U.S. Department of Labor

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

BRB No. 22-0403 BLA

PHILLIP J. MARTIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DAKOTA, LLC c/o PATRIOT COAL CORPORATION	)	
	)	
and	)	DATE ISSUED: 12/08/2023
	)	
BRICKSTREET/ENCOVA MUTUAL INSURANCE	)	
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal[1] Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits (2020-BLA-05533) rendered on a subsequent claim filed on October 24, 2018,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 29.41 years of underground coal mine employment. She found he established complicated pneumoconiosis and therefore 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), and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §§718.304, 725.309(c). Further, she found Claimant's

[1] On September 21, 2022, the Benefits Review Board ordered Employer to show cause, within ten days of receipt of the order, why its appeal should not be dismissed for failure to file its Petition for Review and brief. *Martin v. Dakota, LLC*, BRB No. 22-0403 BLA (Sept. 21, 2022) (Order) (unpub.). On October 11, 2022, Employer filed its Petition for Review and brief, and responded that, due to a clerical error, the case was not docketed correctly and requested that its brief be accepted as part of the record. As no party has objected to Employer's request, the Board accepts Employer's brief as part of the record. 20 C.F.R. §802.217(e).

[2] This is Claimant's second claim for benefits. On January 31, 2020, the district director denied Claimant's prior claim, filed on May 10, 2010, for failure to establish any element of entitlement. Director's Exhibit 2 at 9.

[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 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); *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 any element of entitlement, he was required to submit new evidence establishing at least one element to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 2.

pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203(b).

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

The 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 & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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 large 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 is a condition that would yield results equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The ALJ must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether Claimant has invoked the irrebuttable presumption. *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, 1-33-34 (1991) (en banc).

Employer argues the ALJ erred in weighing the x-ray evidence. 20 C.F.R. §718.304(a); Employer's Brief at 4-10. The ALJ considered nine interpretations of three x-rays dated December 6, 2018, August 10, 2019, and March 3, 2020. Decision and Order at 20-22. Drs. Crum and Ramakrishnan read the December 6, 2018 x-ray as positive for

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 29.41 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 16; Director's Exhibits 7, 8.

simple and complicated pneumoconiosis. Director's Exhibit 22; Claimant's Exhibit 2. Dr. DePonte read the same x-ray as positive for simple pneumoconiosis and further diagnosed a category A opacity in the form of a pseudoplaque. Director's Exhibit 16 at 14. Dr. Meyer read this x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Employer's Exhibit 2. Dr. Adcock read this x-ray as positive for simple pneumoconiosis but, though he noted a "[m]inor pleural pseudoplaque formation," opined the x-ray is negative for complicated pneumoconiosis. Employer's Exhibit 3. Dr. DePonte read the August 10, 2019 x-ray as positive for simple and complicated pneumoconiosis with a category A large opacity. Director's Exhibit 23. She also read the March 3, 2020 x-ray as positive for simple pneumoconiosis and diagnosed "category A opacities in the form of pseudoplaques."[6] Claimant's Exhibit 1. Dr. Meyer read the same x-rays as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Employer's Exhibits 1, 4.

The ALJ initially noted all the interpreting physicians are dually qualified as B readers and Board-certified radiologists. Decision and Order at 21. She found the December 6, 2018 x-ray positive for pneumoconiosis because three physicians read the x-ray as positive for pneumoconiosis while two read it as negative for the disease. *Id.* She likewise found the interpretations of the August 10, 2019 and March 3, 2020 x-rays "in equipoise" because Dr. DePonte read each x-ray as positive for pneumoconiosis while Dr. Meyer read them as negative for the disease. *Id.* Therefore, having found one x-ray positive for pneumoconiosis and the interpretations of two in equipoise, the ALJ found Claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(a).

Employer contends the ALJ erred in crediting Dr. DePonte's diagnosis of complicated pneumoconiosis in the form of pseudoplaques because she failed to resolve the conflict between Drs. DePonte and Adcock as to whether pseudoplaques constitute complicated pneumoconiosis. Employer's Brief at 8-9. We disagree. Although Dr. Adcock diagnosed "[m]inor pleural pseudoplaque formation" and concluded there are no large opacities consistent with pneumoconiosis based on his reading of the December 6, 2018 x-ray, he did not indicate the size of this pseudoplaque formation, nor did he specifically opine pseudoplaques cannot constitute complicated pneumoconiosis. Employer's Exhibit 3. Thus, there is no conflict in the record as to whether pseudoplaques may constitute complicated pneumoconiosis.

[6] Claimant submitted Dr. DePonte's reading of a second x-ray dated March 3, 2020, which the ALJ declined to consider as it would exceed the evidentiary limitations at 20 C.F.R. §725.414(a). Claimant's Exhibit 1.

We agree, however, that the ALJ erred in assessing the qualifications of the physicians reading the x-rays. Employer's Brief at 5-7. The ALJ correctly noted all the readers are dually qualified, Decision and Order at 21, but she failed to address Employer's argument that Drs. Adcock and Meyer have superior academic and professional credentials that warrant greater weight. Employer's Post-Hearing Brief at 3-5. Although an ALJ may give greater weight to an expert with "superior" qualifications such as a professorship in radiology, she is not required to do so. *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); *see Melnick*, 16 BLR at 1-36-37; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-154 (1989) (en banc). She must, however, address Employer's contention that Drs. Adcock's and Meyer's credentials entitle their readings to greater weight.

We further agree the ALJ erred in finding the December 6, 2018 x-ray positive for complicated pneumoconiosis. Employer's Brief at 4-5. As Employer accurately notes, *id.*, the ALJ provided no rationale for crediting the positive readings of Drs. DePonte, Crum, and Ramakrishnan over the contrary readings of Drs. Adcock and Meyer but rather found this x-ray positive for complicated pneumoconiosis because "two readings [identified] no large opacities and three [identified] category A opacities." Decision and Order at 22; Employer's Brief at 4. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has expressed disapproval of "counting heads" to resolve conflicting evidence, *Adkins*, 958 F.2d at 52 ("counting heads" is a "hollow" way to resolve conflicts in the evidence), but has approved of weighing x-ray evidence by taking into account both the quality (such as the credentials of the readers) as well as the quantity of the interpretations. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins*, 958 F.2d at 52-53. In this regard, an ALJ must consider and address evidence which detracts from or supports the credibility of evidence. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997). Here, as Employer contends, the ALJ failed to address Employer's arguments regarding inconsistencies in Dr. DePonte's interpretations which may render her readings less persuasive. Employer's Brief at 7-10; Employer's Post-Hearing Brief at 5-7.

For the reasons set forth above, we vacate the ALJ's finding that the evidence establishes complicated pneumoconiosis, 20 C.F.R. §718.304, and remand the case for further consideration. On remand, the ALJ must consider the x-ray interpretations, the readers' qualifications, and the nature of the readings when resolving the conflicting x-ray interpretations. *See Addison*, 831 F.3d at 256-57 (ALJ must perform both a qualitative and quantitative analysis of conflicting x-ray evidence); *Adkins*, 958 F.2d at 52. The ALJ must also adequately explain her bases for resolving the conflicting evidence as the Administrative Procedure Act Requires (APA).[7] *See* 5 U.S.C. §557(c)(3)(A), as

[7] The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions and the reasons or basis therefor, on all the material issue

incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

The ALJ should first address whether Claimant can invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act by establishing complicated pneumoconiosis. If the ALJ finds the evidence establishes complicated pneumoconiosis, she must address whether the evidence establishes that Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *Daniels Co. v. Mitchell*, 479 F.3d 321, 339 (4th Cir. 2007). If Claimant cannot establish complicated pneumoconiosis, the ALJ must address whether Claimant has established total disability. 20 C.F.R. §§718.204(b), 718.305(b). If Claimant establishes total disability, he will have invoked the presumption of total disability due to pneumoconiosis at the Section 411(c)(4) of the Act,[8] 30 U.S.C. §921(c)(4), and the ALJ must then determine whether Employer has rebutted the presumption. *See* 20 C.F.R. §718.305(d)(1)(i), (ii). If the ALJ finds Claimant is not disabled, however, she must deny benefits, as Claimant will have failed to have established a necessary element of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). In rendering her credibility findings on remand, the ALJ must explain her findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

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).

[8] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has 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.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Awarding Benefits, and we remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge