U.S. Department of Labor

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

BRB No. 23-0464 BLA

RONCIE W. SPURLOCK Claimant-Respondent v. COPPERAS COAL CORPORATION and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 10/30/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2021-BLA-05516) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1] This case involves a subsequent claim filed on February 11, 2020.[2]

The ALJ credited Claimant with 19.54 years of underground coal mine employment and found he established the existence of clinical pneumoconiosis and legal pneumoconiosis. 20 C.F.R. §718.202(a). He also found Claimant established the presence of complicated pneumoconiosis and thus 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) (2018); *see* 20 C.F.R. §718.304, and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.[3] Further, he found Claimant's complicated

[1] Employer moved for the ALJ to remand the case to the district director to correct the numbering of the Director's Exhibits. Director's Exhibit 96. By Order dated June 7, 2021, the ALJ remanded the case to the district director to resolve the numbering of the Director's Exhibits. Director's Exhibit 101. The record contains Director's Exhibits 1 through 106: Director's Exhibits 1 through 35 contain evidence from Claimant's prior claim and Director's Exhibits 36 through 106 contain evidence from his current claim. At the May 23, 2023 telephonic hearing, both Claimant and Employer each confirmed to the ALJ that they had all of the Director's Exhibits. Hearing Tr. at 6-8. Although the ALJ's citation to some of the Director's Exhibits in his decision does not accord with the numbering indicated in the record, his error in this regard, if any, is harmless because we are able to discern the evidence that he considered in his analysis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[2] On June 6, 2018, the district director denied Claimant's prior claim, filed on October 16, 2017, because he did not establish total disability. Director's Exhibit 2. Claimant did not further pursue benefits until he filed his current claim. Director's Exhibit 39.

[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 "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)(1); *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 Claimant's prior claim was denied for failure to establish total

pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203. Thus, he awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established the presence of complicated pneumoconiosis and thus invoked the Section 411(c)(3) presumption.[4] It also argues the ALJ erred in finding Claimant established legal pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer filed a reply brief, reiterating its contentions.

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. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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 consider 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); *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56 (4th Cir. 2000); *Double B*

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disability, Claimant had to submit evidence establishing this element to obtain review of the merits of his current claim. *Id*.

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established 19.54 years of underground coal mine employment and the existence of simple clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7, 22-23.

[5] 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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 40; Hearing Tr. at 18.

Mining, Inc. v. Blankenship, 177 F.3d 240, 243-44 (4th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The ALJ found the x-ray and medical opinion evidence supports a finding of complicated pneumoconiosis.[6] 20 C.F.R. §718.304(a), (c); Decision and Order at 16-23. Weighing all of the evidence together, he concluded Claimant established the presence of complicated pneumoconiosis and thus invoked the irrebuttable presumption at Section 411(c)(3) of the Act. *Id*. at 23.

Section 718.304(a) – X-rays

The ALJ considered eleven interpretations of five chest x-rays dated January 6, 2018, March 4, 2020, July 22, 2020, March 14, 2021, and April 8, 2021. All of the physicians who interpreted the x-rays are dually qualified as B readers and Board-certified radiologists. Dr. Seaman read the January 6, 2018 x-ray as negative for complicated pneumoconiosis. Director's Exhibit 59. Drs. DePonte, Crum, and Meyer each read the March 4, 2020 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Seaman read the x-ray as negative for the disease.[7] Director's Exhibits 16, 21, 23, 24. Dr. DePonte read the July 22, 2020 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Seaman read the x-ray as negative for the disease. Director's Exhibits 22, 25. Finally, Dr. DePonte read the March 14, 2021 and April 8, 2021 x-rays as positive for complicated pneumoconiosis, Category A, while Dr. Adcock read the x-rays as negative for the disease. Claimant's Exhibits 1, 4; Employer's Exhibits 1, 2.

The ALJ found the January 6, 2018 x-ray negative for complicated pneumoconiosis, the March 4, 2020 x-ray positive for complicated pneumoconiosis, and the readings of the July 22, 2020, March 14, 2021, and April 8, 2021 x-rays in equipoise. Decision and Order at 17-18. Finding the March 4, 2020 x-ray entitled to greater weight than the January 6, 2018 x-ray because it is more recent than the negative x-ray, the ALJ concluded the x-ray evidence supports a finding of complicated pneumoconiosis. *Id*. at 18.

Employer argues the ALJ erred in weighing Drs. DePonte's and Seaman's readings of the July 22, 2020 x-ray, and Dr. Meyer's reading of the March 4, 2020 x-ray, because neither party designated them as evidence. Employer's Brief at 4-7; Employer's Reply Brief at 1-6. Employer is correct, and Claimant agrees, that the parties designated only

[6] The record does not contain biopsy or computed tomography scan evidence. *See* 20 C.F.R. §718.304(b), (c).

[7] The ALJ correctly noted Dr. Lundberg read the March 4, 2020 x-ray for film quality only. Decision and Order at 17; Director's Exhibit 54.

eight readings of four chest x-rays dated January 6, 2018, March 4, 2020, March 14, 2021, and April 8, 2021.[8] Employer's Brief at 5-6; Claimant's Response Brief at 4-5.

With respect to the July 22, 2020 x-ray, the error is harmless as the ALJ found the conflicting readings of that x-ray in equipoise, and thus it neither confirms nor disproves the presence of complicated pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 734-35 (7th Cir. 2013) (rejecting employer's argument that ALJ's finding the x-ray and computed tomography (CT) scan evidence in equipoise violated the Administrative Procedure Act because ALJ properly considered interpreting physicians' qualifications and found evidence equally balanced). Employer does not explain how the ALJ's consideration of the equipoise July 22, 2020 x-ray readings affected his determination that the March 4, 2020 x-ray is positive for complicated pneumoconiosis and is the most probative x-ray in the record. *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").

In addition, while the ALJ erred in considering Dr. Meyer's positive reading of the March 4, 2020 x-ray, he properly weighed Drs. DePonte's and Crum's readings of the x-ray as positive for complicated pneumoconiosis and Dr. Seaman's reading of the x-ray as negative for the disease. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order at 17. As substantial evidence supports the ALJ's finding that the preponderance of the readings of the March 4, 2020 x-ray are positive for complicated pneumoconiosis, Employer has not set forth how this error it alleges would make a difference. *Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278.

Because the ALJ permissibly found the March 4, 2020 x-ray entitled to greater weight than the negative January 6, 2018 x-ray based on its recency, *Thorn v. Itmann Coal*

[8] On April 25, 2023, Employer filed an Evidence Summary form designating Dr. Seaman's reading of the January 6, 2018 x-ray as its affirmative x-ray evidence and Dr. Adcock's readings of the March 4, 2020 and April 8, 2021 x-rays, in addition to Dr. Seaman's reading of the March 4, 2020 x-ray, as its rebuttal x-ray evidence.

On May 23, 2023, Claimant filed an Evidence Summary form designating Dr. DePonte's readings of the March 4, 2020, March 14, 2021, and April 8, 2021 x-rays as his affirmative x-ray evidence and Dr. Crum's readings of the January 6, 2018 and March 4, 2020 x-rays as his rebuttal x-ray evidence. At the hearing, however, counsel for Claimant withdrew Dr. Crum's reading of the January 6, 2018 x-ray. Hearing Tr. at 8.

Co., 3 F.3d 713, 719 (4th Cir. 1993); *Adkins*, 958 F.2d at 51-52 (because pneumoconiosis is a latent and progressive disease, more recent evidence may be rationally credited where it shows a miner's condition has worsened); *Kincaid v. Island Creek Coal Co*., 26 BLR 1-43, 1-49-52 (2023), we affirm his determination that the x-ray evidence supports a finding of complicated pneumoconiosis. *See Addison*, 831 F.3d at 256-57; *Adkins*, 958 F.2d at 52-53; Decision and Order at 17-18.

Section 718.304(c) – Medical Opinions

The ALJ considered the medical opinions of Drs. Ajjarapu, Werchowski, Agarwal, Spagnolo, and Zaldivar. Decision and Order at 19-22. Drs. Ajjarapu, Werchowski, and Agarwal opined Claimant has complicated pneumoconiosis, while Dr. Spagnolo opined he does not. Director's Exhibit 51; Claimant's Exhibits 1, 4; Employer's Exhibit 4. Dr. Zaldivar stated he is unable to confirm or deny the presence of complicated pneumoconiosis because there are no CT scans to review. Employer's Exhibit 5.

The ALJ found Drs. Spagnolo's and Zaldivar's opinions not reasoned. Decision and Order at 22. In contrast, he found Drs. Ajjarapu's, Werchowski's, and Agarwal's opinions well-reasoned and documented. *Id*. He thus found the preponderance of the medical opinion evidence supports a finding of complicated pneumoconiosis. *Id*.

We initially reject Employer's argument that the ALJ erred in crediting the opinions of Drs. Ajjarapu, Werchowski, and Agarwal that Claimant has complicated pneumoconiosis because, it asserts, they did not provide bases for their opinions. Employer's Brief at 10-11. Contrary to Employer's argument, Drs. Ajjarapu, Werchowski, and Agarwal each based their opinions on a physical examination, objective tests, Claimant's coal mine employment, social and medical histories, and x-ray evidence. Director's Exhibit 51; Claimant's Exhibits 1, 4. The ALJ noted Drs. Ajjarapu, Werchowski, and Agarwal "based their complicated pneumoconiosis diagnosis on the objective data." Decision and Order at 22. He thus permissibly found their opinions well-reasoned, documented, and entitled to great weight. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 22.

We also reject Employer's argument that the ALJ failed to "properly analyze" Drs. Spagnolo's and Zaldivar's opinions as, it asserts, they are "based on a complete review of the evidence, and not just a snapshot of one exam." Employer's Brief at 12. Contrary to Employer's assertion, an ALJ is not required to credit the opinion of a physician who reviewed all of a miner's medical records when the opinion is otherwise not well-reasoned and documented. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996). In this case, the ALJ permissibly found Dr. Spagnolo's opinion that Claimant does not have complicated pneumoconiosis unpersuasive because the doctor relied on x-ray readings that

do not support a finding of complicated pneumoconiosis, contrary to his finding that the x-ray evidence as a whole supports a finding of the disease. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12 (4th Cir. 2000) (ALJ erred in relying on a doctor's opinion of simple clinical pneumoconiosis because it was based on a positive x-ray which the ALJ had discredited); *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (en banc) (reliability of a physician's opinion may be "called into question" when the diagnostic tests upon which the physician based his diagnosis have been undermined); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Decision and Order at 22.

Further, Dr. Zaldivar stated that "[w]ithout the CT scan of the chest, the issue is whether this is a pseudo plaque which represents thickening of the pleura due to any number of conditions, or complicated pneumoconiosis or cancer cannot be settled." Employer's Exhibit 5 at 5. The ALJ permissibly found Dr. Zaldivar's opinion equivocal because the doctor stated "Claimant *may* have complicated pneumoconiosis or *may* have something else." Decision and Order at 22 (emphasis in original); *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999) (weight to give the testimony of an uncertain witness is a question for the trier of fact); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988) (ALJ permissibly considered the equivocal nature of a physician's opinion).

Employer's arguments amount 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). As Employer raises no further challenges, we affirm the ALJ's finding that the medical opinion evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 22. We further affirm the ALJ's finding that all the evidence weighed together establishes the presence of complicated pneumoconiosis and thus Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis,[9] 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304, and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309; Decision and Order at 4, 24. In addition, we affirm, as unchallenged, the ALJ's finding that Claimant's complicated pneumoconiosis arose out of his coal mine employment. *See Skrack*, 6 BLR at 1-711; 20

[9] In view of our affirmance of the ALJ's finding that Claimant established the presence of complicated pneumoconiosis and thus 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) (2018); *see* 20 C.F.R. §718.304, we need not address Employer's assertion that the ALJ erred in finding Claimant established the existence of legal pneumoconiosis. *See Larioni*, 6 BLR at 1-1278.

C.F.R. §718.203(b); Decision and Order at 23. Consequently, we affirm the ALJ's award of benefits.

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

GREG J. BUZZARD
Administrative Appeals Judge