U.S. Department of Labor

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

BRB No. 24-0321 BLA

ELIZABETH H. VANDYKE (o/b/o Estate of CLAYTON R. VANDYKE)	)	
Claimant-Respondent	)	**NOT-PUBLISHED**
v.	)	
BEATRICE POCAHONTAS COMPANY	)	DATE ISSUED: 11/13/2024
Self-Insured 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 William P. Farley, Administrative Law Judge, United States Department of Labor.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

Simon Jacobs (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman 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 JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) William P. Farley's Decision and Order Awarding Benefits (2021-BLA-05438) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on December 30, 2019.[1]

The ALJ found Claimant[2] established the Miner had 22.5 years of coal mine employment and the existence of both simple clinical pneumoconiosis and complicated pneumoconiosis. Thus, he found Claimant established a change in an applicable condition of entitlement,[3] 20 C.F.R. §725.309(c), and invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304. He further found the Miner's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203(b), and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the award of benefits.[4]

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[1] This is the Miner's third claim for benefits. On April 18, 2002, the district director denied the Miner's more recent prior claim, filed on January 29, 2001, because he failed to establish any element of entitlement. Director's Exhibit 2. The Miner took no further action until filing his current claim. Director's Exhibit 4.

[2] Claimant is the widow of the Miner, who died on February 13, 2023. She is pursuing the miner's claim on behalf of her husband's estate. Claimant's May 25, 2023 Motion to Have Claim Recaptioned.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "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 Miner failed to establish any element of entitlement in his prior denied claim, Claimant had to establish at least one element of entitlement to obtain review of the merits of the Miner's current claim. *Id.*

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established the Miner had 22.5 years of coal mine employment, the existence of simple

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 accordance with applicable law.[5] 33 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 was totally disabled due to pneumoconiosis if he suffered 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 a 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-ray evidence supports a finding of complicated pneumoconiosis, 20 C.F.R. §718.304(a), the computed tomography (CT) scans and the Miner's treatment records neither support nor refute the existence of complicated pneumoconiosis, and the medical opinions do not support a finding of complicated pneumoconiosis.[6] 20 C.F.R. §718.304(c); Decision and Order at 28-34. Weighing all the evidence together, the ALJ concluded the x-ray evidence outweighs the CT scan, treatment

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clinical pneumoconiosis, and a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 9.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 22.

[6] As the ALJ's finding that the Miner's treatment records do not establish the presence or absence of complicated pneumoconiosis is unchallenged, we affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 33.

record, and medical opinion evidence. Decision and Order at 34. He thus found Claimant established the existence of complicated pneumoconiosis.[7] *Id*.

20 C.F.R. §718.304(a) – X-rays

The ALJ considered eleven interpretations of five x-rays dated December 13, 2019, April 23, 2020, February 26, 2021, September 29, 2021, and November 3, 2021.[8] Dr. DePonte, a dually-qualified Board-certified radiologist and B reader, read the December 13, 2019, February 26, 2021, and November 3, 2021 x-rays as positive for simple and complicated pneumoconiosis, Category A, while Dr. Adcock, who is also a dually-qualified radiologist, read the x-rays as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Claimant's Exhibits 1, 3, 4; Employer's Exhibits 1, 2, 23. Dr. Ramakrishnan, a dually-qualified radiologist, read the September 29, 2021 x-ray as positive for simple and complicated pneumoconiosis, Category A, while Dr. Adcock read the x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 17. Finally, Dr. Crum, a dually-qualified radiologist, read the April 23, 2020 x-ray as positive for simple pneumoconiosis and a "Borderline" Category A opacity, while Dr. Seaman, who is also a dually-qualified radiologist, and Dr. Forehand, a B reader, read the x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibit 16; Claimant's Exhibit 5 at 1-2; Employer's Exhibit 3.

The ALJ found the December 13, 2019 and February 26, 2021 x-rays positive for complicated pneumoconiosis because Dr. DePonte's positive readings for the disease outweighed Dr. Adcock's negative readings for the disease. Decision and Order at 29-30. He also found the April 23, 2020 x-ray does not support a finding of complicated pneumoconiosis as no radiologist unequivocally read the x-ray as positive for the disease. *Id*. at 29. Further, he found the readings of the September 29, 2021 and November 3, 2021 x-rays in equipoise regarding complicated pneumoconiosis because an equal number of dually-qualified radiologists read each x-ray as positive or negative for the disease. *Id*. at 30. Having found two x-rays positive for complicated pneumoconiosis, one x-ray does not

[7] The ALJ found there is no biopsy or autopsy evidence in the record. 20 C.F.R. §718.304(b); Decision and Order at 28.

[8] The ALJ also considered four interpretations of two x-rays dated April 23, 2001, and November 29, 2001, from the Miner's prior claim. Decision and Order at 29. He found these x-ray readings entitled to little weight because they did not accurately reflect the Miner's condition prior to his death. *Id*. This credibility determination is unchallenged; thus, we affirm it. *See Skrack*, 6 BLR at 1-711.

support a finding of complicated pneumoconiosis, and two x-rays in equipoise, the ALJ concluded the x-ray evidence supports a finding of complicated pneumoconiosis. *Id.*

Employer argues the ALJ erred in discrediting Dr. Adcock's negative readings of the December 13, 2019 and February 26, 2021 x-rays. Employer's Brief at 6-7. We disagree.

The ALJ correctly stated all of the radiologists found the five x-rays positive for simple pneumoconiosis. Decision and Order at 29; *see* Claimant's Exhibits 1-5; Employer's Exhibits 1-3, 17, 23; Director's Exhibit 16. He also correctly noted that with the exception of Dr. Adcock's readings of the December 13, 2019 and February 26, 2021 x-rays, the radiologists identified "simple pneumoconiosis in all [lung] zones on every x-ray of record." Decision and Order at 29. Specifically, he concluded "Dr. Adcock is an outlier in that he did not mark simple pneumoconiosis in the upper lung zones on the December 13, 2019 and February 26, 2021 x-rays." *Id.* He permissibly found Dr. Adcock's readings of these x-rays entitled to little weight regarding complicated pneumoconiosis because the doctor deviated from the other radiologists' findings of simple pneumoconiosis in all lung zones on every x-ray of record.[9] *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986) (ALJ may reasonably question validity of a physician's opinion that varies significantly from the remaining medical opinions of record); Decision and Order at 29.

Because it is supported by substantial evidence, we affirm the ALJ's finding that the x-ray evidence establishes complicated pneumoconiosis. *See* 20 C.F.R. §718.304(a); *see also Compton v Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); Decision and Order at 30.

[9] Employer also argues the ALJ erred in considering the December 13, 2019 x-ray because the April 23, 2020 x-ray was unanimously read as positive for simple clinical pneumoconiosis only. Employer's Brief at 7. Employer has not explained how the ALJ's finding concerning the April 23, 2020 x-ray impacts his finding regarding the December 13, 2019 x-ray, or how the ALJ erred in considering both x-rays. We therefore decline to address its argument. *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).

20 C.F.R. §718.304(c) – CT Scans

The ALJ considered the interpretations of five CT scans dated January 22, 2015, September 15, 2016, August 17, 2017, August 25, 2020, and March 22, 2021.[10] Decision and Order at 31-32. Claimant submitted Dr. DePonte's serial report interpreting all five CT scans. Claimant's Exhibit 7. Dr. DePonte identified large opacities "exceeding one centimeter in greatest length" in each CT scan. Claimant's Exhibit 7 at 1-2. She stated two "11 mm opacities" in the right upper lobe remain stable over a six-year period and a "2.5 right parahilar opacity" showed minimal increase to "approximately 2.8 cm" over a six-year period. Thus, she diagnosed complicated coal workers' pneumoconiosis, Category A, and opined the large opacities "would measure similar in size and greater than one centimeter on a standard chest radiograph (x-ray)." *Id*. Employer submitted Dr. Adcock's serial report interpreting all five CT scans and four chest x-rays, and his individual interpretations of each CT scan. Employer's Exhibits 4, 18-22. Like Dr. DePonte, Dr. Adcock identified opacities in the right upper lobe, but he opined they measured less than one centimeter and thus did not demonstrate opacities diagnostic of complicated pneumoconiosis. Employer's Exhibits 4, 18-22 at 1-2.

The ALJ found the serial CT scan reports of Drs. DePonte and Adcock specific, detailed, and entitled to equivalent weight. Decision and Order at 31-32. Because he found no reason to give more weight to either of the physicians' conflicting interpretations, he found the CT scan evidence neither supports nor refutes a finding of complicated pneumoconiosis. *Id*. at 32.

Employer argues the ALJ erred in considering Dr. DePonte's serial CT scan report as "other medical evidence" because it asserts the doctor's report constitutes a medical report. Employer's Brief at 8-9. It contends that because Claimant did not designate individual interpretations of each of the five CT scans in accordance with the regulatory provision at 20 C.F.R. §718.107, the ALJ should have found the CT scan evidence does not support a finding of complicated pneumoconiosis based on Dr. Adcock's individual interpretations of all five CT scans. *Id*. The Director responds that Employer forfeited this argument. Director's Brief at 3.

[10] The ALJ also considered a January 16, 1997 CT scan interpretation that did not identify complicated pneumoconiosis. Decision and Order at 31. He found the CT scan entitled to little weight because it was "conducted two decades before the current claim for benefits." *Id*. Employer does not challenge the ALJ's weighing of this CT scan; thus, we affirm it. *See Skrack*, 6 BLR at 1-711.

Employer neither objected to Claimant's submission of Dr. DePonte's serial CT scan report at the hearing nor mentioned it in its closing brief to the ALJ. Hearing Tr. at 10-11; Employer's Closing Brief at 2. Rather, as the Director notes, Employer stated the ALJ should find "the CT scan readings are at best in equipoise" as Drs. DePonte and Adcock have "similar credentials." Employer's Closing Brief at 7; Director's Response Brief at 3. We therefore agree with the Director's position that Employer forfeited its right to challenge the ALJ's weighing of Dr. DePonte's serial CT scan report as "other medical evidence" under 20 C.F.R. §718.107 as it failed to raise the issue before the ALJ and makes its arguments for the first time on appeal.[11] *See Edd Potter Coal Co. v. Dir., OWCP* [*Salmons*], 39 F.4th 202, 208 (4th Cir. 2022) (parties forfeit arguments before the Board not first raised to the ALJ).

Regardless, Employer has not explained how the ALJ's consideration of Dr. DePonte's serial CT scan report under the "other medical evidence" header in his decision instead of the medical opinion evidence header constitutes legal error. *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); Employer's Brief at 9-10. Further, while x-ray, biopsy, and autopsy evidence are specifically enumerated among the types of evidence used to establish complicated pneumoconiosis, the Act and regulations also permit claimants to establish the existence of the disease by any "other means," which may include medical reports and CT scans. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(c). Because the ALJ properly considered all the CT scan and medical opinion evidence relevant to the presence or absence of complicated pneumoconiosis under 20 C.F.R. §718.304(c), the section heading he organized his consideration of such evidence under is not legally significant. *See Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 255-56; *Melnick*, 16 BLR at 1-33.

Further, to the extent Employer argues the ALJ's admission of Dr. DePonte's serial CT scan report into the record violated the evidentiary limitations, we disagree. In support of her affirmative case, Claimant submitted only one of two available medical reports. Claimant's Evidence Summary Form at 5-6; *see* 20 C.F.R. §§718.107, 725.414(a)(2)(i). Thus, even assuming Employer is correct that Dr. DePonte's serial CT scan report constitutes a medical report instead of "other medical evidence," Claimant did not submit the report in excess of the evidentiary limitations, and as Dr. DePonte's serial CT scan report is evidence relevant to the existence of complicated pneumoconiosis, the ALJ was

[11] Employer offers no reason for its failure to challenge Dr. DePonte's serial CT scan report before the ALJ. Employer's Brief at 8-9.

required to consider it.[12] *See* 30 U.S.C. §923(b) (ALJ must consider all relevant evidence); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253-54 (4th Cir. 2016); *Melnick*, 16 BLR at 1-33; *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

Because we see no error in the ALJ's credibility determinations, we affirm his finding that the CT scan evidence neither supports nor refutes a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 32.

Employer's argument that the medical opinion evidence outweighs the x-ray evidence amounts to a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 9. We therefore affirm the ALJ's finding that all the evidence weighed together establishes the existence of complicated pneumoconiosis, and thus Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304; *Melnick*, 16 BLR at 1-33; Decision and Order at 34.

We further affirm, as unchallenged, the ALJ's finding that the Miner'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 35.

[12] We further reject Employer's argument that Claimant was required to designate and submit each CT scan reading underlying Dr. DePonte's serial CT scan report pursuant to 20 C.F.R. §725.414(a)(2)(i). Employer's Brief at 9-10. Employer's reliance on the regulation is misplaced. Section 725.414(a)(2)(i) provides that any "chest x-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report" must themselves be admissible based on the applicable evidentiary limitations. 20 C.F.R. §725.414(a)(2)(i). The pertinent regulation does not include CT scan interpretations; however, they are admissible under 20 C.F.R. §718.107, which permits each party to submit one reading of each CT scan in support of its affirmative case. As the Director asserts, "[t]here was no need for Claimant to enter into evidence a separate document for each of the five [CT] scans" underlying Dr. DePonte's serial CT scan report because her report "included both her overall evaluations and her interpretations of the CT scans that were the basis for those evaluations." Director's Brief at 4; *see Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-134 n.31 (2006) (en banc) (purposes of the regulation are to "avoid repetition" and "focus attention on quality rather than quantity").

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge