U.S. Department of Labor

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

BRB No. 17-0053 BLA

TEDDY DAVID BELCHER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELKAY MINING COMPANY	)	
	)	DATE ISSUED: 10/30/2017
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 Awarding Benefits of Richard A. Morgan, 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.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-BLA-5548) of Administrative Law Judge Richard A. Morgan (the administrative law judge) on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30

U.S.C. §§901-044 (2012) (the Act). This case involves a miner's subsequent claim[1] filed on August 11, 2014.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with at least twenty-three years of qualifying coal mine employment and found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[3] The administrative law judge also found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4), and that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds in support

[1] Claimant's initial claim for benefits, filed on March 16, 1999, was finally denied by the district director because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant's second claim, filed on December 10, 2010, was finally denied by the district director, who found that while claimant had pneumoconiosis, he failed to establish that he was totally disabled. Director's Exhibit 2.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3).

of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response in this appeal.[4]

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.[5] 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 of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[6] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least twenty-three years of qualifying coal mine employment, the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

[6] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(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).

Clinical Pneumoconiosis

Employer asserts that the administrative law judge erred in his evaluation of the x-ray, CT scan, and medical opinion evidence on the issue of clinical pneumoconiosis. Employer's Brief at 12-20.

In addressing whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge considered interpretations of x-rays dated October 14, 2014 and April 29, 2015. Drs. Crum and DePonte, both dually qualified as B readers and Board-certified radiologists,[7] read the October 14, 2014 x-ray as positive for pneumoconiosis. Dr. Seaman, also a dually-qualified radiologist, read it as negative. Director's Exhibit 10; Claimant's Exhibit 1; Employer's Exhibit 2. Dr. Crum read the April 29, 2015 x-ray as positive; Dr. Zaldivar, a B reader, read it as negative. Claimant's Exhibit 2; Employer's Exhibit 1.

Based on the quantity of the positive and negative readings of each x-ray and the radiological qualifications of the physicians, the administrative law judge determined that the October 14, 2014 and April 29, 2015 x-rays were positive for pneumoconiosis. Decision and Order at 27. Noting the progressive nature of pneumoconiosis, the administrative law judge accorded greater weight to the 2015 x-ray on the grounds that it was the more recent x-ray of record and that it had been read as positive for pneumoconiosis by a dually-qualified radiologist, Dr. Crum, and as negative by Dr. Zaldivar, who is lesser qualified as "only" a B reader. Decision and Order at 27. Thus, the administrative law judge found that the x-ray evidence did not disprove the existence of pneumoconiosis. The administrative law judge further determined that even if he had found that the 2014 x-ray was in equipoise based on the superior qualifications of Dr. Seaman,[8] he would have reached the same conclusion based on the more recent x-ray showing the presence of pneumoconiosis. *Id*.

[7] A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A "Board-certified radiologist" is a physician who has been certified by the American Board of Radiology as having particular expertise in the field of radiology.

[8] The administrative law judge found that Dr. Seaman is the best qualified radiologist, followed by Drs. Crum and DePonte. Decision and Order at 27.

Employer argues that the administrative law judge erroneously resolved the conflict in the 2014 x-ray evidence by relying "solely" on the numerical superiority of the positive readings. Employer's Brief at 13. Employer asserts that the administrative law judge did not provide any explanation for his findings regarding either x-ray, and therefore failed to comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Employer's Brief at 12-15. We disagree.

The administrative law judge properly performed both a qualitative and quantitative review of the x-ray evidence, taking into consideration the number of x-ray interpretations, along with the readers' qualifications, the dates of the films, and the nature of the readings. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co*., 22 BLR 1-294, 1-300 (2003); *Bateman v. E. Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003). The administrative law judge permissibly assigned greater weight to the x-ray readings by the dually-qualified radiologists, and rationally explained how he resolved the conflict in the x-ray evidence by crediting the more recent x-ray. *See* 20 C.F.R. §§718.102, 718.202(a)(1); *Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66 (recognizing that the "later evidence is better" rule is properly applied where the miner's condition has worsened); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991) (en banc). Thus, we find no merit to employer's APA challenge. If a reviewing court can discern what the administrative law judge did and why he or she did it, the duty of explanation under the APA is satisfied. *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557, 25 BLR 2-339, 2-351 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316, 25 BLR 2-115, 2-133 (4th Cir. 2012). Therefore, we affirm, as supported by substantial evidence, the administrative law judge's determination that the x-ray evidence does not disprove the existence of clinical pneumoconiosis.

Employer next contends that the administrative law judge erred in finding that the CT scan evidence did not rebut the Section 411(c)(4) presumption, as he failed to provide an explanation for his credibility determinations. Employer's Brief at 17-19. We disagree.

The administrative law judge considered the interpretations of two treatment CT scans, taken on December 11, 2014 and November 30, 2015. Claimant's Exhibits 3, 4. Dr. Davis, whose credentials are not in the record, interpreted the December 11, 2014 CT scan of claimant's chest as revealing ground glass opacities in both posterior lung fields and a 3 mm pulmonary nodule on and in the right lower lobe. Claimant's Exhibit 3. Dr. Mega, whose credentials are not in the record, interpreted the November 30, 2015 CT scan of claimant's chest as showing minimal atelectasis suspected posteriorly in each

lower lung and a small nodular density on the right, likely relating to the atelectasis. Claimant's Exhibit 4.

Neither Dr. Davis nor Dr. Mega specifically stated that the CT scans did not show pneumoconiosis. Noting that treatment CT scans that do not contain diagnoses of pneumoconiosis are not necessarily conclusive evidence that a miner does not have the disease, the administrative law judge permissibly found that the CT scan evidence is insufficient to satisfy employer's burden to disprove the existence of clinical pneumoconiosis. *Looney*, 678 F.3d at 316, 25 BLR at 2-133; Decision and Order at 8, 28.

Employer further contends that the administrative law judge erred in finding that the medical opinion evidence was insufficient to disprove the existence of clinical pneumoconiosis. Employer argues that the administrative law judge selectively analyzed the opinions of Drs. Basheda and Zaldivar. Employer's Brief at 15-17. We disagree.

The administrative law judge considered the medical opinions of Drs. Basheda and Zaldivar that claimant does not have clinical pneumoconiosis. Decision and Order at 11-15, 28-30. Dr. Basheda acknowledged that some x-ray interpretations revealed changes that could be consistent with pneumoconiosis, but testified that the CT scan evidence demonstrated that those changes are not due to pneumoconiosis, as it showed no rounded opacities consistent with coal workers' pneumoconiosis. Employer's Exhibit 4 at 34, 35-36, 38. Similarly, Dr. Zaldivar acknowledged that there were some x-ray interpretations that were positive for pneumoconiosis, but stated that the CT scan evidence did not show evidence of nodules and that it correlated very well with the negative x-ray interpretations recorded by Dr. Seaman and himself. Employer's Exhibits 1, 3 at 35, 37, 53. Dr. Zaldivar concluded that claimant does not have clinical pneumoconiosis, noting that "he has not inhaled sufficient mineral dust that we can perceive anywhere." Employer's Exhibit 3 at 61-62.

Weighing the opinions of Drs. Basheda and Zaldivar, the administrative law judge permissibly found that they did not rebut the presumed fact of clinical pneumoconiosis, as the physicians' conclusion that the x-ray evidence did not establish clinical pneumoconiosis was contrary to the administrative law judge's finding that the weight of this evidence was positive. Moreover, because the CT scans were not read specifically for the presence or absence of pneumoconiosis, whereas dually-qualified radiologists read the x-rays specifically for pneumoconiosis and classified them accordingly, the administrative law judge permissibly found that the opinions of Drs. Basheda and Zaldivar were not sufficiently persuasive to establish that claimant does not have clinical pneumoconiosis. Decision and Order at 11-15, 30; *see Scott v. Mason Coal Co.*, 289

F.3d 263, 269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995).

Considering the evidence as a whole, the administrative law judge found that employer failed to rebut the Section 411(c)(4) presumption by affirmatively disproving the existence of clinical pneumoconiosis, Decision and Order at 31, and we affirm his finding as supported by substantial evidence. *See* 20 C.F.R. §718.305(d)(1)(i)(B). Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[9] Consequently, we affirm the administrative law judge's finding that employer did not establish rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(i). *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015).

Disability Causation

The administrative law judge next addressed whether employer could establish the second method of rebuttal by showing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge rationally discounted the opinions of Drs. Basheda and Zaldivar that claimant's obstructive impairment was not caused by pneumoconiosis because neither physician diagnosed pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the presence of pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-720-21 (4th Cir. 2015); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Toler*, 43 F.3d at 116, 19 BLR at 2-83; Decision and Order at 35-36. As substantial evidence supports these findings, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption that claimant is totally disabled due to pneumoconiosis.

[9] We therefore need not address employer's contentions of error regarding the administrative law judge's finding that employer also failed to establish that claimant does not have legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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