U.S. Department of Labor

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

BRB No. 17-0684 BLA

BARNEY D. DEEL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	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 Order Granting Reconsideration and Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Rita Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Granting Reconsideration and Awarding Benefits, rendered by Administrative Law Judge Thomas M. Burke on a subsequent miner's claim filed on September 6, 2013, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge initially issued a Decision and Order Denying Benefits on April 25, 2017. In that decision, he credited claimant with 18.02 years of underground coal mine employment based on employer's concession and found that claimant established a totally disabling respiratory or pulmonary impairment, thus invoking the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] The administrative law judge found, however, that employer successfully rebutted the presumption and denied benefits accordingly.

The Director requested reconsideration, asserting that the administrative law judge erred in finding that employer rebutted the presumption. After considering the Director's motion, and the responses by claimant and employer, on August 31, 2017 the administrative law judge issued an Order Granting Reconsideration and Awarding Benefits (Order Granting Reconsideration). He determined that employer did not rebut the existence of clinical pneumoconiosis or that claimant's totally disabling respiratory impairment was due to clinical pneumoconiosis and awarded benefits.

[1] Claimant filed an initial claim for benefits on October 9, 1998, but subsequently withdrew this claim. He filed a new claim on January 5, 2001, which was denied by the district director on February 14, 2001, because he did not establish the existence of pneumoconiosis, a totally disabling respiratory impairment, or that his respiratory impairment was due to pneumoconiosis. Director's Exhibit 1. Claimant did not take any further action until he filed his current claim. Director's Exhibit 3.

[2] Under Section 411(c)(4) of the Act, claimant's total disability is presumed to be due to pneumoconiosis if he has 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).

On appeal, employer argues that the administrative law judge erred in finding that it did not rebut the presumed existence of clinical pneumoconiosis or the presumed fact of total disability causation. Employer also states that the administrative law judge erred in failing to consider rebuttal of the presumed existence of legal pneumoconiosis in his most recent Decision and Order. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), also responds and maintains that the Board should reject employer's arguments and affirm the administrative law judge's findings.[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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[5] or that

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant had 18.02 years of underground coal mine employment, established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), and invoked the rebuttable presumption at Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order Denying Benefits at 2, 23-24; Order Granting Reconsideration and Awarding Benefits (Order Granting Reconsideration) at 1. We also hold, based on the administrative law judge's finding that claimant is totally disabled, that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *Skrack*, 6 BLR at 1-711.

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

[5] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*. 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).

"no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

I. Rebuttal of Clinical Pneumoconiosis

A. Chest X-ray Evidence

In finding that employer did not disprove that claimant has clinical pneumoconiosis, the administrative law judge considered interpretations of x-rays dated September 14, 2013,[6] April 23, 2014, July 22, 2016, August 8, 2016, and September 9, 2016. Drs. DePonte and Alexander, both dually-qualified as Board-certified radiologists and B readers, interpreted the September 14, 2013 x-ray as positive for pneumoconiosis, while Dr. Wolfe, who is also dually-qualified, interpreted it as negative. Director's Exhibits 10, 14-15. Dr. Crum, who is dually-qualified, interpreted the April 23, 2014 digital x-ray and the July 22, 2016 and August 8, 2016 x-rays as positive for pneumoconiosis, while Dr. Wolfe interpreted them as negative. Director's Exhibits 13, 16; Claimant's Exhibits 1, 5; Employer's Exhibits 39, 44. Finally, Dr. Crum interpreted the September 9, 2016 x-ray as positive for pneumoconiosis, and there are no contrary readings of this x-ray by other physicians. Claimant's Exhibit 2.

The administrative law judge determined that the September 14, 2013 x-ray is positive for pneumoconiosis based on the interpretations of Drs. DePonte and Alexander, given that they, as well as Dr. Wolfe, who provided a negative interpretation, are all dually-qualified radiologists. Decision and Order Denying Benefits at 25. He further found that the April 23, 2014, July 22, 2016, and August 8, 2016 x-rays are in equipoise because they were interpreted as positive and negative by two dually-qualified physicians. *Id*. The administrative law judge concluded that the September 9, 2016 x-ray is positive for pneumoconiosis based on the sole interpretation by Dr. Crum. *Id*. Weighing the evidence as a whole, and in light of his findings that two of the x-rays are positive for pneumoconiosis, three are in equipoise, and none are negative, the administrative law judge found that the x-ray evidence "supports the presence of clinical pneumoconiosis." *Id*. Thus, he found that the x-ray evidence does not support employer's burden to disprove that claimant has pneumoconiosis.

[6] The September 14, 2013 x-ray was also interpreted by Dr. Gaziano for quality purposes only. Director's Exhibit 10.

Employer asserts that the administrative law judge impermissibly "counted heads" in finding that the September 14, 2013 x-ray is positive for pneumoconiosis because two dually-qualified physicians read it as positive and only one dually-qualified physician read it as negative. Employer's Brief at 5, *citing Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992). Employer thus contends that this x-ray is at best in equipoise. Concerning the April 23, 2014, July 22, 2016, August 8, 2016, and September 9, 2016 x-rays, employer argues that Dr. Crum's positive readings should actually be considered negative because he read them as 1/0. According to employer, this classification denotes that even though Dr. Crum interpreted the x-rays as positive for pneumoconiosis, he "seriously considered" reading them as negative. *Id*. at 6-7, *quoting ILO Guidelines for the use of the ILO International Classification of Radiographs of Pneumoconiosis*. Therefore, employer maintains that the x-ray evidence does not support a finding of clinical pneumoconiosis.

Employer's contentions are without merit. Whether Dr. Crum "seriously considered" the films to be negative is irrelevant because he ultimately interpreted all four x-rays as positive for pneumoconiosis under the ILO classification system. 20 C.F.R. §718.202(a)(1). As employer raises no other arguments with respect to the x-rays read by Dr. Crum, we affirm the administrative law judge's finding that the April 23, 2014, July 22, 2016 and August 8, 2016 x-rays are in equipoise, while the September 9, 2016 x-ray is positive for pneumoconiosis. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998).

We also reject employer's contention that, with respect to the September 14, 2013 x-ray, the administrative law judge based his finding solely on the numerical superiority of the positive versus negative readings. Rather, the administrative law judge also based his finding on the radiological qualifications of the physicians. *See Addison*, 831 F.3d at 256.[7] Furthermore, even if the September 14, 2013 x-ray is in equipoise, employer has not explained how such a finding warrants remand; because it is employer's burden to establish

[7] Moreover, we reject employer's contention that the interpretations of the September 14, 2013 x-ray should be in equipoise based on *Sea "B" Mining Co. v. Addison*, 831 F.3d 244 (4th Cir. 2016). In *Addison*, the court held that an administrative law judge "may not base a decision on the numerical superiority of the same items of evidence" and indicated its concern with "resolving the conflict of medical opinion *solely* on the basis of the number of physicians supporting the respective parties." *Addison*, 831 F.3d at 256, *quoting Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997) (emphasis added). In the current case, the administrative law judge initially considered the qualifications of the physicians interpreting the September 2013 x-ray, not the number of physicians making a certain finding.

clinical pneumoconiosis, *Morrison*, 644 F.3d at 480, a finding that this x-ray is in equipoise does not support employer's burden. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference."). We therefore affirm the administrative law judge's finding that the x-ray evidence does not support rebuttal of the presumed existence of clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(B). *See* Decision and Order Denying Benefits at 25; Order Granting Reconsideration at 2.

B. Other Evidence

The administrative law judge also considered interpretations of five CT scans dated March 19, 2008, November 28, 2008, August 4, 2009, February 15, 2012, and August 23, 2012. The administrative law judge found that the March 19 and August 23 scans were not read to determine the presence or absence of pneumoconiosis. Order Granting Reconsideration at 2; Employer's Exhibits 24, 34.[8] He found that the remaining three CT scans were negative for pneumoconiosis, based on the readings by Drs. Fino and Sargent.[9] The administrative law judge thus concluded that the CT scan evidence is negative for

[8] Dr. Sheikh, the pulmonologist reading the March 2008 scan, observed "[b]ilateral perihilar fibrosis along with multilobar consolidative process," and recommended ruling out "infection versus malignancy." Employer's Exhibit 24. The August 23, 2012 scan was interpreted by Dr. Kendall, a radiologist, as showing "bilateral perihilar infiltrates" and "[s]mall left lower lobe infiltrate, decreased from prior exam." Employer's Exhibit 34.

[9] The November 28, 2008 scan was initially read by Dr. Petrozzo, a radiologist, as showing "[f]ibrotic changes with bronchiectasis . . . and no definite evidence of pulmonary, hilar or mediastinal mass" and "[s]carring in the mid left lung . . . with focal pleural thickening and no definite mass." Claimant's Exhibit 4. Dr. Fino also read the November 28, 2008 scan and concluded that it showed "ground-glass opacities in the upper half of the left lung" most likely related to fibrosis but does not "show any evidence of a coal mine dust related pulmonary condition." Director's Exhibit 16. The August 4, 2009 scan was interpreted by Dr. Stefanini as showing "intense scarring" at the base of both lungs. Employer's Exhibit 23. Dr. Sargent reviewed this scan, finding that it did not show "any evidence of interstitial changes consistent with coal worker[s'] pneumoconiosis." Employer's Exhibit 39. The February 15, 2012 scan was interpreted by Dr. Kendall as showing "small to moderate sized bilateral perihilar and left lower lobe infiltrates" plus "[a] few scattered calcified granulomas." Employer's Exhibit 33. Dr. Sargent indicated that this scan was negative for coal workers' pneumoconiosis. Employer's Exhibit 39.

clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Order Granting Reconsideration at 2.

In his initial Decision and Order Denying Benefits, the administrative law judge gave more weight to the negative CT scan evidence and to the medical opinions of Drs. Fino and Sargent, who relied on those scans, to find that employer rebutted the presumed existence of clinical pneumoconiosis. Decision and Order Denying Benefits at 26-27. The administrative law judge also determined that the negative CT scan evidence was entitled to greater weight than the positive x-ray evidence. The Director argued on reconsideration that the negative CT scan evidence should not be credited over the positive x-ray evidence. The Director asserted that Drs. Fino and Sargent did not provide the source for their conclusions that CT scans are superior to chest x-rays, citing *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 890 (7th Cir. 2002), which rejected the view that a negative CT scan is conclusive even if "it is ostensibly 'the most sophisticated and sensitive diagnostic test' available." The Director also contended that the positive x-ray evidence is more credible than the negative CT scan evidence because the physicians who interpreted the chest x-rays are better-qualified than the physicians who interpreted the CT scans.[10] The administrative law judge agreed with the Director that reconsideration of the denial of benefits was warranted and concluded, "[a] second look at the radiographic evidence shows no reason to credit the CT scan readings of Dr. Fino and Dr. Sargent over the positive [x]-ray readings of Dr. DePonte, Dr. Alexander, and Dr. Crum." Order Granting Reconsideration at 4.

Employer contends that the administrative law judge erred in giving more weight to the positive x-ray evidence than to the negative CT scan evidence because Drs. Fino and Sargent are not radiologists. The Director responds that it is reasonable for an administrative law judge to credit Board-certified radiologists over physicians certified in other specialties "because, by definition, radiologists review images." Director's Brief at 3.[11]

[10] As noted above, Drs. DePonte, Alexander, and Crum, the physicians interpreting the chest x-rays since 2013 as positive, are dually-qualified as Board-certified radiologists and B readers. Dr. Fino is a Board-certified pulmonologist and B reader, but not a radiologist. Dr. Sargent is a Board-certified pulmonologist, but is neither a B reader nor a radiologist.

[11] The Director asserts that a radiologist is "a physician who uses imaging methodologies to diagnose and manage patients and provide therapeutic options." Director's Brief at 4, *quoting* American Board of Medical Specialists, American Board of

Contrary to employer's assertion, the administrative law judge did not give more weight to the positive x-ray evidence than to the negative CT scan evidence based on the superior radiological qualifications of the x-ray readers.[12] Rather, the administrative law judge, relying on the holding in *Stein* and the evidence in this case, permissibly found that there is no basis in this record for concluding that the CT scan evidence is more reliable than the x-ray evidence for detecting the presence or absence of pneumoconiosis. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012). Thus, he rationally concluded that the negative CT scans "are not determinative" and there is "no reason to credit the CT scan readings of Dr. Fino and Dr. Sargent over the positive X-ray readings of Dr. DePonte, Dr. Alexander and Dr. Crum." Order Granting Reconsideration at 4. Because employer bears the burden of proof on rebuttal, we see no error in the administrative law judge's finding that employer did not disprove the existence of clinical pneumoconiosis based on the radiological evidence, taking into consideration his finding that the positive x-rays are not outweighed by the negative CT scans. *Looney*, 678 F.3d at 316-17. We also affirm the administrative law judge's determination that the medical opinion evidence does not support rebuttal of clinical pneumoconiosis, as employer does not specifically challenge it on appeal.[13] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Consequently, we affirm the administrative law judge's finding that employer did not rebut the existence of clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(B).[14]

Radiology, http://www.abms.org/member-boards/contact-an-abms-member-board/american-board-of-radiology/ (last visited Aug. 29, 2018).

[12] Moreover, even had the administrative law judge given greater weight to the positive x-rays based on the readers' superior qualifications as dually-qualified Board-certified radiologists and B readers, employer has not identified any reversible error. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); *see also* 20 C.F.R. §718.204(a)(1) (in evaluating x-rays, "consideration must be given to the radiological qualifications" of the physicians).

[13] Furthermore, to the extent the administrative law judge permissibly found that the radiographic evidence does not disprove clinical pneumoconiosis and that the CT scans are "not determinative," he permissibly declined to credit the opinions of Drs. Fino and Sargent that claimant does not have clinical pneumoconiosis, as "they based their opinions in part on their own CT scan readings." Order Granting Reconsideration at 4; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

[14] We reject employer's argument that the administrative law judge erred in failing to consider whether it rebutted the presumed existence of legal pneumoconiosis at 20

II. Total Disability Causation

Because employer did not disprove that claimant has clinical pneumoconiosis, its burden under the second method of rebuttal is to establish that "no part" of claimant's respiratory or pulmonary total disability was caused by that disease. 20 C.F.R. §718.305(d)(1)(ii); *see Minich*, 25 BLR at 1-154-56. The administrative law judge determined that the opinions of Drs. Fino and Sargent are insufficient to rebut the presumed fact of total disability causation because the physicians did not diagnose clinical pneumoconiosis, contrary to the administrative law judge's finding that employer did not disprove that claimant has the disease. Order Granting Reconsideration at 5. Employer asserts that the administrative law judge erred in discrediting their opinions on this basis, as a physician's opinion on causation can only be discredited if claimant proved that he had pneumoconiosis, not if the disease is presumed.

Contrary to employer's argument, once a claimant has invoked the Section 411(c)(4) presumption and the employer has failed to rebut the existence of pneumoconiosis, the administrative law judge may discredit a physician's opinion regarding disability causation on the basis that the physician mistakenly believed that the claimant did not have pneumoconiosis. *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015) (in such circumstances, administrative law judge may not credit physician's opinion absent "specific and persuasive" reasons, and may give opinion at most "little weight"); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013). Therefore, we affirm the administrative law judge's determination that employer failed to rebut the presumption that claimant's disabling respiratory or pulmonary impairment is due to clinical pneumoconiosis under 20 C.F.R. §718.305(d)(1)(ii).

C.F.R. §718.305(d)(1)(i)(A). The regulations provide that employer must disprove both clinical and legal pneumoconiosis to establish rebuttal under the first method. *See* 20 C.F.R. §718.305(d)(1)(i)(A), (B); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). Thus, under the facts of this case, the administrative law judge was not required to consider whether employer also rebutted the presumed existence of legal pneumoconiosis.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge