U.S. Department of Labor

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

BRB No. 17-0470 BLA

GORDON LESTER VARNEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 05/29/2018
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

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

Glenn M. Hammond (Glenn Martin Hammond Law Office), Pikeville, Kentucky, for claimant.

Michelle S. Gerdano (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2014-BLA-05892) of Administrative Law Judge Joseph E. Kane, rendered on a claim filed on December 31, 2013, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). After crediting claimant with forty-one years of underground coal mine employment, the administrative law judge determined that the evidence was

insufficient to establish total disability, a requisite element of entitlement, and therefore denied benefits.

On appeal, claimant asserts only that the administrative law judge erred in failing to consider evidence claimant 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.[1] The Director, Office of Workers' Compensation Programs (the Director), notes that claimant submitted Dr. Saha's August 4, 2016 letter and treatment records after the hearing and that counsel for the Director objected to their admission as untimely. The Director states that "[to] the best of our knowledge, the [administrative law judge] made no ruling regarding admission of Dr. Saha's report." Director's Brief at 2. The administrative law judge's Decision and Order mentions neither Dr. Saha's August 4, 2016 letter nor the treatment notes. The Director contends that any error by the administrative law judge in failing to address this evidence is harmless, as Dr. Saha's August 4, 2016 letter and treatment notes, even if admissible, are insufficient to establish that claimant has complicated pneumoconiosis.[2] The Director contends that if the Board disagrees that the evidence is insufficient to establish

[1] 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 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) before determining whether invocation of the irrebuttable presumption has been established. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 387, 21 BLR 2-616, 2-624 (6th Cir. 1999).

[2] Complicated pneumoconiosis is also known as "progressive massive fibrosis." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7, 3 BLR 2-36, 2-38 (1976). Dr. Saha's letter describes that claimant has "slowly progressive *pulmonary* fibrosis." Dr. Saha's August 4, 2016 letter. Claimant maintains that Dr. Saha's opinion is sufficient to establish that claimant has "progressive *massive* fibrosis." Claimant's Brief in Support of Petition for Review at 5-6. The Director, Office of Workers' Compensation Programs, asserts that Dr. Saha's letter does not support a finding of complicated pneumoconiosis because Dr. Saha did not use the term "massive" in conjunction with the pulmonary fibrosis he described and "does not identify [claimant's] disease by any appellation suggesting complicated pneumoconiosis." Director's Brief at 2.

complicated pneumoconiosis, it should remand the case for the administrative law judge to address the admission of the evidence.[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).

At the hearing held on June 8, 2016, the administrative law judge instructed the parties to disclose, in accordance with 20 C.F.R. §725.413, any medical evidence not exchanged with the opposing party or not admitted as evidence into the record.[5] Hearing Transcript at 6. The administrative law judge gave the parties sixty days post-hearing to disclose the required information. *Id*.

Claimant submitted a Notice of Disclosure, dated August 4, 2016, which consisted of a list of evidence, including medical records from Dr. Saha dated September 29, 2014 – August 4, 2016. Under a separate cover letter, also dated August 4, 2016, claimant submitted a copy of a letter of the same date from Dr. Saha and the physician's treatment records listed in the Notice of Disclosure. In the cover letter he gave "notice of submission of the attached medical records of Dr. Sibu P. Saha . . . which the Claimant wishes to file as evidence . . . ."

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[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), and that claimant is unable to invoke the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4) (2012). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-6. Because claimant has not established that he is totally disabled at 20 C.F.R. §718.204(b)(2), he is precluded from an award of benefits unless he invokes the irrebuttable presumption of total disability due to complicated pneumoconiosis. 20 C.F.R. §§718.304, 725.202(d)(2).

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

[5] Evidence disclosed pursuant to 20 C.F.R. §725.413(c) "must not be considered in adjudicating any claim unless the party designates the information as evidence in the claim." 20 C.F.R. §725.413(d).

In the Notice of Disclosure filed by the Director and a subsequent post-hearing brief, the Director objected to the admission of Dr. Saha's August 4, 2016 letter and treatment records on the grounds that they were not designated on claimant's Evidence Summary Form and "were not referenced as potential exhibits at the hearing held on June 8, 2016." Director's Post-Hearing Brief at 3.

Pursuant to 20 C.F.R. §725.456(b)(2), documentary evidence that was not submitted to the district director may be received in evidence, 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 shall 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).

Because the administrative law judge did not discuss Dr. Saha's August 4, 2016 letter and treatment records in the Decision and Order, or otherwise address the admissibility of this evidence, we vacate the administrative law judge's denial of benefits and remand this case for the administrative law judge to resolve this evidentiary issue.[6] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). The administrative law judge must specifically address on remand whether claimant's post-hearing evidentiary submissions should be admitted into the record pursuant to 20 C.F.R. §§725.414 and 725.456(b)(3). If the evidence is admitted on remand, the administrative law judge should consider its relevance on the issue of whether claimant has complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. If claimant's evidence is not admitted, the administrative law judge must specifically exclude it and deny benefits, or remand the claim to the district director for consideration of that evidence.

[6] In remanding this case, the Board makes no determination as to whether Dr. Saha's evidence is sufficient to establish complicated pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge