U.S. Department of Labor

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

BRB No. 20-0224 BLA

DANIEL L. KEEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 03/12/2021
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 William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Associate Chief Administrative Law Judge William S. Colwell's Decision and Order Awarding Benefits (2018-BLA-05665) rendered on a claim filed on May 30, 2017, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with thirty years of coal mine employment and found he established complicated pneumoconiosis, thereby invoking 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). He further found Claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203, and awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding complicated pneumoconiosis.[1] Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The Benefits Review 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.[2] 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, 361-62 (1965).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), 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 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). *See* 20 C.F.R. §718.304. In determining whether Claimant has invoked the irrebuttable presumption, the administrative law judge must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge found the x-ray and medical opinion evidence establishes complicated pneumoconiosis, 20 C.F.R. §718.304(a), (c), while the biopsy reports, computed tomography (CT) scans, and treatment records do not. 20 C.F.R. §718.304(b), (c); Decision and Order at 17-21. Weighing all of the evidence, the administrative law judge found the contrary evidence of record does not undermine the x-

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established thirty years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 6, 7.

ray and medical opinion evidence of complicated pneumoconiosis, thus entitling Claimant to the irrebuttable presumption of total disability due to pneumoconiosis. *Id*.

Employer first argues the administrative law judge erred in weighing the x-ray evidence. Employer's Brief at 3-9 (unpaginated). The administrative law judge considered five interpretations of two x-rays dated February 20, 2017 and August 1, 2017. Decision and Order at 7-8. Dr. DePonte, a dually-qualified Board-certified radiologist and B reader, interpreted the February 20, 2017 x-ray as positive for complicated pneumoconiosis, whereas Dr. Colella, also a dually-qualified radiologist, read it as negative for the disease. Director's Exhibit 14; Employer's Exhibit 2. Dr. Forehand, a B reader, and Dr. DePonte each interpreted the August 1, 2017 x-ray as positive for complicated pneumoconiosis, while Dr. Colella read it as negative for the disease. Director's Exhibit 13; Claimant's Exhibit 1; Employer's Exhibit 1.

In resolving the conflicting readings of the February 20, 2017 x-ray, the administrative law judge found Dr. DePonte's positive reading and Dr. Colella's negative reading "equally balanced" because both physicians are dually-qualified and "[t]here is no basis on which to credit either interpretation over the other one." Decision and Order at 8. With respect to the August 1, 2017 x-ray, the administrative law judge again acknowledged Drs. DePonte and Colella are dually-qualified and rendered conflicting readings. *Id*. Although Dr. Forehand is only a B reader, the administrative law judge found the physician's expertise and experience "lends significant credibility to his positive interpretation and therefore, increases the probative value of his interpretation." *Id*. at 8. Thus he found Dr. DePonte's positive reading, as supported by Dr. Forehand's positive reading, "overwhelms" Dr. Colella's negative reading. *Id*. As the record contains one positive x-ray and one x-ray's readings in equipoise, he found the x-ray evidence established complicated pneumoconiosis. Decision and Order at 7-8; 20 C.F.R. §718.304(a).

Employer contends the administrative law judge failed to adequately explain his resolution of the conflicting readings of the August 1, 2017 x-ray and improperly "counted heads" in finding it positive for complicated pneumoconiosis. Employer's Brief at 3-9 (unpaginated). It asserts he should have found the readings of the x-ray in equipoise. Employer's argument has no merit.

As discussed above, the administrative law judge acknowledged that Drs. DePonte and Colella are equally qualified,[3] and that more weight can be given to dually-qualified

[3] Employer now argues before the Board that Dr. Colella's additional qualifications beyond just being a dually-qualified radiologist should have resulted in his reading being assigned the most weight. Employer's Brief at 9. Employer, however, did not make this

physicians than to B readers. Decision and Order at 7-8. He nevertheless explained his basis for assigning additional weight to Dr. Forehand's reading, notwithstanding that he is a B reader, and for finding it supports Dr. DePonte's positive interpretation. *Id*. The administrative law judge noted Forehand currently serves as the Director of the Southern Appalachian Center for Pulmonary Studies as well as the Medical Director of the Respiratory Care Program at Southwest Virginia Community College. Decision and Order at 8; Director's Exhibit 13. He further noted Dr. Forehand maintains his clinical experience as a designated examining physician for the Department of Labor federal black lung program since 1991, is a certified B reader since 1993, and is a prominent expert in the field based on the "numerous times" he was "an invited speaker at various black lung conferences." *Id.* Given Dr. Forehand's additional qualifications, particularly his clinical expertise in black lung cases, the administrative law judge permissibly found this factor increased the probative value of his interpretation. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order at 8. Moreover, contrary to Employer's argument, the administrative law judge also permissibly found Dr. Forehand's reading buttressed Dr. DePonte's reading and together their readings outweighed Dr. Colella's negative reading. *See Addison*, 831 F.3d at 256-57; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997).

Because it is supported by substantial evidence, we affirm the administrative law judge's conclusion that the August 1, 2017 x-ray is positive for complicated pneumoconiosis, as well as his finding that the x-ray evidence as a whole establishes complicated pneumoconiosis. 20 C.F.R. §718.304(a).

Even if there was merit to Employer's argument that the readings of the August 1, 2017 x-ray are in equipoise, we need not remand this case for the administrative law judge to reconsider the issue of complicated pneumoconiosis. As discussed below, we affirm the administrative law judge's finding that Dr. Forehand's medical opinion diagnosing complicated pneumoconiosis is reasoned and documented. Thus even if the administrative law judge found the readings of the August 1, 2017 x-ray in equipoise, Claimant would still establish complicated pneumoconiosis based on the medical opinion evidence.

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argument before the administrative law judge. Rather, it argued that Drs. DePonte, Colella, and Forehand are all equally qualified as dually-qualified radiologists (an incorrect statement with respect to Dr. Forehand). Employer's Post-Hearing Brief at 7. Thus we hold Employer forfeited this argument and decline to consider it for the first time on appeal. *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], F.3d , No. 20-3329, 2021 WL 386555, slip. op. at 4-6 (6th Cir. Feb. 4, 2021); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Kurcaba v. Consol. Coal Co.*, 9 BLR 1-73, 1-75 (1986).

Shinseki v. Sanders, 556 U.S. 396, 413 (2009) (appellant must explain how "error to which he points could have made any difference"); 20 C.F.R. §718.304(a), (c).

Dr. Forehand diagnosed progressive massive fibrosis based on Claimant's x-ray. Director's Exhibit 13. He opined Claimant's complicated pneumoconiosis was the "direct result of the prolonged daily exposure to . . . fresh cut silica and coal dust into his lungs for [thirty] years while working at the face of a poorly ventilated coal mine (curtains not hung, brattices not kept up) without wearing a mask[.]" *Id*. Dr. Forehand noted Claimant worked "where dust levels were highest and most toxic as a roof bolt operator on the return side [of the mine] and where there were frequent blow outs." *Id*. He explained "[t]he inhaled particles of fresh cut silica and coal dust settled in [C]laimant's lungs and triggered a fibrotic reaction, causing the most serious form of coal workers' pneumoconiosis." *Id*. Finally, he noted there is "no evidence of any additional or alternative disease of [C]laimant's lungs such as cancer, pneumonia, tuberculosis, histoplasmosis, sarcoidosis, hypersensitivity pneumonitis, granulomatous lung disease, fungal lung disease, or rheumatoid lung disease." *Id*.

Contrary to Employer's argument, the administrative law judge did not credit Dr. Forehand's opinion because it is merely a restatement of his positive x-ray reading. Employer's Brief at 9-10 (unpaginated). The administrative law judge found Dr. Forehand based his opinion on a physical examination, objective tests, and the nature and dust conditions of Claimant's various jobs in the coal mines. Decision and Order at 9-10. He also found Dr. Forehand "observed that there was an absence of any disease process which could be an alternate or additional cause of the condition observed on x-ray" and "credibly described Claimant's lung masses as being a fibrotic reaction to his long-term dust exposure." *Id*. at 11. The administrative law judge permissibly found Dr. Forehand's opinion well-reasoned and documented. *Milburn Colliery Co. v. Hicks* 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 11. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant established complicated pneumoconiosis based on the medical opinion evidence. 20 C.F.R. §718.304(c).

Further, Employer does not challenge the administrative law judge's finding that all the relevant evidence considered together establishes Claimant has complicated pneumoconiosis. Decision and Order at 11-12. Thus we affirm this finding. *See Cox*, 602 F.3d at 283; *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.304. We further affirm, as unchallenged, the administrative law judge's finding that Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack*, 6 BLR at 1-711; Decision and Order at 12.

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