLR 2-77, 2-84-85 (6th Cir. 1993); Decision and Order at 7. Thus, because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

II. The Medical Opinions and Evidence as a Whole

Pursuant to 20 C.F.R. §718.304(c),[7] the administrative law judge considered the medical opinions of Drs. Fernandes and Dahhan. She credited Dr. Fernandes' opinion that claimant has complicated pneumoconiosis over Dr. Dahhan's contrary opinion.[8]

[6] Employer contends that the administrative law judge erred in failing to explain what impact Dr. Ahmed's comment of "possible cancer" had on his classification of the October 4, 2012 x-ray. To the extent employer argues that Dr. Ahmed's reading is insufficient on its face to support claimant's burden of proof, that argument is rejected. *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366, 23 BLR 2-374, 2-386 (4th Cir. 2006) (holding that the refusal to express a diagnosis in categorical terms is candor, not equivocation). Moreover, even if Dr. Ahmed's reading of complicated pneumoconiosis could be interpreted as equivocal, the administrative law judge's finding of complicated pneumoconiosis is otherwise supported by substantial evidence, which includes the positive readings of two Board-certified radiologists and B readers.

[7] We affirm the administrative law judge's finding that claimant is unable to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b), as there is no biopsy evidence in the record. Decision and Order at 7. Relevant to 20 C.F.R. §718.304(c), there is no CT scan evidence in the record for consideration.

[8] The administrative law judge found that Dr. Fernandes' opinion was reasoned and documented because the physician reviewed Dr. Groten's x-ray reading and based

Employer does not identify any specific error by the administrative law judge in her weighing of the medical opinions at 20 C.F.R. §718.304(c). Consequently, we affirm the administrative law judge's finding that claimant established complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

As the administrative law judge considered all of the relevant evidence and explained the basis for her credibility determinations, we affirm the administrative law judge's finding that claimant has complicated pneumoconiosis and is entitled to the irrebuttable presumption of total disability due to pneumoconiosis.[9] 20 C.F.R. §718.304; *see Gray*, 176 F.3d at 388-89, 21 BLR at 2-626-29; *Melnick*, 16 BLR at 1-33; *Wojtowicz*, 12 BLR at 1-165.

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her opinion on "objective medical evidence consistent with the overall record." Decision and Order at 11. In contrast, the administrative law judge found that Dr. Dahhan based his diagnosis of complicated pneumoconiosis on his own "A reading . . . rather than the interpretations of two dually qualified physicians." Decision and Order at 10. The administrative law judge considered Dr. Dahhan's explanation that "a disease like tuberculosis or histoplasmosis could result in radiographic variation from October of one year to June of the next year." *Id.*, *citing* Employer's Exhibit 4 at 14. However, after reiterating that there is no evidence in the record that claimant suffered from an inflammatory or infectious disease in 2012, the administrative law judge concluded that Dr. Dahhan's opinion was speculative and entitled to little weight. Decision and Order at 10.

[9] Employer also asserts that claimant is not entitled to benefits under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as a matter of law, and that the evidence is insufficient to establish the element of disability causation under 20 C.F.R. §718.204(c). Employer's Brief in Support of Petition for Review at 12-17. In light of our affirmance of the administrative law judge's finding that claimant invoked the irrebuttable presumption under 20 C.F.R. §718.304, and is therefore entitled to benefits, employer's arguments are moot.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge