U.S. Department of Labor

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

BRB Nos. 22-0454 BLA
and 22-0455 BLA

RHONDA MORGAN (o/b/o and Widow of STEVE MORGAN)	)	
Claimant-Respondent	)	
v.	)	
SEA "B" MINING COMPANY	)	
	)	DATE ISSUED: 7/27/2023
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Granting Benefits and Decision and Order Granting Survivor's Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Granting Benefits (2020-BLA-06006) and Decision and Order Granting Survivor's Benefits (2021-BLA-05240) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on May 24, 2018, and a survivor's claim filed on August 31, 2020.[1]

Considering the miner's claim, the ALJ found Claimant established the Miner had 26.53 years of qualifying coal mine employment and had 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). She further found the Miner's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203(b). In a separate decision issued on the same day as the Miner's award, the ALJ found Claimant entitled to derivative benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).[2]

On appeal, Employer argues the ALJ erred in failing to consider Dr. Vey's medical report. It further argues the ALJ erred in finding the Miner had complicated pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.[3]

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 (1965).

---

[1] Claimant is the widow of the Miner, who died on July 21, 2018. Miner's Claim (MC) Director's Exhibit 10; Survivor's Claim (SC) Director's Exhibit 10. She is pursuing the miner's claim on his behalf, along with her own survivor's claim.

[2] Section 422(*l*) of the Act provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[3] We affirm, as unchallenged on appeal, the ALJ's finding of 26.53 years of qualifying coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); MC Decision and Order at 9.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in Virginia.

Miner's Claim

Employer's Evidentiary Challenge - Dr. Vey's Report

Employer argues the case must be remanded because the ALJ failed to consider Dr. Vey's report relevant to the miner's claim, although she addressed the report in considering the survivor's claim. Employer's Brief at 4-7. We disagree.

As Employer recounts, the ALJ issued Prehearing Orders, for both the miner's and survivor's claims on April 30, 2021, which required the parties to exchange all evidence by February 25, 2022, twenty days prior to the date of the scheduled hearing on March 17, 2022. MC and SC Prehearing Orders dated April 30, 2021 at 3. On February 25, 2022, Employer submitted its Evidence Summary Forms, identifying Dr. Vey's medical report as MC Employer's Exhibit 1 in the miner's claim and SC Employer's Exhibit 8 in the survivor's claim. It also provided a copy of the report to Claimant and copied the ALJ by electronic mail (email). Employer's February 25, 2022 Letters to Mr. Wolfe (noting it sent only Employer's Evidence Summary Forms and Prehearing Reports to the ALJ by email).

On March 9, 2022, Employer submitted its evidence, including Dr. Vey's report, to the ALJ by email. Employer's March 9, 2022 Letters to ALJ. Employer's submission accorded with the ALJ's Prehearing Orders which provided: "A complete set of the pre-marked exhibits . . . should be provided to the ALJ at least seven days before the hearing and **not before**." ALJ's Prehearing Orders at 3 (emphasis in Orders). At the March 17, 2022 hearing, the ALJ admitted Dr. Vey's report as MC Employer's Exhibit 1 and SC Employer's Exhibit 8, by exhibit number only, without specifically identifying either exhibit as Dr. Vey's report. Hearing Transcript at 7-10.

In her decisions, the ALJ stated that Employer had submitted Dr. Vey's report only for consideration in the survivor's claim, although Employer had identified the report as Employer's Exhibit 1 on its Evidence Summary Forms in both claims. MC Decision and Order at 2 n.3, 8 n.6; SC Decision and Order at 8 n.5. She did not consider the report in finding the Miner entitled to benefits. However, after holding Claimant was derivatively entitled to survivor's benefits, the ALJ considered Dr. Vey's report. SC Decision and Order at 10. She summarized Dr. Vey's report dated February 21, 2022, and identified it as SC Employer's Exhibit 8. *Id*. The ALJ specifically considered and rejected Dr. Vey's report in her analysis of the survivor's claim evidence.

See Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 16.

Although we agree with Employer that the ALJ erred in concluding Dr. Vey's report was not part of the miner's claim record, remand is not required. In considering the survivor's claim, the ALJ noted Dr. Vey had reviewed the reports by Drs. Haq, Roggli, and Perper (discussed *infra*), and disputed Dr. Perper's diagnosis of complicated pneumoconiosis. SC Decision and Order at 10. However, the ALJ observed "Dr. Vey did not refute the existence of a 1 cm lesion, but instead concluded, without documentation, that the lesion was nothing more than pleural plaque." *Id*. Finding Dr. Vey's opinion neither well-reasoned nor well-documented, the ALJ gave it less weight and concluded "the preponderance of the medical opinion evidence supports a finding of complicated pneumoconiosis." *Id*. Although Employer generally asserts on appeal that Dr. Vey's opinion is credible, it does not identify any specific error in the ALJ's ultimate conclusion that Dr. Vey's opinion is neither adequately documented nor reasoned to outweigh Dr. Perper's opinion. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Having explained her weighing of Dr. Vey's opinion when discussing the presence of complicated pneumoconiosis in the survivor's claim, and as both claims rely on the same evidence, we consider the ALJ's error in not specifically discussing Dr. Vey's opinion in the miner's claim to be harmless. *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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 was totally disabled due to pneumoconiosis if he suffered 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* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In determining whether 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. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found the autopsy evidence was in equipoise and neither supported nor refuted a finding of complicated pneumoconiosis, and the medical opinion evidence established complicated pneumoconiosis. 20 C.F.R. §718.304(b)-(c); MC Decision and Order at 5-8. Weighing the evidence together, she found the evidence establishes complicated pneumoconiosis. *Id*. at 8.

Autopsy Reports

Dr. Haq conducted the Miner's autopsy, a postmortem pneumonectomy of the right lung of the Miner on July 21, 2018, and opined the Miner had fibrotic nodules of anthracosilicosis consistent with coal miners' pneumoconiosis and patchy pleural fibrosis with anthracosilicosis. MC Director's Exhibit 14. In the Miner's upper lobe, he observed two plaque-like lesions on the pleural surface measuring up to 1.2 centimeters and 1.8 centimeters. *Id*. He also observed nodules ranging from 0.1 centimeter to up to 0.3 centimeter in the upper lobe and from 0.1 centimeter to 0.2 centimeter in the middle lobe, and a nodule measuring up to 0.4 centimeter in the lower lobe. *Id*.

On November 15, 2019, Dr. Roggli reviewed the ten autopsy slides prepared from the postmortem pneumonectomy of the Miner's right lung. He identified coal dust macules and silicotic nodules consistent with simple coal workers' pneumoconiosis.[5] MC Director's Exhibit 14.

We affirm, as unchallenged on appeal, the ALJ's finding that the autopsy evidence is in equipoise and thus neither supports nor refutes a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(b).[6] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); MC Decision and Order at 5.

[5] Contrary to Employer's characterization, Dr. Roggli did not identify pleural plaques. Employer's Brief at 12.

[6] Employer inaccurately states that Dr. Haq did not diagnose complicated pneumoconiosis. Employer's Brief at 9.

Medical Opinions[7]

Dr. Perper prepared a report on April 15, 2019, based on his review of the Miner's death certificate,[8] employment and smoking histories, and the ten autopsy slides, labeled A1-A10, from the Miner's postmortem pneumonectomy of the right lung. MC Director's Exhibit 12. He observed a "pleural-subpleural anthraco-silicotic nodule, exceeding 1 [centimeter] in maximal dimension alongside the pleural plane," in slide A1. *Id*. at 3. With respect to slide A3, he noted "[s]evere fibro-anthracosis . . . extending from the 2.5 [centimeter] pleural margin edge down . . . alongside the entire 1.5 [centimeter] downside edge . . ." [and] "the fibro-anthracotic 1.5 [centimeter] edge . . . indicat[es] that the mass was larger than sampled on the slide." *Id*. at 4. On slide A4, Dr. Perper noted a mass sized 2.4 centimeters by 1.7 centimeters that "has been only partially excised," as well as "severe interstitial fibrosis/fibro-anthracosis." *Id*. at 4-5. Dr. Perper diagnosed complicated pneumoconiosis with fibro-anthracotic and anthracosilicotic masses exceeding two centimeters. *Id*. at 12. Furthermore, Dr. Perper opined that "pathological findings of complicated coal workers['] pneumoconiosis are reflected radiologically by opacities of about the same size" and "[a] pathological lesion of 1.0 [centimeter] or 2.0 [centimeters] is *equivalent* to a radiological lesion of 1.0 [centimeter] or 2.0 [centimeters] or slightly larger . . . ." *Id*. at 16 (emphasis in original).

On April 17, 2020, Dr. Rosenberg reviewed the Miner's death certificate; the reports by Drs. Perper, Haq, and Roggli; the Miner's April 27, 2018 x-ray; and the Miner's coal mine employment and smoking histories. MC Director's Exhibit 15. Dr. Rosenberg diagnosed the Miner with simple pneumoconiosis, but not complicated pneumoconiosis or progressive massive fibrosis. *Id*. at 3-4.

In a February 21, 2022 report, Dr. Cool reviewed the autopsy slides and the medical record. Claimant's Exhibit 3. Dr. Cool diagnosed complicated pneumoconiosis and progressive massive fibrosis based on her review of slide A1, which showed a "subpleural

[7] We note Claimant designated medical reports from Drs. Perper and Cool which included reviews of the Miner's autopsy slides and other medical evidence. Because Claimant had evidentiary slots available to submit at least one additional autopsy slide review as a rebuttal autopsy report, we need not remand this case to the ALJ to address whether the parties' evidentiary designations comply with the regulatory limitations. 20 C.F.R. §725.414.

[8] The Miner's death certificate identified the immediate cause of death as coronary artery disease due to congestive heart failure, radiation fibrosis of the lung, and obstructive sleep apnea. MC Director's Exhibit 10.

fibrotic lesion approximately 1.6 [centimeters] in [the] greatest dimension." *Id*. at 8. On slide A3, she also observed a "subpleural fibrotic lesion" measuring 1.5 centimeters which is "likely larger." *Id*. at 11. Dr. Cool stated the postmortem pneumonectomy reflected at least two lesions greater than one centimeter that were consistent with complicated pneumoconiosis and progressive massive fibrosis. *Id*. at 13. Similar to Dr. Perper's opinion, Dr. Cool stated that a "pathologic lesion of 1 [centimeter] is equivalent to a radiologic lesion of 1 [centimeter], or larger . . . ." *Id*. at 19.

The ALJ found Drs. Perper's and Cool's opinions well-reasoned and documented and entitled to greater weight than Dr. Rosenberg's contrary opinion. The ALJ also observed that they each provided a requisite equivalency determination, explaining that the lesions seen on autopsy would appear greater than one centimeter on x-ray. *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999); MC Decision and Order at 8. In addition, she found their findings align with Dr. Haq's autopsy report. MC Decision and Order at 8.

As trier of fact, the ALJ must evaluate the evidence, weigh it, and draw her own conclusions. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). Employer's arguments are a request to reweigh the evidence, which we are not permitted to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because substantial evidence supports the ALJ's findings that Claimant established complicated pneumoconiosis based on the medical opinions and in consideration of the evidence as a whole,[9] we affirm them. *See* 20 C.F.R. §718.304(c); *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); MC Decision and Order at 8.

We also affirm the ALJ's unchallenged finding that the Miner's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 337 (4th Cir. 2007); *Skrack*, 6 BLR at 1-711; MC Decision and Order at 9. Consequently, we affirm the ALJ's conclusion that Claimant invoked the irrebuttable presumption and the award of benefits in the miner's claim. 20 C.F.R. §718.304.

[9] Employer contends the ALJ failed to consider that Dr. Cool reviewed enlarged pictures of the Miner's autopsy slides taken by Dr. Perper and not the actual slides. We consider the ALJ's error, if any, to be harmless as Dr. Perper's opinion constitutes substantial evidence to support the ALJ's finding of complicated pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Survivor's Claim

The ALJ determined Claimant established all the necessary elements for automatic entitlement to survivor's benefits. 30 U.S.C. §932(*l*); SC Decision and Order at 10. Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. § 932(*l*); *see Thorne v. Eastover Mining Co*., 25 BLR 1-121, 1-126 (2013).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge