U.S. Department of Labor

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

BRB No. 22-0501 BLA

ROBERT L. McCOWAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LAUREL RUN MINING COMPANY	)	
	)	
and	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 12/05/2023
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Jonathan C. Masters (Masters Law Office PLLC), South Williamson, Kentucky, for Claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer.

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

Claimant appeals Administrative Law Judge (ALJ) Patricia J. Daum's Decision and Order Denying Benefits (2019-BLA-05709) rendered on a subsequent claim[1] filed on March 12, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established at least twenty-four years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She thus found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. However, she found Employer rebutted the presumption by establishing Claimant does not have pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i), and thus he failed to establish a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). She therefore denied benefits.

[1] This is Claimant's third claim for benefits. Director's Exhibits 1; 2. On April 22, 2016, ALJ Richard A. Morgan denied Claimant's prior claim, filed October 14, 2010, because Employer successfully rebutted the Section 411(c)(4) presumption of pneumoconiosis. Decision and Order at 2; Director's Exhibit 2. Claimant took no further action until filing his current claim.

[2] Section 411(c)(4) of the Act 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); 20 C.F.R. §718.305.

[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 they find 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 ALJ Morgan denied Claimant's prior claim for failure to establish pneumoconiosis, Claimant had to submit new evidence establishing that element in order to obtain review of his current claim on the merits. *White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c)(3), (4).

On appeal, Claimant argues the ALJ erred in finding the Section 411(c)(4) presumption rebutted.[4] Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

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 into the act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis, or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer established rebuttal by disproving the existence of pneumoconiosis. Decision and Order at 35. Claimant challenges the ALJ's finding that Employer disproved clinical pneumoconiosis.[6] Claimant's Brief at 4-12.

To disprove clinical pneumoconiosis, Employer must establish Claimant does not have any of the diseases "recognized by the medical community as pneumoconioses, *i.e.*,

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established at least twenty-four years of qualifying coal mine employment and total disability, and therefore invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.305; Decision and Order at 5, 26.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6; Hearing Tr. at 9-10, 16.

[6] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). We affirm, as unchallenged on appeal, the ALJ's finding that Employer rebutted the existence of legal pneumoconiosis. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §§718.201(a)(2), 718.305(d)(1)(i)(A); Decision and Order at 35.

the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(1), 718.305(d)(1)(i)(B). The ALJ found the x-rays, medical opinions, and other evidence disproves clinical pneumoconiosis.[7] Decision and Order at 29-35.

The ALJ first considered five readings of two x-rays dated May 15, 2018, and September 21, 2018, by Drs. Meyer, Willis, Adcock, and Basheda.[8] *Id.* at 8-10, 30-31. The ALJ noted that Drs. Adcock, Meyer, and Willis are dually-qualified as B readers and Board-certified radiologists, and she found they are more qualified than Dr. Basheda, a B reader only. *Id*. at 30. Drs. Meyer and Willis read the May 15, 2018 x-ray as positive for pneumoconiosis, while Dr. Adcock read it as negative for the disease. Director's Exhibit 11 at 6; Claimant's Exhibit 1; Employer's Exhibit 2. In the comments section of his International Labour Organization (ILO) x-ray form, Dr. Meyer stated that "[b]y ILO rules I must classify this as possible simple coal workers' pneumoconiosis." Claimant's Exhibit 1. He also stated "[s]moking-related respiratory bronchiolitis has a similar appearance" and a computed tomography (CT) scan "would be useful for better characterization." *Id.* Drs. Basheda and Adcock read the September 21, 2018 x-ray as negative for pneumoconiosis. Director's Exhibit 15 at 40-41; Employer's Exhibit 3.

Although the ALJ indicated the May 15, 2018 x-ray is positive because it has a greater number of positive readings by dually-qualified radiologists, she gave it little weight because she found that Dr. Meyer's narrative comments with respect to possible smoking-induced bronchiolitis indicate he was "not convinced" the x-ray is actually positive. Decision and Order at 30-31. She further assigned the x-ray diminished weight because she found Drs. Meyer and Adcock, a majority of the dually-qualified radiologists, gave the x-ray a grade two quality rating on the ILO x-ray form while only Dr. Willis gave it a grade one rating.[9] *Id.*

[7] The ALJ found the record contains no biopsy evidence. Decision and Order at 29.

[8] Dr. Gaziano read the May 15, 2018 x-ray for quality purposes only. Director's Exhibit 12.

[9] The ILO x-ray form allows a radiologist to identify the quality of the radiograph. 20 C.F.R. §718.102 (standards for x-rays), *incorporating by reference Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses*, Revised edition 2011 (ILO Guidelines). The ILO guidelines set forth four quality ratings of one, two, three, and unreadable. A grade one quality rating denotes the film is "[g]ood," a grade two rating denotes the film is "[a]cceptable, with no technical defect likely to impair

The ALJ next found the September 21, 2018 x-ray is negative for pneumoconiosis based on the unrebutted negative readings of Drs. Basheda and Adcock, and that it is entitled to significant weight because both physicians gave it a grade one quality rating. *Id.* Weighing the two x-rays together, she found the negative September 21, 2018 x-ray outweighs the positive May 15, 2018 x-ray, and thus found the x-ray evidence is negative for pneumoconiosis and rebuts the existence of clinical pneumoconiosis. *Id*. at 31.

Claimant argues the ALJ erred in finding the September 21, 2018 x-ray outweighs the May 15, 2018 x-ray because of Dr. Meyer's comments. Claimant's Brief at 4-6. We agree.

The ALJ found Dr. Meyer's comments "suggest[] that he was not convinced that the x-ray demonstrated pneumoconiosis." Decision and Order at 31. She determined that, "while his reading is technically positive, . . . Dr. Meyer's positive reading is [not] any more supportive of Dr. Willis'[s] positive reading than Dr. Meyer's narrative is supportive of Dr. Adcock's negative reading." *Id*.

We are unable to affirm this finding. Because Dr. Meyer's x-ray reading is positive for pneumoconiosis under the regulatory criteria, which apply the ILO guidelines, the ALJ erred in concluding his reading undermines a finding of pneumoconiosis. *See Piney Mountain Caol Co. v. Mays*, 176 F.3d 753, 763 (4th Cir. 1999) (opinion that pneumoconiosis "could be" a complicating factor in miner's death was not equivocal); *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006) (refusal to express a diagnosis in categorical terms is candor, not equivocation); 20 C.F.R. §718.102(d) (x-ray classified as Category 1, 2, or 3 in accordance with the ILO classification system constitutes evidence of pneumoconiosis); Decision and Order at 31; Claimant's Exhibit 1. Additionally, the ALJ did not address the veracity of Dr. Meyer's only alternative diagnosis to pneumoconiosis, smoking-induced bronchiolitis, in light of her own finding that Claimant never smoked. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253-54 (4th Cir. 2016); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984); Claimant's Brief at 5.

Moreover, we agree with Claimant's argument that the ALJ did not adequately address his treatment record evidence. Claimant's Brief at 5-8. Claimant sought treatment from Huntington Veterans Affairs Medical Center for pulmonary issues and adenopathy

---

classification of the radiograph for pneumoconiosis," and a grade three rating denotes the film is "[a]cceptable, with some technical defect but still adequate for classification purposes." ILO Guidelines at 3. An unreadable rating denotes the film is unacceptable for classification purposes. *Id*.

on multiple occasions. Employer's Exhibit 1. The April 4, 2016 treatment record states Claimant was seen for pneumoconiosis, lymphadenopathy, lung nodules, right upper lung infiltrate, dyspnea, and hypoxemia, and he underwent a CT scan to follow-up on a January 4, 2016 CT scan that showed right upper lung infiltrate. *Id.* at 1. It further stated the infiltrate appeared to be resolved and was likely due to inflammation, but that the other changes were stable. *Id.* at 1-2. Another treatment note from May 18, 2016, states a CT scan conducted that day showed a "[s]table tiny pulmonary nodule in the right lung." *Id.* at 8. Additionally, treatment records from Pikeville Medical Center state Claimant has pulmonary nodules and coal workers' pneumoconiosis, and that a bronchoscopy showed black spots in his airways. Claimant's Exhibit 3 at 2, 14, 17.

The ALJ summarized Claimant's treatment records and concluded they do not support a finding of clinical pneumoconiosis. Decision and Order at 10, 19-20, 34. To the extent the ALJ determined the weight to give to Claimant's treatment records and CT scans based on whether they "support a finding of the existence of pneumoconiosis," she has applied an erroneous legal standard. Decision and Order at 34. Because it is Employer's burden to rebut the presumption of pneumoconiosis, the proper inquiry is whether Claimant's treatment record evidence rebuts the existence of clinical pneumoconiosis. *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018); 20 C.F.R. §§718.201(a)(1), (b), 718.305(d)(1)(i)(B).

Additionally, the ALJ neither explained this finding nor addressed whether Claimant's treatment records, that document pneumoconiosis and do not mention any smoking-induced bronchiolitis on CT scan, affect her decision to give less weight to Dr. Meyer's positive x-ray reading based on his identification of possible smoking-related bronchiolitis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208 (4th Cir. 2000); *Addison*, 831 F.3d at 253-54; *McCune*, 6 BLR at 1-998.

Finally, the ALJ failed to adequately explain why the September 21, 2018 x-ray is entitled to more weight than the May 15, 2018 x-ray based on the image quality ratings. Decision and Order at 30-31. The regulations do not require x-ray readings to be of optimal quality; they only need to "be of suitable quality for proper classification of pneumoconiosis." 20 C.F.R. §718.102(a); *Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214, 1-1215-16 (1984). A grade one rating indicates the image is "[g]ood" and a grade two quality rating indicates the image is "[a]cceptable, with no technical defect likely to impair classification of the radiograph for pneumoconiosis." *Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses* at 3 (rev. ed. 2011).

Drs. Meyer, Adcock, and Gaziano gave the May 15, 2018 x-ray a grade two rating, while Dr. Willis gave it a grade one rating. Director's Exhibits 11 at 6; 12; Claimant's Exhibit 1; Employer's Exhibit 2. The physicians gave different reasons for the grade two

quality rating: Dr. Meyer indicated the image is overexposed, Dr. Adcock indicated it had excessive contrast, and Dr. Gaziano explained that "the left lateral chest was cut off." Director's Exhibit 16 at 1; Claimant's Exhibit 1; Employer's Exhibit 2. However, no physician opined that the May 15, 2018 x-ray's image quality influenced their interpretations. Drs. Basheda and Adcock gave the September 21, 2018 x-ray a grade one rating. Director's Exhibit 15 at 40; Employer's Exhibit 3. The ALJ found the September 21, 2018 x-ray was entitled to more weight, in part, because it is of "optimal" quality, while only Dr. Willis gave the May 15, 2018 x-ray an "optimal" rating. Decision and Order at 30-31.

Because no physician opined the May 15, 2018 x-ray is unreadable or unsuitable for classification of pneumoconiosis, the ALJ has not explained, as the Administrative Procedure Act (APA)[10] requires, why it is entitled to less weight than the September 21, 2018 x-ray based on image quality. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998) (ALJ erred by failing to adequately explain why he credited certain evidence and discredited other evidence); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

In light of the foregoing errors, we vacate the ALJ's weighing of the x-ray evidence and Claimant's treatment records and remand the case for reconsideration. Decision and Order at 30-31, 34.

The ALJ also considered the medical opinions of Drs. Basheda, Spagnolo, and Gaziano concerning clinical pneumoconiosis. *Id.* at 32-33. The ALJ credited the opinions of Drs. Basheda and Spagnolo that Claimant does not have clinical pneumoconiosis because their conclusion "is based on their comprehensive examination of all the imaging and is well-supported by the objective medical records in this matter." *Id.* at 33. She discredited Dr. Gaziano's opinion that Claimant has clinical pneumoconiosis on the grounds that his opinion is based on his own reading of the May 15, 2018 x-ray and he failed to address the CT scan evidence.[11] *Id.* at 32-33. Thus, she found the medical

[10] The Administrative Procedure Act, 5 U.S.C. §§500-591, requires that every adjudicatory decision 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[11] We agree with Claimant's argument that the ALJ erred in discrediting Dr. Gaziano's opinion on the grounds that he relied upon his own reading of the May 15, 2018 x-ray, which was not admitted into the record. Claimant's Brief at 12. Claimant correctly notes that Dr. Gaziano based his opinion on his interpretation of a January 18, 2011 x-ray

opinions also weighed against the existence of clinical pneumoconiosis. *Id.* Because we have vacated the ALJ's findings based on the x-ray evidence and Claimant's treatment records, which affected the weight she assigned the medical opinions, we also vacate her finding that the medical opinions weigh against the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Remand Instructions

On remand, the ALJ must reconsider whether Employer rebutted the Section 411(c)(4) presumption by establishing that Claimant does not have clinical pneumoconiosis. She must reconsider Dr. Meyer's reading of the May 15, 2018 x-ray and the overall weight of that x-ray, and reweigh the x-ray evidence overall. *See Mays*, 176 F.3d at 763; *Perry*, 469 F.3d at 366; 20 C.F.R. §§718.102(d), 718.305(d)(1)(i). In addition, she must consider and weigh the treatment record and CT scan evidence, and adequately explain her findings. *Wojtowicz*, 12 BLR at 1-165. She must also reweigh the medical opinions of Drs. Basheda, Spagnolo, and Gaziano taking into consideration the physicians' credentials, explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their opinions. *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Wojtowicz*, 12 BLR at 1-165; 20 C.F.R. §718.204(b)(2)(iv). The ALJ must explain the bases for her credibility determinations, findings of fact, and conclusions of law as the APA requires. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165.

If Employer establishes Claimant does not have clinical pneumoconiosis, it will have rebutted the presumption, and the ALJ can reinstate the denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc). However, if Employer does not disprove the clinical form of the disease, a rebuttal finding that Claimant does not have pneumoconiosis is precluded. The ALJ must then specifically address the second rebuttal method and render a finding as to whether Employer established that no part of Claimant's respiratory disability is due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

---

conducted in Claimant's prior claim for benefits and did not provide or rely upon his own substantive reading of the May 15, 2018 x-ray. *See* Director's Exhibit 16 at 2. Thus the ALJ's discrediting of Dr. Gaziano's opinion on this ground is not supported by substantial evidence. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the ALJ 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