U.S. Department of Labor

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

BRB No. 18-0451 BLA

BARRY MAGGARD Claimant-Petitioner v. KAT RAN ENTERPRISES, INCORPORATED and COMMERCE & INDUSTRY/CHARTIS Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/11/2019 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

C. Phillip Wheeler, Jr. (Kirk Law Firm, PLLC), Pikeville, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle, PLLC), Lexington, Kentucky, for employer/carrier.

Sarah M. Hurley (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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2017-BLA-05117) of Administrative Law Judge John P. Sellers, III, rendered on a subsequent claim[1] filed on July 14, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). After crediting claimant with fifteen years of coal mine employment, the administrative law judge found the new evidence did not establish complicated pneumoconiosis and therefore claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Because claimant further failed to establish total disability, the administrative law judge found he did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2012), or establish a change in an applicable condition of entitlement. 20 C.F.R. §§725.309, 718.204(b)(2). The administrative law judge therefore denied benefits.

On appeal, claimant contends the administrative law judge erred in finding he did not establish complicated pneumoconiosis.[3] Employer/carrier (employer) responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director), has filed a limited response, agreeing the administrative law judge erred in weighing the evidence on complicated pneumoconiosis.

[1] Claimant's initial claim, filed on November 8, 2012, was denied by the district director because he did not establish total disability. 20 C.F.R. §718.204(b)(2); Director's Exhibit 1.

[2] 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 qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 22-24.

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.[4] 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).

To be entitled to benefits under the Act, claimant must establish he has pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his total disability is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). Presumptions aid claimants in meeting these elements when certain conditions are met.

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, establish an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering or suffered 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). 20 C.F.R. §718.304. 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 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge found the biopsy evidence supports a finding of complicated pneumoconiosis, 20 C.F.R. §718.304(b), while the x-ray, CT scan, treatment record, and medical opinion evidence does not, 20 C.F.R. §718.304(a), (c). Decision and Order at 15-21. Specifically, he found Drs. Dennis and Johnson credibly interpreted a lung biopsy taken on May 31, 2012 of a right upper lobe nodule that was resected from claimant's lungs as positive for progressive massive fibrosis. Decision and Order at 19;

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because claimant's most recent coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Decision and Order at 3; Director's Exhibit 4; Hearing Transcript at 26.

Director's Exhibit 12; Claimant's Exhibit 3. Weighing all of the evidence, the administrative law judge assigned diminished weight to the biopsy evidence, however, because he found there is no indication claimant continued to have complicated pneumoconiosis after the lung nodule rescission was performed. Decision and Order at 21. He explained that while claimant's lungs "may have contained a large opacity [of complicated pneumoconiosis] in May 2012, the opacity was resected. All objective testing conducted post-resection suggests the same and does not weigh in favor of a finding of complicated pneumoconiosis." *Id.*

Claimant asserts "the administrative law judge's "reasoning is flawed in that it concludes that [he] must make his decision regarding the existence of complicated pneumoconiosis on the medical evidence at the time the claim is adjudicated rather than at the time of diagnosis of complicated pneumoconiosis." Claimant's Brief at 7. The Director similarly argues "it was not necessary for [claimant's] lungs to currently exhibit residual evidence of complicated pneumoconiosis in order to invoke the presumption; it was sufficient if the evidence establishes that [he] had the disease earlier, although the disease has now been excised." Director's Brief at 1. We agree the administrative law judge's rationale for assigning diminished weight to the biopsy evidence, when compared to the evidence as a whole, was error.

The statute expressly provides that the irrebuttable presumption may be invoked by biopsy evidence. 30 USC 921(c)(3)(B). This provision would be rendered useless if there had to be other qualifying evidence that complicated pneumoconiosis existed after the biopsy excised the qualifying evidence.[5] Moreover, the regulation applicable to biopsy evidence states that a "negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis," but "where positive findings are obtained on biopsy, the results will constitute evidence of the presence of pneumoconiosis." 20 C.F.R. §718.106. Further, once the irrebutable presumption is invoked, it is not necessary to otherwise establish entitlement; thus, the question is solely whether the requirements for the irrebuttable presumption have been satisfied. *See Swanson v. R.G. Johnson Co. and Hartford Insurance Group*, 15 BLR 1-49, 1-51 (1991) (liability for benefits is established as of the date of determination of complicated pneumoconiosis); *Williams v. Director, OWCP*, 13 BLR 1-18, 1-30 (1989) (where a claimant is found entitled to the irrebuttable presumption, benefits commence as of first credible evidence of complicated pneumoconiosis); J*ustus v. J & L Coal Co.*, 3 BLR 1-185, 1-189 (1981) ("[A] miner who establishes the existence of complicated pneumoconiosis is irrebuttably presumed totally disabled due to pneumoconiosis as of the month complicated pneumoconiosis is established, even though

[5] Of course, evidence relating to the *credibility* of the diagnosis by biopsy evidence, in the face of contrary probative evidence, is a different matter.

the [miner] may still be working."). Neither the Act nor the regulations require a claimant to also prove that residual complicated pneumoconiosis remains after the biopsy, and the administrative law judge cited no authority for imposing that requirement. Therefore, the administrative law judge erred in assigning diminished weight to the biopsy evidence of complicated pneumoconiosis based on his finding that there is no evidence of the disease after the nodule was surgically removed for biopsy.

The administrative law judge also erroneously weighed the medical opinions using a similarly flawed rationale. 20 C.F.R. §718.304(c). Dr. Baker examined claimant on December 15, 2015, and noted in his report that claimant "had progressive massive fibrosis on biopsy" and was "status post resection of lesion that represented progressive massive fibrosis." Director's Exhibit 11. The administrative law judge interpreted Dr. Baker's opinion to be claimant "had complicated pneumoconiosis in the past but not presently." Decision and Order at 19. He also found Dr. Crum diagnosed complicated pneumoconiosis based on the May 2012 biopsy, but "did not explain how [post-operative] changes and areas of coalescence" he observed on a June 2017 x-ray "constituted complicated pneumoconiosis absent the resected macule."[6] *Id.*; *see* Claimant's Exhibit 2. The administrative law judge erred in requiring Drs. Baker and Crum to explain why claimant continues to have complicated pneumoconiosis after the May 2012 resection, if the biopsy of a resected nodule was positive for the disease.

Based on the foregoing errors, we vacate the administrative law judge's findings that the medical opinions do not establish complicated pneumoconiosis, the evidence as a whole does not establish complicated pneumoconiosis, and the denial of benefits.[7] 20 C.F.R. §718.304; Decision and Order at 15-21. On remand, he must reconsider whether the medical opinions establish complicated pneumoconiosis. 20 C.F.R. §718.304(c). He should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *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). He must then weigh together all the evidence relevant to the issue of complicated pneumoconiosis,

[6] The administrative law judge did not indicate what weight, if any, he was assigning the opinions of Drs. Forehand, Broudy, and Rosenberg because they did not diagnose complicated pneumoconiosis and thus their opinions do not support claimant's burden of proof. Decision and Order at 20.

[7] Because it is unchallenged, we affirm the administrative law judge's finding that the x-rays, CT scans, and treatment records do not establish complicated pneumoconiosis. *Skrack,* 6 BLR at 1-711; Decision and Order at 15-21.

after considering whether the weight to be accorded evidence from one section is affected by evidence offered in another. *Gray*, 176 F.3d at 388-90.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge