U.S. Department of Labor

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

BRB No. 23-0489 BLA

ROBERT L. PLASTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	**NOT-PUBLISHED**
	)	
GLAMORGAN COAL CORPORATION	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 02/28/2025
	)	
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.

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

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) William P. Farley's Decision and Order Awarding Benefits (2020-BLA-06158) rendered on a subsequent claim filed on

November 4, 2019,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

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

On appeal, Employer asserts the ALJ erred in admitting and considering evidence in excess of the evidentiary limitations. On the merits, it contends the ALJ erred in finding Claimant established complicated pneumoconiosis.[3] Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs (the Director), declined to file a response brief unless requested.

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.[4] 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, 361-62 (1965).

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[1] The district director denied Claimant's prior claim, filed on August 22, 2017, for failure to establish total disability. Director's Exhibit 1.

[2] 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 district director denied Claimant's prior claim for failure to establish total disability, Claimant had to submit new evidence establishing this element to obtain review of his current claim on the merits. *White*, 23 BLR at 1-3.

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

[4] 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 Virginia. *See*

Evidentiary Ruling

The regulatory evidentiary limitations provide, in relevant part, that each party may submit: two x-ray readings as part of its affirmative case; one x-ray reading to rebut each affirmative x-ray reading submitted by the opposing party; one x-ray reading to rebut the x-ray reading submitted by the Director as part of the Department of Labor (DOL)-sponsored complete pulmonary evaluation of the miner; and, finally, one piece of rehabilitative evidence for any of the party's affirmative x-rays that were rebutted by the opposing party. 20 C.F.R. §725.414(a)(2), (3). Medical evidence that exceeds these limitations "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1). The ALJ is obligated to enforce these limitations even if no party objects to the evidence or testimony. *See Smith v. Martin Cnty. Coal Corp*., 23 BLR 1-69, 1-74 (2004) (evidentiary limitations set forth in the regulations are mandatory and, as such, are not subject to waiver).

Dr. DePonte read the February 10, 2020 x-ray as part of Claimant's DOL-sponsored complete pulmonary evaluation. Director's Exhibit 12. Claimant designated Dr. DePonte's readings of the March 19, 2020 and August 17, 2021 x-rays as his affirmative evidence; Dr. DePonte's reading of the August 11, 2021 x-ray as rebuttal evidence to Employer's affirmative x-ray evidence; and Dr. Crum's reading of the February 10, 2020 x-ray to rebut the x-ray submitted by the Director as part of the DOL-sponsored complete pulmonary evaluation of Claimant. Claimant's Evidence Summary Form; Director's Exhibits 12, 17, 19; Claimant's Exhibits 1, 7. He also submitted a medical report from Dr. DePonte consisting of a serial review and explanation of her overall findings with respect to the February 10, 2020, March 19, 2020, August 11, 2021, and August 17, 2021 x-rays that she had previously read individually. Claimant's Evidence Summary Form; Claimant's Exhibit 8.

At the hearing, Employer objected to the admission of Dr. DePonte's report in its entirety, asserting it constituted x-ray interpretations in excess of the evidentiary limitations. Hearing Transcript at 8-11, 14. The ALJ admitted Dr. DePonte's report into the record. *Id.* at 14; Decision and Order at 2.

Employer argues remand is required because the ALJ erred in admitting Dr. DePonte's medical report, again contending it constitutes x-ray evidence in excess of the evidentiary limitations. Employer's Brief at 3-5; *see* Claimant's Exhibit 8. We need not resolve this issue because Employer has not explained why the alleged error requires

Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 34; Director's Exhibit 4.

remand. *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"). The ALJ did not address or cite Dr. DePonte's separate report in his consideration of the x-ray evidence at 20 C.F.R. §718.304(a). Additionally, in considering it as a medical report at 20 C.F.R. §718.304(c), he accorded it no weight on the issue of complicated pneumoconiosis. Decision and Order at 17-19, 22. Thus, absent an explanation from Employer as to how it was prejudiced by the ALJ's evidentiary ruling, any error in his admitting and considering Dr. DePonte's report was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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 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. Consol. Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found the x-ray evidence supports a finding of complicated pneumoconiosis, whereas he found the medical opinion evidence is inconclusive and neither supports nor refutes a finding of complicated pneumoconiosis.[5] 20 C.F.R. §718.304(a), (c); Decision and Order at 19, 23-24. Weighing the evidence together, he found Claimant established complicated pneumoconiosis by a preponderance of the evidence. Decision and Order at 23-24.

The ALJ considered nine interpretations of four x-rays dated February 10, 2020, March 19, 2020, August 11, 2021, and August 17, 2021. Decision and Order at 8-9, 17-19. He found all the physicians who interpreted the x-rays are dually qualified as B readers and Board-certified radiologists. *Id.* at 17-19. Drs. DePonte and Crum read the February 10, 2020 x-ray as positive for simple and complicated pneumoconiosis, Category A, while Dr. Seaman read it as positive for simple pneumoconiosis but negative for complicated

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

pneumoconiosis. Director's Exhibits 12, 19, 20. Dr. DePonte read the March 19, 2020 and August 11, 2021 x-rays as positive for simple and complicated pneumoconiosis, Category A, while Dr. Tarver interpreted these x-rays as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibit 18; Claimant's Exhibit 7; Employer's Exhibits 2; 4 at 24; 5. Finally, Dr. DePonte read the August 17, 2021 x-ray as positive for simple and complicated pneumoconiosis, Category A, whereas Dr. Seaman read it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 6.

The ALJ found the February 10, 2020 x-ray is positive for complicated pneumoconiosis because a greater number of dually-qualified radiologists read it as positive than as negative. Decision and Order at 17-18. He further found the readings of the March 19, 2020, August 11, 2021, and August 17, 2021 x-rays "in equipoise" because an equal number of dually-qualified physicians read each x-ray as positive compared to negative for the disease. *Id.* at 18-19. Because one x-ray is positive for complicated pneumoconiosis and the readings of the remaining x-rays are in equipoise, he found the x-ray evidence supports a finding of complicated pneumoconiosis. *Id.* at 19.

Employer contends the ALJ erred in finding the February 10, 2020 x-ray positive for complicated pneumoconiosis because he impermissibly "count[ed] heads" to resolve the conflict in the evidence. Employer's Brief at 8-9. We disagree.

In weighing the x-ray evidence, the ALJ accurately observed that all the interpreting physicians are dually qualified as B readers and Board-certified radiologists. Decision and Order at 18-19; Director's Exhibits 14; 19 at 4; 20 at 4; Employer's Exhibit 2 at 3. Because the physicians "have equal radiological credentials," the ALJ "grant[ed] their readings equal weight on the basis of credentials and qualifications." Decision and Order at 19. Thus, giving each of the readers of the February 10, 2020 x-ray "the same weight," the ALJ determined it supports a finding of complicated pneumoconiosis. *Id.* at 18.

Employer asserts that because there is nothing in the record indicating Drs. DePonte or Crum had more information concerning Claimant or any other reason to give their opinions greater weight, the ALJ erred in finding this x-ray is positive for complicated pneumoconiosis. Employer's Brief at 8. Contrary to Employer's contentions, the ALJ properly performed both a qualitative and quantitative analysis of the conflicting x-ray readings, taking into consideration the physicians' opinions and their qualifications. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016); Decision and Order at 17-19; Director's Exhibits 12, 18-20; Claimant's Exhibits 1, 7; Employer's Exhibits 2, 4-6. Having found a preponderance of the readings by equally qualified physicians to be positive for complicated pneumoconiosis, he permissibly determined the February 10,

2020 x-ray is positive for the disease. 20 C.F.R. §718.202(a)(1); Decision and Order at 17-18.

Moreover, because he found the February 10, 2020 x-ray positive for complicated pneumoconiosis and the readings of the March 19, 2020, August 11, 2021, and August 17, 2021 x-rays in equipoise, the ALJ rationally found the x-ray evidence as a whole establishes the disease. Decision and Order at 19; *see* 20 C.F.R. §718.304(a). Thus, we affirm the ALJ's conclusion that the x-ray evidence supports a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(a). Decision and Order at 19.

As Employer raises no further challenges to the ALJ's determination that Claimant established complicated pneumoconiosis, we affirm it and therefore also affirm his conclusion that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. *See Skrack v Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 24. We further affirm, as unchallenged on appeal, the ALJ's determination that Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack*, 6 BLR at 1-711; Decision and Order at 25.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge