U.S. Department of Labor

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

BRB No. 17-0573 BLA

FRANKLIN D. MALDOVAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL CORPORATION	)	
	)	DATE ISSUED: 09/28/2018
Employer-Petitioner	)	
	)	
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 of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

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

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-5807) of Administrative Law Judge Natalie A. Appetta rendered on a claim filed pursuant to the provisions of 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 March 24, 2015.

Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with twenty-one years of coal mine employment at an underground mine, as stipulated by the parties and supported by the record. She further found that claimant established the existence of complicated pneumoconiosis and, therefore, invoked the irrebuttable presumption of total disability due to pneumoconiosis at 30 U.S.C. §921(c)(3). *See* 20 C.F.R. §718.304. The administrative law judge also found that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and she awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that claimant has complicated pneumoconiosis arising out coal mine dust exposure, pursuant to 20 C.F.R. §§718.304, 718.203(b).[1] Employer asserts that claimant instead suffers from sarcoidosis, unrelated to coal mine dust exposure.[2] Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, did not file a 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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Employer does not allege any specific error in the administrative law judge's finding that claimant suffers from complicated pneumoconiosis at 20 C.F.R. §718.304, but instead focuses its appeal on whether the administrative law judge properly found that it did not rebut that claimant's pneumoconiosis was caused by coal dust exposure at 20 C.F.R. §718.203(b). Because the administrative law judge's findings at Section 718.304 are relevant to employer's arguments at Section 718.203(b), however, we necessarily discuss herein her findings under both sections.

[2] Claimant testified that he was diagnosed with sarcoidosis in the 1980's. Hearing Tr. at 29.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established twenty-one years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

[4] The Board will apply the law of the United States Court of Appeals for the Third Circuit, as claimant was last employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 13.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Existence of Complicated Pneumoconiosis

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 that a miner is totally disabled due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large 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, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption. Rather, the administrative law judge must examine all of the evidence on the issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflicts, and make a finding of fact. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287, 24 BLR 2-269, 2-286 (4th Cir. 2010); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (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); *Truitt v. North Am. Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom*. *Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

If the administrative law judge determines that claimant has established the existence of complicated pneumoconiosis, claimant must then establish that the complicated pneumoconiosis arose out of coal mine employment. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22, n.21, 3 BLR 2-36, 2-48, n.21 (1976); *The Daniels Co. v. Mitchell*, 479 F.3d 321, 337, 24 BLR 2-1, 2-32 (4th Cir. 2007). A miner who establishes at least ten years of coal mine employment is entitled to a rebuttable presumption that his pneumoconiosis arose out of coal mine employment, in which case the burden shifts to employer to disprove this fact. 30 U.S.C. §921(c)(1); 20 C.F.R. §718.203(b).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered six interpretations of three x-rays dated September 1, 2015, February 8, 2016, and February 18, 2016. Decision and Order at 8-9, 24-26. Dr. Ahmed, who is a B reader and a Board-certified radiologist, and Dr. Ranavaya, who is a B reader, both interpreted the September 1, 2015 x-ray as positive for simple pneumoconiosis. Director's Exhibits 12, 19. Because there are no contrary readings, the administrative law judge found that the September 1, 2015 x-ray is positive for the existence of simple pneumoconiosis. *See Mancia v. Director,*

OWCP, 130 F.3d 579, 584, 21 BLR 2-215, 2-225 (3d Cir. 1997); Decision and Order at 25.

Dr. DePonte, who is a B reader and a Board-certified radiologist, interpreted the February 8, 2016 x-ray film as positive for simple pneumoconiosis, 2/1, and complicated pneumoconiosis, Category B. Claimant's Exhibit 3. Dr. Basheda, a B reader, read this x-ray as negative for simple and complicated pneumoconiosis.[5] Director's Exhibit 20. Dr. Deponte also read the February 18, 2016 x-ray as positive for simple pneumoconiosis, 2/1, and complicated pneumoconiosis, Category B. Claimant's Exhibit 2. Dr. Fino, a B reader, read this x-ray as negative for simple and complicated pneumoconiosis. Director's Exhibit 20.

The administrative law judge considered that Dr. DePonte's notations indicated the presence of additional abnormalities on both of her positive x-ray readings.[6] Decision and Order at 25-26; Claimant's Exhibits 2, 3. She found, however, that because Dr. DePonte definitively diagnosed Category B opacities, these notations did not detract from the credibility of her positive readings for complicated pneumoconiosis. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); Decision and Order at 25-26. According greater weight to Dr. DePonte's readings based on her superior radiological qualifications as compared to Drs. Basheda and Fino, the administrative law judge found that the February 8, 2016 and February 18, 2016 x-rays are positive for simple and complicated pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *see also Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894, 899 (7th Cir. 2003); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); Decision and Order at 25.

Having found that all of the x-rays are positive for simple pneumoconiosis, and two of the three x-rays, including the two most recent x-rays, are positive for complicated

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[5] In addition to noting an ill-defined heart border, in the comments section of the ILO form, Dr. Basheda reported "enlarged hila, right [greater than] left with perihilar infiltrates/ ? fibrosis with calcification – stage IV sarcoidosis (need comparison with old [chest x-rays]/chest [computed tomography scans] if available)." Director's Exhibit 20. Dr. Basheda also noted he would need to compare the February 8, 2016 x-ray with old chest x-rays and chest computed tomography (CT) scans if available. *Id.*

[6] In addition to small opacities, 2/1, and a large opacity, Category B, Dr. DePonte indicated the presence of atherosclerotic aorta, coalescence of small opacities, abnormality of cardiac size or shape, cor pulmonale, marked distortion of an intrathoracic structure, emphysema, ill-defined heart border, and parenchymal bands. Claimant's Exhibits 2, 3.

pneumoconiosis, the administrative law judge found that the weight of the x-ray evidence established the existence of simple and complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-65 (2004) (en banc); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003); Decision and Order at 25-26. Employer has not identified any error in the administrative law judge's weighing of the x-ray evidence. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983). We therefore affirm her finding that the x-ray evidence establishes the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

The administrative law judge correctly found that neither party offered biopsy evidence for consideration pursuant to 20 C.F.R. §§718.304(b), 725.414(a)(2)(i), (a)(3)(i).[7] Decision and Order at 26.

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge considered six readings of three computed tomography (CT) scans dated December 5, 2011, March 9, 2012, and October 1, 2012, and found that this evidence does not support the existence of complicated pneumoconiosis, pursuant to 20 C.F.R. §§718.107, 718.304(c).[8] *See Soubik*

[7] The administrative law judge noted that Drs. Cohen, Klayton, Basheda, and Fino all refer to a purported 1981 and/or 1983 bronchoscopy and/or mediastinoscopy in their opinions and appear to rely on it to conclude that claimant has sarcoidosis. Decision and Order at 26. She further noted that it is not clear, however, exactly what the physicians are referring to and reiterated that there is no biopsy evidence in the record. *Id.*

[8] Specifically, the administrative law judge noted that all three CT scans were read as positive for simple pneumoconiosis by Dr. Cohen, but negative for simple pneumoconiosis by Dr. Basheda, and that none of the CT scans was read as positive for complicated pneumoconiosis by either physician. Decision and Order at 27; Employer's Exhibits 1-3; Claimant's Exhibit 8. Rather, Dr. Basheda interpreted the three CT scans as compatible with old granulomatous disease and stated that the differential diagnosis would include a post-infection process such as old histoplasmosis versus immune allergy such as sarcoidosis. Decision and Order at 27; Employer' Exhibits 1-3. Dr. Cohen interpreted the most recent October 1, 2012 CT scan as compatible with pneumoconiosis, profusion 1/1, and claimant's known diagnosis of sarcoidosis, and stated that the other two CT scans were similar in their findings. Claimant's Exhibit 8. Finding that neither physician is better qualified to read CT scans, the administrative law judge concluded that the CT scan evidence is in equipoise for the existence of simple pneumoconiosis and does not support of a finding of complicated pneumoconiosis. Decision and Order at 28.

v. Director, OWCP, 366 F.3d 226, 233, 23 BLR 2-85, 2-97 (3d Cir. 2004); Decision and Order at 28.

The administrative law judge next considered the medical opinions of Drs. Cohen, Klayton, Basheda, and Fino.[9] Decision and Order at 28-31. The physicians agree that claimant has sarcoidosis but offered differing opinions as to whether he might also have complicated pneumoconiosis. Drs. Cohen and Klayton stated that complicated pneumoconiosis and sarcoidosis can occur together and that they would need to review additional medical evidence before determining whether any of the large lesions seen on claimant's x-rays are complicated pneumoconiosis.[10] Decision and Order at 29-30; Claimant's Exhibits 4 at 5; 5 at 20, 23, 29-30, 39. Dr. Basheda agreed that pneumoconiosis and sarcoidosis can occur together, but opined that there is no radiographic evidence of simple or complicated pneumoconiosis and that the small and large abnormalities observed radiographically are related to stage II/IV sarcoidosis.[11] Decision and Order at 29; Director's Exhibit 20; Employer's Exhibit 5 at 16-18, 25, 29-30. Dr. Fino similarly opined that while pneumoconiosis and sarcoidosis can occur together, there is no radiographic

[9] The administrative law judge also considered the opinion of Dr. Ranavaya and noted correctly that he diagnosed simple pneumoconiosis but did not address the existence of complicated pneumoconiosis. Decision and Order at 30; Director's Exhibit 10. He also did not address the existence of sarcoidosis. Director's Exhibit 10.

[10] Dr. Cohen diagnosed simple pneumoconiosis but stated that he could not diagnose complicated pneumoconiosis because sarcoidosis is often associated with large scars that can be confused with complicated pneumoconiosis, or vice versa, on x-rays and CT scans. Thus, Dr. Cohen stated that he would need a significant number of x-rays or CT scans over time, or a recent surgical biopsy, to distinguish between the two diseases. Decision and Order at 29-30; Claimant's Exhibit 5 at 20, 29-30, 39. Dr. Klayton diagnosed stage III or IV pulmonary sarcoidosis and both clinical and legal pneumoconiosis, but similarly stated that he could not determine whether the large lesions seen on claimant's x-rays are complicated pneumoconiosis or sarcoidosis without a lung biopsy. Decision and Order at 30; Claimant's Exhibit 4.

[11] During his December 12, 2016 deposition, Dr. Basheda testified that there was no x-ray or CT scan evidence of simple or complicated coal workers' pneumoconiosis in this case. His review of the February 8, 2016 x-ray revealed "bilateral hilar lymphadenopathy with perihilar fibrosis and some small subcentimeter lung nodules" and "the possibility of . . . stage four sarcoidosis with pulmonary fibrosis." Employer's Exhibit 5 at 14.

evidence of clinical coal workers' pneumoconiosis and the abnormalities seen on x-ray represent stage IV sarcoidosis.[12] Employer's Exhibits 4 at 5, 9; 6 at 22-23, 27, 39-40.

The administrative law judge found the opinions of Drs. Cohen and Klayton to be equivocal and, therefore, not determinative as to the existence of complicated pneumoconiosis. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 31. The administrative law judge also found that the opinions of Drs. Basheda and Fino, attributing the large lung masses to sarcoidosis rather than to pneumoconiosis, are not well-documented. Decision and Order at 31. Specifically, she found that in concluding that claimant does not have complicated pneumoconiosis, neither physician appeared to consider the February 8, 2016 and February 18, 2016 x-ray readings by Dr. DePonte that were found to be positive for complicated pneumoconiosis, Category B. *See Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986) (administrative law judge may assign less weight to physician's opinion which reflects an incomplete picture of the miner's health); Decision and Order at 31. Rather, she found that they relied on their own negative readings of the February 8, 2016 and February 18, 2016 x-rays, which were contrary to her finding that these x-rays are positive for large opacities of complicated pneumoconiosis based on the readings of a more highly-qualified reader. *See Balsavage*, 295 at 396-97, 22 BLR at 2-396; *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); Decision and Order at 31. The administrative law judge therefore determined that, as all of the medical opinions expressing an opinion as to the existence of complicated pneumoconiosis are either equivocal or undocumented, the medical opinion evidence does not support a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). As employer does not set forth any specific challenge to the administrative law judge's credibility determinations, these findings are affirmed. *See Skrack*, 6 BLR at 1-711; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Weighing together all of the evidence under 20 C.F.R. §718.304(a)-(c), the administrative law judge found that the x-ray evidence establishes the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a) and outweighs the CT scan and

[12] Dr. Fino did not specify whether he was referring to simple pneumoconiosis, complicated pneumoconiosis, or both. Decision and Order at 30; Employer's Exhibits 4, 6. He reiterated that he "did not see any rounded opacities consistent with a coal dust related condition" on the February 18, 2016 x-ray and, therefore, classified it as 0/0. Employer's Exhibit 6 at 17. He diagnosed stage IV sarcoidosis with bilateral perihilar fibrosis based on his February 18, 2016 x-ray interpretation and "the fact that [claimant] had been diagnosed with sarcoidosis way back in the 1980s." Employer's Exhibit 6 at 18.

medical opinion evidence at 20 C.F.R. §718.304(c).[13] Decision and Order at 32. She found that while CT scans may be a more sensitive tool for diagnosing lung disease than x-rays, here the three CT scans pre-date the most recent x-ray by four or more years and, therefore, do not necessarily contradict the x-ray evidence. 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); Decision and Order at 32. Further, while none of the physicians' opinions diagnosed complicated pneumoconiosis, the administrative law judge noted that she found the opinions of Drs. Cohen and Klayton equivocal, discredited the opinions of Drs. Basheda and Fino that claimant does not have complicated pneumoconiosis, and found that Dr. Ranavaya did not address whether claimant had complicated pneumoconiosis. Decision and Order at 32. Thus, the administrative law judge concluded that the x-ray evidence is "highly persuasive and sufficient to meet claimant's burden to establish complicated pneumoconiosis" and invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *Id.*

It is within the administrative law judge's discretion as fact-finder to weigh the credibility of the experts, and to determine the persuasiveness of their opinions. *See Balsavage*, 295 F.3d at 396-97, 22 BLR at 2-396; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8. Because employer has not identified any error in the credibility determinations made by the administrative law judge, we affirm her finding that the weight of the medical evidence, overall, affirmatively establishes the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. *See Skrack*, 6 BLR at 1-711; *Fish*, 6 BLR at 1-107.

Causation of Complicated Pneumoconiosis

Because claimant had twenty-one years of coal mine employment, the administrative law judge properly found that claimant invoked the rebuttable presumption at 20 C.F.R. §718.203(b) that his complicated pneumoconiosis arose out of coal mine employment. Decision and Order at 32-33. Noting that "no evidence indicates an alternate cause," the administrative law judge found that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *Id.* at 33.

Employer asserts that the administrative law judge erred in finding that claimant's complicated pneumoconiosis arose out of his coal mine employment. Employer's Brief at 19-22. Employer contends that, contrary to the administrative law judge's statement, there was "abundant evidence that the changes seen on the x-ray film by Dr. DePonte were due to sarcoidosis and not coal mine dust exposure." Employer's Brief at 19. Specifically,

[13] The administrative law judge reiterated that there is no biopsy evidence in the record, pursuant to 20 C.F.R. §718.304(b). Decision and Order at 32.

employer asserts that Drs. Basheda and Fino "testified extensively that the changes seen on x-ray and CT scan were not due to coal mine dust exposure," and that even Drs. Cohen and Klayton acknowledged that the changes seen on x-ray could be attributable to sarcoidosis. Employer's Brief at 20, 22.

As claimant correctly asserts, employer's arguments are misplaced. Claimant's Brief at 6-7. The Board has held that evidence relating to whether the disease being diagnosed is or is not a pneumoconiosis, i.e. a dust disease of the lung, or whether the diagnosis of pneumoconiosis is equivocal, should be considered at 20 C.F.R. §718.304(a). *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991) (en banc) (recognizing that a comment as to ruling out cancer must be considered by the administrative law judge to determine whether the diagnosis of pneumoconiosis was equivocal). Conversely, comments that do not undermine the credibility of the positive ILO classification, but instead relate to the source of the pneumoconiosis, i.e. whether the pneumoconiosis is due to coal dust, asbestosis, or another dust, must be considered at 20 C.F.R. §718.203. *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5-6 (1999) (recon. en banc).

Here, Drs. Basheda and Fino neither diagnosed any form of pneumoconiosis nor addressed its source, either on the x-rays they interpreted or in their medical opinions. Rather, they opined that claimant suffers from another type of lung disease altogether, sarcoidosis. Therefore, the administrative law judge properly considered their opinions at 20 C.F.R. §718.304(a) and (c), not at 20 C.F.R. §718.203(b). Further, as noted *supra*, the administrative law judge discredited their opinions for reasons not challenged by employer. Employer does not identify any other evidence which would rebut the causation presumption. We, therefore, reject employer's allegation of error and affirm the administrative law judge's conclusion that employer did not rebut the presumption that claimant's complicated pneumoconiosis arose out of his coal mine employment, pursuant to 20 C.F.R. §718.203(b).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge