U.S. Department of Labor

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

BRB Nos. 16-0267 BLA
and 16-0267 BLA-A

RICKY MULLINS	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
NEW ERA COAL COMPANY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 03/16/2017
	)	
EMPLOYERS INSURANCE OF WAUSAU	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
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 Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits (2012-BLA-05352) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the provisions of 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 August 24, 2010.

After crediting claimant with 14.06 years of coal mine employment,[1] the administrative law judge found that claimant was not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] However, the administrative law judge found that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(3), 718.304. Consequently, the administrative law judge found that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The administrative law judge further found that claimant's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. Claimant responds, urging affirmance of the award of benefits. Claimant has filed a cross-appeal, challenging the administrative law judge's finding that the evidence did not establish the existence of either clinical pneumoconiosis or legal pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4). Claimant asserts that, if the Board does not affirm the award

[1] While the administrative law judge noted that, "[a]t the hearing, the parties stipulated to 13.06 years of coal mine employment," he found that "[c]laimant had an additional year of coal mine employment based on [claimant's] testimony, for a total of 14.06 years." Decision and Order at 4.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a 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.

of benefits, the administrative law judge should be instructed to consider all elements of entitlement on remand. In response to claimant's cross-appeal, employer urges the Board to affirm the administrative law judge's finding that claimant did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and to decline to address claimant's assertion that the evidence is sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i), (ii), (iv) as premature. The Director, Office of Workers' Compensation Programs, did not file a brief in either appeal.[3]

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 into the Act 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), as implemented by 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). 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, 21 BLR 2-615, 2-626-29 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

Employer argues that the administrative law judge erred in finding that the x-ray evidence established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). The administrative law judge considered eight interpretations of three x-rays dated April 12, 2011, December 6, 2011 and April 29, 2015. Decision and Order at 7-8, 16-18; Director's Exhibit 10; Claimant's Exhibits 1, 2, 4, 13; Employer's Exhibits 1,

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant has 14.06 years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because 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.

2, 9. The April 12, 2011 x-ray was read as positive for simple pneumoconiosis by Dr. Alexander, who is dually qualified as a B reader and Board-certified radiologist. Claimant's Exhibit 1. In contrast, Dr. Meyer, a dually-qualified radiologist, and Dr. Rasmussen, a B reader, read this x-ray as negative. Director's Exhibit 10; Employer's Exhibit 2. The December 6, 2011 x-ray was read as positive for simple pneumoconiosis by Dr. Alexander, whereas Dr. Kendall, who is also a dually-qualified radiologist, read this x-ray as negative. Claimant's Exhibit 2; Employer's Exhibit 1. Finally, the April 29, 2015 x-ray was read as positive for both simple pneumoconiosis and category A complicated pneumoconiosis by Drs. Meyer[5] and Seaman, who are dually-qualified radiologists, whereas Dr. Smith, a dually-qualified radiologist, read this x-ray as negative for both simple pneumoconiosis and complicated pneumoconiosis. Claimant's Exhibits 4, 13; Employer's Exhibit 9.

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 April 12, 2011 and December 6, 2011 x-rays are in equipoise and the April 29, 2015 x-ray is positive for complicated pneumoconiosis. Decision and Order at 17-18. Weighing the x-rays together, the administrative law judge determined that there was a "significant time gap" between the x-rays taken in 2011 and the x-ray taken in 2015. *Id*. at 18. The administrative law judge gave greater weight to the April 29, 2015 x-ray showing the presence of complicated pneumoconiosis because it was the most recent x-ray of record. Thus, the administrative law judge found that the weight of the x-ray evidence established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a).

Employer asserts that the administrative law judge erred in finding that the April 12, 2011 x-ray was in equipoise. Employer asserts that because the administrative law judge stated that Dr. Rasmussen's negative B reading of this x-ray was entitled to "minimal weight," it should have broken the tie between the dually-qualified readers and

[5] On the ILO classification form for the April 29, 2015 x-ray, Dr. Meyer checked the box indicating the presence of category A large opacities. Claimant's Exhibit 4. In his accompanying narrative report, however, Dr. Meyer characterized his reading as "possible complicated pneumoconiosis," noting that the focal nodular density he observed could be neoplastic or explained by sequelae of aspiration or organizing pneumonia. *Id.* The administrative law judge properly considered these alternative diagnoses, and permissibly concluded that the x-ray reading is positive for complicated pneumoconiosis because there is no evidence in the record that claimant suffers from the alternative etiologies proposed by Dr. Meyer. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287, 24 BLR 2-269, 2-286-87 (4th Cir. 2010); Decision and Order at 18. Moreover, employer does not challenge this finding on appeal. *Skrack*, 6 BLR at 1-711.

established that the x-ray is negative. Employer's Brief at 3. We disagree.

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw his own conclusions and inferences from it. *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The administrative law judge began his analysis of the x-ray evidence by stating, as was within his discretion, that he considered the dually-qualified readers to be "the most qualified." *See Staton v. Norfolk & W. Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); Decision and Order at 17. As employer asserts, in evaluating the April 12, 2011 x-ray, the administrative law judge initially stated that the negative reading of this x-ray by Dr. Rasmussen, a B reader, was entitled to "minimal weight" because it was "rebutted by two more highly qualified readers [Drs. Alexander and Meyer]." Decision and Order at 17. Contrary to employer's assertion, however, administrative law judge rationally relied on the readings by Drs. Alexander and Meyer because of their superior radiological qualifications. *Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *Chaffin v. Peter Cave Coal Co*., 22 BLR 1-294, 1-300 (2003). Thus, the administrative law judge permissibly concluded that "[b]ecause [the April 12, 2011] x-ray was [equally] interpreted as both positive and negative for pneumoconiosis by the most highly-qualified readers, it is in equipoise on the issue of pneumoconiosis."[6] Decision and Order at 17; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *Chaffin*, 22 BLR at 1-300.

Employer also asserts that the administrative law judge erred in failing to weigh all of the x-ray evidence together. Employer's Brief at 4. Employer specifically asserts that, when looked at as a whole, there are four positive readings and four negative readings for simple pneumoconiosis, but only two positive readings versus six negative readings for complicated pneumoconiosis. *Id.*

[6] Moreover, the administrative law judge ultimately found that the April 12, 2011 x-ray lacks comparative probative value because of its age. Decision and Order at 17. In light of this finding, employer has not explained how, even if negative, this x-ray would undermine the administrative law judge's determination that the x-ray evidence, as a whole, is positive for complicated pneumoconiosis. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

Contrary to employer's assertion, it was proper for the administrative law judge to consider each x-ray individually and resolve the conflict in the readings of each of those films based on his consideration of the radiological qualifications of the physicians. 20 C.F.R. §718.202(a)(1). Further, as set forth above, the administrative law judge noted "the two x-rays that are in equipoise date from April and December 2011, while the x-ray that is positive for complicated pneumoconiosis dates from April 2015," which he characterized as "a significant gap in time." Decision and Order at 18. Because of the progressive nature of pneumoconiosis, the administrative law judge permissibly gave greater weight to the April 29, 2015 x-ray that is positive for complicated pneumoconiosis because it is the most recent x-ray of record by "a number of years." *See Woodward*, 991 F.2d at 319-20, 17 BLR at 2-84-85; *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order at 18. As it is supported by substantial evidence, we affirm the administrative law judge finding that the x-ray evidence established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740, 25 BLR 2-675, 2-687 (6th Cir. 2014); *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

Employer has not raised any other allegations of error concerning the administrative law judge's findings on the issue of complicated pneumoconiosis. We therefore affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(3), 718.203(b)[7] and 718.304, and his award of benefits.[8]

[7] We affirm, as unchallenged on appeal, the administrative law judge's finding that the complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Skrack*, 6 BLR at 1-711.

[8] In view of our affirmance of the administrative law judge's award of benefits, we need not address claimant's contentions, on cross-appeal, regarding the issues of legal pneumoconiosis and total respiratory disability. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (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