U.S. Department of Labor

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

BRB No. 24-0023 BLA

JERRY CLEVINGER Claimant-Respondent v. LODESTAR ENERGY, INCORPORATED and KENTUCKY EMPLOYERS' MUTUAL INSURANCE Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 01/30/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in a Modification of an Initial Claim and Order Denying Employer's Motion for Reconsideration of the Decision and Order Awarding Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Thomas L. Ferreri and Matthew J. Zanetti (Ferreri Partners, PLLC), Louisville, Kentucky, for Employer and its Carrier.

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

GRESH, Chief Administrative Appeals Judge, and BUZZARD, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits in a Modification of an Initial Claim and his Order Denying Employer's Motion for Reconsideration of the Decision and Order Awarding Benefits (2020-BLA-05769). This case involves a request for modification of the denial of a claim filed on October 12, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ credited Claimant with twenty-five years of surface coal mine employment, working in conditions substantially similar to those in an underground mine. He also found Claimant established complicated pneumoconiosis, thereby invoking 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). *See* 20 C.F.R. §718.304. He further found Claimant's complicated pneumoconiosis arose out of his coal mine employment. Thus, the ALJ found Claimant established modification based on a change in conditions and that granting modification would render justice under the Act. 20 C.F.R. §§718.203(b), 725.310. Consequently, the ALJ awarded benefits and subsequently denied Employer's motion for reconsideration.

On appeal, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis and invoked the irrebuttable presumption. Claimant

[1] Claimant filed a prior claim on May 15, 2013, but withdrew it on November 15, 2013. Director's Exhibit 1. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306(b). The district director initially denied Claimant's current claim on October 11, 2018, for failure to establish total disability or disability causation. Director's Exhibit 52. Claimant requested modification and the district director awarded benefits on April 6, 2020. Director's Exhibits 58, 72. Pursuant to Employer's request for a hearing, the case was assigned to the ALJ. Director's Exhibits 80, 90.

responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response brief.[2]

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.[3] 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).

An ALJ may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). In considering whether a change in conditions has been established, an ALJ is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement that defeated an award in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). Before ultimately granting a request for modification, an ALJ must determine whether doing so will render justice under the Act. *Westmoreland Coal Co. v. Sharpe* [*Sharpe II*], 692 F.3d 317, 327-28 (4th Cir. 2012).

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;[4] or

[2] We affirm, as unchallenged on appeal, the ALJ's finding of twenty-five years of qualifying coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-4.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 5; Hearing Transcript at 17.

[4] The parties did not designate any biopsy evidence for consideration at 20 C.F.R. §718.304(b). Claimant's Evidence Summary Form at 6; Employer's Evidence Summary Form at 6.

(c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 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 Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

Employer contends that the ALJ erred in finding Claimant establish complicated pneumoconiosis based on the x-ray evidence. We reject Employer's contention.

The ALJ's Findings – X-ray Evidence

The ALJ considered fourteen readings of six x-rays dated December 28, 2017, March 5, 2018, May 1, 2018, May 14, 2018, August 31, 2019, and February 26, 2021. All of the x-ray readers are Board-certified radiologists and B readers. Taking into consideration the physicians' additional credentials relating to "radiological experience, publications, and/or presentations related to coal worker's pneumoconiosis," the ALJ found Dr. DePonte is "the most qualified in the field of detecting and/or diagnosing coal workers' pneumoconiosis," and thus accorded more weight to her readings. Decision and Order at 7-9.

Drs. DePonte and Crum interpreted the December 28, 2017 x-ray as positive for both simple and complicated pneumoconiosis, while Dr. Kendall read the same x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibits 10, 19; Claimant's Exhibit 4. The ALJ credited Dr. DePonte's reading based on her qualifications and further noted her reading was consistent with Dr. Crum's reading of that film. Decision and Order at 10, 15-16; Director's Exhibits 10, 19; Claimant's Exhibit 4.

Drs. Kendall and Adcock both read the March 5, 2018 x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis, while Dr. DePonte interpreted the x-ray as positive for both simple and complicated pneumoconiosis. Director's Exhibits 20, 63; Employer's Exhibit 2. Despite Dr. DePonte's superior qualifications, the ALJ concluded the readings of the x-ray were inconclusive because two dually-qualified radiologists disagreed with Dr. DePonte's reading. Decision and Order at 10-11, 16.

Dr. Crum read the May 1, 2018 x-ray as positive for both simple and complicated pneumoconiosis while Dr. Adcock read it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibits 58 at 2-3; 62. Giving equal

weight to the two readings, the ALJ found them inconclusive as to the existence of complicated pneumoconiosis. Decision and Order at 11; Director's Exhibits 58 at 2-3; 62.

Dr. Crum interpreted the May 14, 2018 x-ray as positive for simple and complicated pneumoconiosis, while Dr. Kendall read the x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibits 17; 58 at 4-5. Giving the two readings of this x-ray equal weight, the ALJ found them inconclusive as to the existence of complicated pneumoconiosis. Decision and Order at 11, 16; Director's Exhibits 17; 58 at 4-5.

Dr. DePonte read the August 31, 2019 x-ray as positive for both simple and complicated pneumoconiosis, while Dr. Adcock read it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibits 60, 64. The ALJ gave greater weight to Dr. DePonte's reading and found the film positive for both diseases. Decision and Order at 11; Director's Exhibits 60, 64.

Finally, Dr. DePonte read the February 26, 2021 x-ray as positive for both simple and complicated pneumoconiosis, while Dr. Simone read it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 3. The ALJ found the x-ray positive for both diseases based on Dr. DePonte's reading. Decision and Order at 12; Claimant's Exhibit 1; Employer's Exhibit 3.

Considering all of the x-ray evidence, the ALJ found there are three positive x-rays for complicated pneumoconiosis (December 28, 2017, August 31, 2019, and February 26, 2021) and three x-rays whose readings are inconclusive (March 5, 2018, May 1, 2018, and May 14, 2018). Decision and Order at 10-12, 15-16. Thus, the ALJ found that the x-ray evidence overall supports a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(a).

Employer's Arguments on Appeal

Employer first contends the ALJ failed to adequately explain why he found Dr. DePonte is "better qualified" than Drs. Kendall, Adcock, and Simone. Employer's Brief at 2-4. We disagree.

The ALJ discussed the credentials of all of the physicians based on their "Board-certification, B reader status, radiological experience, publications, and/or presentations related to coal worker[s'] pneumoconiosis." Decision and Order at 9. He further observed that Drs. DePonte, Crum, Kendall, and Adcock have held professorships in radiology or have served on the faculty of colleges teaching radiology. *Id.*

Contrary to Employer's contention, the ALJ permissibly found Dr. DePonte is "better qualified" "based on her radiological experience, as well as her research and lectures specifically focused on coal workers' pneumoconiosis." *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); Decision and Order at 9; Claimant's Exhibit 2 at 2-5. In this regard, the ALJ specifically noted Dr. DePonte's professional appointments included: member of the American College of Radiology Pneumoconiosis Certification Program Task Force; reader for the National Institute for Occupational Safety and Health Coal Workers' Health Surveillance Program; and consultant for the Washington and Lee University Black Lung Clinic. Decision and Order at 7-8; Claimant's Exhibit 2 at 4. Additionally, the ALJ noted Dr. DePonte delivered four presentations on coal workers' pneumoconiosis and chest x-ray imaging at the 2013 and 2015 National Conferences for the National Coalition of Black Lung and Respiratory Disease Clinics. Decision and Order at 8; Claimant's Exhibit 2 at 5. Moreover, the ALJ pointed to Dr. DePonte's description of her practice as being "in the coalfields" interpreting x-rays "[a]lmost every day" at Norton Community Hospital, which has a "very active black lung clinic." Decision and Order at 8; Claimant's Exhibit 6 at 7-8.

In contrast, the ALJ accurately noted that while Drs. Adcock's and Simone's curricula vitae (CVs) refer to publications, none involved the subject of coal workers' pneumoconiosis, and Dr. Kendall's CV did not include any publications. Decision and Order at 8; Director's Exhibit 62 at 6-7; Employer's Exhibits 2; 3 at 6.

Although Employer notes Drs. Kendall, Adcock, and Simone served as heads of radiology in either a hospital or medical group in states where "extensive" or "active" coal mining takes place, the ALJ permissibly found their CVs do not reflect their specific radiological experience in diagnosing coal workers' pneumoconiosis, while Dr. DePonte's CV does. *See Harris*, 23 BLR at 1-114; *Chaffin*, 22 BLR at 1-302; *Worhach*, 17 BLR at 1-108; Decision and Order at 7-9; Employer's Brief at 3; *see* Director's Exhibit 62 at 4-8; Claimant's Exhibit 2 at 2-5; Employer's Exhibits 2, 3. Thus, we affirm the ALJ's crediting of Dr. DePonte based on her qualifications and reject Employer's contention that the ALJ failed to sufficiently explain that finding.

Employer also contends the ALJ erred by not rendering a finding as to who among Drs. Crum, Adcock and Kendall is most qualified. Because Dr. Crum read the May 1, 2018 and May 14, 2018 x-rays as positive for complicated pneumoconiosis and they were read by Dr. Adcock or Dr. Kendall as negative for the disease, Employer asserts the ALJ did not adequately explain why he found the readings of those x-rays inconclusive. Employer's Brief at 4-5.

However, having explained why Dr. DePonte's readings were the most credible, the ALJ also acted within his discretion in giving the rest of the readings by Drs. Crum, Adcock, and Kendall equal weight. *Staton v. Norfolk & W. Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995) (requiring both a qualitative and quantitative evaluation of the x-ray evidence); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993) (same); Decision and Order at 11, 16; Director's Exhibits 17; 58 at 2-5; 62. The ALJ was not required to further rank the qualifications of Drs. Crum, Adcock, and Kendall beyond their equal qualifications as dually-qualified radiologists, and we affirm the ALJ's permissible finding that the May 1, 2018 and May 14, 2018 x-rays are inconclusive as to the existence of complicated pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); Decision and Order at 11, 16; Director's Exhibits 17; 58 at 2-5; 62.

Moreover, even if we were to agree with Employer that the ALJ should have further weighed the qualifications of the physicians, Employer has not shown how this error, if any, affects the ALJ's decision in this case. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (appellant must explain how the "error to which it points could have made any difference."). Even assuming the ALJ had found these two x-rays negative, a preponderance of the x-ray evidence still supports the ALJ's finding that Claimant established complicated pneumoconiosis. There would be three positive x-rays for complicated pneumoconiosis (December 28, 2017, August 31, 2019, and February 26, 2021), two negative x-rays for complicated pneumoconiosis (May 1, 2018, and May 14, 2018), and one inconclusive x-ray (March 5, 2018). Consequently, Employer's alleged error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Conclusion

The ALJ has discretion to weigh the evidence, draw appropriate inferences, and determine credibility, and the Board cannot substitute its judgment for that of the ALJ even if our conclusions would have been different. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002) (reviewing court should not reverse the conclusions of an ALJ that are supported by substantial evidence, even if the facts permit an alternative conclusion); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522-23 (6th Cir. 2002). Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established complicated pneumoconiosis based on the x-ray evidence at 20 C.F.R. §718.304(a). We further affirm, as unchallenged, the ALJ's finding that the medical opinion evidence supports a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(c).[5] 20 C.F.R. §718.304(c); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-

[5] The ALJ found Dr. DePonte's deposition testimony supported a finding of complicated pneumoconiosis and gave little weight to the contrary medical reports of Drs.

711 (1983); Decision and Order at 16-17; Director's Exhibits 15; 16 at 14-15; 17 at 6; Claimant's Exhibit 6 at 31. Thus, we affirm the ALJ's overall finding that Claimant invoked the irrebuttable presumption and established modification based on a change in conditions. 20 C.F.R. §§718.304, 725.310.

We also affirm, as unchallenged, the ALJ's findings that Claimant's complicated pneumoconiosis arose out of his coal mine employment and that granting Claimant's modification request renders justice under the Act. 20 C.F.R. §§718.203(b), 725.310; *see Skrack*, 6 BLR at 1-711; Decision and Order at 18-19.

Dahhan and Rosenberg, as well as Dr. Dahhan's deposition testimony. Decision and Order at 16-17; Director's Exhibits 15; 16 at 14-15; 17 at 6; Claimant's Exhibit 6 at 31.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits in a Modification of an Initial Claim and his Order Denying Employer's Motion for Reconsideration of the Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge