U.S. Department of Labor

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

BRB No. 18-0553 BLA

TIMOTHY LEWIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DIXIE FUEL COMPANY, LLC	)	
	)	DATE ISSUED: 10/25/2019
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 Scott Morris, Administrative Law Judge, United States Department of Labor.

Carl M. Brashear (Hoskins Law Offices PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-05415) of Administrative Law Judge Scott Morris, rendered on a claim filed on October 7, 2015,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the

[1] Claimant filed a previous claim but it was withdrawn. A withdrawn claim is "considered not to have been filed." 20 C.F.R. §725.306(b).

Act). The administrative law judge credited claimant with 14.75 years of coal mine employment and found he established complicated pneumoconiosis, thereby invoking the irrebuttable presumption he is totally disabled due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. He further found employer did not rebut the presumption that claimant's complicated pneumoconiosis arose out of coal mine employment, 20 C.F.R. §718.203(b), and awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant has complicated pneumoconiosis.[2] Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large 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, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 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. 30 U.S.C.

---

[2] Employer filed a supplemental brief, asserting Sections 411(c)(4) and 422(*l*) of the Act are unconstitutional. 30 U.S.C. §§921(c)(4), 932(*l*) (2012). We decline to address these arguments because they were not raised in employer's petition for review and supporting brief. *See Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues the petitioner raises after it has filed its opening brief). Furthermore, employer's arguments are moot. The administrative law judge did not apply Section 411(c)(4) because claimant established less than fifteen years of coal mine employment, and Section 422(*l*) is not applicable because this case does not involve a survivor's claim.

[3] Claimant's coal mine employment was in Kentucky. Hearing Transcript at 17-18. Accordingly, this case arises within 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).

§923(b); *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge found that a preponderance of the x-ray evidence is positive for complicated pneumoconiosis. 20 C.F.R. §718.304(a); Decision and Order at 12. We affirm that finding as it is unchallenged on appeal.[4] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). He further found the biopsy evidence did not mention pneumoconiosis, 20 C.F.R. §718.304(b), and the other medical evidence in the record either supported or "did not weigh against" the x-ray evidence, 20 C.F.R. §718.304(c). Decision and Order at 13, 18. Considering all the evidence together, the administrative law judge found that claimant established complicated pneumoconiosis and invoked the irrebuttable presumption. *Id.* at 18.

Employer asserts the administrative law judge "did not weigh the lack of findings of complicated pneumoconiosis on CT scan, PET scan, and biopsy against the x-ray findings." Employer's Brief at 4. It maintains the case must be remanded for the administrative law judge to fully consider whether all of the medical evidence established complicated pneumoconiosis. *Id.* Employer's argument is without merit.

[4] The administrative law judge considered eight interpretations of five x-rays, all of which were positive for simple pneumoconiosis. Decision and Order at 11. Dr. Meyer, a dually qualified B reader and Board-certified radiologist, read the August 8, 2012 x-ray as negative for complicated pneumoconiosis and there were no other readings of that film. Employer's Exhibit 2. Dr. DePonte, also dually qualified, read the July 8, 2015 x-ray as positive for complicated pneumoconiosis, Category A, and there were no other readings of that film. Director's Exhibit 17. Drs. DePonte and Miller read the December 30, 2015 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Meyer read it as negative. Director's Exhibits 15, 18, 19. Dr. Meyer later read a July 11, 2017 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Dahhan, a B reader, read it as negative. Employer's Exhibit 1; Claimant's Exhibit 2. Dr. DePonte read the August 24, 2017 x-ray as positive for complicated pneumoconiosis, Category A, and there were no other readings of that film. Claimant's Exhibit 1. The administrative law judge considered Dr. Meyer's sole negative reading of the August 8, 2012 x-ray to be of little probative value regarding claimant's current condition "based on the progressive nature of pneumoconiosis." Decision and Order at 12. The administrative law judge concluded that a preponderance of the readings by the dually qualified radiologists of the more recent films was positive for complicated pneumoconiosis. *Id.*

After finding the x-ray evidence showed complicated pneumoconiosis, the administrative law judge thoroughly discussed the other medical evidence.[5] Decision and Order at 13-18. He noted correctly that claimant was referred for a bronchoscopy after an x-ray[6] and a CT scan showed masses in his lungs. *Id*. at 17; Director's Exhibit 17; Claimant's Exhibit 6. The bronchoscopy was performed on September 23, 2015, and a biopsy of lung tissue from the upper lobe of the left lung was obtained. Claimant's Exhibit 4. The biopsy report did not mention complicated pneumoconiosis and was "negative for granulomas or malignancy." *Id*. Reviewing Dr. Girish's treatment notes, the administrative law judge permissibly concluded the biopsy report did not weigh against the positive x-ray evidence because it was obtained for the purpose of determining whether claimant had cancer and not to diagnose pneumoconiosis. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984) (administrative law judge may find an x-ray that is silent on the existence of pneumoconiosis is a negative reading for the disease, but is not required to do so); Decision and Order at 18. He also permissibly determined that because the biopsy report showed no cancer or granulomatous disease, it was probative only "to rule out potential alternative explanations" for the Category A large opacities seen on the x-rays.[7] Decision and Order at 13; *see* 20 C.F.R. §718.304(b); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287 (4th Cir. 2010). Because we see no error in the administrative law judge's analysis, we affirm his weighing of the biopsy evidence. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012) (the administrative law judge's

[5] Employer does not identify error with regard to the administrative law judge's consideration of the medical opinions or treatment records relevant to whether claimant has complicated pneumoconiosis. *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

[6] The administrative law judge observed the treatment notes did not specify the date of the x-ray that prompted further diagnostic testing, but he permissibly inferred, based on the timing of the notes, that Dr. DePonte's August 24, 2015 reading of the July 8, 2015 x-ray led to the September 9, 2015 CT scan and subsequent bronchoscopy. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Decision and Order at 17 n.13. Although Dr. DePonte read the July 8, 2015 x-ray as positive for complicated pneumoconiosis, Category A, she recommended a CT scan to rule out cancer. Director's Exhibit 17. The administrative law judge concluded the biopsy evidence alleviated concerns Dr. DePonte expressed in 2015 as to whether the large opacity she saw was cancer. Decision and Order at 11.

[7] The biopsy evidence predates most of the x-ray evidence the administrative law judge credited as establishing complicated pneumoconiosis. Decision and Order at 12.

function is to weigh the evidence, draw appropriate inferences, and determine credibility).

Furthermore, contrary to employer's contention, the administrative law judge adequately explained why the CT and PET scans "provide support to the preponderant [x]-ray evidence." Decision and Order at 18; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). He noted correctly a September 9, 2015 CT scan showed "a mass lesion in the left hilum" and scattered nodules in both lungs with the largest nodule measured as eleven millimeters in the right upper lobe. Claimant's Exhibit 7. A PET scan obtained on October 12, 2015 showed opacities and nodules consistent with "[claimant's] known history of pneumoconiosis" and one opacity measuring eleven millimeters in diameter noted in the right upper lobe. Claimant's Exhibit 5. The administrative law judge permissibly found that while claimant did not introduce evidence to establish CT and PET scans as medically acceptable for diagnosing pneumoconiosis, 20 C.F.R. §718.107(b), they nonetheless "lend some support" to the positive x-ray evidence for complicated pneumoconiosis, as an eleven millimeter nodule was found in the same location as the Category A large opacities identified on the x-rays. Decision and Order at 17; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Marra*, 7 BLR at 1-218-19.

Substantial evidence supports the administrative law judge's finding, based on his consideration of all the relevant evidence, that claimant established complicated pneumoconiosis and invoked the irrebuttable presumption of total disability due to pneumoconiosis. *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33-34. We also affirm, as unchallenged on appeal, the administrative law judge's finding that employer did not rebut the presumption that claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *Skrack*, 6 BLR at 1-711.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge