U.S. Department of Labor

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

BRB No. 19-0282 BLA

DANNY L. HALL Claimant-Petitioner v. DEL RIO, INCORPORATED and SECURITY INSURANCE COMPANY OF HARTFORD Employer/Carrier Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/29/2020 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and Order Denying Director's Motion for Reconsideration of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Danny L. Hall, Pineville, Kentucky.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for employer.

Rita A. Roppolo (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: ROLFE, GRESH, JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits and the Order Denying Director's Motion for Reconsideration (2017-BLA-05605) of Administrative Law Judge Scott R. Morris rendered on a miner's subsequent claim filed on March 8, 2016,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act).

The administrative law judge found claimant did not establish complicated pneumoconiosis and therefore 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. He also found claimant established at least fifteen years of underground coal mine employment but did not establish total disability. Thus, the administrative law judge found claimant did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act or establish entitlement under 20 C.F.R. Part 718, and therefore denied benefits. The Director, Office of Workers' Compensation Programs (the Director), requested reconsideration, asserting claimant is entitled to a new pulmonary function study pursuant to 20 C.F.R. §7l8.406(c) in order for the Department of Labor (DOL) to satisfy its obligation to provide him with a complete pulmonary evaluation. The administrative law judge denied the Director's motion finding she waived her right to raise the issue of a complete pulmonary evaluation and failed to show why the DOL-sponsored pulmonary function study that was submitted was invalid, and further testing was unnecessary.

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[1] On claimant's behalf Diane Jenkins, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Board review the administrative law judge's decision, but Ms. Jenkins is not representing claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant's previous claim was denied on February 26, 2001, and the record was destroyed by the Federal Records Center. Director's Exhibit 1. Thus, there is no information in the current claim record regarding why the prior claim was denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the denial of benefits and denial of the Director's motion for reconsideration. The Director has filed a limited response, asserting claimant was not provided a complete pulmonary evaluation and requesting the case be remanded to the district director.

In an appeal filed by a claimant without the assistance of counsel, the Board addresses whether substantial evidence supports the decision and order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). 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.[3] 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).

Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is 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 an opacity 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 reveal 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 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge considered eight interpretations of three x-rays. Decision and Order at 7-9. Dr. DePonte, dually qualified as a B reader and Board-certified radiologist, read the October 22, 2015 x-ray positive for simple pneumoconiosis and complicated pneumoconiosis, Category A, while Dr. Adcock, also dually qualified, read it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibits 19, 20. The administrative law judge found the x-ray readings in

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 6.

equipoise for complicated pneumoconiosis based on the equal number of positive and negative readings by dually qualified radiologists. Decision and Order at 9.

Dr. DePonte read the January 20, 2016 x-ray as positive for simple pneumoconiosis and complicated pneumoconiosis, Category A, while Drs. Adcock and Miller, each dually qualified, read the film as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibits 9, 22; Employer's Exhibit 1. The administrative law judge found the January 20, 2016 x-ray negative based on the preponderance of the negative readings by the dually-qualified radiologists. Decision and Order at 8.

Dr. DePonte read the June 21, 2016 x-ray positive for complicated pneumoconiosis, while Dr. Adcock and Dr. Dahhan, a B reader, read it negative for the disease. The administrative law judge found the June 21, 2016 x-ray negative based on the preponderance of negative readings. Decision and Order at 9; Director's Exhibits 18, 21; Employer's Exhibit 2. However, he also noted that even if Dr. Dahhan's reading were given no weight, the x-ray readings would be in equipoise for complicated pneumoconiosis. Decision and Order at 9 n.11.

Having found two x-rays negative for complicated pneumoconiosis and one x-ray in equipoise, the administrative law judge determined claimant did not prove complicated pneumoconiosis based on the x-ray evidence. Decision and Order at 9. We see no error in the administrative law judge's determination, as he performed both a qualitative and quantitative review of the x-rays, taking into consideration the number of interpretations and the readers' qualifications when resolving the conflict in the readings. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993). Thus, we affirm the administrative law judge's finding that the x-ray evidence does not establish complicated pneumoconiosis. 20 C.F.R. §718.304(a); Decision and Order at 9; *see generally Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994).

The administrative law judge found there is no biopsy evidence. 20 C.F.R. §718.304(b); Decision and Order at 9. Considering the medical opinion evidence,[4] he noted neither Dr. Fino nor Dr. Dahhan diagnosed complicated pneumoconiosis. Decision and Order at 13; Director's Exhibit 18; Employer's Exhibit 3. He accurately found Dr. Ajjarapu diagnosed complicated pneumoconiosis based on Dr. DePonte's positive reading for complicated pneumoconiosis of the January 20, 2016 x-ray. Decision and Order at 12;

[4] Neither Dr. Fino nor Dr. Dahhan diagnosed complicated pneumoconiosis. Director's Exhibit 18; Employer's Exhibit 3.

Director's Exhibit 17. But having found the January 20, 2016 x-ray negative for complicated pneumoconiosis and the x-ray evidence, as a whole, insufficient to establish complicated pneumoconiosis, the administrative law judge permissibly found Dr. Ajjarapu's opinion unpersuasive. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 13.

The administrative law judge also considered claimant's treatment records, which contain x-rays, computed tomography scans, physicians' notes, and a cytology report of a bronchial washing. Decision and Order at 13-16; Claimant's Exhibits 2-6; Employer's Exhibits 5-9. He accurately found the treatment records do not include diagnoses of complicated pneumoconiosis. Decision and Order at 16. Thus, we affirm the administrative law judge's finding claimant did not establish complicated pneumoconiosis based on other evidence in the record. 20 C.F.R. §718.304(c); Decision and Order at 16.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant did not establish complicated pneumoconiosis and is unable to invoke the irrebuttable presumption. *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33; Decision and Order at 17.

Invocation of the Section 411(c)(4) Presumption - Total Disability

The administrative law judge found none of the pulmonary function studies yielded qualifying values for total disability[5] and no evidence indicates claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 18, 20.

The administrative law judge noted the record contains two arterial blood gas studies. The January 20, 2016 study showed qualifying results at rest but not after exercise. Director's Exhibit 9. The June 21, 2016 study had non-qualifying results at rest and claimant declined an exercise test. Director's Exhibit 18. The administrative law judge noted "[m]ore weight may be accorded to the results of a recent blood gas study over one which was conducted earlier" and because the qualifying resting study was conducted "five months" prior to the non-qualifying resting study, he found the more recent study "provides

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

a better depiction of [c]laimant's current pulmonary condition and warrants more weight." Decision and Order at 19. He also noted, however, that if recency were not considered, there was no reason to give greater weight to either study. *Id.*, n.21. To the extent the administrative law judge permissibly found the two resting studies in equipoise, we affirm his finding claimant did not establish total disability based on the blood gas study evidence. *See generally Ondecko*, 512 U.S. at 280-81.

In weighing the medical opinion evidence, the administrative law judge found Dr. Ajjarapu is the only physician to opine claimant is totally disabled. He found "she based her opinion on [c]laimant's pulmonary function test results, which she concluded were 'abnormal' and his arterial blood gas test results, which she opined demonstrated 'hypoxemia' . . . [but] the preponderant pulmonary function test[s] and arterial blood gas test results of record did not establish total disability." Decision and Order at 20. The administrative law judge also noted "Dr. Ajjarapu opined that the spirometry she relied upon involved 'sub-optimal' output and therefore she 'cannot rely on the values.'" *Id.*, *citing* Director's Exhibit 9. The administrative law judge concluded that Dr. Ajjarapu's opinion on total disability "rests on faulty premises (*e.g.*, the 'sub-optimal' and unreliable results she achieved") and was therefore not well reasoned. *Id*. Additionally, the administrative law judge found Dr. Ajjarapu did not adequately explain her opinion that claimant is totally disabled based on the blood gas study she obtained. *Id*. at 21.

We vacate the administrative law judge's discrediting of Dr. Ajjarapu's opinion and the denial of benefits because we agree with the Director that claimant did not receive a complete pulmonary evaluation on the issue of total disability.

Complete Pulmonary Evaluation

The Act requires that "[e]ach miner who files a claim . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-89-90 (1994).

In her motion for reconsideration, the Director asserted the DOL failed to satisfy its obligation to provide claimant with a complete pulmonary evaluation because Dr. Ajjarapu, who conducted the DOL-sponsored pulmonary evaluation, invalidated the pulmonary function study she obtained as part of her examination as "sub-optimal" and stated she

"[could] not rely on the values" to assess claimant's respiratory disability.[6] Director's Motion for Reconsideration at 2, *quoting* Director's Exhibit 9.

In his Order Denying Director's Motion for Reconsideration, the administrative law judge found the Director did not timely raise the issue of whether claimant was afforded a complete pulmonary evaluation at the hearing or in a post-hearing brief. Order at 4. He also found the Director did not explain why the pulmonary function study was not in substantial compliance with the quality standards since there is a notation on the report of the study indicating claimant gave good effort. *Id*. The administrative law judge further found that even assuming claimant gave suboptimal effort, it was not necessary to obtain a new study because it could only result in higher values, not lower values. *Id.* at 5, *citing Andruscavage v. Director, OWCP*, No. 93-3291 (3d Cir. Feb. 22, 1994) (unpub.).

We agree with the Director's argument that the administrative law judge's bases for denying her motion for reconsideration and denying claimant the opportunity for a new pulmonary function study are without merit. Initially the administrative law judge erred in finding the Director waived the right to raise the issue of whether claimant received a complete pulmonary evaluation because she did not present her argument until after the administrative law judge issued his decision. *See Hodges*, 18 BLR at 1-89-90 (case must be remanded when there is a defect in the complete pulmonary evaluation even if the defect was not raised before the administrative law judge.). Contrary to the administrative law judge's finding, the Board has held that because the Director has a statutory duty to provide a miner with a complete pulmonary examination, she may raise the issue at any time during the processing of the claim. *Id*.

The administrative law judge also erred in finding the Director did not show why the DOL pulmonary function study was not in substantial compliance with the quality standards. Order at 4. As the Director correctly notes, a pulmonary function study "whose results are rejected as 'sub-optimal' and unreliable by the administering physician is by its very nature not in substantial compliance" with the quality standards.[7] Director's Brief at

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[6] The administrative law judge mischaracterized Dr. Ajjarapu's opinion that in finding claimant totally disabled, she relied on the pulmonary function study results. Dr. Ajjarapu indicated she could not rely on them and thus based her disability opinion on claimant's blood gas studies.

[7] The Director accurately states it is unclear whether the administering technician or Dr. Ajjarapu made the notation of good effort and cooperation on the study's report. In

2. We also see no merit in the administrative law judge's rationale that even if the DOL pulmonary function study was invalid, a new pulmonary function study is unnecessary because spurious high values are not possible and therefore the invalid test is still a reliable indicator of claimant's respiratory function. *See Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991) (recognizing that, because pneumoconiosis is a chronic condition, a miner's functional ability on a pulmonary function study may vary, and thus could measure higher on any given day than its typical level).

The regulation at 20 C.F.R. 718.406(c) specifically provides that "[i]f any medical examination or test conducted under paragraph (a) of this section is not administered or reported in substantial compliance with the provisions of part 718 of this subchapter, ... the district director must schedule the miner for further examination and testing;" and that "[w]here the deficiencies of the report are the result of a lack of effort on the part of the miner, the miner will be afforded one additional opportunity to produce a satisfactory result." 20 C.F.R. 718.406(c). The administrative law judge's rationale for denying the Director's motion is inconsistent with the regulation.

Given the Director's concession that the DOL failed to provide claimant with a complete pulmonary evaluation as the Act requires, we grant the Director's request to remand this case. 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406; *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42 (6th Cir. 2009); *R.G.B.* [*Blackburn*] *v. Southern Ohio Coal Co.*, 24 BLR 1-129, 1-137-140 (2009) (en banc); Director's Brief at 2.

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either event, Dr. Ajjarapu clearly invalidated the study in her report and there is no contrary evidence in the record to establish its validity. Director's Brief at 2.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and his Order Denying Director's Motion for Reconsideration is vacated, and the case is remanded to the district director for further development of the evidence.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge