U.S. Department of Labor

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

BRB No. 19-0265 BLA

JEFFERY D. KEEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BETTY COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 05/15/2020
	)	
Employer/Carrier-Petitioners	)	
	)	
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 on Modification of an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Modification of an Initial Claim (2017-BLA-05003) of Administrative Law Judge Larry S. Merck, rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant filed this claim on November 10, 2010.

In a June 14, 2013 Decision and Order Awarding Benefits, Administrative Law Judge Richard A. Morgan found claimant established total disability due to legal pneumoconiosis. 20 C.F.R. §§718.202(a)(4), 718.204(b)(2), 718. 204(c); Director's Exhibit 49. On appeal, the Board affirmed Judge Morgan's finding that claimant is totally disabled but vacated his determinations on legal pneumoconiosis and disease causation. *Keen v. Betty Coal Co.*, BRB No. 13-0465 BLA, slip op. at 5-6 (June 19, 2014) (unpub.). Thus, the Board vacated the award of benefits and remanded the case for further consideration. *Id*. at 6.

On July 6, 2015, Judge Morgan issued a Decision and Order on Remand Denying Benefits, finding claimant did not establish legal pneumoconiosis. Director's Exhibit 73. Claimant timely requested modification on August 13, 2015, and the case was assigned to Judge Merck (the administrative law judge). Director's Exhibit 74.

In his January 28, 2019 decision, which is the subject of this appeal, the administrative law judge credited claimant with 7.34 years of coal mine employment[1] and accepted employer's stipulations that claimant has simple pneumoconiosis arising out of his coal mine employment. 20 C.F.R. §§718.202(a)(1), 718.203. The administrative law judge found claimant 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 claimant's complicated pneumoconiosis arose out of his coal mine employment. Accordingly, the administrative law judge found claimant entitled to modification based on a change in conditions and awarded benefits. 20 C.F.R. §725.310.[2]

On appeal, employer challenges the administrative law judge's finding claimant established complicated pneumoconiosis. Claimant responds in support of the award of

[1] Because claimant established fewer than fifteen years of coal mine employment, he is unable to invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[2] Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310, authorizes modification of an award or denial of benefits in a miner's claim based on a mistake in a determination of fact or a change in conditions.

benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[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 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, 30 U.S.C. §921(c)(3), establishes 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; *E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243-62 (4th Cir. 1999). The administrative law judge must first 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) to determine if claimant has invoked the irrebuttable presumption. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46 (4th Cir. 1993); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991) (en banc).

The administrative law judge found a preponderance of the x-ray evidence positive for complicated pneumoconiosis. 20 C.F.R §718.304(a); Decision and Order at 18. He noted the parties did not designate any biopsy evidence. 20 C.F.R. §718.304(b); Decision and Order at 19. He found the medical opinions and claimant's treatment records, which include a bronchoscopy report and computed tomography (CT) scans, insufficient to establish complicated pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 30. He concluded, however, that this other evidence did not "undermine the value of the most

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding claimant established simple pneumoconiosis arising out of his coal mine employment. 20 C.F.R. §§718.202(a)(1), 718.203; Decision and Order at 14; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Claimant's coal mine employment occurred in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

recent chest x-rays, which have demonstrated complicated pneumoconiosis." Decision and Order at 30. Thus, the administrative law judge found claimant invoked the irrebuttable presumption. *Id*. Employer argues the administrative law judge erred in finding claimant established complicated pneumoconiosis based on the x-ray evidence. We disagree.

The administrative law judge considered twelve readings of five x-rays. Decision and Order at 15-17. Dr. Forehand, a B reader, and Drs. Alexander and Miller, dually-qualified B readers and Board-certified radiologists, read the December 8, 2010 x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis, while Drs. Meyer and Shipley, also dually-qualified radiologists, read it as negative for both simple and complicated pneumoconiosis. Director's Exhibits 13, 27, 40; Claimant's Exhibit 1. The administrative law judge found the x-ray negative for complicated pneumoconiosis but "the conflicting interpretations of this x-ray by equally-qualified radiologists" in equipoise regarding simple pneumoconiosis. Decision and Order at 18.

Dr. Alexander read the March 12, 2012 x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis, while Dr. Meyer read it as negative for both diseases. Director's Exhibit 39; Employer's Exhibit 1. The administrative law judge found this x-ray negative for complicated pneumoconiosis but found the interpretations of the x-ray in equipoise regarding simple pneumoconiosis. Decision and Order at 18. However, he found Dr. Alexander's observation of a "'possible 10 [millimeter] pulmonary nodule' in the right lung zone [to be] highly relevant." Decision and Order at 18, *quoting* Director's Exhibit 39. He also noted Dr. Meyer's finding of "an elliptical nodular focus . . . at the right lung base" and an "asymmetric density associated with the right hilum superiorly." Decision and Order at 18, *quoting* Employer's Exhibit 1.

Dr. Zaldivar, a B reader, interpreted a September 19, 2012 x-ray as negative for simple and complicated pneumoconiosis. Director's Exhibit 40. As there are no other readings of the film, the administrative law judge found the x-ray negative for either form of pneumoconiosis. Decision and Order at 18.

There were two x-rays submitted on modification. Dr. Kendall, a dually-qualified radiologist, read the December 13, 2016 x-ray as positive for simple pneumoconiosis, profusion "3/2" with type "q/t" opacities in all six lung zones, and for complicated pneumoconiosis, Category A. Claimant's Exhibit 3. Dr. Meyer, also dually-qualified, read the x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Employer's Exhibit 2. Dr. Meyer marked boxes on his International Labour Organization (ILO) classification form indicating the x-ray showed cancer (ca), pleural effusion (ef), enlargement of non-calcified hilar or mediastinal lymph nodes (hi), and parenchymal bands (pi).

In a narrative report attached to his ILO form, Dr. Meyer diagnosed "possible simple coal workers' pneumoconiosis" and noted an "[a]symmetric right hilar opacity [that] may be adenopathy or a mass." Employer's Exhibit 2. He recommended comparison with prior x-rays or further characterization with a CT scan. Because Dr. Meyer "did not provide a definitive diagnosis" regarding the cause of the mass he identified, the administrative law judge found Dr. Kendall's positive reading more persuasive and sufficient to establish the December 13, 2016 x-ray positive for complicated pneumoconiosis. Decision and Order at 18.

Dr. Crum, a dually-qualified radiologist, interpreted the August 3, 2017 x-ray as positive for simple pneumoconiosis, profusion "3/2" with type "q/t" opacities in all six lung zones, and for complicated pneumoconiosis, Category B. Claimant's Exhibit 5. He noted on his ILO form that there was "coalescence" and a right "hilar opacity . . . suggesting [progressive massive fibrosis]." *Id.* Dr. Meyer interpreted this x-ray as positive for simple pneumoconiosis and negative for complicated pneumoconiosis. Employer's Exhibit 3. He checked boxes on his ILO form identifying a coalescence of small opacities (ax), pleural effusion (ef), and enlargement of the non-calcified hilar or mediastinal lymph nodes (hi). *Id.* In a narrative report attached to that ILO form, he described a "band-like opacity . . . suggesting atelectasis" and an "[e]nlarged right hilum suggesting lymphadenopathy." *Id.*

In rejecting Dr. Meyer's negative reading, the administrative law judge found he did not explain why claimant's radiological abnormalities were "inconsistent with complicated pneumoconiosis." Decision and Order at 19. Relying on Dr. Crum's interpretation, the administrative law judge found the August 3, 2017 x-ray positive for complicated pneumoconiosis. *Id.*

Considering the x-ray evidence as a whole, the administrative law judge noted the x-ray readings from 2010 to 2016 show a progression of the miner's simple pneumoconiosis, with the more recent x-rays in 2016 and 2017 showing complicated pneumoconiosis. Decision and Order at 19. He concluded that claimant established complicated pneumoconiosis by a preponderance of the more credible x-ray evidence, including the two most recent x-rays. 20 C.F.R. §718.204(a); Decision and Order at 19.

Employer does not directly contest the administrative law judge's finding Dr. Meyer did not adequately explain why the mass he observed on the December 13, 2016 and August 3, 2017 x-rays was not complicated pneumoconiosis but could be due to other conditions. Decision and Order at 18-19, *citing Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285 (4th Cir. 2010) (physicians' "equivocal and speculative" diagnoses for masses on x-ray do not "constitute affirmative evidence . . . that the opacities were not due to pneumoconiosis"). Rather, employer argues the administrative law judge's discrediting of Dr. Meyer's narrative reports improperly shifted the burden of proof. Employer's Brief at 14. It contends Dr. Meyer was not required to explain the diagnoses set forth in his

narrative report, since he clearly reported on his ILO classification form that there were no parenchymal abnormalities consistent with complicated pneumoconiosis. *Id*.

Contrary to employer's contention, we see no error in the administrative law judge's finding that because Dr. Meyer failed to set forth his rationale for why the mass he observed is not complicated pneumoconiosis, his opinion is less persuasive than the opinions of the two dually-qualified radiologists, Drs. Crum and Miller, who found complicated pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); Decision and Order at 18.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding claimant established complicated pneumoconiosis based on the x-ray evidence.[5] 20 CF.R. §718.304(a); *Underwood*, 105 F.3d at 949; Decision and Order at 30. As employer raises no other allegations of error with regard to the administrative law judge's weighing of the evidence, we affirm his finding claimant established complicated pneumoconiosis and invoked the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304; *Gollie*, 22 BLR at 1-311; *Melnick*, 16 BLR at 1-33-34; Decision and Order at 30. We further affirm, as unchallenged, the administrative law judge's finding that claimant's complicated pneumoconiosis arose out of his coal mine employment.[6] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 30.

[5] Employer asserts Dr. Crum's interpretation of the August 3, 2017 x-ray is equivocal because he identified a Category B opacity suggestive of progressive massive fibrosis but also recommended a follow-up to exclude a neoplasm. Employer's Brief at 15. Contrary to employer's contention, Dr. Crum did not mention a neoplasm or recommend a follow-up when interpreting the August 3, 2107 x-ray. Claimant's Exhibit 4. Employer appears to be referencing Dr. Crum's reading of the December 13, 2016 x-ray which was withdrawn at the hearing and is not part of the record. Hearing Transcript at 10; Claimant's Exhibit 2.

[6] We also affirm, as unchallenged, the administrative law judge's finding that claimant established modification based on a change in conditions. *See Skrack*, 6 BLR at 1-711; Decision and Order at 30. Employer does not contend the administrative law judge's granting of claimant's modification request fails to render justice under the Act. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255-56 (1971).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Modification of an Initial Claim is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge