U.S. Department of Labor

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

BRB No. 18-0395 BLA

DARREL STEPHEN PARISH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 06/21/2019
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

John R. Jacobs and Paisley Newsome (Maples Tucker & Jacobs, LLC), Birmingham, Alabama, for claimant.

Kathleen H. Kim (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: BUZZARD, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2016-BLA-05154) of Administrative Law Judge Daniel F. Solomon, rendered 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 subsequent claim filed on May 30, 2014.[1]

The administrative law judge credited claimant with 7.53 years of coal mine employment.[2] Because claimant did not have at least fifteen years of coal mine employment, the administrative law judge found that he could not invoke the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). Considering whether claimant established entitlement to benefits[4] without the presumption, the administrative law judge found that the evidence does not establish claimant has pneumoconiosis or is totally disabled due to pneumoconiosis at 20 C.F.R. §§718.202(a), 718.204(c).[5] Accordingly, he denied benefits.

On appeal, claimant argues the administrative law judge erred in admitting x-ray evidence submitted by employer, and in finding that the evidence does not establish

[1] Claimant filed two previous claims, both of which were finally denied. Director's Exhibits 1, 2. His most recent prior claim, filed on December 31, 1990, was denied by the district director on June 3, 1991 for failure to establish any element of entitlement. Director's Exhibit 2.

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Hearing Transcript at 13; Director's Exhibit 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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.

[4] The administrative law judge found that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).

[5] The administrative law judge found that the named employer is not the responsible operator in this claim, and thus dismissed employer. Decision and Order at 9-10.

pneumoconiosis or total disability due to pneumoconiosis.[6] The Director, Office of Workers' Compensation Programs (the Director), responds in support of the denial of benefits.

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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *McClanahan v. Brem Coal Co.*, 25 BLR 1-171, 1-175 (2016).

I. Evidentiary Issue

The regulations permit claimant and employer to submit, in support of their affirmative cases, "no more than two chest [x]-ray interpretations." 20 C.F.R. §725.414(a)(2)(i), (3)(i). In rebuttal, each party may submit "no more than one physician's interpretation of each chest [x]-ray . . . submitted by" the opposing party "and by the Director pursuant to [20 C.F.R.] §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (iii).

Claimant did not designate any affirmative x-ray readings on his evidence form. Claimant's Evidence Form. Employer designated as its two readings Dr. Tarver's negative interpretation of a July 30, 2014 x-ray and Dr. Meyer's negative interpretation of an October 24, 2014 x-ray. Director's Exhibit 17; Employer's Evidence Form. Claimant designated as rebuttal evidence Dr. Miller's positive interpretation of an August 6, 2014 x-ray. Claimant's Exhibit 1; Claimant's Evidence Form. Employer designated as rebuttal evidence Dr. Meyer's negative interpretation of the same film submitted by claimant.[7] Director's Exhibit 17; Employer's Evidence Form.

The administrative law judge found that claimant incorrectly designated Dr. Miller's interpretation of the August 6, 2014 x-ray as rebuttal evidence. Decision and

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding of 7.53 years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] In addition, the Director, Office of Workers' Compensation Programs (the Director) submitted Dr. Crum's positive interpretation of the Department of Labor (DOL)-sponsored x-ray taken on July 30, 2014. Director's Exhibit 15. Claimant designated as rebuttal x-ray evidence Dr. Smith's positive interpretation of the July 30, 2014 DOL x-ray and Dr. Alexander's positive interpretation of the October 24, 2014 x-ray submitted by employer. Claimant's Exhibits 2, 3; Claimant's Evidence Form. Employer designated as rebuttal evidence Dr. Seaman's negative interpretation of the July 30, 2014 DOL x-ray and

Order at 10. He noted it was not responsive to either of employer's two affirmative x-ray interpretations: Dr. Tarver's July 30, 2014 x-ray interpretation or Dr. Meyer's October 24, 2014 x-ray interpretation. *Id*. Rather than excluding claimant's evidence, however, the administrative law judge redesignated the reading as one of claimant's two available affirmative x-ray readings pursuant to 20 C.F.R. §725.414(a)(2)(i). *Id*. Further, he admitted Dr. Meyer's negative interpretation of the same film as employer's rebuttal evidence, finding that it rebutted Dr. Miller's interpretation.[8] *Id*. at 11.

Claimant asserts the administrative law judge erred in rejecting his proffer of Dr. Miller's August 6, 2014 x-ray interpretation as rebuttal evidence and in redesignating it as affirmative x-ray evidence. Claimant's Brief at 4-7. Claimant contends rebuttal evidence submitted by a party pursuant to 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii) need only refute the opposing party's case. *Id*. Because this positive x-ray interpretation refutes employer's case, he argues it constitutes rebuttal evidence. *Id*. Further, as claimant did not designate any affirmative evidence, he contends the administrative law judge erred in admitting Dr. Meyer's negative interpretation of the same x-ray as rebuttal evidence. *Id*. Claimant's argument has no merit.

Each party may submit as rebuttal evidence "no more than one physician's interpretation of each chest [x]-ray . . . submitted by" the opposing party "and by the Director pursuant to [20 C.F.R.] §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (iii). Rebuttal evidence submitted by a party pursuant to 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii) need not contradict the specific item of evidence to which it is responsive, but rather, need only refute the case presented by the opposing party. *See J.V.S.* [*Stowers*] *v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-83 (2008).[9] Contrary to claimant's argument, while

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Dr. Meyer's negative interpretation of the same x-ray. Director's Exhibit 2; Employer's Exhibit 1; Employer's Evidence Form.

[8] The administrative law judge also excluded Dr. Seaman's negative interpretation of the July 30, 2014 x-ray because employer already submitted a rebuttal reading of the DOL x-ray. Decision and Order at 11.

[9] Claimant cites to the Board's decision in *Sprague v. Freeman United Coal Mining Co.*, BRB No. 05-1020 BLA (Nov. 28, 2006) (unpub.) to support his argument. That case arose in the context of a claimant submitting a rebuttal reading of an x-ray provided by the Director as part of a complete pulmonary evaluation under 20 C.F.R. §725.406. In *Sprague*, the Board rejected employer's argument that rebuttal evidence submitted by a party pursuant to 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii) must contradict the specific item of evidence to which it is responsive. *See J.V.S.* [*Stowers*] *v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-83 (2008) (applying the Board's reasoning in *Sprague*). As the

a rebuttal x-ray reading need not actually refute or contradict the opposing party's proffered evidence, it nonetheless must be responsive to a specific x-ray reading submitted by the opposing party or the Director. Here, unlike in *Stowers*, Dr. Miller's August 6, 2014 x-ray interpretation is not responsive to an x-ray reading of this film submitted by employer as affirmative evidence or by the Director as part of the DOL complete pulmonary evaluation under 20 C.F.R. §725.406. Having properly found that Dr. Miller's x-ray interpretation was not admissible as rebuttal of employer's general case, the administrative law judge acted within his discretion in redesignating the reading as one of claimant's two affirmative x-ray readings,[10] and in admitting Dr. Meyer's negative interpretation of the August 6, 2014 x-ray as rebuttal evidence submitted by employer. *McClanahan*, 25 BLR at 1-175; 20 C.F.R. §725.414(a)(2), (a)(3).

II. Entitlement under 20 C.F.R. Part 718

In a living miner's claim where no statutory presumptions are invoked, claimant must establish that he is totally disabled by pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (en banc). Failure to establish any element precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

A. Clinical Pneumoconiosis

The administrative law judge found that the x-ray, biopsy, CT scan, and medical opinion evidence does not establish clinical pneumoconiosis[11] pursuant to 20 C.F.R.

Director notes, however, the Board did not hold in *Sprague* that "a stand-alone x-ray can be admitted as rebuttal of the opposing party's case." Director's Brief at 2.

[10] Further, even had the administrative law judge decided not to redesignate this reading and instead excluded from the record all readings of the August 6, 2014 x-ray, the x-ray evidence would still be insufficient to establish clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). As discussed below, claimant has not identified any error with regard to the administrative law judge's weighing of the x-rays. Because the administrative law judge found the remaining two x-rays from July 30, 2014 and October 24, 2014 in equipoise, the x-ray evidence still does not establish clinical pneumoconiosis. Thus claimant has not set forth how the error that he alleges "could have made any difference." *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

[11] "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

§718.202(a)(1)-(4). Decision and Order at 26-30. Claimant argues the administrative law judge erred in finding the x-ray and medical opinion evidence does not establish clinical pneumoconiosis.[12] Claimant's Brief at 7-12.

1. X-ray Evidence

Pursuant to 20 C.F.R §718.202(a)(1), the administrative law judge considered eight interpretations of three x-rays dated July 30, 2014, August 6, 2014, and October 24, 2014.[13] Decision and Order at 11. Because an equal number of dually-qualified Board-certified radiologists and B readers read each of the x-rays as positive and negative for pneumoconiosis, the administrative law judge found that the July 30, 2014, August 6, 2014, and October 24, 2014 x-rays are in equipoise and the x-ray evidence as a whole does not establish clinical pneumoconiosis. *Id*. at 26-27.

Aside from his argument that Dr. Meyer's negative interpretation of the August 6, 2014 x-ray should have been stricken from the record, claimant sets forth only a general allegation that the x-ray evidence establishes clinical pneumoconiosis. Claimant's Brief at 7. The Board must limit its review to contentions of error specifically raised by the parties. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Because claimant does not identify any specific error with regard to the administrative law judge's weighing of the x-rays, we affirm his finding that the x-ray evidence does not establish clinical pneumoconiosis. Decision and Order at 26-27.

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tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[12] Because it is unchallenged, we affirm the administrative law judge's findings that the biopsy and CT scan evidence does not establish clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4). *See Skrack*, 6 BLR at 1-711; Decision and Order at 26-27.

[13] Drs. Crum and Smith interpreted the July 30, 2014 x-ray as positive for pneumoconiosis. Director's Exhibit 15; Claimant's Exhibit 3. Drs. Meyer and Tarver interpreted the same x-ray as negative for the disease. Director's Exhibits 16, 17. Dr. Miller interpreted the August 6, 2014 x-ray as positive for pneumoconiosis. Claimant's Exhibit 1. Dr. Meyer interpreted this x-ray as negative for the disease. Employer's Exhibit 1. Dr. Alexander interpreted the October 24, 2014 x-ray as positive for pneumoconiosis. Claimant's Exhibit 2. Dr. Meyer read this x-ray as negative for the disease. Director's Exhibit 17. Drs. Crum, Smith, Meyer, Tarver, Miller, and Alexander are all dually-qualified Board-certified radiologists and B readers. Director's Exhibits 15-17; Claimant's Exhibits 1-3; Employer's Exhibit 1.

2. Medical Opinion Evidence

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered Dr. Gallup's opinion that claimant has clinical pneumoconiosis.[14] Decision and Order at 27-28; Director's Exhibit 15. Contrary to claimant's argument,[15] the administrative law judge permissibly rejected his opinion because his diagnosis of clinical pneumoconiosis was based upon Dr. Crum's positive interpretation of the July 30, 2014 x-ray, which is inconsistent with the administrative law judge's finding that the x-rays do not establish the presence of the disease. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514 (6th Cir. 2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 27. We affirm the administrative law judge's finding that the medical opinion evidence does not establish clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4) as it is supported by substantial evidence.

B. Legal Pneumoconiosis

To establish legal pneumoconiosis,[16] claimant must prove that he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The administrative law judge weighed Dr. Gallup's opinion that claimant has an obstructive ventilatory defect due to coal mine dust exposure and cigarette smoking.[17] Director's Exhibit 15. He found it entitled to little weight because Dr. Gallup based his opinion on a twenty-year coal mine

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[14] The administrative law judge also considered the medical opinions of Drs. Rosenberg and Tuteur that claimant does not have clinical pneumoconiosis. Director's Exhibit 17; Employer's Exhibit 3. He found their opinions are credible because they are consistent with the weight of the x-rays. Decision and Order at 27-28. This finding is affirmed as it is not challenged. *Skrack*, 6 BLR at 1-711.

[15] Claimant's argument, that Dr. Gallup's opinion on clinical and legal pneumoconiosis should be credited, is based primarily on an incorrect assertion that "the x-ray evidence of record supports a finding of clinical pneumoconiosis[.]" Claimant's Brief at 11. Claimant also generally asserts that Dr. Gallup "based his opinion on radiographic evidence, the [c]laimant's pulmonary function testing, medical and occupation histories, and physical examination." *Id*.

[16] 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).

[17] The administrative law judge also considered the medical opinions of Drs. Tuteur and Rosenberg that claimant does not have legal pneumoconiosis and assigned them diminished weight because they are not well-reasoned. Decision and Order at 28-30.

employment history when claimant had only 7.53 years. Decision and Order at 28. Contrary to claimant's argument, the administrative law judge permissibly rejected Dr. Gallup's opinion because he relied upon an inaccurate coal mine employment history. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); Decision and Order at 28. We affirm the administrative law judge's finding that the medical opinion evidence does not establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) as it is supported by substantial evidence.

Because claimant has raises no other allegations of error with respect to the administrative law judge's weighing of the evidence relevant to the existence of pneumoconiosis, we affirm his determination that the evidence as a whole does not establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a). 20 C.F.R. §§802.211(b), 802.301(a). Moreover, because claimant failed to establish pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge