U.S. Department of Labor

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

BRB No. 23-0169 BLA

RANDALL R. FULLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HAR LEE COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 07/29/2024
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 Heather C. Leslie, Administrative Law Judge, United States Department of Labor.

D. Allison Mullins (Allison Mullins, Attorney at Law), Birchleaf, Virginia, for Claimant.

Carl M. Brashear (Hoskins Law Offices PLLC), Lexington, Kentucky, for Employer.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Heather C. Leslie's Decision and Order Denying Benefits (2021-BLA-05206) rendered on a subsequent claim filed on

July 5, 2019,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant did not establish complicated pneumoconiosis and thus could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Additionally, she credited Claimant with 15.26 years of underground coal mine employment. However, she found Claimant did not establish a totally disabling respiratory or pulmonary impairment and therefore could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Because Claimant failed to establish an essential element of entitlement, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in weighing the x-ray evidence in finding he failed to establish complicated pneumoconiosis and invoke the Section 411(c)(3) presumption. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, declined to respond.[3]

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in

[1] This is Claimant's second claim for benefits. Director's Exhibit 3. He filed his first claim on October 20, 2009. Director's Exhibit 1 at 828. In a Decision and Order Denying Benefits dated January 9, 2010, ALJ Pamela J. Lakes denied benefits because Claimant failed to establish a totally disabling respiratory or pulmonary impairment. *Fuller v. Har Lee Coal Co., Inc.*, Case No. 2010-BLA-05799 (Jan. 9, 2010). In a January 22, 2013 Decision and Order, the Board affirmed the ALJ's denial of benefits. *Fuller v. Har Lee Coal Co., Inc.*, BRB No. 12-0240 BLA (Jan. 22, 2013). Claimant took no further action until filing the current claim. Director's Exhibit 3.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 15.26 years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8, 18.

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 Assocs., Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(3) Presumption: Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more 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, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. In determining whether Claimant has invoked the irrebuttable presumption, the ALJ must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The ALJ found the x-rays, computed tomography (CT) scans, medical opinions, and Claimant's treatment records do not support a finding of complicated pneumoconiosis.[5] 20 C.F.R. §718.304(a)-(c); Decision and Order at 10-17. Weighing all the evidence together, she found Claimant did not establish the disease. 20 C.F.R. §718.304; Decision and Order at 17.

We affirm, as unchallenged on appeal, the ALJ's findings that the CT scans, medical opinions, and Claimant's treatment records do not support a finding of complicated pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.304(c); Decision and Order at 13, 17.

Claimant challenges the ALJ's weighing of the x-ray evidence. Claimant's Brief at 2-3. The ALJ considered eight readings of four x-rays dated June 11, 2014, May 30, 2019,

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

[5] The ALJ found there is no biopsy evidence of record. 20 C.F.R. §718.304(b); Decision and Order at 18 n.86.

September 30, 2019,[6] and March 19, 2020. Decision and Order at 10-12; Director's Exhibits 16, 17, 19, 20, 22; Claimant's Exhibits 1, 2; Employer's Exhibit 2.

Dr. Meyer, a dually-qualified Board-certified radiologist and B reader, interpreted the June 11, 2014 x-ray as negative for complicated pneumoconiosis. Director's Exhibit 19. Dr. Crum, a dually-qualified radiologist, interpreted the May 30, 2019 x-ray as positive for complicated pneumoconiosis, while Dr. Meyer interpreted it as negative for the disease. Director's Exhibit 17; Employer's Exhibit 2. Dr. Alexander, a dually-qualified radiologist, and Dr. Forehand, a B reader, read the September 30, 2019 x-ray as positive for complicated pneumoconiosis, while Dr. Meyer interpreted it as negative for the disease. Director's Exhibits 16 at 12, 18 at 3-4; Claimant's Exhibit 2. Dr. Alexander interpreted the March 19, 2020 x-ray as positive for complicated pneumoconiosis, while Dr. Kendall, a dually-qualified radiologist, interpreted it as positive only for simple pneumoconiosis. Director's Exhibit 20 at 32-33.

The ALJ found the June 11, 2014 x-ray is negative for complicated pneumoconiosis, as Dr. Meyer's negative interpretation is the only reading of this x-ray. Decision and Order at 11. She also found the readings of the May 30, 2019 and March 19, 2020 x-rays are in equipoise because an equal number of dually-qualified physicians read the x-rays as positive or negative for complicated pneumoconiosis. *Id.* at 12. As Claimant does not challenge these findings, we affirm them. *Skrack*, 6 BLR at 1-711.

Claimant asserts the ALJ erred in weighing the readings of the September 30, 2019 x-ray. Claimant's Brief at 2-3. We disagree.

The ALJ permissibly assigned less weight to Dr. Forehand's September 30, 2019 x-ray reading because, unlike Drs. Alexander and Meyer, he is not Board certified in radiology. *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); *see* Decision and Order at 12. Moreover, she permissibly found his interpretation of the September 30, 2019 x-ray is entitled to less weight because he subsequently changed his opinion by stating Claimant does not have complicated pneumoconiosis but only has simple pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 12 n.60, *citing* Director's Exhibit 22. Having permissibly discredited Dr. Forehand's x-ray interpretation, the ALJ permissibly found the September 30, 2019 x-ray in equipoise because an equal number of dually-qualified physicians, Drs. Alexander and Meyer, read it as positive and negative for complicated pneumoconiosis. Decision and Order at 12.

[6] Dr. Gaziano, a B reader, read the September 30, 2019 x-ray for quality purposes only. Director's Exhibit 16 at 1.

While Claimant contends the ALJ should have given more weight to Dr. Forehand's reading and thus found the September 30, 2019 x-ray positive, Claimant's Brief at 2-3, his argument amounts to a request to reweigh the evidence, which the Board may not do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Because the ALJ found none of the x-rays are positive for complicated pneumoconiosis, we affirm her finding the x-ray evidence, when weighed together, does not establish complicated pneumoconiosis. 20 C.F.R. §718.304(a); *see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; Decision and Order at 12. As Claimant raises no additional arguments, we affirm the ALJ's findings that the evidence as a whole does not establish complicated pneumoconiosis and Claimant did not invoke the Section 411(c)(3) presumption. *Melnick*, 16 BLR at 1-33; 20 C.F.R. §718.304; Decision and Order at 17-18.

Claimant does not challenge the ALJ's additional findings that he did not establish total disability based on pulmonary function studies, arterial blood gas studies, medical opinions, treatment records, or the evidence when weighed together.[7] 20 C.F.R. §718.204(b)(2); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); Decision and Order at 18-22. Thus we affirm these findings. *Skrack*, 6 BLR at 1-711. We therefore also affirm the ALJ's finding that Claimant failed to invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.305; Decision and Order at 22.

Because Claimant did not establish total disability, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc); Decision and Order at 22-23.

[7] The ALJ accurately noted the record does not contain any evidence diagnosing cor pulmonale with right-sided congestive heart failure. Decision and Order at 21.

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge