U.S. Department of Labor

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

BRB No. 23-0073 BLA

GARY TAYLOR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SAPPHIRE COAL COMPANY	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE/AIG	)	DATE ISSUED: 01/05/2024
	)	
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 Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Timothy J. Walker and Daniel G. Murdock (Fogle Keller Walker, 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 Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2021-BLA-05199) rendered on a subsequent claim filed on September 27, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

At the hearing, the ALJ denied Employer's request for an extension of time to obtain and submit the pathology report of Dr. Roggli. In his decision, the ALJ credited Claimant with 13.38 years of qualifying coal mine employment and also found that he established complicated pneumoconiosis. Thus, the ALJ found Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2018), and established a change in the applicable condition of entitlement.[2] 20 C.F.R. §§718.304, 725.309(c). He further found Claimant's complicated 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 denying its request for an extension to obtain and submit the pathology report of Dr. Roggli. On the merits of entitlement, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis. Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed 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

[1] This is Claimant's fourth claim for benefits. Director's Exhibits 1-3. On May 24, 2016, the district director denied Claimant's most recent prior claim, filed on August 27, 2015, for failure to establish the presence of a totally disabling pulmonary or respiratory impairment, and Claimant took no further action on that claim. Director's Exhibit 3.

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

accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc*., 380 U.S. 359, 361-62 (1965).

Evidentiary Challenge

Claimant testified by deposition on September 2, 2020, that he underwent a lung biopsy at the University of Kentucky Medical Center ("UKMC"). Employer's Exhibit 7 at 17.

Prior to the hearing, the ALJ set a deadline of June 30, 2021, for the parties to designate and exchange exhibits they planned to rely on as initial evidence. April 6, 2021 Case Schedule; Supplemental Prehearing Order; and Notice of Intent to Take Official Notice at 1-2. The ALJ instructed the parties that they could extend the deadline as long as the parties agreed in writing, and he notified them that he might exclude evidence which did not comply with his Order. *Id*. at 2-3. On October 7, 2021, Employer requested an extension of time to obtain and submit the pathology report of Dr. Roggli. Employer's Motion for Extension at 1. At the November 1, 2021 hearing, Employer's counsel conceded Claimant's counsel never agreed to extend the deadline. Hearing Transcript at 13-14. Noting Employer's Motion for Extension was filed more than three months after the due date for the evidence, the ALJ considered whether Employer established excusable neglect in failing to timely obtain and submit Dr. Roggli's report. *Id*.

Employer explained it had difficulty obtaining the biopsy slides from UKMC after making its first request for the slides on November 6, 2020; it did not receive the slides until September 22, 2021.[4] Hearing Transcript at 14-15. It did not request a subpoena during this time period. *Id*. at 15. Claimant objected to Employer's Motion for Extension at the hearing because it would take time for him to obtain evidence to rebut the report. *Id*. at 16-17. The ALJ stated Employer could have been more diligent in seeking help in obtaining the slides prior to the evidentiary deadline. *Id*. at 17-19. Citing the potential prejudice to Claimant, including the time it would take for Claimant to respond to Dr.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6; Hearing Transcript at 22.

[4] During Claimant's September 2, 2020 deposition, Employer first learned Claimant underwent a lung biopsy at the University of Kentucky Medical Center. Employer's Exhibit 7 at 17.

Roggli's report, and the detrimental effect of the anticipated delays on the ALJ's docket, the ALJ denied Employer's Motion for Extension. *Id*. at 18-19. The ALJ emphasized that he denied Employer's Motion for Extension because of Employer's "lack of diligence in obtaining the slides from the University Hospital by not seeking a subpoena from" him. *Id*. at 19.

On appeal, Employer asserts the ALJ erred in denying its request for an extension of time to obtain and submit Dr. Roggli's report. Employer's Brief at 6-7. Specifically, Employer asserts the ALJ denied its request for an extension of time "based on the representation of Claimant's counsel that Claimant had no notice of the slides being read by Dr. Roggli before the motion was filed on October [7], 2021, but Employer in fact disclosed its intent [to] have the slides read to the Claimant on August 31, 2021." *Id.* Employer further argues Claimant would not have been harmed by the ALJ's granting of its request to obtain and submit Dr. Roggli's report post-hearing because he is already receiving benefits. *Id.* Finally, Employer contends the ALJ should have prioritized the fair adjudication of the claim over the potential effects granting an extension would have on his docket. *Id.* We conclude the ALJ acted within his discretion in denying Employer's extension request to obtain and submit Dr. Roggli's report.

The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (OALJ Rules) apply in proceedings under the Act to the extent they are not inconsistent with either the Act itself or the Act's regulations. 29 C.F.R. §18.10(a). The OALJ rules in turn adopt the Federal Rules of Civil Procedure "excusable neglect" standard for determining whether an untimely pleading should be entertained. *See* 29 C.F.R. §18.32(b), *accord* Fed. Rule Civ. P. 6(b)(1)(B). Specifically, when an act "must be done within a specified time," the ALJ "may, for good cause, extend the time . . . if the party failed to act because of *excusable neglect*." *Id*. (emphasis added). This is a strict standard under which judges must have "good reasons for permitting litigants to exceed deadlines." *Robinson v. City of Harvey, Ill.*, 617 F.3d 915, 918-19 (7th Cir. 2010), *citing Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 395 (1996). Further, the moving party bears the burden of proving that its delay is excusable. *Drippe v. Tobelinski*, 604 F.3d 778, 784 (3d Cir. 2010), *citing Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 896 n.5 (1990).

The United States Supreme Court has outlined four factors to consider when determining if "excusable neglect," i.e. good cause, exists: (1) prejudice to the opposing party; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant;

and (4) whether the movant acted in good faith.[5] *Pioneer Inv. Services Co.*, 507 U.S. at 395. As the Court explained, "the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Id.*

We see no error in the ALJ's denial of Employer's Motion for Extension of time to obtain and submit Dr. Roggli's report. The ALJ analyzed all four of the excusable neglect factors enumerated in *Pioneer Investment Services* prior to rendering his determination. *See Pioneer Inv. Services Co.*, 507 U.S. at 395; Hearing Transcript at 12-21. The ALJ explained that granting Employer's request for an extension of time to obtain and submit Dr. Roggli's report would cause a significant delay because he would have to allow Claimant time to respond to Dr. Roggli's report, which would in turn disrupt his docket. *Id*. at 18-19. Taking into account that the initial deadline was June 30, 2021, the ALJ noted Employer still did not have the report as of the time of the hearing on November 1, 2021.[6] *Id.* The ALJ also determined that, while Employer did not act in bad faith, it could have "pursued with more diligence" the slides Dr. Roggli required to write his report, and thus its failure to timely obtain and submit Dr. Roggli's report was within Employer's control. *Id.* at 18. After discussing and weighing all four factors of the excusable neglect standard, the ALJ permissibly gave controlling weight to Employer's lack of diligence in obtaining the slides and its failure to seek a subpoena for them from him. *Id.* at 19; *see Pioneer Inv. Services Co.*, 507 U.S. at 395.

An ALJ exercises broad discretion in resolving procedural and evidentiary matters. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). Thus, a party seeking to overturn the disposition of a procedural or evidentiary issue must establish an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). Here, Employer has failed to establish the ALJ abused his discretion in denying its request for an extension of time to obtain and submit Dr. Roggli's report. We therefore affirm the ALJ's denial of Employer's request for an extension of time to obtain and submit Dr. Roggli's report.

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[5] The United States Court of Appeals for the Third Circuit acknowledged that *Pioneer* involved a bankruptcy issue, but held that the Supreme Court's construction of "excusable neglect" applies to other federal proceedings. *George Harms Constr. Co. v. Chao*, 371 F.3d 156, 163-64 (3d Cir. 2004).

[6] Employer attaches to its brief Dr. Roggli's report, dated October 21, 2021, and printed on November 1, 2021 at 3:13 pm, just after the hearing ended on November 1, 2021, at 2:46 pm. *See* Exhibit 2 to Employer's Brief.

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. *Gray v. SLC Corp.*, 176 F.3d 382, 389-90 (6th Cir. 1999); *Melnick v. Consol. Coal Co*., 16 BLR 1-31, 1-33-34 (1991) (en banc).

Employer challenges the ALJ's finding that Claimant established complicated pneumoconiosis based on the x-ray evidence and considering the evidence as a whole. Specifically, Employer contends the ALJ erred in rejecting Dr. Tarver's opinion that Claimant does not have complicated pneumoconiosis. We disagree.

X-ray Evidence – 20 C.F.R. §718.304(a)

The ALJ considered seven interpretations[7] of two x-rays. Decision and Order at 8-9. He found that all the interpreting physicians are dually-qualified B readers and Board-certified radiologists, and thus gave their credentials equal weight. *Id.* at 9.

Drs. DePonte and Crum interpreted the February 8, 2020 x-ray as positive for complicated pneumoconiosis with a Category A opacity. Director's Exhibits 19 at 30; 22 at 2. Drs. Tarver and Adcock read the February 8, 2020 x-ray as negative for both simple and complicated pneumoconiosis. Director's Exhibit 24 at 2; Employer's Exhibit 1. The ALJ found the readings of the February 8, 2020 x-ray in equipoise as to the existence of complicated pneumoconiosis.

Drs. DePonte and Crum interpreted the June 25, 2020 x-ray as positive for complicated pneumoconiosis with a Category A opacity. Director's Exhibits 21 at 2; 23 at 2. Dr. Tarver read the June 25, 2020 x-ray as negative for pneumoconiosis, but found an opacity in the right apex "which could represent cancer or old tuberculosis." Employer's

[7] Additionally, Dr. Gaziano performed a quality reading only of the February 8, 2020 x-ray. Director's Exhibit 20.

Exhibit 2. Relying on a preponderance of the readings, the ALJ found the June 25, 2020 x-ray is positive for simple and complicated pneumoconiosis. Decision and Order at 9-10.

Because the readings of one x-ray were in equipoise and that of another x-ray was positive, the ALJ found that when the x-ray evidence is considered in isolation, Claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(a).[8]

Other Medical Evidence – 20 C.F.R. §718.304(c)

The ALJ noted the record contains two readings by Dr. Tarver of computed tomography (CT) scans taken on December 6, 2019, and January 22, 2020. Employer's Exhibits 3, 4. Dr. Tarver read both CT scans as negative for simple and complicated pneumoconiosis, but observed an irregular opacity in the right upper lobe or right apex which he indicated could represent old tuberculosis, histoplasmosis, or lung cancer. *Id*. The ALJ also noted Claimant underwent a positron emission tomography (PET) scan on January 22, 2020. Decision and Order at 11; Employer's Exhibit 5. Dr. Buck's report states: "[o]n previous CT scan December 6, 2019 is 2.5 x 2.7 cm spiculated mass and this has an increased uptake SUV value approximately 5.5." Employer's Exhibit 5. The doctor's impression was "[r]ight apical spiculated mass described previously on CT scan from December [6], 2019 has increased metabolic activity and also several metabolically active lymph nodes in the right hilum, pretracheal space and left hilum with mediastinal metastatic disease." *Id*. He recommended a bronchoscopy to determine if Claimant has bronchogenic carcinoma. *Id*.

The ALJ found that Dr. Buck's credentials are not in the record, but as one of Claimant's treating physicians his opinion was credible. Decision and Order at 11. As Dr. Buck did not reference pneumoconiosis and his primary concern was determining whether the mass was bronchogenic carcinoma, the ALJ found the PET scan evidence neither supports nor refutes the existence of simple or complicated pneumoconiosis. *Id*. Further, the ALJ ultimately found there was no definitive evidence in the record that Claimant has bronchogenic cancer. *Id*. at 13.

Lastly, the ALJ considered Dr. Green's medical opinion. Decision and Order at 11-12. Dr. Green diagnosed complicated pneumoconiosis, and the ALJ found it merited "little weight" and added "nothing to the analysis" as it was little more than a restatement of Dr. DePonte's reading of the February 8, 2020 x-ray. *Id*. at 12; Director's Exhibits 19 at 4-5;

[8] The ALJ gave no weight to the February 6, 2018 and May 10, 2016 x-rays in Claimant's treatment records because they were silent as to whether Claimant had simple or complicated pneumoconiosis. Decision and Order at 7, 10; Employer's Exhibit 6.

25 at 2-3. Thus, the ALJ found that Claimant did not establish complicated pneumoconiosis at 20 C.F.R. §718.304(c). Decision and Order at 10-12.

Weighing the Evidence as a Whole

The ALJ gave little weight to Dr. Tarver's x-ray and CT scan readings because he found the physician's alternative diagnoses of tuberculosis, histoplasmosis, and lung cancer were not supported by the record. Decision and Order at 13; Director's Exhibit 19 at 2-3. Thus, the ALJ found Claimant established complicated pneumoconiosis when considering the evidence as a whole and that he invoked the irrebuttable presumption. Decision and Order at 14.

Employer asserts the ALJ erred in discrediting Dr. Tarver's opinion regarding the etiology of the opacity in Claimant's right apex. Employer's Brief at 5. We disagree. An ALJ may reject the opinion of a physician who excludes coal mine dust exposure as the cause for masses seen on x-ray and attributes the radiological findings to conditions such as tuberculosis, histoplasmosis, or other diseases, if he fails to point to evidence in the record indicating that the miner suffers, or suffered, from any of the alternative diseases. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285 (4th Cir. 2010). Here, the ALJ permissibly found Dr. Tarver's opinion that Claimant's mass could be tuberculosis, histoplasmosis, or cancer was not supported by the evidence of record, specifically relying on his determination that the PET scan did not definitively diagnose lung cancer and Dr. Green's recitation of Claimant's medical history[9] indicating Claimant had not been diagnosed with cancer or any other possible alternative disease identified by Dr. Tarver.[10] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (it is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility); Decision and Order at 13; Director's Exhibit 19 at 2-3.

[9] Specifically, the ALJ relied on Dr. Green's report that Claimant denied any personal history of tuberculosis or histoplasmosis and underwent a bronchoscopy just days before his visit with Dr. Green, and that there was "no evidence reportedly of cancer." Director's Exhibit 19 at 2-3. Employer does not contend that there was evidence of any of the diseases cited by Dr. Tarver; rather, it argues that there was no evidence to the contrary. Employer's Brief at 5.

[10] As the ALJ provided a valid reason for rejecting Dr. Tarver's readings, we decline to address Employer's challenge to the ALJ's additional finding that Dr. Tarver's opinion is not credible because it was based on an erroneous assumption that a diagnosis of pneumoconiosis requires small, rounded opacities. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 13-14; Employer's Brief at 5.

Employer's arguments on appeal are a request to reweigh the evidence, which we are not empowered to do. *Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 352-53 (6th Cir. 2007); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 5. Consequently, we affirm the ALJ's conclusion that Claimant invoked the irrebuttable presumption of total disability due to complicated pneumoconiosis and established a change in the applicable condition of entitlement. 20 C.F.R. §§718.304, 725.309(c). We also affirm, as unchallenged, the ALJ's finding that Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14-15.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge