U.S. Department of Labor

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

BRB No. 21-0375 BLA

BRUCE D. SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BUFFALO MINING COMPANY	)	
	)	DATE ISSUED: 7/28/2022
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

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

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for Employer.

Before: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Patricia J. Daum's Errata Decision and Order Awarding Benefits[1] (2018-BLA-06006) rendered on a subsequent

[1] The ALJ issued a Decision and Order Awarding Benefits on March 19, 2021. Pursuant to Claimant's request that the ALJ revise her decision to specify a commencement date for benefits, the ALJ issued an Errata Decision and Order Awarding Benefits on March

claim filed on July 19, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[2]

The ALJ credited Claimant with at least twelve years of qualifying coal mine employment and found he has 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), and establishing a change in an applicable condition of entitlement.[3] 20 C.F.R. §§718.304, 725.309(c). She 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 argues the ALJ erred in finding complicated pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

23, 2021. The ALJ's Errata Decision and Order included the entirety of her initial decision and a commencement date finding. We cite to the ALJ's Errata Decision and Order as "Decision and Order" in this opinion.

[2] This is Claimant's fifth claim. Director's Exhibits 1-4, 6. Claimant withdrew his fourth claim. Director's Exhibit 4. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306. The district director denied Claimant's third claim for failure to establish total disability, and Claimant took no further action on that claim. Director's Exhibit 3.

[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 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 Claimant's third claim was denied for failure to establish total disability, he had to submit new evidence establishing this element of entitlement in order to obtain review of the merits of his current claim. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3. Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 by invoking the Section 411(c)(3) presumption. *See E. Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-12 (4th Cir. 2015).

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

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 & Grylls Assocs., Inc*., 380 U.S. 359, 361-62 (1965).

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. *See E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243-44 (4th Cir. 1999); *Melnick v. Consol. Coal Co*., 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found the x-ray and medical opinion evidence establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), (c) as does the record as a whole.[6] 20 C.F.R. §718.304; Decision and Order at 40-42. She thus concluded Claimant established complicated pneumoconiosis by a preponderance of the evidence and invoked the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 42.

[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 37.

[6] We affirm, as unchallenged on appeal, the ALJ's findings that the record contains no biopsy evidence, autopsy evidence, CT scan evidence, or hospitalization or treatment records for consideration at 20 C.F.R. §718.304(b), (c). *See Skrack*, 6 BLR at 1-711; Decision and Order at 32, 40-42.

X-rays

The ALJ considered nine interpretations of four x-rays dated August 23, 2017, September 11, 2018, September 28, 2018, and October 29, 2018.[7] Decision and Order at 37-40. She noted all three interpreting physicians, Drs. DePonte, Seaman, and Crum, are dually-qualified Board-certified radiologists and B readers and hold academic and professional affiliations. Decision and Order at 37. The ALJ further observed that Dr. Seaman has a history of pertinent publications, while Drs. DePonte and Crum do not, and found Dr. Seaman's additional credentials render her "marginally more qualified" than Drs. DePonte and Crum but do not warrant giving "dispositive weight" to her readings. *Id*. at 37-40. Based on Drs. DePonte's, Crum's, and Seaman's comparable qualifications, the ALJ found each physician's x-ray readings merit "substantially similar weight." *Id.* at 37.

Drs. DePonte and Crum each interpreted the August 23, 2017 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Seaman read it as negative for the disease. Director's Exhibit 25; Claimant's Exhibit 3; Employer's Exhibit 3. The ALJ found the August 23, 2017 x-ray positive for complicated pneumoconiosis as two of the three dually-qualified physicians read it as positive for the disease. Decision and Order at 38.

Dr. Crum interpreted the September 11, 2018 and October 29, 2018 x-rays as positive for Category A complicated pneumoconiosis, while Dr. Seaman interpreted them as negative for the disease. Claimant's Exhibits 2, 4; Employer's Exhibits 4, 6. Given the readers' substantially similar qualifications, the ALJ found both x-rays in equipoise. Decision and Order at 38.

The ALJ similarly found the September 28, 2018 x-ray in equipoise as Dr. DePonte interpreted it as positive for Category A complicated pneumoconiosis while Dr. Seaman read it as negative for the disease. Claimant's Exhibit 1; Employer's Exhibit 5; Decision and Order at 38. Having found one x-ray positive for complicated pneumoconiosis and three x-rays in equipoise, the ALJ found Claimant established complicated pneumoconiosis by a preponderance of the x-ray evidence at 20 C.F.R. §718.304(a). Decision and Order at 40.

Employer argues the ALJ selectively analyzed the physicians' qualifications in finding Dr. Seaman only "marginally more qualified" than Drs. DePonte and Crum. Employer's Brief at 15-18. It asserts the ALJ failed to acknowledge some of Dr. Seaman's qualifications, such as a book chapter Dr. Seaman authored regarding environmental and occupational diseases, which resulted in minimizing the weight accorded to Dr. Seaman's

[7] Dr. Gaziano read the August 23, 2017 x-ray for quality purposes only. *See* Director's Exhibit 26; Decision and Order at 37.

opinion. *Id*. at 15-17. Contrary to Employer's argument, the ALJ applied the same level of scrutiny to all x-ray readers by summarizing the pertinent qualifications of each and demonstrating an awareness of the information conveyed on their resumes, including specifically acknowledging that Dr. Seaman "co-authored several publications on pulmonary and respiratory matters." Decision and Order at 36-37, *citing* Employer's Exhibit 8 (Dr. Seaman's resume). The ALJ neither selectively analyzed the physicians' qualifications nor ignored Dr. Seaman's authorship of publications relating to pulmonary conditions.

We further see no error in the ALJ's finding that Dr. Seaman's qualifications are "only marginally" greater than those of Drs. DePonte and Crum and do not warrant assigning dispositive weight to her x-ray readings. Decision and Order at 37-39. Consistent with the regulations, the ALJ gave "consideration . . . to the radiological qualifications of the physicians interpreting" the x-rays. 20 C.F.R. §718.202(a)(1). She was not required to give additional weight to Dr. Seaman based on her publications. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc); *Bateman v. E. Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003); *Melnick*, 16 BLR at 1-37. As the ALJ explained Dr. Seaman's additional qualifications do not merit assigning her readings dispositive weight because Drs. DePonte and Crum are similarly credentialed to interpret x-rays as dually-qualified radiologists and B readers, we reject Employer's assertion that the ALJ's credibility determination is inadequately explained and fails to comply with the Administrative Procedure Act (APA).[8] *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762, (4th Cir. 1999) (APA duty of explanation is satisfied if reviewing court can discern what the ALJ did and why she did it); *see* 20 C.F.R. §718.202(a)(1); *Harris*, 23 BLR at 1-114; Decision and Order at 37-38; Employer's Brief at 17-20.

Because substantial evidence supports the ALJ's finding that one dually-qualified expert interpreted each of the September 11, 2018, September 28, 2018, and October 29, 2018 x-rays as positive for complicated pneumoconiosis, and one dually-qualified expert interpreted each x-ray as negative, we affirm her finding that these x-rays are in equipoise.[9] *See* 20 C.F.R. §718.202(a)(1); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th

[8] The Administrative Procedure Act requires that every adjudicatory decision include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 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).

[9] Apart from challenging the ALJ's weighing of the interpreting physicians' credentials, which we have rejected, Employer does not challenge the ALJ's finding that the September 11, 2018, September 28, 2018, and October 29, 2018 x-rays are in equipoise.

Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order at 38-40.

We also reject Employer's assertion that the ALJ counted heads in finding the August 23, 2017 x-ray positive for complicated pneumoconiosis. Employer's Brief at 13-14. The ALJ properly performed a quantitative and qualitative analysis of the physicians' x-ray interpretations. Decision and Order at 36-38. Because two dually-qualified readers interpreted the x-ray as positive for complicated pneumoconiosis and one dually-qualified expert interpreted it as negative for the disease, the ALJ permissibly concluded that the August 23, 2017 x-ray is positive for complicated pneumoconiosis. *See Addison*, 831 F.3d at 256-57; *Adkins*, 958 F.2d at 52; Decision and Order at 36-38.

As the ALJ permissibly found three x-rays in equipoise and one x-ray positive for the presence of complicated pneumoconiosis, we affirm her finding that Claimant established complicated pneumoconiosis by a preponderance of x-ray evidence at 20 C.F.R. §718.304(a).[10]

Medical Opinions

The ALJ considered four medical opinions. Drs. Raj and Nader diagnosed complicated pneumoconiosis based on the positive x-ray readings of record,[11] while Dr. Seaman relied on her own record x-ray interpretations to conclude Claimant does not have the disease.[12] Director's Exhibit 25; Claimant's Exhibits 1-2; Employer's Exhibit 9. The ALJ accorded Dr. Raj's diagnosis "significant weight," explaining that it is supported by the August 23, 2017 x-ray on which he relied and is consistent with the weight of x-ray evidence at 20 C.F.R. §718.304(a). Decision and Order at 40. Even though Dr. Nader

[10] Because the ALJ found Claimant carried his burden at 20 C.F.R. §718.304(a) by a preponderance of evidence, Employer's assertion that the ALJ improperly found he carried his burden with evenly balanced evidence is a mischaracterization of the record, and we reject it. Employer's Brief at 20-21.

[11] Dr. Raj diagnosed complicated pneumoconiosis based on Dr. DePonte's positive reading of the August 23, 2017 x-ray. Director's Exhibit 25. Dr. Nader diagnosed complicated pneumoconiosis based on Dr. DePonte's positive reading of the August 28, 2018 x-ray and Dr. Crum's positive reading of the October 29, 2019 x-ray. Claimant's Exhibits 1-2.

[12] Dr. Rosenberg opined Claimant does not have complicated pneumoconiosis, and the ALJ rejected his opinion as not well-documented or reasoned. Employer's Exhibits 1-2; Decision and Order at 41. We affirm this credibility determination as Employer does not challenge it. *See Skrack*, 6 BLR at 1-711.

relied on positive readings of x-rays the ALJ found in equipoise, his diagnosis is consistent with her overall finding at 20 C.F.R. §718.304(a); therefore, he ALJ accorded Dr. Nader's opinion "some, though not significant, weight." *Id*. at 40-41. The ALJ similarly found Dr. Seaman's opinion supported by her underlying negative x-ray readings. However, because Dr. Seaman's opinion is inconsistent with her findings that the August 23, 2017 x-ray and the x-ray evidence as a whole are positive for complicated pneumoconiosis, the ALJ accorded Dr. Seaman's conclusion "little weight." *Id.* at 41.

As the ALJ assessed whether each physician's opinion is consistent with both its underlying documentation and the ALJ's findings at 20 C.F.R. §718.304(a), we reject Employer's assertions that she selectively analyzed the medical opinion evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174 (4th Cir 1997); Employer's Brief at 24. Further, as the ALJ accurately observed that the opinions of Drs. Raj and Nader are consistent with her overall finding at 20 C.F.R. §718.304(a), but Dr. Seaman's opinion is not, she permissibly accorded greater weight to the opinions of Drs. Raj and Nader. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 41. We therefore affirm her determination that the medical opinions support a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(c).

Employer's arguments at 20 C.F.R. §718.304 amount to a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As the ALJ permissibly found the x-ray and medical opinion evidence establish complicated pneumoconiosis at 20 C.F.R. §718.304(a), (c), we affirm her finding that Claimant established complicated pneumoconiosis on the record as a whole. 20 C.F.R. §718.304; *see Scarbro*, 220 F.3d at 255. We also affirm the ALJ's unchallenged finding 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 49. Consequently, we affirm the ALJ's finding that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis and thereby established a change in an applicable condition of entitlement. 20 C.F.R. §§718.304, 725.309(c).

Accordingly, the ALJ's Errata Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge