U.S. Department of Labor

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

BRB No. 24-0202 BLA

GARNETT DUTY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	**NOT-PUBLISHED**
	)	
CLINCHFIELD COAL COMPANY	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 03/26/2025
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Modification and Awarding Benefits of William P. Farley, Administrative Law Judge, United States Department of Labor.

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

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

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

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

Employer appeals Administrative Law Judge (ALJ) William P. Farley's Decision and Order Granting Modification and Awarding Benefits (2021-BLA-05067) rendered on

a second request for modification of a claim filed on September 14, 2017,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The district director initially denied benefits on June 3, 2019, because Claimant did not establish total disability. Director's Exhibit 37. Claimant timely requested modification on July 17, 2019, and the district director denied the request on March 26, 2020. Director's Exhibits 43, 56. Claimant timely filed a second modification request on May 26, 2020, which the district director granted on September 15, 2020. Director's Exhibits 62, 73. Employer subsequently requested a hearing, and the claim was referred to the Office of Administrative Law Judges on September 22, 2020. Director's Exhibits 74, 77.

In his Decision and Order Granting Modification, which is the subject of this appeal, the ALJ admitted Dr. DePonte's December 9, 2021 medical report over Employer's objection. The ALJ credited Claimant with thirty years of coal mine employment. He found Claimant established complicated pneumoconiosis and, therefore, invoked 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. Further, he found Claimant's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits.[2] 20 C.F.R. §718.203(b).

On appeal, Employer contends the ALJ erred in admitting Dr. DePonte's report because it contains x-ray readings that exceed the evidentiary limitations at 20 C.F.R. §725.414(a). It also contends the ALJ erred in finding Claimant established complicated pneumoconiosis. Claimant responds in support of the award of benefits. The Acting

[1] Claimant filed a prior claim and withdrew it. Director's Exhibit 1. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] Although the ALJ found Claimant established a mistake in a determination of fact and concluded that granting modification would render justice under the Act, he was not required to do so. 20 C.F.R. §725.310. In cases involving a request for modification of a district director's decision, the ALJ proceeds de novo and "the modification finding is subsumed in the [ALJ's] findings on the issues of entitlement." *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Motichak v. BethEnergy Mines, Inc.*, 17 BLR 1-14, 1-19 (1992).

Director, Office of Workers' Compensation Programs, declined to file a substantive response.[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).

Evidentiary Challenge

Employer argues Dr. DePonte's December 9, 2021 report does not comply with the evidentiary limitations at 20 C.F.R. §725.414(a).[5] Employer's Brief at 3-6; Claimant's Exhibit 9.

Dr. DePonte initially prepared International Labour Organization (ILO) classified readings of x-rays dated June 23, 2017, November 15, 2017, June 29, 2018, October 16,

[3] We affirm, as unchallenged on appeal, the ALJ's finding of thirty years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 8.

[4] 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); Hearing Transcript at 38.

[5] The regulations set limits on the number of specific types of medical evidence the parties can submit into the record. *See* 20 C.F.R. §§725.414, 725.456(b)(2). In support of their affirmative case, each party may submit no more than two chest x-ray interpretations, two pulmonary function studies, two arterial blood gas studies, one autopsy report, one biopsy report, and two medical reports. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest [x]-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). In a modification proceeding, each party is entitled to submit one additional x-ray interpretation, pulmonary function study, blood gas study, and medical report as its affirmative case evidence, "along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of § 725.414." 20 C.F.R. §725.310(b). Medical evidence that exceeds those limitations "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

2018, and September 2, 2021. Each of these five readings were positive for complicated pneumoconiosis and the readings were admitted into the record without challenge. Director's Exhibits 12, 19, 63; Claimant's Exhibit 7. Claimant subsequently obtained a report from Dr. DePonte in which she prepared a serial reading of the same x-rays for the purpose of determining the progression of Claimant's radiographic changes over time. Claimant's Exhibit 9. Dr. DePonte again gave her overall impression that Claimant has complicated pneumoconiosis. *Id.*

Employer contends Dr. DePonte's report exceeds the evidentiary limitations for x-rays because she actually re-read the films again and did not simply review her prior ILO classified x-ray reports. Employer's Brief at 4-6. It contends a physician's review of the admissible evidence in preparing a medical report "does not extend to the *re-review* of the actual x-rays." *Id.* at 4 (emphasis added). Further, it asserts the "admissible evidence here is the submitted interpretations of the x-rays and *not the x-rays themselves*." *Id.* (emphasis added). As explained below, we consider the ALJ's error, if any, in admitting Dr. DePonte's medical report to be harmless as the ALJ did not actually consider Dr. DePonte's report when weighing the x-ray evidence at 20 C.F.R. §718.304(a), and weighed it only at 20 C.F.R §718.304(c). Decision and Order on Modification at 12-15, 19-23.

Complicated Pneumoconiosis

Section 411(c)(3) of the Act 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 large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy[6] 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 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 x-ray evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(a); Decision and Order on Modification at 15. He further found the medical opinion evidence supports a finding of complicated pneumoconiosis, while Claimant's treatment record evidence neither supports nor undermines a diagnosis of complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision

[6] The record contains no biopsy evidence. 20 C.F.R. §718.304(b).

and Order on Modification at 21-23. Weighing all of the evidence, the ALJ found Claimant established complicated pneumoconiosis. Decision and Order on Modification at 23.

20 C.F.R. §718.304(a) – X-rays

The ALJ considered seventeen interpretations of five x-rays dated June 23, 2017, November 15, 2017, June 29, 2018, October 16, 2018, and September 2, 2021.[7] Decision and Order on Modification at 12-15; Director's Exhibits 12, 19-22, 45, 55, 63; Claimant's Exhibits 1, 2, 7, 8; Employer's Exhibits 1, 2, 5. All of the interpreting physicians are dually-qualified B readers and Board-certified radiologists. Decision and Order on Modification at 12-15.

The ALJ found the June 23, 2017, June 29, 2018, October 16, 2018, and September 2, 2021 x-ray readings in equipoise for complicated pneumoconiosis because an equal number of dually-qualified radiologists read each x-ray as positive and negative for the disease. Decision and Order on Modification at 12-15. Drs. DePonte and Crum read the November 15, 2017 x-ray as positive for simple and complicated pneumoconiosis, Category A, whereas Dr. Colella read it as negative for pneumoconiosis. Director's Exhibits 12, 20; Claimant's Exhibit 1. Relying on the preponderance of the positive readings for complicated pneumoconiosis by the dually-qualified radiologists, the ALJ found the November 15, 2017 x-ray positive for the disease. Decision and Order on Modification at 15. Having found the November 15, 2017 x-ray positive for complicated pneumoconiosis and the readings of the June 23, 2017, June 29, 2018, October 16, 2018, and September 2, 2021 x-rays in equipoise, the ALJ determined the x-ray evidence supports a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(a). *Id.*

Employer argues the ALJ erred in finding the November 15, 2017 x-ray supports a finding of complicated pneumoconiosis because he "counted heads and failed to provide an adequate explanation for why he gave more weight to Dr. DePonte and Dr. Crum." Employer's Brief at 9-11. It also generally asserts the ALJ failed to adequately explain why he gave less weight to Drs. Colella's, Tarver's, Seaman's, and Simone's negative x-ray readings, but also states the ALJ "properly found" that the readings of the June 23, 2017, June 29, 2018, October 16, 2018, and September 2, 2021 x-rays are in equipoise. *Id.* at 9-11, 14.

[7] Dr. Ranavaya read the November 15, 2017 x-ray for quality purposes only, Dr. Seaman submitted a rehabilitation reading of the October 16, 2018 and September 2, 2021 x-rays, and Dr. Tarver submitted a rehabilitation reading of the September 2, 2021 x-ray. Director's Exhibit 15; Employer's Exhibits 6, 7; Employer's January 7, 2022 Evidence Summary Form.

Contrary to Employer's argument, the ALJ properly performed both a qualitative and quantitative analysis of the conflicting x-ray readings, taking into consideration the physicians' qualifications, their specific interpretations, and the number of readings of each film. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order on Modification at 15. Having found the readings of four x-rays are in equipoise and one x-ray is positive for complicated pneumoconiosis, the ALJ reasonably determined the x-ray evidence supports a finding of complicated pneumoconiosis. Decision and Order on Modification at 15; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994).

We therefore affirm the ALJ's determination that the x-ray evidence supports a finding of complicated pneumoconiosis as it is supported by substantial evidence. 20 C.F.R. §718.304(a); Decision and Order on Modification at 15.

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

The ALJ considered four medical opinions and Claimant's treatment records. Dr. DePonte diagnosed complicated pneumoconiosis, Dr. Ajjarapu initially diagnosed complicated pneumoconiosis but modified her opinion based on a letter from the Department of Labor indicating that the x-ray evidence did not establish simple or complicated pneumoconiosis and that Drs. Fino and McSharry opined Claimant does not have the disease. Decision and Order on Modification at 16-21; Director's Exhibits 12, 22-26; Claimant's Exhibit 9; Employer's Exhibits 2-4. The ALJ discredited Drs. Fino's, McSharry's, and Ajjarapu's opinions and credited Dr. DePonte's report, and therefore determined that the medical opinion evidence supports a finding of complicated pneumoconiosis. Decision and Order on Modification at 21-22. He further found the treatment record evidence did not support nor undermine a finding of complicated pneumoconiosis and thus determined the evidence as a whole at 20 C.F.R. §718.304(c) supports a finding of complicated pneumoconiosis. Decision and Order on Modification at 22-23; Director's Exhibits 19, 20.

As discussed previously, even if we were to agree that Dr. DePonte's report should be excluded from the record as Employer maintains, there is no basis to remand this case. While Employer generally asserts the ALJ "failed to properly weigh or analyze" the medical opinion evidence, it does not identify any specific error by the ALJ in rejecting the opinions of Drs. Ajjarapu, Fino, and McSharry that Claimant does not have complicated pneumoconiosis. 20 C.F.R. §718.304(c); Employer's Brief at 14; *see Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Decision and Order on Modification at 16-22. Thus, in the absence of credible contrary probative evidence, even if we were to consider the ALJ's admission of Dr.

DePonte's report as a medical report or his consideration of it in regard to establishing complicated pneumoconiosis by "other means" at 20 C.F.R. §718.304(c) to be in error, Employer has failed to explain how this error would undermine his weighing of the x-ray evidence at 20 C.F.R. §718.304(a). *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); Employer's Brief at 12-13.

Because there is no credible contrary evidence to dispute the ALJ's crediting of the positive x-ray evidence for complicated pneumoconiosis, we affirm the ALJ's conclusion that Claimant established complicated pneumoconiosis and, therefore, invoked 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; *see Cox*, 602 F.3d at 283; Decision and Order on Modification at 23. We further affirm, as unchallenged, the ALJ's finding that Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 23.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring:

I concur in the majority decision, including its determination that the ALJ's alleged error in admitting Dr. DePonte's medical report is, at worst, harmless. That said, I do not

believe the ALJ erred. Dr. DePonte provided a medical report in which she concluded, based upon her serial review of the admissible x-rays, that Claimant has complicated pneumoconiosis and alternative diagnoses, such as malignancy, could be excluded due to the "lack of appreciable growth" of the opacity over time. Claimant's Exhibit 9. For reasons similar to those discussed in *Barber v. Triple B Corp.*, I would hold that the ALJ properly admitted Dr. DePonte's medical report and weighed it alongside the other medical reports at 20 C.F.R. §718.304(c). BRB Nos. 23-0396 BLA and 23-0397 BLA, slip op. at

4-8 (Dec. 6, 2024) (explaining why a physician's conclusions, drawn from her review of several admissible x-rays, is admissible as a "medical report").

GREG J. BUZZARD
Administrative Appeals Judge