U.S. Department of Labor

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

BRB No. 22-0092 BLA

ROGER DALE BACK	)	
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Claimant-Respondent	)	
	)	
v.	)	
	)	
SAPPHIRE COAL COMPANY C/O UNITED COAL	)	
	)	
	)	DATE ISSUED: 6/27/2023
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY NKA ENCOVA MUTUAL INSURANCE GROUP	)	
	)	
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 Granting Benefits in a Subsequent Claim of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for Claimant.

Ryan M. Stratton (Baird & Baird, P.S.C.), Pikeville, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Granting Benefits in a Subsequent Claim (2020-BLA-05257) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ found Claimant established 20.90 years of coal mine employment and complicated pneumoconiosis. The ALJ therefore concluded that 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), and further found his pneumoconiosis arose out of coal mine employment. 20 C.F.R. §§718.203(b), 718.304. Thus, the ALJ found Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c),[2] and awarded benefits.

On appeal, Employer asserts the ALJ erred in finding Claimant established complicated pneumoconiosis. Claimant responds in support of the award of benefits. The

[1] Claimant filed a prior claim for benefits on July 19, 2013, and the district director denied it on April 15, 2014, for failure to establish any element of entitlement. Decision and Order at 2; Director's Exhibit 1. Claimant filed his current claim on February 13, 2019. 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 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 did not establish any element of entitlement in his prior claim, he had to submit evidence establishing at least one element to obtain review of the merits of his current claim. *Id*.

Director, Office of Workers' Compensation Programs (the Director), 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).

Complicated Pneumoconiosis

Section 411(c)(3) of the Act provides an irrebuttable presumption 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 large 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, is a condition that would yield results equivalent to (a) or (b). 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 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 the ALJ erred in finding Claimant established complicated pneumoconiosis based on the x-rays, medical opinions, and in consideration of the evidence as a whole. We disagree.

X-rays – 20 C.F.R. §718.304(a)

The ALJ considered seven interpretations of two x-rays dated March 20, 2019, and July 10, 2019. Decision and Order at 8-10. All the interpreting physicians are dually-qualified Board-certified radiologists and B readers. *Id*. at 8.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant has 20.90 years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4; Employer's Post-hearing Brief at 2.

[4] 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); Decision and Order at 4; Director's Exhibit 4; Hearing Transcript at 19, 22, 42.

Dr. DePonte interpreted the March 20, 2019 x-ray as positive for simple pneumoconiosis and complicated pneumoconiosis, Category A large opacity in the upper lung zone. Director's Exhibit 11. In the comments section of the International Labour Organization (ILO) x-ray form, she wrote, "[m]alignancy should be excluded." *Id*. Dr. Crum also interpreted this x-ray as positive for simple and complicated pneumoconiosis, Category A large opacity. Claimant's Exhibit 1. On the ILO form, he wrote, "[f]indings suggesting [progressive massive fibrosis] PMF." *Id*. In contrast, Dr. Meyer read the March 20, 2019 x-ray as positive for simple pneumoconiosis but negative for large opacities consistent with pneumoconiosis.[5] Employer's Exhibit 4. The ALJ found the March 20, 2019 x-ray positive for complicated pneumoconiosis, based on the preponderance of the readings by the dually-qualified radiologists. Decision and Order at 9.

Dr. DePonte interpreted the July 10, 2019 x-ray as positive for simple and complicated pneumoconiosis, Category A large opacity. Claimant's Exhibit 2. On the ILO form, she specifically identified a fourteen millimeter Category A large opacity in the left upper lung zone "consistent with complicated coal workers[']s pneumoconiosis." *Id*. Dr. Crum also interpreted this x-ray as positive for simple and complicated pneumoconiosis, Category A large opacity. Director's Exhibit 17. On the ILO form, he commented that he saw coal workers' pneumoconiosis and coalescence, which was "likely" a left upper lung Category A large opacity but which "could be" confirmed by a computed tomography (CT) scan. Director's Exhibit 17. Both Drs. Kendall and Seaman interpreted this x-ray as positive for simple pneumoconiosis but negative for any large opacities consistent with complicated pneumoconiosis. Director's Exhibit 20; Employer's Exhibit 3. The ALJ found the July 10, 2019 x-ray "inconclusive" because there was an equal number of positive and negative readings for complicated pneumoconiosis by the dually-qualified radiologists. Decision and Order at 9.

Weighing the two x-rays together, the ALJ found one positive and the readings of one in equipoise. Thus, he concluded Claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(a). Decision and Order at 9-10.

Initially, we reject Employer's assertion the ALJ erred in not giving controlling weight overall to the negative readings by Drs. Kendall, Meyer, and Seaman based on their "superior credentials." Employer's Brief at 26-27. The ALJ permissibly found the physicians equally qualified as Board-certified radiologists and B readers. *See Staton v. Norfolk & W. Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991

[5] Dr. Lundberg assessed the March 20, 2019 x-ray for film quality only. Director's Exhibit 15.

F.2d 314, 321 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); Decision and Order at 9.

> Employer also argues the ALJ "did not consider" that Drs. DePonte's and Crum's comments on the ILO forms detract from the credibility of their positive readings for complicated pneumoconiosis. Employer's Brief at 19-21. Citing *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (en banc), Employer alleges (incorrectly) the ALJ did nothing more than credit a checkmark on the ILO form without considering the entire form. *Id.* at 20.

It is unclear whether Employer contends the ALJ failed to consider the physicians' comments, or whether it contends the ALJ was required to find the readings equivocal based on them. But it does not matter: neither contention would be accurate. Unlike *Melnick*, where the ALJ did not consider the comments on the ILO form, here the ALJ explicitly acknowledged the additional comments, discussed them, and rationally concluded they do not alter the physicians' interpretations given the ILO form's design and the fact that each physician specifically "checked the box" identifying a Category A large opacity consistent with complicated pneumoconiosis. Decision and Order at 9; Director's Exhibit 11; Claimant's Exhibit 1. No more is required. *See Melnick*, 16 BLR at 1-37 (remanding where doctor recommended ruling out cancer because "[t]he record contain[ed] no evidence the [doctor's] comment *was considered* by the administrative law judge") (emphasis added).

Employer's general suggestion the ALJ should have evaluated the comments differently (or even just more extensively) is a simple request to reweigh the evidence that does not permit us to remand this case for the ALJ to address the same issue a second time. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999) (duty of explanation under the APA "is not intended to be a mandate for administrative verbosity or pedantry"); *Elkins v. Sec'y of HHS*, 658 F.2d 437, 439 (6th Cir. 1981) ("If the [ALJ's] findings are supported by substantial evidence then we must affirm the [ALJ's] decision even though as triers of fact we might have arrived at a different result.").

Employer also appears to misunderstand Claimant's burden of proof in arguing the comments that a malignancy should be excluded and suggesting the readings "could be" confirmed by CT scan necessarily make the readings too equivocal to credit. Claimant need only establish it is more likely than not that he suffers from complicated pneumoconiosis; he does not have to establish it as a certainty. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993). And in that inquiry, "refusal to express a diagnosis in categorial terms is candor, not equivocation." *Perry v. Mynu Coals, Inc.*, 469

F.3d 360, 366 (4th Cir. 2006). Drs. DePonte's and Crum's indication that the x-rays they reviewed met the ILO standards to diagnose complicated pneumoconiosis permitted the ALJ to consider their x-ray readings positive for the disease. 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.102(d), 718.304; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

We also reject Employer's contention that the ALJ merely performed a "headcount" of the readings to find the March 20, 2019 x-ray positive. Employer's Brief at 21-22. The ALJ performed a quantitative and qualitative analysis of the three conflicting readings of the March 20, 2019 x-ray and permissibly credited the preponderance of the readings by the dually-qualified radiologists. *See Staton*, 65 F.3d at 59; *Woodward*, 991 F.2d at 321; 20 C.F.R. §718.202(a)(1); Decision and Order at 9. We therefore affirm the ALJ's finding that the March 20, 2019 x-ray is positive for complicated pneumoconiosis.

Regarding the July 10, 2019 x-ray, Employer contests the ALJ's finding that the readings are in equipoise by alleging Drs. DePonte's and Crum's positive readings for complicated pneumoconiosis were made only in an attempt to aid Claimant in getting benefits.[6] We reject Employer's unsubstantiated assertion of improper motive or bias on the part of either Dr. DePonte or Dr. Crum. *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 637 n.6 (6th Cir. 2009) (bias cannot be presumed merely because an expert is compensated for his opinion); *Urgolites v. BethEnergy Mines, Inc*., 17 BLR 1-20, 1-23 n.4 (1992); *Melnick*, 16 BLR at 1-35-36 (it is error to discredit, as biased, a medical report prepared for litigation absent a specific basis for finding the report to be unreliable). Thus, we affirm the ALJ's conclusion that the readings of the July 10, 2019 x-ray are in equipoise.

Additionally, Employer argues when weighing the evidence as a whole the ALJ should have given greatest weight to the July 10, 2019 x-ray, based on its recency, and concluded Claimant did not satisfy his burden of proof because the ALJ found the readings of that film are in equipoise.[7] Employer's Brief at 24. However, the United States Court

[6] Employer states, "Certainly, the timing of their reports in relation to the parties' evidentiary deadline along with nearly complete purging of their language indicating an alternative diagnosis or uncertainty as to etiology casts a shadow of positional bias over their interpretations." Employer's Brief at 23.

[7] Employer argues the ALJ erred in finding the readings of the July 10, 2019 x-ray "inconclusive" as opposed to in equipoise. Employer's Brief at 23-24, 26. However, Employer fails to explain why the distinction matters as neither characterization is sufficient to establish the presence or absence of complicated pneumoconiosis. *See*

of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held it irrational to credit evidence solely on the basis of recency where it shows the miner's condition has improved. *See Woodward*, 991 F.2d at 319-20 (given the progressive nature of pneumoconiosis, a fact-finder must evaluate evidence without reference to its chronological order when the evidence shows a miner's condition has improved), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (when the evidence shows improvement in condition, as opposed to deterioration, "[e]ither the earlier or the later result *must* be wrong, and it is just as likely that the later evidence is faulty as the earlier") (emphasis in original).

Because the ALJ adequately explained his weighing of the x-ray evidence, we affirm as supported by substantial evidence his conclusion that Claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(a).[8]

Biopsy Evidence - 20 C.F.R. §718.304(b)

Dr. Alam performed a bronchoscopy on January 15, 2019, identifying emphysema and anthracosilicosis and no evidence of cancer. Employer's Exhibit 15 at 21. Because Dr. Alam did not identify massive lesions, the ALJ found the biopsy evidence was insufficient to establish complicated pneumoconiosis. Decision and Order at 10. However, based on the limited tissue available for review, the ALJ found the biopsy evidence did not preclude a finding that Claimant has complicated pneumoconiosis. *Id*. As the ALJ observed, Employer's expert, Dr. Vuskovich, opined that a bronchoscopy does not provide a complete picture of the lungs. Decision and Order at 10; Employer's Exhibit 10 at 13. We affirm the ALJ's determination as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

The ALJ also considered the CT scan and medical opinion evidence. Dr. Adcock read a November 14, 2018 CT scan as positive for simple but not complicated pneumoconiosis. Employer's Exhibit 11. Claimant's treatment records contain CT scan

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Shinseki v. Sanders, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

[8] We affirm, as unchallenged, the ALJ's finding that a treatment x-ray dated July 29, 2018 identifying a left lung nodule "support[s] the findings [of large opacities] in the designated x-rays." *See Skrack*, 6 BLR at 1-711; Decision and Order at 9; Employer's Exhibit 15 at 51.

readings taken on March 8, 2017, July 26, 2018, and November 14, 2018, which were not read for simple or complicated pneumoconiosis. Employer's Exhibits 13 at 11; 14 at 277; 15 at 47. Because the November 14, 2018 CT scan predated the positive x-ray evidence for complicated pneumoconiosis, the ALJ gave it little weight. Decision and Order at 11. He also found the treatment record CT scans did not detract from the positive x-ray evidence. *Id*.

Employer argues the ALJ erred in his analysis because the November 14, 2018 CT scan showing no complicated pneumoconiosis was taken only a few months earlier than the March 20, 2019 x-ray, and both Drs. DePonte and Crum recommended a CT scan when they read that x-ray. Employer's Brief at 25-26. We disagree. The ALJ's rationale for crediting the more recent positive x-ray evidence over the earlier negative CT scan is consistent with the Department of Labor's recognition that pneumoconiosis may be a latent and progressive disease. *See* 20 C.F.R. §718.201(c). We discern no error in his permissible conclusion that the November 14, 2018 CT scan, along with the treatment record CT scans, do not undermine the probative value of the positive x-ray evidence. Decision and Order at 10-11; Employer's Exhibits 11; 13 at 11; 14 at 277; 15 at 47. Moreover, Dr. DePonte recommended a CT scan to rule out cancer, and neither the CT scan evidence nor the bronchoscopy showed evidence of cancer or other diseases to refute the opinions of Drs. DePonte or Crum that Claimant has radiographic evidence of complicated pneumoconiosis. *See* Director's Exhibits 11, 17; Claimant's Exhibits 1, 2; Employer's Exhibits 11, 13-15.

Regarding the medical opinion evidence, the ALJ credited Dr. Green's opinion that Claimant has complicated pneumoconiosis over the contrary opinions of Drs. Rosenberg and Vuskovich. Decision and Order at 11-15; Director's Exhibits 11, 20; Employer's Exhibits 1, 2, 8-10. The ALJ permissibly found Dr. Green's opinion better reasoned than Employer's experts since it was consistent with the positive x-ray evidence for complicated pneumoconiosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514 (6th Cir. 2003); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12 (4th Cir. 2000); Decision and Order at 11-15. In addition, he correctly noted Drs. Vuskovich and Rosenberg opined Claimant did not have complicated pneumoconiosis based, in part, on their shared view that Claimant would not have developed complicated pneumoconiosis after leaving the mines because latent and progressive pneumoconiosis is rare. Director's Exhibit 20; Employer's Exhibits 1, 2, 8-10. The ALJ permissibly found their views inconsistent with the regulations which describe pneumoconiosis as a latent and progressive disease that "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012) (same); Decision and Order at 13-14.

Finally, although Employer generally contends Claimant's treatment records do not support a finding of complicated pneumoconiosis, it has not shown error in the ALJ's consideration of them. *See* Employer's Brief at 13, 30. The ALJ permissibly found that while the treatment records do not include diagnoses of complicated pneumoconiosis, those records do not refute the more recent positive x-ray evidence for the disease. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984) (ALJ has discretion to determine the weight to accord an x-ray that is silent on the existence of pneumoconiosis); Decision and Order at 11-15; Employer's Exhibits 13-16. Consequently, we affirm the ALJ's finding that Claimant established complicated pneumoconiosis at Section 718.304(c) based on Dr. Green's opinion.[9]

Weighing the Evidence as a Whole

Considering all categories of evidence together, the ALJ gave greatest weight to the x-ray evidence. Decision and Order at 15. He specifically noted "[t]here is no evidence in the record that Claimant suffers from another condition, such as cancer, fungal infection, histoplasmosis, or blastomycosis, that would cause the formation of the large opacities seen in the x-rays. Thus, I find there is nothing in the record sufficient to establish that the large opacities seen in Claimant's x-rays do not exist or are attributable to some other condition" other than complicated pneumoconiosis. *Id*.

Although Employer generally disagrees with the ALJ's finding that Claimant has complicated pneumoconiosis, the ALJ considered all the relevant evidence and explained the bases for his credibility findings as he was required to do. *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33-34. Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113; Employer's Brief at 24-25.

Because it is supported by substantial evidence, we affirm the ALJ's conclusion that Claimant established complicated pneumoconiosis, thereby establishing a change in an applicable condition of entitlement and invoking the irrebuttable presumption of total disability due to pneumoconiosis. *See* 20 C.F.R. §§718.304, 725.309(c); *see also Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33-34; Decision and Order at 15. We further affirm, as unchallenged, the ALJ's finding that Claimant's complicated pneumoconiosis

[9] As the ALJ gave valid reasons for discrediting Drs. Vuskovich's and Rosenberg's opinions, and for crediting Dr. Green's opinion, we need not address Employer's remaining argument challenging the ALJ's evaluation of the qualifications of the respective physicians. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 27-28.

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 16.

Accordingly, we affirm the ALJ's Decision and Order Granting Benefits in a Subsequent Claim.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge