



BRB No. 19-0286 BLA

GORDON LESTER VARNEY (deceased)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 05/15/2020
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Glenn M. Hammond and J. Casey Smith (Glenn Martin Hammond Law Office), Pikeville, Kentucky, for claimant.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Remand (2014-BLA-05892) of Administrative Law Judge Joseph E. Kane rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on December 31, 2013, and is before the Board for the second time.

The administrative law judge initially issued a Decision and Order Denying Benefits on May 3, 2017. Claimant appealed and the Board affirmed, as unchallenged, the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), and therefore claimant did not invoke the

presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).<sup>1</sup> *Varney v. Director, OWCP*, BRB No. 17-0470 BLA, slip op. at 3 n.3 (May 29, 2018) (unpub.). The Board noted claimant asserted only that the administrative law judge erred in failing to consider evidence he submitted post-hearing relevant to whether he has complicated pneumoconiosis and is entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). *Id.* at 2. Because the administrative law judge did not discuss this evidence in his decision and order or otherwise address its admissibility, the Board vacated the denial of benefits and remanded the case for resolution of that evidentiary issue. *Id.* at 4.

The Board instructed the administrative law judge to determine on remand whether claimant's post-hearing evidence is admissible, 20 C.F.R. §§725.414 and 725.456(b)(3), and if admitted, to determine whether claimant established complicated pneumoconiosis. *Varney*, BRB No. 17-0470 BLA, slip op. at 4. If claimant's evidence was not admitted, the Board instructed the administrative law judge to deny benefits<sup>2</sup> or remand the claim to the district director for consideration of that evidence. *Id.*

On remand, the administrative law judge found claimant's post-hearing evidence untimely submitted and he did not show good cause for admitting it into the record. He also found that even if the evidence was admitted, it did not establish complicated pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts the administrative law judge erred in finding he did not show good cause for admitting his post-hearing evidence and that it does not prove complicated pneumoconiosis.<sup>3</sup> The Director, Office of Workers' Compensation Programs, did not file a response brief.

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<sup>1</sup> Section 411(c)(4) provides a rebuttable presumption that claimant was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

<sup>2</sup> Because claimant did not establish total disability at 20 C.F.R. §718.204(b)(2), he is unable to establish entitlement to benefits without invoking the irrebuttable presumption.

<sup>3</sup> Claimant's counsel informs the Board claimant died on November 15, 2018, while the case was on remand to the administrative law judge, and attached a copy of an autopsy report to the petition for review and brief. We are unable to consider this evidence as the Board's scope of review is limited to the record developed at the hearing before the administrative law judge. 20 C.F.R. §802.301. Any additional evidence may be submitted

The Board's scope of review is defined by statute. We must affirm the administrative law judge's decision if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

An administrative law judge may admit documentary evidence that was not submitted to the district director, subject to the objection of any party, if such evidence is sent to all other parties at least twenty days before a hearing is held in connection with the claim. 20 C.F.R. §725.456(b)(2). Evidence not exchanged within the twenty-day time frame may still be admitted at the hearing with the written consent of the parties or on the record at the hearing, or upon a showing of good cause. 20 C.F.R. §725.456(b)(3). If the parties do not waive the twenty-day requirement or good cause is not shown, the administrative law judge must either exclude the late evidence from the record or remand the claim to the district director for consideration of such evidence. 20 C.F.R. §725.456(b)(3).

The administrative law judge noted claimant submitted no exhibits at the June 8, 2016 hearing and did not request leave to submit post-hearing evidence. Decision and Order on Remand at 3. On August 4, 2016, claimant submitted a copy of Dr. Saha's letter, also dated August 4, 2016, and the physician's treatment records.<sup>5</sup> *Id.* The administrative law judge noted claimant did not mention the post-hearing evidence or argue he had complicated pneumoconiosis in his post-hearing brief. *Id.* Claimant first raised the issue of complicated pneumoconiosis before the Board in his prior appeal. *Id.*

The administrative law judge found claimant did not provide any explanation for the untimely submission of Dr. Saha's letter and treatment records or make a good cause argument for admitting that evidence. Decision and Order on Remand at 3; *see* 20 C.F.R.

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to the district director along with a request for modification within one year of this decision. 20 C.F.R. §725.310.

<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

<sup>5</sup> The Director, Office of Workers' Compensation Programs, objected to the admission of this evidence. Director's Post-Hearing Brief at 3.

§725.456(b)(2). We see no error in the administrative law judge’s determination.<sup>6</sup> Other than asserting Dr. Saha’s letter did not “exist” until August 4, 2016, claimant does not explain why he was unable to obtain a letter from Dr. Saha or copies of the physician’s treatment records until after the hearing. Claimant’s Brief at 7.

Notwithstanding, any error regarding the administrative law judge’s evidentiary ruling is harmless, as he actually considered the post-hearing evidence on complicated pneumoconiosis. See *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the “error to which he points could have made any difference”). The administrative law judge found that “[w]ith or without this additional evidence, the record is devoid of any evidence that [c]laimant is totally disabled and this includes a lack of evidence to support complicated pneumoconiosis.” Decision and Order on Remand at 4. We affirm the administrative law judge’s finding.

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that would yield results 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 must weigh together the evidence at subsections (a), (b), and (c) before determining whether invocation of the irrebuttable presumption has been established. See *Gray v. SLC Coal Co.*, 176 F.3d 382, 387 (6th Cir. 1999).

Dr. Saha’s letter includes one sentence pertaining to claimant’s diagnosis: “The patient has slowly progressive pulmonary fibrosis.” Dr. Saha’s August 4, 2016 letter at 1. The administrative law judge permissibly found Dr. Saha’s opinion insufficient to satisfy claimant’s burden of proof because he did not use the term “massive” in conjunction with

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<sup>6</sup> An administrative law judge exercises broad discretion in resolving procedural and evidentiary matters. See *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). Thus, a party seeking to overturn an administrative law judge’s disposition of a procedural or evidentiary issue must establish that the administrative law judge’s action represented an abuse of discretion. See *V.B. [Blake] v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). Claimant has not shown the administrative law judge abused his discretion in finding he did not establish good cause for admitting the post-hearing evidence. *Blake*, 24 BLR at 1-113; *Dempsey*, 23 BLR at 1-47; *Clark*, 12 BLR at 1-153.

the pulmonary fibrosis he described and did not otherwise diagnose a condition that satisfies the statutory definition of complicated pneumoconiosis, 30 U.S.C. §921(c)(3). Decision and Order on Remand at 4; *see Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7, 3 BLR 2-36, 2-38 (1976).

Further, the administrative law judge permissibly found Dr. Saha's opinion inadequately reasoned. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). As the administrative law judge noted, "even if Dr. Saha had mentioned progressive massive fibrosis, he provided no explanation for his opinion or the basis of his opinion within the letter." Decision and Order on Remand at 4.

Regarding the treatment records accompanying Dr. Saha's letter, the administrative law judge accurately noted that neither Dr. Saha nor any other physician diagnosed progressive massive fibrosis or complicated pneumoconiosis. Decision and Order on Remand at 4. He thus found Dr. Saha's diagnosis of "slowly progressive pulmonary fibrosis," when read "in conjunction with the treatment records," does not establish complicated pneumoconiosis. *Id.* Because the administrative law judge's credibility determinations are rational, we affirm his finding. *See Barrett*, 478 F.3d at 356; *Rowe*, 710 F.2d at 255.

Finally, the administrative law judge found the other evidence of record insufficient to establish complicated pneumoconiosis. Decision and Order on Remand at 4. He noted that none of the x-rays or computed tomography scans admitted into the record reveal large opacities or progressive massive fibrosis, and neither Dr. Mettu nor Dr. Broudy diagnosed complicated pneumoconiosis. *Id.*; *see* 20 C.F.R. §718.304(a), (c).

Claimant does not identify any specific error by the administrative law judge in weighing the record evidence on complicated pneumoconiosis. *See* 20 C.F.R. §802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). We therefore affirm as supported by substantial evidence the administrative law judge's findings claimant did not establish complicated pneumoconiosis and invoke the irrebuttable presumption. *See Gray*, 176 F.3d at 387.

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge