U.S. Department of Labor

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

BRB No. 24-0119 BLA

MARVIN L. JOHNSON Claimant-Respondent v. BUCHANAN MINERALS, LLC Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 06/05/2025 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

Olgamaris Fernandez (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

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

Employer appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Granting Benefits (2019-BLA-05822) rendered on a claim filed on February 26, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Employer is the responsible operator. She credited Claimant with thirty-five years of qualifying coal mine employment, based on the parties' stipulation, and found Claimant established the existence of complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The ALJ further determined Claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203(b), and awarded benefits commencing in November 2018.

On appeal, Employer asserts the ALJ erred in determining it is liable for the payment of benefits.[1] It contends the ALJ should have found Claimant developed complicated pneumoconiosis prior to his employment with Employer, and thus it is not liable for his benefits. Claimant has not filed a response. The Acting Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's responsible operator arguments and to review the date of entitlement.

The 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.[2] 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, 361-62 (1965).

[1] We affirm, as unchallenged on appeal, the ALJ's award of benefits under Section 411(c)(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2; Hearing Transcript at 29.

Onset of Complicated Pneumoconiosis and Liability for Benefits

Generally, the responsible operator is the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year.[3] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it shows either that it is financially incapable of assuming liability for benefits or that another "potentially liable operator" that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c). However, where the evidence establishes that a miner's complicated pneumoconiosis predates the commencement of his coal mine employment with an employer, the Board has recognized that the latter employer should not be liable for the payment of the miner's black lung benefits. 20 C.F.R. §725.494(a); *see Swanson v. R.G. Johnson Co.*, 15 BLR 1-49, 1-51 (1991); *Truitt v. N. Am. Coal Corp.*, 2 BLR 1-199, 1-204 (1979).

The ALJ stated that the district director identified Employer as the potentially liable operator responsible for the payment of benefits and that Employer conceded 1) that Claimant began working for it in April 2016 when it acquired the mine where Claimant was employed; 2) Claimant continued working for Employer at least until the April 14, 2021 hearing, and 3) Employer has not shown that another operator more recently employed Claimant for at least a year or that it is financially incapable of assuming liability for the payment of benefits. Decision and Order at 4; Employer's Brief before ALJ at 6; Director's Exhibit 42; Hearing Transcript at 27. As Employer does not challenge these findings, we affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

Rather, Employer contends that Dr. Basheda's "unrefuted medical testimony"[4] establishes that Claimant's treatment records confirm the presence of complicated pneumoconiosis at least as early as November 2015, prior to the date Claimant began his employment with it. Employer's Brief at 9. Thus, Employer argues it should be dismissed as the responsible operator and liability should transfer to the Black Lung Disability Trust Fund.

The Director responds that because Employer did not identify Dr. Basheda as a liability witness or submit Dr. Basheda's testimony or the computed tomography (CT) scans he reviewed to the district director within the time limitations governing the submission of liability evidence, they are inadmissible for the purpose of determining Employer's liability. Director's Brief at 2-3 (unpaginated); *see* 20 C.F.R. §§725.414(b), (c); 725.456(b)(1); 725.457(c)(1). We agree with the Director's position.

The district director issued a Notice of Claim on March 7, 2018, identifying Buchanan Minerals, LLC (Employer) as the potentially liable operator and SummitPoint Insurance Company (SummitPoint) as the potentially liable carrier. Director's Exhibit 28. The notice gave Employer thirty days to respond and ninety days to submit liability evidence. *Id.* On March 28, 2018, Employer denied liability but did not submit any liability evidence or seek an extension to submit such evidence. Director's Exhibit 31.

On October 17, 2018, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) designating Employer as the responsible operator and indicating Claimant would be entitled to benefits if a decision was issued at that time because the evidence[5] establishes complicated pneumoconiosis. Director's Exhibit 36. The SSAE gave "any party that wishes to submit liability evidence or identify liability witnesses" until December 16, 2018, to do so and provided that the date could be extended

[4] Before the ALJ, Employer submitted Dr. Basheda's April 2, 2021 deposition testimony; in that testimony Dr. Basheda interpreted Claimant's November 11, 2015, and June 10, 2016 computed tomography (CT) scans as positive for complicated pneumoconiosis given Claimant's subsequent testing excluding other etiologies. *See* Employer's Exhibit 1 at 7-11; *see also* Director's Exhibit 20 at 3-6, 23; Claimant's Exhibits 3, 5. When Dr. Basheda previously examined Claimant on November 29, 2018, he stated that, based on his own exam and a review of records, he could not definitely diagnose complicated pneumoconiosis based on the November 29, 2018 chest x-ray he interpreted. Director's Exhibit 22 at 10-11.

[5] In the SSAE, the district director stated that Dr. Koonce read a July 18, 2018 x-ray as positive for simple and complicated pneumoconiosis. Director's Exhibit 36 at 7.

for good cause shown. *Id.* at 3. The district director further advised that, "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability . . . may be admitted into the record once a case is referred to the Office of Administrative Law Judges [(OALJ)]." *Id.* (citing 20 C.F.R. §725.456(b)(1)).

On October 29, 2018, Employer responded that it disagreed with the SSAE and identified Claimant, Claimant's spouse, any authorized representative of Claimant or Claimant's estate, or any authorized representative of Employer as "a potential 20 C.F.R. §725.414(c) witness pertaining to the liability of the potentially liable operator." Director's Exhibit 37 at 1. Employer also reserved the right to present additional evidence on the responsible operator issue and requested additional time to develop medical evidence since the district director failed to disclose Dr. Farrow's July 18, 2018 medical report from Claimant's Department of Labor-sponsored pulmonary evaluation within thirty days of its generation in compliance with 20 C.F.R. §725.413(c). *Id.* at 1-2.

On November 8, 2018, Employer requested an extension of the scheduling order deadline, which the district director granted on January 11, 2019, allowing until February 14, 2019, for the submission of evidence. Director's Exhibits 40, 41. Employer subsequently submitted Dr. Farrow's January 28, 2018 deposition testimony but did not submit any other evidence before the deadline. *See* Director's Exhibit 39.

On February 22, 2019, the district director issued a Proposed Decision and Order awarding benefits commencing February 2018, the claim's filing date, and designating Employer as the responsible operator. Director's Exhibit 42. The district director also found Claimant had complicated pneumoconiosis and is, therefore, entitled to benefits based upon the irrebuttable presumption at 20 C.F.R. §718.304. *Id.*

Employer requested a hearing, and the claim was forwarded to the OALJ on May 1, 2019. Director's Exhibits 48, 51. Before the ALJ, Employer submitted Dr. Basheda's April 2, 2021 deposition testimony and argued for the first time that it should be dismissed as the responsible operator based on this evidence. Dr. Basheda testified that, upon his review of additional medical information,[6] Claimant has complicated pneumoconiosis that was present "five to ten years" prior to the 2015 CT scan and therefore prior to his

[6] Among other records, Dr. Basheda reviewed CT scans Claimant disclosed to Employer on November 2, 2018, and February 28, 2019, in compliance with 20 C.F.R. §725.413. *See* Director's Exhibits 23, 24.

employment with Employer.[7] Employer's Brief before ALJ at 5-8; Employer's Exhibit 1 at 8-11.

Although Employer responded to the SSAE and disputed its status as the responsible operator, it did not submit any documentary evidence regarding liability or request an extension to submit such evidence within the time limitations governing the submission of liability evidence. 20 C.F.R. §§725.414(b), 725.345(b)(1). In addition, while Employer identified possible liability witnesses, it did not include Dr. Basheda in its designation. 20 C.F.R. §§725.414(c), 725.457(c)(1). Further, Employer does not allege extraordinary circumstances existed to excuse the untimely submission. 20 C.F.R. §725.456(b)(1). Thus, as the Director asserts, Dr. Basheda's testimony and the CT scans he relied on are inadmissible for the purpose of determining Employer's liability. *See Weis v. Marfork Coal Co.*, 23 BLR 1-182, 1-191-92 (2006) (en banc), *aff'd*, *Marfork Coal Co. v. Weis*, 251 F. App'x 229, 235-36 (4th Cir. 2007) (medical evidence cannot be used to challenge a party's liability for a claim, if not first submitted to the district director). Therefore, we affirm the ALJ's determination that Employer is the responsible operator. Decision and Order at 4-5.

Commencement Date of Benefits

Once entitlement to benefits is established, the date for commencement of those benefits is determined by the month in which the claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). When a claimant is found entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, the fact-finder must consider whether the evidence of record establishes the onset date of the claimant's complicated pneumoconiosis. *See Williams v. Director, OWCP*, 13 BLR 1-18, 1-30 (1989). If the evidence does not reflect that date, the date for the commencement of benefits is the month in which the claim was filed, unless the evidence affirmatively establishes that the claimant had only simple pneumoconiosis for any period subsequent to the date of filing. In that case, the date for the commencement of benefits follows the period the claimant had simple pneumoconiosis. *Williams*, 13 BLR at 1-30; 20 C.F.R. §725.503(b).

[7] In her Decision and Order, the ALJ rejected Employer's argument concerning the onset date for the commencement of benefits, finding that "the CT scans were inconclusive at the time they were taken, and Dr. Basheda's current interpretation based on evidence gathered more recently does not make them retroactively conclusive." Decision and Order at 7.

The ALJ considered interpretations of three x-rays, dated April 17, 2018, July 18, 2018, and November 29, 2018. Decision and Order at 6; Director's Exhibits 18-20; Claimant's Exhibits 1, 2. All the interpreting physicians diagnosed complicated pneumoconiosis.[8] Director's Exhibits 18-20; Claimant's Exhibits 1, 2. The ALJ found the commencement date of benefits is November 2018, as "Claimant's third chest x-ray on November 29, 2018 marks the date at which the cumulative x-ray evidence definitely confirms the presence of complicated pneumoconiosis." Decision and Order at 7.

The Director urges the Board to review the date of entitlement given that the ALJ found, and the record supports, that an April 17, 2018 x-ray was uniformly interpreted as positive for Category A large opacities of complicated pneumoconiosis. Thus, it is not clear why the ALJ awarded benefits beginning in November 2018 since generally liability is established as of the date of determination of the existence of complicated pneumoconiosis. *See Truitt*, 2 BLR at 1-204; *Swanson*, 15 BLR at 1-51.

We agree with the Director's position that the ALJ did not adequately explain her onset date determination given that all three x-rays she credited were positive for complicated pneumoconiosis. However, remand is not required on this basis because the ALJ rendered the necessary findings. *See Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187 (4th Cir. 2014). Although the April 17, 2018 chest x-ray is the earliest credited evidence of complicated pneumoconiosis in the record, the ALJ did not identify any evidence in the record that established Claimant had only simple pneumoconiosis for any period subsequent to the date of filing. Thus, benefits commence as of February 2018, the month in which Claimant filed his claim, and we modify the ALJ's commencement date accordingly. *Williams*, 13 BLR at 1-30; 20 C.F.R. §725.503(b).

[8] Because Board-certified radiologists and B readers interpreted the x-rays as uniformly positive for Category A and B large opacities and Employer conceded the evidence shows that Claimant has complicated pneumoconiosis, the ALJ found Claimant invoked the Section 411(c)(3) irrebuttable presumption. Decision and Order at 6.

Accordingly, we affirm the ALJ's Decision and Order Granting Benefits, as modified to reflect a commencement date of February 2018 for the payment of benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur in the result.

JUDITH S. BOGGS
Administrative Appeals Judge