U.S. Department of Labor

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

BRB No. 18-0235 BLA

FREDERICK C. KING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BARNES & TUCKER COMPANY	)	
	)	DATE ISSUED: 04/24/2019
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Ralph J. Trofino, Johnstown, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2016-BLA-5532) of Administrative Law Judge Natalie A. Appetta, denying benefits on a claim filed pursuant to 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 April 7, 2015.

Based on the parties' stipulation, the administrative law judge credited claimant with nine years and eleven months of underground coal mine employment.[1] Because claimant did not establish at least fifteen years of coal mine employment, he was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). The administrative law judge then considered whether he established entitlement to benefits under 20 C.F.R. Part 718 without the aid of the presumption. She found that although claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), he failed to establish he has pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, she denied benefits.

On appeal, claimant contends the administrative law judge erred in finding he did not establish pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this 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. 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).

To be entitled to benefits under the Act, claimant must establish he has pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his totally disabling impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

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

[2] Section 411(c)(4) provides a rebuttable presumption of total disability due to pneumoconiosis if 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), as implemented by 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established nine years and eleven months of coal mine employment and thus did not invoke the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Failure to establish any one of these elements precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Claimant may establish the existence of pneumoconiosis by x-rays, autopsies or biopsies, one of the presumptions described in 20 C.F.R. §§718.304-306,[4] or a physician's opinion. 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge must consider all relevant evidence and weigh the evidence as a whole to determine if it establishes pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25 (3d Cir. 1997).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered five readings of three x-rays. Decision and Order at 19-20. Drs. Smith and Ahmed, both dually-qualified as Board-certified radiologists and B readers, interpreted the June 11, 2015 x-ray as positive, while Dr. Wolfe, also a dually-qualified radiologist, interpreted it as negative. Director's Exhibit 13; Claimant's Exhibit 1; Employer's Exhibit 2. Dr. Fino, a B reader, interpreted the January 7, 2016 x-ray as negative, Employer's Exhibit 1, and Dr. Pickerill, also a B reader, interpreted the July 5, 2016 x-ray as negative. Employer's Exhibit 3.

Giving "the most weight"[5] to the x-ray interpretations of physicians who are dually-qualified, the administrative law judge found the June 11, 2015 x-ray positive because there are more positive than negative readings by dually-qualified physicians. Decision and Order at 20. Based on the uncontradicted readings by the B readers, she found the January 7, 2016 and July 5, 2016 x-rays negative. Weighing the three x-rays together, the administrative law judge found that although the positive x-ray was read by more highly qualified physicians, the x-ray evidence as a whole is negative "because the two most recent x-rays are negative." *Id.*

[4] The record contains no biopsy evidence and it is undisputed that the presumptions used to establish pneumoconiosis do not apply in this case. Decision and Order at 18 nn.13, 14; *see* 20 C.F.R. §§718.202(a)(2),(3).

[5] The administrative law judge explained that, "[f]or the purpose of analyzing the x-ray evidence, I give the most weight to the opinions of physicians who are dually[-] qualified . . . . because they have wide professional experience in all aspects of x-ray interpretation and . . . a certified proficiency in interpreting x-rays for indicia of pneumoconiosis." Decision and Order at 20. She stated that she would give equal weight to the interpretations of physicians with the same qualifications, but where there was an interpretation of a specific x-ray by a dually-qualified reader, she would give "minimal weight" to the readings by physicians with lesser radiological qualifications. *Id*.

Claimant contends the administrative law judge did not adequately explain how she weighed the three conflicting x-rays together in light of the readers' radiological qualifications. Claimant's Brief at 5. We agree.

The administrative law judge stated that "[f]or the purpose of analyzing the x-ray evidence, I give the most weight to the opinions of physicians who are dually qualified as Board-certified radiologists and B-readers." Decision and Order at 20. She noted that the June 11, 2015 positive x-ray was read by dually qualified physicians, but found that because the two more recent x-rays are negative, the x-ray evidence as a whole is negative "despite the higher qualifications of the . . . physicians [who] read the earlier positive x-ray . . . ." Decision and Order at 20. Given the administrative law judge's statement that she gave the most weight to the opinions of the dually qualified readers, absent further explanation, we are unable to discern how she weighed the three conflicting x-rays in light of the readers' radiological qualifications.[6] *See Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 356 (3d Cir. 1997); *see also Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016). Employer argues we should affirm this finding because B readers should be considered equally proficient in interpreting x-rays for pneumoconiosis. Employer's Brief at 5. We, however, are restricted to the reasons the administrative law judge actually gave for her weighing of the evidence. *See Addison*, 831 F.3d at 256-57.

Therefore, we must vacate the administrative law judge's finding at 20 C.F.R. §718.202(a)(1), and remand this case for her to set forth her explanation for determining the overall weight of the x-ray evidence in accordance with the Administrative Procedure Act,[7] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Further, because the

[6] The fact that a negative x-ray is more recent than an earlier positive x-ray, standing alone, is not a sufficient reason to credit the later negative x-ray. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992). Further, an administrative law judge may not base a decision on the numerical superiority of the same items of evidence. *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016). Thus, the administrative law judge's statement that one x-ray is positive while two more recent x-rays are negative merely describes the record.

[7] The Administrative Procedure Act provides that every adjudicatory decision must include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

administrative law judge weighed the medical opinions on clinical pneumoconiosis[8] at 20 C.F.R. §718.202(a)(4) based on her determination that the x-rays are negative,[9] we vacate her finding on that issue and instruct her to reconsider the medical opinions after she has reconsidered the x-rays.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge also considered the medical opinions of Drs. Zlupko, Fino, and Pickerill regarding whether claimant has legal pneumoconiosis.[10] Dr. Zlupko diagnosed legal pneumoconiosis, in the form of a severe obstructive ventilatory impairment due to coal mine dust exposure with a possible contribution by smoking. Director's Exhibit 13. Dr. Fino diagnosed claimant with asthma unrelated to either coal mine dust exposure or smoking. Employer's Exhibits 1, 5. Dr. Pickerill diagnosed claimant with asthma unrelated to coal mine dust exposure, but opined that some of his obstruction is also due to smoking. Employer's Exhibits 3, 6.

The administrative law judge found Dr. Zlupko's opinion equivocal to the extent he stated there was "some possible" contribution to claimant's impairment by smoking, but he "favor[ed] CWP." Director's Exhibit 13 at 18-19; Decision and Order at 22. Additionally, she found his diagnosis of legal pneumoconiosis not well-reasoned. She noted that because Dr. Zlupko made no reference to claimant's coal mine employment history in his report, it was unclear what exposure history he relied upon to attribute

[8] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[9] The administrative law judge found Dr. Zlupko's opinion diagnosing clinical pneumoconiosis based on Dr. Smith's positive reading of the June 11, 2015 x-ray not well-reasoned or documented because she found the x-ray evidence negative. Decision and Order at 21. She found the contrary opinions of Drs. Fino and Pickerill well-reasoned and documented in view of the negative x-ray evidence. *Id.*

[10] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

claimant's impairment to coal mine dust exposure.[11] Decision and Order at 22. She further found that he provided "little, if any, explanation" for his opinion that claimant's impairment is due to both coal mine dust exposure and smoking, and thus accorded it "less weight." *Id*. In contrast, the administrative law judge found the opinions of Drs. Fino and Pickerill well-reasoned and documented, and concluded that the medical opinion evidence does not establish legal pneumoconiosis.[12] Decision and Order at 22-24.

On appeal, claimant does not challenge the administrative law judge's finding that Dr. Zlupko's opinion is not well-reasoned because it is inadequately explained and because it is unclear what coal mine employment history he relied upon to diagnose legal pneumoconiosis. Claimant's Brief at 9. We therefore affirm those credibility determinations and the administrative law judge's decision to accord Dr. Zlupko's opinion less weight for those reasons. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Therefore, we need not address claimant's argument that the administrative law judge erred in also finding his opinion equivocal. Claimant's Brief at 9. Error, if any, in that finding would be harmless.[13] *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 12 BLR 1-1276, 1-1278 (1984). We therefore affirm the administrative law judge's finding that claimant did not establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

In sum, we remand this case for the administrative law judge to reconsider whether the x-rays and medical opinions establish clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1),(4). *See Williams*, 114 F.3d at 25. If so, the administrative law judge must determine whether claimant can establish that his clinical pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(c), and is a substantially contributing cause of his

[11] The record reflects that Dr. Zlupko checked a box indicating that claimant's coal mine employment history form "CM-911a is not attached . . . ." Director's Exhibit 13 at 15. The medical report form instructed the physician in that case to complete additional sections by detailing claimant's coal mine employment history. Those sections of the medical report form are blank. *Id*.

[12] The administrative law judge also considered hospitalization and treatment records and found they do not establish pneumoconiosis. Decision and Order at 24-26. We affirm this finding as unchallenged. *See Skrack*, 6 BLR at 1-711.

[13] Additionally, because claimant bears the burden of proof to establish legal pneumoconiosis and the administrative law judge discredited the only medical opinion supportive of his burden, we need not address claimant's argument that she erred in finding the opinions of Drs. Fino and Pickerill well-reasoned. Claimant's Brief at 5-9.

total disability at 20 C.F.R. §718.204(c). If she again finds that claimant has not established that he has clinical pneumoconiosis, she may reinstate the denial of benefits.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge