U.S. Department of Labor

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

BRB No. 23-0282 BLA

PHYLLIS F. FACELLO (on behalf of FRANK J. FACELLO) Claimant-Respondent v. CONSOLIDATION COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 10/31/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits (2020-BLA-05669) rendered on a subsequent miner's claim

filed on March 18, 2019,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901–944 (2018) (Act).

The ALJ accepted the parties' stipulation that the Miner had twenty-three years of qualifying coal mine employment and found Claimant[2] established a totally disabling respiratory or pulmonary impairment. Thus, she found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018), and established a change in an applicable condition of entitlement. *See* 20 C.F.R. §§718.305, 725.309. In addition, she 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.[4] 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. She further found the Miner's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203(b), and awarded benefits.

[1] This is the Miner's eighth claim for benefits. Director's Exhibits 1-6. The Miner withdrew his most recent prior claim. Director's Exhibit 7. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b). The district director denied the Miner's sixth claim, filed on October 20, 2009, for failure to establish total disability. Director's Exhibit 6 at 6.

[2] Claimant is the surviving spouse of the Miner, who died on August 7, 2020, and is pursuing the miner's claim on his behalf. Decision and Order at 3; Hearing Transcript at 10-13.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes 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.

[4] 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 she 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 district director denied the Miner's prior claim for failure to establish total disability, Claimant needed to submit new evidence establishing total disability to warrant review of the Miner's subsequent claim on the merits. *White*, 23 BLR at 1-3; Director's Exhibit 6.

On appeal, Employer asserts the ALJ erred in finding Claimant established complicated pneumoconiosis.[5] Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, did not submit a response brief.

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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assoc., Inc.*, 380 U.S. 359, 361-62 (1965).

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

Section 411(c)(3) of the Act 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). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

The United States Court of Appeals for the Fourth Circuit has held, "'[b]ecause prong (A) sets out an entirely objective scientific standard'—i.e., an opacity on an x-ray greater than one centimeter—x-ray evidence provides the benchmark for determining what under prong (B) is a 'massive lesion' and what under prong (C) is an equivalent diagnostic result reached by other means." *E. Assoc. Coal Corp. v. Director* [*Scarbro*], 220 F.3d 250, 256 (4th Cir. 2000) (quoting *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999)). Claimant bears the burden to establish the existence of complicated pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994). 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);

[5] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established twenty-three years of qualifying coal mine employment, total disability, and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7-8, 23-24.

[6] 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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 27.

Scarbro, 220 F.3d at 255-56; *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found the autopsy evidence and medical opinion evidence support a finding of complicated pneumoconiosis, while the x-ray evidence, computed tomography scans, and the Miner's treatment records do not. 20 C.F.R. §718.304(b), (c); Decision and Order at 27, 31-34. Weighing the evidence together, she found Claimant established he has the disease. Decision and Order at 34.

Autopsy Evidence

The ALJ considered the autopsy reports of Drs. Bafakih and Vey. Decision and Order at 27-31; Claimant's Exhibit 2; Employer's Exhibits 3, 4. Dr. Bafakih performed the Miner's autopsy, examined twelve microscopic tissue slides, and diagnosed complicated pneumoconiosis based on findings of "fibrotic nodules" measuring "at least" 1.7 centimeters by 1.2 centimeters, pleural thickening and fibrosis, and emphysema. Claimant's Exhibit 2 at 2-4. He further opined around fifty percent of the Miner's lung was affected and that the nodules would likely measure greater than one-centimeter in diameter on x-ray imaging. Employer's Exhibit 4 at 18, 28. Dr. Vey reviewed the microscopic slides and diagnosed simple pneumoconiosis as well as bronchopneumonia, loose fibroinflammatory interstitial expansion, bronchiolitis obliterans organizing pneumonia (BOOP), and usual interstitial pneumonia (IUP). Employer's Exhibit 3 at 7. In reaching his diagnoses, he identified five separate coalescences of nodules or macules ranging from 0.3 centimeters to 0.9 centimeters. *Id.* at 6-7.

The ALJ found Drs. Bafakih and Vey equally qualified to render an opinion on the autopsy findings and that their opinions are equally well-reasoned and documented. Decision and Order at 30-31. In addition, she found Dr. Bafakih's opinion satisfies the Fourth Circuit's equivalency determination requirement and is sufficient to diagnose complicated pneumoconiosis. *Id.* She found, however, that Dr. Vey did not specifically "reach a conclusion as to whether [the] Miner suffered from complicated pneumoconiosis." *Id.* at 31. She therefore concluded Dr. Vey's opinion could not rebut Dr. Bafakih's diagnosis and thus found the autopsy evidence supported a finding of complicated pneumoconiosis. *Id.*

Employer argues the ALJ erred in finding Dr. Vey did not reach a conclusion as to whether Miner suffered from complicated pneumoconiosis.[7] We agree.

As Employer correctly notes, Dr. Vey diagnosed simple pneumoconiosis as well as bronchopneumonia, BOOP, and UIP, and did not identify any lesion or macule greater than 0.9 centimeters in diameter. Employer's Brief at 12-13; Employer's Exhibit 3 at 6-7. Dr. Vey also acknowledged Dr. Bafakih's diagnosis of complicated pneumoconiosis but ultimately concluded the Miner "had histopathologic manifestations of simple coal workers pneumoconiosis." Employer's Exhibit 3 at 4, 7. In finding Dr. Vey did not specifically reach a conclusion as to the presence of complicated pneumoconiosis, the ALJ did not sufficiently explain how the physician's statements and diagnoses taken together do not constitute an opinion that the Miner did not have complicated pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 31; Employer's Exhibit 3 at 6-7. The ALJ's findings thus do not satisfy the explanatory requirements of the Administrative Procedure Act.[8] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We must, therefore, vacate her finding that the autopsy evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(b).

Medical Opinion Evidence

The ALJ considered the medical opinions of Drs. Green, Ranavaya, Basheda, and Habre. Decision and Order at 32-33. Dr. Green opined the Miner suffered from complicated pneumoconiosis, while Drs. Ranavaya and Basheda opined he did not have simple or complicated pneumoconiosis. Director's Exhibit 26 at 22; Claimant's Exhibit 11 at 9-10; Employer's Exhibits 2 at 7, 10; 6 at 18, 26-33. Dr. Habre opined the Miner had clinical pneumoconiosis. Director's Exhibit 22 at 26; Employer's Exhibit 1 at 25. The

[7] We affirm, as unchallenged, the ALJ's finding that Dr. Bafakih's medical report is well-reasoned and documented and sufficient to establish complicated pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 31.

[8] The APA provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

ALJ credited Dr. Green's opinion over the contrary opinions of Drs. Ranavaya, Basheda, and Habre and found the medical opinion evidence supports a finding of complicated pneumoconiosis. Decision and Order at 32-33.

Because the ALJ's weighing of the autopsy evidence at 20 C.F.R. §718.304(b) may affect her weighing of the medical opinion evidence, we vacate her finding that the medical opinion evidence supports a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(c).

Smoking History

The ALJ found the Miner had a smoking history of less than three pack-years. Decision and Order at 4-5. In reaching this conclusion, the ALJ considered the Miner's smoking history form; the opinions of Drs. Habre, Basheda, Green, and Ranavaya from the present claim; and the opinions of Drs. Mullins, Zaldivar, Crisalli, and Rasmussen from the prior claims. Decision and Order at 4-5. The ALJ discredited Dr. Ranavaya's opinion that the Miner had a smoking history of twenty pack-years and determined the Miner smoked for three years at a rate of less than one pack per day. *Id.* at 5; Employer's Exhibit 2 at 6.

Employer contends the ALJ erred in calculating the Miner's smoking history. Employer's Brief at 15-17. We agree, in part. To the extent Employer raises any argument at all regarding the smoking histories reported by Drs. Mullins and Crisalli, we consider them requests to reweigh the evidence, which we may not do.[9] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

[9] In asserting the ALJ erred in her calculation of the Miner's smoking history, Employer states Dr. Mullins reported a smoking history of seven years at a rate of "less than a pack per day" and that Dr. Crisalli reported a smoking history of ten pack-years. Employer's Brief at 21 (citing Director's Exhibits 3 at 39; 4 at 79). The ALJ interpreted Dr. Mullins's report as a smoking history of 3.5 pack-years. Decision and Order at 4. Similarly, in asserting Dr. Crisalli reported a smoking history of ten pack-years, Employer cites to a note at the top of the Miner's January 12, 2004 pulmonary function study. Employer's Brief at 21 (citing Director's Exhibit 4 at 79). However, in his narrative report, Dr. Crisalli reports the Miner "smoked cigarettes for seven years at one-half pack per day" and that "[h]is smoking history [was] negligible." Director's Exhibit 4 at 68, 70, 72. Appearing to rely on the narrative report, the ALJ concluded Dr. Crisalli reported a smoking history of 3.5 pack-years. To the extent Employer's statements constitute an inference that the ALJ erred in interpreting their reports, we reject them as a request to

We agree, however, that the ALJ erred in failing to consider all of the evidence of record relating to the Miner's smoking history. As Employer asserts, the ALJ did not consider Dr. Walker's 1994 report that the Miner smoked for twenty years or Dr. Rasmussen's 1997 report that the Miner smoked a pack per day for nine years and further erroneously discredited Dr. Ranavaya's opinion on the basis that he relied, in part, on these examination reports.[10] Director's Exhibit 3 at 56, 61, 86. Employer further notes a potential discrepancy in the ALJ's statement that Dr. Zaldivar reported the Miner smoked from when he was a teenager until 1968,[11] and her conclusion that Dr. Zaldivar reported a smoking history of "N/A."[12] Employer's Brief at 16; Director's Exhibit 4 at 27; *see* Decision and Order at 4.

We thus agree with Employer's argument that the ALJ erred in discrediting Dr. Ranavaya's opinion on the basis that it is inconsistent with the smoking histories reported in the record. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. We therefore vacate the ALJ's finding that the Miner smoked for three years at a rate of less than one pack per day.

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reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

[10] The ALJ states Dr. Walker's 1994 report and Dr. Rasmussen's 1997 report, both developed as part of the complete pulmonary exams in the Miner's prior claims, are not in the record. Decision and Order at 5 n.3. Contrary to the ALJ's statement, both reports are available in the record in Director's Exhibit 3, and there is no indication either report was excluded. *See* 20 C.F.R. §725.309(c)(2) ("Any evidence submitted in connection with any prior claim must be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim."); Director's Exhibit 3 at 56, 86.

[11] The ALJ summarized Dr. Zaldivar as recording a smoking history that ended in "1963." Decision and Order at 4. However, Dr. Zaldivar's report states the Miner smoked from when he was a "teenager" until "1968." Director's Exhibit 4 at 27. Employer contends this amounts to a smoking history of thirteen years. Employer's Brief at 16.

[12] The ALJ's Decision and Order indicates Dr. Zaldivar's report is contained in Director's Exhibit 3. Decision and Order at 4. However, in the record before us, Dr. Zaldivar's report is contained in Director's Exhibit 4.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant has established complicated pneumoconiosis. In weighing the autopsy evidence, she must reconsider whether Dr. Vey's autopsy report constitutes credible, probative evidence that is contrary to Dr. Bafakih's opinion and resolve any conflicts between their opinions. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 (4th Cir. 1999); 20 C.F.R. §718.304(b). The ALJ must then consider all relevant evidence related to Miner's smoking history, render a finding on the issue, and explain her rationale in resolving the discrepancies in the evidence. *Bobick v. Saginaw Mining Co*., 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985). The ALJ must further reevaluate the medical opinion evidence, considering the physicians' qualifications, explanations for their conclusions, the documentation underlying their medical judgments and the sophistication of, and bases for, their diagnoses and medical conclusions. *See Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439.

If the ALJ again finds Claimant established complicated pneumoconiosis, she may reinstate the award of benefits. 20 C.F.R. §718.304. If, however, she determines Claimant has not established complicated pneumoconiosis, given her finding, which we have affirmed, that Claimant invoked the Section 411(c)(4) presumption, she must determine whether Employer can rebut it.

In reaching her conclusions on remand, the ALJ must set forth her findings in detail and explain her credibility determinations, findings of fact, and conclusions of law in accordance with the APA. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165.

Accordingly, ALJ's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge