U.S. Department of Labor

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

BRB No. 23-0411 BLA

JAMES MULLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LODESTAR ENERGY INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS' MUTUAL INSURANCE	)	DATE ISSUED: 06/12/2024
	)	
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 Granting Benefits in a Subsequent Claim and Decision and Order Denying Motion to Vacate of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for Claimant.

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

William M. Bush (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, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Granting Benefits in a Subsequent Claim and Decision and Order Denying Motion to Vacate (2020-BLA-05816) rendered on a subsequent claim[1] filed on June 13, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant has twenty-five years of coal mine employment. He found Claimant established complicated pneumoconiosis and, therefore, invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act and established a change in an applicable condition of entitlement.[2] 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.304, 725.309(c). Further, he found Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b). Thus, the ALJ awarded benefits.

[1] This is Claimant's fourth claim for benefits. Director's Exhibits 1-3, 5. The district director denied Claimant's most recent prior claim, filed on March 31, 2014, for failure to establish total disability. Director's Exhibit 3 at 6-7.

[2] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must deny the subsequent claim unless he finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the district director denied Claimant's prior claim for failure to establish total disability, Claimant needed to submit new evidence establishing total disability to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 3 at 6-7.

Employer subsequently filed a "Motion [to] Reconsider and Vacate the 6/28/23 Decision Awarding Benefits, to Allow the Parties an Opportunity to Amend Designation of Evidence, and to Reopen Proof to Allow Rebuttal Evidence to Statisfy [sic] Due Process Requirements" (Motion for Reconsideration) on July 24, 2023, asserting the ALJ erred by failing to make evidentiary rulings on the x-ray evidence prior to issuing his Decision and Order. On July 25, 2023, the ALJ issued a Decision and Order Denying Motion to Vacate (Order Denying Reconsideration) rejecting Employer's arguments and denying its motion.

On appeal, Employer asserts the ALJ erred by making evidentiary rulings in his Decision and Order and in finding Claimant established complicated pneumoconiosis.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), urges the Benefits Review Board to reject Employer's evidentiary challenges.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Orders if they are rational, supported by substantial evidence, and in 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).

Evidentiary Issues

The ALJ considered seventeen readings of five x-rays dated May 2, 2014, September 11, 2014, January 8, 2016, August 1, 2019, and December 20, 2019. Decision and Order at 7-13. Claimant submitted Dr. Crum's reading of the May 2, 2014 and September 11, 2014 x-rays as affirmative evidence, and Employer submitted Drs. Simone's and Kendall's readings of those x-rays as rebuttal evidence. Claimant's Evidence Summary Form at 2; Employer's Evidence Summary Form at 2. Employer submitted Drs. Adcock's, Kendall's, and Simone's readings of the December 20, 2019 x-ray as affirmative evidence, and Claimant submitted Drs. Crum's and DePonte's readings of that x-ray as rebuttal evidence.[5] Employer's Evidence Summary Form at 2; Claimant's Evidence

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-five years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10, 13.

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 13; Director's Exhibit 6.

[5] With respect to its submission of Dr. Simone's reading of the December 20, 2019 x-ray, Employer's Exhibit 10, Employer stated "[i]f the Employer is determined to have

Summary Form at 2. Claimant submitted Dr. DePonte's reading of the Department of Labor (DOL) sponsored August 1, 2019 x-ray, and Employer submitted Drs. Kendall's, Adcock's, and Simone's readings to rebut that x-ray.[6] Claimant's Evidence Summary Form at 2; Employer's Evidence Summary Form at 2-3. The January 8, 2016 x-ray was taken during the course of Claimant's treatment; Claimant submitted Dr. Crum's additional reading of that x-ray, and Employer submitted Dr. Kendall's additional reading of it. Director's Exhibits 16 at 19; Claimant's Exhibit 11; Employer's Exhibit 6.

The ALJ did not consider any readings of the May 2, 2014 and September 11, 2014 x-rays because those x-rays were taken before the denial of Claimant's prior claim and therefore could not be used to establish a change in an applicable condition of entitlement. Decision and Order at 7-10. In addition, the ALJ noted Employer withdrew Dr. Adcock's reading of the August 1, 2019 x-ray at the hearing, and he found Employer's submission of Dr. Simone's readings of the August 1, 2019 and December 20, 2019 x-rays exceeded the evidentiary limitations. *Id.*; Hearing Transcript at 9; Employer's Evidence Summary Form at 2-3. The ALJ also found Claimant's submission of Dr. Crum's reading of the December 20, 2019 x-ray exceeded the evidentiary limitations for rebuttal evidence. Decision and Order at 9, 12 n.41; Claimant's Evidence Summary Form at 2. However, because he had determined the readings of the 2014 x-rays could not be used to establish a change in condition, the ALJ found Claimant had "two affirmative readings available to submit" and thus redesignated Dr. Crum's reading of the December 20, 2019 x-ray as affirmative evidence. Decision and Order at 12 n.41. In considering Claimant's entitlement to benefits, the ALJ ultimately concluded that the x-ray evidence supported a finding of complicated pneumoconiosis. *Id.* at 13.

Employer argues the ALJ violated its due process rights by failing to make his evidentiary rulings prior to issuing the Decision and Order; erred in redesignating Claimant's evidence, thereby acting as Claimant's advocate; and erred by not giving Employer the opportunity to respond to Claimant's redesignated affirmative evidence. Employer's Brief at 10-12 (unpaginated) (citing *C.S. v. Koch Carbon Raven Division VA*,

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exceeded the evidentiary limitations, then the Employer *will withdraw* this Exhibit." Employer's Evidence Summary Form at 2 (emphasis added).

[6] With respect to its submission of Drs. Adcock's and Simone's readings of the August 1, 2019 x-ray, Employer's Exhibits 3 and 9, Employer stated "[i]f the Employer is determined to have exceeded the evidentiary limitations, then the Employer *will withdraw* this Exhibit." Employer's Evidence Summary Form at 2-3 (emphasis added).

BRB No. 08-0340 BLA (Feb. 27, 2009) (unpub.)).[7] The Director agrees the ALJ erred in redesignating Claimant's evidence but argues the error was harmless as it was based on the ALJ's misunderstanding of the evidentiary limitations. According to the Director, Claimant's initial designation of Dr. Crum's reading as rebuttal evidence was consistent with the regulations; thus, it was admissible, although for different reasons than the ALJ found. Furthermore, the Director maintains that remand would not advance the "principles of fairness and administrative efficiency" that the Board outlined in *Preston* because Employer has not demonstrated prejudicial error. Director's Brief at 4-8 (citing *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc)).[8] We agree with the Director's position.

An ALJ is granted broad discretion in resolving procedural and evidentiary issues. *See Dempsey v. Sewell Coal Corp*., 23 BLR 1-47 (2004) (en banc); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989) (en banc). A party seeking to overturn an ALJ's resolution of an evidentiary issue must show that the ALJ's action was an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co*., 24 BLR 1-109, 1-113 (2009).

The regulations set limits on the number of specific types of medical evidence the parties can submit into the record. *See* 20 C.F.R. §§725.414, 725.456(b)(1). In support of their affirmative case, each party may submit no more than two chest x-ray interpretations, two pulmonary function studies, two arterial blood gas studies, one autopsy report, one report of each biopsy, and two medical reports. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). To rebut the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest [x]-ray, pulmonary function test, arterial blood gas

[7] In *C.S. v. Koch Carbon Raven Division VA*, BRB No. 08-0340 BLA, slip op. at 5 (Feb. 27, 2009) (unpub.), the Board explained "[p]rocedural due process requires that interested parties be notified of the evidence contained in the record and that they be afforded the opportunity to present objections to that evidence."

[8] In *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-62-63 (2008) (en banc), the Board held that the parties have a right to cross-examine adverse witnesses if necessary to ensure fairness in the adjudication of the claim. It thus determined the ALJ erred in excluding cross-examination testimony from the claimant's physician. *Id.* at 1-63. Furthermore, the Board went on to address "another important matter" implicated by the case, stating that "[c]onsistent with the principles of *fairness and administrative efficiency* that underlie the evidentiary limitations," ALJs should render evidentiary rulings on the exclusion of evidence before issuing the Decision and Order. *Id.* (emphasis added).

study, autopsy or biopsy submitted by" the opposing party. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii).

Medical evidence that exceeds those limitations "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1). Additionally, the Board has long held the rebuttal provisions set forth in Section 725.414(a)(2)(ii) and (3)(ii) "permitting each party to submit 'no more than one physician's interpretation of each chest [x]-ray' in rebuttal, refer to the x-ray *interpretations* that are proffered by the opposing party in its affirmative case, not to the underlying x-ray film." *J.V.S.* [*Stowers*] *v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78, 1-84 (2008) (quoting *Ward v. Consolidation Coal Co.*, 23 BLR 1-151, 1-155 (2006)) (emphasis in original); *see also Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 299 (4th Cir. 2007).

Here, Employer submitted Drs. Adcock's and Kendall's readings of the December 20, 2019 x-ray, Director's Exhibit 19 and Employer's Exhibit 5, as its affirmative evidence,[9] and Claimant submitted Drs. Crum's and DePonte's readings of the December 20, 2019 x-ray, Claimant's Exhibits 3 and 4, as his rebuttal evidence. Employer's Evidence Summary Form at 2; Claimant's Evidence Summary Form at 2; *see* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(i). As Employer submitted two readings of the December 20, 2019 x-ray as affirmative evidence, Claimant was entitled to respond to each of those readings. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(i); *see Stowers*, 24 BLR at 1-84; *Ward*, 23 BLR at 1-155-56; *see also Blake*, 480 F.3d at 299. Thus, contrary to the ALJ's finding, Dr. Crum's reading of the December 20, 2019 x-ray did not exceed the evidentiary limitations for rebuttal readings of the December 20, 2019 x-ray.[10] *See* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(i); Decision and Order at 9, 12 n.41; Claimant's Exhibit 3.

Although the ALJ erred in "redesignating" Dr. Crum's reading based on his misunderstanding of the evidentiary limitations, we need not remand this case because Dr. Crum's reading was properly in the record given that Claimant had originally and properly

[9] As discussed more fully below, Employer also submitted Dr. Simone's reading of the December 20, 2019 x-ray, Employer's Exhibit 10, as affirmative evidence and withdrew it. Employer's Evidence Summary Form at 2.

[10] Employer asserts that it "preserved objections" based on the evidentiary limitations; however, Employer did not raise any specific challenges to Claimant's Exhibit 3 at the hearing or in its post-hearing brief and does not identify any other objection to Claimant's Exhibit 3 in the record. Employer's Brief at 2, 6 (unpaginated); Employer's Post-Hearing Brief at 6, 7 n.1 (noting an objection to Claimant's Exhibit 11) (unpaginated); Hearing Transcript at 7-8.

designated it as rebuttal evidence. In short, the ALJ's error was harmless because it resulted in consideration of the same evidence, as originally submitted and designated by the parties, as if the ALJ had not redesignated Claimant's evidence.[11] *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"); Decision and Order at 7-13; Director's Brief at 4-6. Additionally, as Claimant's Exhibit 3 was admitted at the hearing and Employer did not raise a specific objection before the ALJ, remanding this case for the ALJ to reconsider the *same* evidence would merely impede, rather than promote, fairness and administrative efficiency.[12] *See Preston*, 24 BLR at 1-63. We therefore reject Employer's evidentiary challenge.

We also reject Employer's contention that the ALJ erred in excluding Dr. Simone's reading of the December 20, 2019 x-ray, Employer's Exhibit 10. Employer's Brief at 10-12 (unpaginated). As discussed above, Employer submitted two readings of the December 20, 2019 x-ray by Drs. Adcock and Kendall as affirmative evidence, in accordance with the evidentiary limitations. 20 C.F.R. §725.414(a)(3)(i); Employer's Evidence Summary Form at 2. However, Employer also submitted Dr. Simone's reading of the December 20, 2019 x-ray as affirmative evidence, Employer's Exhibit 10, stating "[i]f the Employer is determined to have exceeded the evidentiary limitations, then the Employer *will withdraw* this Exhibit." Employer's Evidence Summary Form at 2 (emphasis added).

The ALJ noted Employer added an extra line to the standard Office of Administrative Law Judges Evidence Summary Form in order to include Dr. Simone's reading of the December 20, 2019 x-ray, Employer's Exhibit 10, as affirmative evidence along with Drs. Adcock's and Kendall's readings of that x-ray, Director's Exhibit 19 and Employers Exhibit 5. Decision and Order at 7-10; Employer's Evidence Summary Form at 2. The ALJ accurately found Dr. Simone's reading exceeded the evidentiary limitations. 20 C.F.R. §725.414(a)(3)(i); Decision and Order at 7-10; Employer's Evidence Summary Form at 2. As Employer submitted three affirmative x-ray readings and specifically

[11] If Claimant had designated Claimant's Exhibit 3 as affirmative evidence, Employer would have been entitled to submit rebuttal evidence. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(ii); *see* Employer's Brief at 11-12; Director's Brief at 6.

[12] In his Order Denying Reconsideration, the ALJ explained that, even if he had excluded Dr. Crum's x-ray reading, he still would have found the December 20, 2019 x-ray positive for complicated pneumoconiosis and that his ultimate decision would remain unchanged. Order Denying Reconsideration at 2-3. As Employer has not raised any objection to the ALJ's alternative finding, we affirm it as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Order Denying Reconsideration at 2-4.

indicated it would withdraw Dr. Simone's reading if it exceeded the evidentiary limitations, the ALJ merely complied with Employer's instructions by not considering Dr. Simone's reading. Decision and Order at 10; Employer's Evidence Summary Form at 2. Thus, Employer has not shown prejudice by the ALJ in not considering Dr. Simone's reading of the December 20, 2019 x-ray. *See Blake*, 24 BLR at 1-113; *Preston*, 24 BLR at 1-63.

While Employer asserts the ALJ's evidentiary rulings "infect not only the complicated pneumoconiosis issue but potentially all other issues in this case[,]" it does not identify any specific error with respect to the ALJ's weighing of the x-ray evidence or the ALJ's finding that Claimant established complicated pneumoconiosis. Employer's Brief at 12 (unpaginated). Consequently, we affirm the ALJ's findings that the x-ray evidence and the medical evidence as a whole support a finding of complicated pneumoconiosis. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Decision and Order at 12, 17-18.

Thus, we affirm the ALJ's conclusion that Claimant invoked the irrebuttable presumption of total disability due to complicated pneumoconiosis and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.304, 725.309(c). We also affirm, as unchallenged, 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 v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 18.

Accordingly, we affirm the ALJ's Decision and Order Granting Benefits in a Subsequent Claim and Decision and Order Denying Motion to Vacate.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge