U.S. Department of Labor

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

BRB No. 23-0191 BLA

FREDDIE J. BROCK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LUCKY BRANCH COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 06/20/2024
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

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

Michael A. Pusateri (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer L. Jones, Deputy Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Awarding Benefits (2021-BLA-05135) rendered on a claim[1] filed on August 27, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901–944 (2018) (Act).

The ALJ found Lucky Branch Coal Company is the responsible operator and Old Republic Insurance Company is the responsible carrier. He credited Claimant with 11.9 years of qualifying coal mine employment and found he established complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. The ALJ further found Claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203(b), and awarded benefits.

On appeal, Employer asserts the ALJ erred in determining it is the responsible operator. On the merits, it argues the ALJ erred finding Claimant established complicated pneumoconiosis.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging rejection of Employer's responsible operator arguments.

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 seventh claim for benefits, but he withdrew his prior six claims. Decision and Order at 2; Director's Exhibits 1-5, 69. A claim that has been withdrawn is considered not to have been filed. 20 C.F.R. §725.306(b).

[2] We affirm, as unchallenged on appeal, the ALJ's length of coal mine employment calculations and finding that Claimant had 11.9 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

accordance with applicable law.[3] 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, 362 (1965).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(a)(1). To be a "potentially liable operator," a coal mine operator must have employed the miner for at least one year and be financially capable of assuming liability for the payment of benefits. 20 C.F.R. §725.494(e). Once the district director properly identifies a potentially liable operator, and then designates it as the responsible operator, that operator may be relieved of liability only if it proves either that it is financially incapable of paying benefits or that another financially capable operator more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

Employer asserts the ALJ erred in finding it is the responsible operator because the record does not contain a statement from the district director that meets the requirements of 20 C.F.R. §725.495(d) attesting that a more recent employer, Ring Coal Sales (Ring Coal), is not financially capable of assuming liability for this claim.[4] Employer's Brief at 7-14. The Director responds that Ring Coal does not meet the definition of a potentially liable operator because it did not employ Claimant for at least one year, and therefore the lack of a Section 725.495(d) statement from the district director regarding Ring Coal does not absolve Employer of liability for this claim. Director's Brief at 3-5. We agree with the Director's position.

Section 725.495(d) provides:

> [i]n any case referred to the Office of Administrative Law Judges pursuant to §725.421 in which the operator finally designated as responsible pursuant to §725.418(d) is not the operator that most recently employed the miner, the record shall contain a statement from the district director explaining the

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 8; Hearing Transcript at 11.

[4] The ALJ acknowledged the record did not contain a Section 725.495(d) statement concerning Ring Coal but found the district director's obligations satisfied because the Proposed Decision and Order included a statement indicating Ring Coal did not have insurance coverage and that a Section 725.495(d) statement had been issued. Decision and Order at 25 (citing Director's Exhibit 61 at 11).

> reasons for such designation, [and] [i]n the absence of such a statement, it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim.

20 C.F.R. §725.495(d). Because the record does not contain the Section 725.495(d) statement for Ring Coal, it is presumed to be financially capable of assuming liability for this claim. *See id.* As the designated potentially liable operator, however, Employer must also show that the more recent operator employed the miner for a cumulative period of not less than one year. 20 C.F.R. §725.494(c).

Claimant reported and his Social Security Earnings records confirm that he worked for Ring Coal in 1990 and May 1991; the ALJ determined he worked for 110.8 days or 0.88 years during those time periods. Decision and Order at 8; Director's Exhibits 10, 11, 12. Employer has not challenged the ALJ's length of coal mine employment calculation, and we thus affirm it. *See Skrack v. Island Coal Co.*, 6 BLR 1-710, 1-711 (1983). As Claimant did not work for Ring Coal for at least one year, it cannot qualify as a potentially liable operator and therefore does not satisfy Employer's burden to establish another financially capable operator more recently employed Claimant for at least one year. 20 C.F.R §§725.494(c), 725.495(c)(2). Consequently, we agree with the Director that any error in addressing the lack of a Section 725.495(d) statement is therefore harmless.[5] *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Invocation of the Section 411(c)(3) Irrebuttable Presumption

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

[5] Employer further contends liability should transfer to the Black Lung Disability Trust Fund because: (1) the Department of Labor (DOL) failed to notify any Kentucky state insurance guarantee funds that might be liable for Ring Coal's obligations of the claim; (2) DOL failed to investigate whether Ring Coal had assets to cover its potential liability; and (3) the regulatory scheme shifting liability to prior operators when a later employer is unable to pay benefits constitutes an unlawful taking. Employer's Brief at 11-20. As each of these arguments is predicated upon Ring Coal being a potentially liable operator, we decline to address them as moot.

(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 a claimant has invoked the irrebuttable presumption, the ALJ must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consol. Coal Co*., 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found Claimant established complicated pneumoconiosis based on the x-ray evidence, computed tomography (CT) scan evidence, and medical opinion evidence.[6] Decision and Order at 19-23; *see* 20 C.F.R. 718.304. Employer contends the ALJ erred in weighing the evidence to find complicated pneumoconiosis. Employer's Brief at 20-26. We affirm the ALJ's findings.

X-Ray Evidence

The ALJ considered eleven interpretations of four chest x-rays dated November 25, 2019,[7] February 5, 2020, February 7, 2020, and March 10, 2020, rendered by physicians who are all dually-qualified as B readers and Board-certified radiologists. Decision and Order at 9-11, 19-21; Director's Exhibits 30-34, 36-39; Claimant's Exhibits 4, 5.

Drs. DePonte and Crum read the November 25, 2019 x-ray as positive for complicated pneumoconiosis, category A, whereas Dr. Adcock read it as negative for the disease. Director's Exhibits 30-31, 33. Because the ALJ found a greater number of dually-qualified radiologists read this x-ray as positive for complicated pneumoconiosis, he found it positive for the disease. Decision and Order at 20.

Dr. DePonte read the February 5, 2020 x-ray as positive for complicated pneumoconiosis, category A, whereas Dr. Adcock read it as negative for the disease. Director's Exhibits 34, 38. Dr. Crum read the February 7, 2020 x-ray as positive for complicated pneumoconiosis, whereas Dr. Adcock read it as negative for the disease. Director's Exhibits 32, 39. Finally, Drs. Crum and DePonte read the March 10, 2020 x-ray as positive for complicated pneumoconiosis, whereas Drs. Meyer and Adcock read it as negative for the disease. Director's Exhibits 36, 37; Claimant's Exhibits 4, 5. Because an equal number of dually-qualified physicians interpreted the February 5, 2020, February 7, 2020, and March 10, 2020 x-rays as positive and negative for complicated pneumoconiosis, the ALJ found these x-rays inconclusive as to the presence of the disease.

[6] The record does not contain any biopsy reports. 20 C.F.R. §718.304(b).

[7] The ALJ noted Dr. Gaziano also read the November 25, 2019 x-ray for quality purposes only. Decision and Order at 10; Director's Exhibit 31.

Decision and Order at 20-21. Having found "the only conclusive x-ray to be positive for complicated pneumoconiosis" (the one dated November 25, 2019), and the remaining x-rays "inconclusive," the ALJ found the x-ray evidence as a whole supports a finding of complicated pneumoconiosis. Decision and Order at 21.

Employer asserts the ALJ erroneously relied on the "numerical superiority" of interpretations in finding the November 25, 2019 x-ray positive for complicated pneumoconiosis. Employer's Exhibit at 21. We disagree. The ALJ did not merely rely on numerical superiority in resolving the conflicting x-ray readings but rather performed a quantitative and qualitative analysis of the x-ray evidence, taking into consideration the physicians' qualifications, their specific interpretations, and the number of readings of each film. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); Decision and Order at 20-21.

Employer also submits the ALJ should have credited Drs. Adcock's and Meyer's readings of the various films over Dr. Crum's readings on the basis that they have superior qualifications as "professors of pulmonology with relevant publications." Employer's Brief at 21. However, as a review of the record reflects Employer did not raise this issue below, we decline to address it. *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 937 F.3d 581, 591 (6th Cir. 2021) (issues must be raised before the ALJ to preserve review before the Board). Nevertheless, while an ALJ has discretion to give greater weight to an expert with qualifications he finds superior to those of the other x-ray readers, the ALJ in this case permissibly found the physicians equally qualified to render opinions based on their dual credentials as B readers and Board-certified radiologists. *See Melnick*, 16 BLR at 1-36-37; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-154 (1989) (en banc). Thus, we affirm the ALJ's conclusion that the x-ray evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(a); Decision and Order at 21.

CT Scan Evidence

The ALJ considered five interpretations of three CT scans. Decision and Order at 21-22; Director's Exhibit 42; Claimant's Exhibits 1, 3; Employer's Exhibits 1, 2. Drs. DePonte and Meyer read the February 6, 2015 CT scan as positive for simple pneumoconiosis but not complicated pneumoconiosis. Director's Exhibit 42; Claimant's Exhibit 1; Employer's Exhibit 2. Dr. DePonte offered the only interpretation of the October 4, 2019 CT scan and opined it showed "opacities suspicious for Category A opacities." Claimant's Exhibit 1; Employer's Exhibit 2. Finally, Dr. DePonte opined the May 11, 2021 CT scan showed a sixteen-millimeter opacity consistent with complicated pneumoconiosis, while Dr. Kirkpatrick, a Board-certified radiologist, did not opine as to the presence or absence of pneumoconiosis. Claimant's Exhibit 3; Employer's Exhibit 1.

The ALJ found the May 11, 2021 CT scan positive for complicated pneumoconiosis because Dr. Kirkpatrick's interpretation was silent as to the presence or absence of the disease and Dr. DePonte is better qualified. Decision and Order at 21-22. Because the most recent CT scan was positive for complicated pneumoconiosis, the next most recent CT scan was "suspicious" for the disease, and the remaining scan was taken more than five years earlier, the ALJ concluded the preponderance of the CT scan evidence weighs in favor of a finding of complicated pneumoconiosis. Decision and Order at 22.

Employer asserts the ALJ erred in finding the May 11, 2021 CT scan positive for complicated pneumoconiosis, arguing Dr. Kirkpatrick "definitively" opined this CT scan is negative for complicated pneumoconiosis, and that the ALJ erred in relying on Dr. DePonte's superior credentials to "break the tie" between the conflicting interpretations. Employer's Brief at 22. We disagree.

Initially, contrary to Employer's assertion that Dr. Kirkpatrick's reading of the May 11, 2021 CT scan is "definitively negative" for complicated pneumoconiosis, Employer's Brief at 22, the ALJ permissibly concluded that the physician did not specifically opine as to the presence or absence of complicated pneumoconiosis. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002) (ALJ's function is to weigh the evidence, draw inferences, and determine credibility); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). The ALJ also permissibly considered the qualifications of the physicians in weighing their interpretations and determined Dr. DePonte's radiological credentials as a dually-qualified B reader and Board-certified radiologist render her better qualified than Dr. Kirkpatrick, who the ALJ found is a Board-certified radiologist but not a B reader.[8] *See Woodward*, 991 F.2d at 321; Decision and Order at 21. Thus, we affirm the ALJ's finding that the May 11, 2021 CT scan is positive for complicated pneumoconiosis. Decision and Order at 22.

We also reject Employer's contention that the ALJ erred in considering the October 4, 2019 CT scan because Dr. DePonte read it as "suspicious" for complicated pneumoconiosis but did not definitively opine it is positive for the disease. Employer's Brief at 22. The ALJ did not find the October 4, 2019 CT scan positive for complicated pneumoconiosis but determined Dr. DePonte's findings on that CT scan support her definitively positive reading of the subsequent May 11, 2021 CT scan. Decision and Order at 21-22.

[8] The ALJ took judicial notice of Dr. Kirkpatrick's Board certification. Decision and Order at 21 n.138. Dr. DePonte's curriculum vitae is in the record. *See* Claimant's Exhibit 2.

We similarly reject Employer's assertion that the ALJ erred in discounting the February 6, 2015 CT scan, which was negative for complicated pneumoconiosis, due to its age. Employer's Brief at 22. While an ALJ may not credit or discredit a CT scan based solely on its recency when it shows improvement, the same is not true when the evidence shows the miner's condition worsened. *Kincaid v. Island Creek Coal Co.*, BLR , BRB Nos. 22-0024 BLA and 22-0024 BLA-A, slip op. at 5-11 (Nov. 17, 2023); *see Woodward*, 991 F.2d at 319-20; *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (given progressive nature of pneumoconiosis, ALJ must resolve conflicting evidence when miner's condition improves "without reference to their chronological relationship").

As Employer raises no further arguments, we affirm the ALJ's determination that the CT scan evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 22.

Medical Opinion Evidence

The ALJ next considered the medical opinions of Drs. Nader and Dahhan. Decision and Order at 22-23. Dr. Nader performed the Department of Labor-sponsored complete pulmonary evaluation of Claimant and opined he has complicated pneumoconiosis. Director's Exhibits 30, 40. Dr. Dahhan also examined Claimant and opined he does not have the disease. Director's Exhibit 35. Crediting Dr. Nader's opinion over Dr. Dahhan's, the ALJ concluded the medical opinion evidence supports a finding of complicated pneumoconiosis. Decision and Order at 23.

Employer contends the ALJ erroneously credited Dr. Nader's diagnosis of complicated pneumoconiosis because his opinion consisted of a mere restatement of "a radiologist's disputed reading."[9] Employer's Brief at 23. We disagree.

A physician's opinion that is wholly reliant on another physician's x-ray reading and is merely a restatement of that reading has no independent weight. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). However, Dr. Nader did not merely restate an x-ray reading. Rather, the ALJ permissibly credited Dr. Nader's diagnosis of complicated pneumoconiosis because he considered several x-ray and CT scan readings and explained why that evidence, along with Claimant's occupational exposure to respirable dust and his history of chronic cough,

[9] We affirm, as unchallenged on appeal, the ALJ's discrediting of Dr. Dahhan's opinion on the issue of complicated pneumoconiosis. *See Skrack*, 6 BLR at 1-711.

wheezing, shortness of breath, and mucus expectoration supports his diagnosis.[10] *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d 185; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 23; Director's Exhibits 30, 40. Thus, we affirm the ALJ's determination that the medical opinion evidence supports a finding of complicated pneumoconiosis.

Evidence as a Whole

Employer contends the ALJ erred in weighing the evidence as a whole to find Claimant established complicated pneumoconiosis, asserting that, having found the x-rays support a finding of complicated pneumoconiosis, he disregarded evidence to the contrary. Employer's Brief at 23. We disagree.

Contrary to Employer's contention, the ALJ appropriately considered the x-ray evidence, CT scan evidence, and medical opinion evidence separately, determined that each category of evidence independently supports a finding of complicated pneumoconiosis, and only then weighed the evidence together to determine Claimant established complicated pneumoconiosis. *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33-34; Decision and Order at 19-23. Although Employer points to objective testing that it asserts undermines a diagnosis of complicated pneumoconiosis, its arguments essentially assert the ALJ should have substituted his opinion for that of the medical experts, which he is not permitted to do. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987) ("The interpretation of objective data is a medical determination and an [ALJ] may not substitute his opinion for that of a physician[.]"); Employer's Brief at 23-25.

Because Employer raises no further arguments, we affirm the ALJ's finding that all the relevant evidence considered together establishes complicated pneumoconiosis. *See Melnick*, 16 BLR at 1-33-34; 20 C.F.R. §718.304; Decision and Order at 23. We further affirm, as unchallenged on appeal, the ALJ's finding that Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack*, 6 BLR at 1-711; Decision and Order at 23.

[10] Moreover, given that Dr. Nader's diagnosis is consistent with the ALJ's finding the x-ray and CT scan evidence is positive for complicated pneumoconiosis, and Employer does not challenge the ALJ's rejection of Dr. Dahhan's opinion, Employer has not explained how discrediting Dr. Nader's diagnosis as a "mere recitation" of another physician's opinion would make a difference in this case. *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 ALJ's finding that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge