U.S. Department of Labor

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

BRB No. 20-0287 BLA

JAMES R. BELCHER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BUCHANAN MINERALS, LLC	)	
	)	
Employer-Petitioner	)	
	)	DATE ISSUED: 9/28/2022
SUMMITPOINT INSURANCE COMPANY	)	
	)	
Carrier-Party-in-Interest	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

James M. Kennedy and Ryan M. Stratton (Baird and Baird, P.S.C.), Pikeville, Kentucky, for Employer.

H. Toney Stroud (BrickStreet/SummitPoint Legal Department), Charleston, West Virginia, for Carrier.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE and JONES, Administrative Appeals Judges

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Peter B. Silvain, Jr.'s Decision and Order Awarding Benefits (2019-BLA-05616) rendered on a claim filed on July 2, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Employer, Buchanan Minerals, LLC (Buchanan), is the responsible operator, and Carrier, SummitPoint Insurance Company (SummitPoint), is the responsible carrier liable for the payment of benefits. He credited Claimant with 37.73 years of coal mine employment and found he established complicated pneumoconiosis. 20 C.F.R. §718.304. Thus he found Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018). He further found Claimant's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203. He found Claimant's complicated pneumoconiosis became onset in March 2018 and thus benefits should commence that month.

On appeal Employer argues the ALJ erred in finding it liable for the payment of benefits. It contends the ALJ should have found Claimant developed complicated pneumoconiosis prior to his employment with Employer and thus neither it nor Carrier is liable for his benefits. Carrier filed a separate brief in support of Employer's arguments.[1] Claimant did not file a response. The Director, Office of Workers' Compensation Programs (the Director), filed a response, contending the ALJ properly determined Claimant's complicated pneumoconiosis became onset in March 2018 and Employer and Carrier are liable for his benefits.

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.[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 (1965).

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[1] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant is entitled to benefits. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710, 1-711 (1983); Decision and Order at 18.

[2] We will apply the law of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director,*

Onset of Complicated Pneumoconiosis and Liability for Benefits

An operator may be considered a "potentially liable operator" if the miner's disability or death "arose at least in part out of employment" with that operator. 20 C.F.R. §725.494(a). The regulations establish a rebuttable presumption that the miner's disability or death "arose in whole or in part" out of his employment with such operator and, unless rebutted, "the responsible operator shall be liable to pay benefits to the claimant[.]" *Id.* Further, a miner's disability or death from pneumoconiosis "shall be considered to have arisen in whole or in part out of work in or around a mine if such work caused, contributed to or aggravated the progression or advancement of a miner's loss of ability to perform his or her regular coal mine employment or comparable employment." *Id.*

Employer and Carrier allege they cannot be liable for Claimant's benefits because he developed complicated pneumoconiosis prior to his employment with Employer and such employment therefore did not contribute to his disabling disease. We disagree.

In his analysis of when Claimant's benefits should commence,[3] the ALJ found Claimant first developed complicated pneumoconiosis in March 2018, and thus first became totally disabled due to pneumoconiosis while employed with Employer. Decision and Order at 19. In so doing, he considered x-rays, computed tomography (CT) scans, treatment records, and medical opinions relevant to the onset date of Claimant's complicated pneumoconiosis. Decision and Order at 10-17. He found the earliest credible evidence establishing the onset of Claimant's complicated pneumoconiosis is Dr. Crum's

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OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 14-15.

[3] The date for the commencement of benefits is the month in which Claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If that date is not ascertainable, benefits commence the month the claim was filed, unless evidence the ALJ credits establishes Claimant was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4 (4th Cir. 1986); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). If the ALJ finds Claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304, the ALJ must determine whether the evidence establishes the onset date of complicated pneumoconiosis. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979).

uncontradicted March 23, 2018 x-ray reading, which he interpreted as positive for the disease. Decision and Order at 11, 19; Director's Exhibit 18.

Employer challenges this finding, arguing the ALJ should have found a June 15, 2010 CT scan and a May 16, 2011 CT scan establish the earliest dates Claimant had complicated pneumoconiosis, prior to his employment with Employer.[4] Employer's Brief at 27-37. We are not persuaded.

The ALJ considered six readings of the June 15, 2010 and May 16, 2011 CT scans. Decision and Order at 13-14. He noted all the physicians who interpreted the CT scans are Board-certified radiologists and B readers and thus are equally qualified. *Id.* at 11-14.

Dr. Halbert read the June 15, 2010 CT scan as showing numerous small nodules that "would be most consistent with occupational lung disease such as coal workers' pneumoconiosis." Claimant's Exhibit 4. He indicated an alternative diagnosis of sarcoidosis "could be considered." *Id.* The ALJ found this reading inconclusive on the issue of complicated pneumoconiosis. Decision and Order at 13-14. Dr. Crum interpreted it as positive for both simple and complicated pneumoconiosis. Claimant's Exhibit 4. He noted three large opacities consistent with complicated pneumoconiosis. *Id.* Dr. Adcock read the scan as consistent with simple pneumoconiosis, but stated there are "[n]o large opacities." Employer's Exhibit 5.

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[4] Employer also asserts the ALJ was prohibited from revisiting the date for commencement of benefits because the district director's commencement date finding in the Proposed Decision and Order (PDO) became final. Employer's Brief at 23-27. Employer asserts Claimant improperly sought to modify the district director's commencement date finding before the ALJ. Employer's argument mischaracterizes the record. Before the ALJ, Claimant filed a "Motion for Early Onset Date," and not a request for modification. He filed this motion with the Office of Administrative Law Judges, not the district director. Thus, Claimant's motion was effectively a brief to the ALJ arguing the commencement date issue. To the extent the ALJ characterized the motion as a modification request, we hold this was a scrivener's error. *U.S. v. Hython*, 443 F.3d 480, 488 (6th Cir. 2006) ("failure to amend the affidavit was nothing more than 'a scrivener's error'" and thus of no legal consequence). Furthermore, we reject Employer's argument that the district director's PDO became final, as Claimant timely requested a hearing and the ALJ was therefore required to address the commencement date issue de novo. *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Motichak v. BethEnergy Mines, Inc.*, 17 BLR 1-14, 1-19 (1992).

Because all three physicians have equivalent credentials, the ALJ gave their conflicting readings of the June 15, 2010 CT scan equal weight. Decision and Order at 13-14. As "Dr. Crum's [reading] was positive, Dr. Halbert's [reading] was inconclusive, and Dr. Adcock's [reading] was negative," the ALJ permissibly found the readings in equipoise and therefore concluded the scan does not confirm the presence of complicated pneumoconiosis. *Id.*; *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).

Dr. Poulos interpreted the May 16, 2011 CT scan and compared it to the June 15, 2010 scan. Claimant's Exhibit 4. He noted numerous small nodules throughout both lungs. *Id.* He indicated the small nodules remained stable from the earlier CT scan, were "suggestive of possible occupational lung disease such as coal workers' pneumoconiosis," and sarcoidosis should also be considered. *Id.* The ALJ found this CT scan reading inconclusive on the issue of complicated pneumoconiosis. Decision and Order at 14. Dr. Crum interpreted the May 16, 2011 CT scan as positive for both simple and complicated pneumoconiosis. Claimant's Exhibit 4. He again noted three large opacities consistent with complicated pneumoconiosis and indicated two of the opacities minimally increased in size compared to the 2010 scan. *Id.* Dr. Adcock read the scan as consistent with simple pneumoconiosis and again stated there are "[n]o large opacities." Employer's Exhibit 6.

Because all three physicians have equivalent credentials, the ALJ again gave their conflicting readings of the May 16, 2011 CT scan equal weight. Decision and Order at 14. With one positive reading, one inconclusive reading, and one negative reading, the ALJ permissibly found the readings in equipoise and thus found the May 16, 2011 CT scan does not confirm the presence of complicated pneumoconiosis. *Addison*, 831 F.3d at 256-57; *Adkins*, 958 F.2d at 52-53; Decision and Order at 14.

Contrary to Employer's arguments, the ALJ considered all the evidence relevant to determining the date of onset of Claimant's complicated pneumoconiosis. In addition to considering the x-rays, medical opinions, and treatment records, he considered all the readings of the June 15, 2010 and May 16, 2011 CT scans. Decision and Order at 10-18. The ALJ rationally found neither the June 15, 2010 nor May 16, 2011 CT reading establishes the onset of complicated pneumoconiosis because the record contains one negative reading, one positive reading, and one inconclusive reading of each CT scan.[5]

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[5] Employer argues that even if these CT scans do not establish the presence of complicated pneumoconiosis, they establish the presence of a large opacity on x-ray measuring at least one centimeter that was eventually found to be consistent with complicated pneumoconiosis. Employer's Brief at 30. Employer's argument that there is no evidence to refute Dr. Crum's observation of large opacities overlooks that Dr. Adcock

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 (1991) (en banc).

Employer argues the ALJ should have credited Dr. Crum's 2010 and 2011 CT scan readings as consistent with his 2019 CT scan reading that the ALJ found credible and positive for complicated pneumoconiosis. Employer's Brief at 28-29. The ALJ, however, was not required to give dispositive weight to Dr. Crum's interpretations of the 2010 and 2011 CT scan readings simply because he credited Dr. Crum's reading of a CT scan eight years later. This is particularly so given the conflicting readings of the earlier CT scans by Drs. Halbert, Poulos, and Adcock whom the ALJ found were equally-qualified. *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000). Employer's arguments regarding the June 15, 2010 and May 16, 2011 CT scans constitute a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Because the ALJ acted within his discretion in weighing the CT scan evidence, we affirm his finding that neither the June 15, 2010 nor the May 16, 2011 CT scan establish the onset of complicated pneumoconiosis. Decision and Order at 13-14. Further, the ALJ rationally found Dr. Crum's uncontradicted March 23, 2018 x-ray reading that is positive for complicated pneumoconiosis is the first credible evidence of complicated pneumoconiosis. *See Cox*, 602 F.3d at 283; *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 11, 19.[6]

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explicitly stated there are "[n]o large opacities" on either CT scan. Employer's Exhibits 5, 6; Employer's Brief at 30.

[6] Employer argues the ALJ erred in finding Claimant entitled to benefits commencing in March 2018 considering he found a December 11, 2018 x-ray negative for complicated pneumoconiosis. Employer's Brief at 37 n.10. We disagree. Although the ALJ found the December 11, 2018 x-ray does not establish complicated pneumoconiosis, he found it outweighed by the positive x-rays of record. Decision and Order at 13. Thus the ALJ rationally found the March 23, 2018 x-ray that is positive for complicated pneumoconiosis is the first credible evidence of complicated pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438 (4th Cir. 1997).

We therefore affirm the ALJ's determination that Claimant's complicated pneumoconiosis became onset in March 2018, during his employment with Employer. 20 C.F.R. §725.503(b); *Truitt*, 2 BLR at 1-204; Decision and Order at 13-14, 19. We thus reject Employer's and Carrier's arguments that Claimant's complicated pneumoconiosis did not arise in part out of his employment with Employer.

Additional Responsible Operator Arguments

Employer and Carrier raise a number of additional arguments that are rendered moot by our affirmance of the ALJ's finding that the June 15, 2010 and May 16, 2011 CT scans do not establish complicated pneumoconiosis.

As noted above, Employer argues it should be dismissed as the responsible operator and SummitPoint should be dismissed as the responsible carrier because Claimant had complicated pneumoconiosis before he worked for Employer and before SummitPoint's policy of insurance became effective. January 27, 2020 Motion to Dismiss. Before the ALJ, it relied on Dr. Crum's readings of the June 15, 2010 and May 16, 2011 CT scans wherein he diagnosed complicated pneumoconiosis. *Id.* The ALJ initially stated he declined to consider this evidence on the responsible operator/carrier issue because Employer failed to submit these readings to the district director as liability evidence, and Employer did not establish extraordinary circumstances for failing to do so.[7] *See* 20 C.F.R. §§725.414(d), 725.456(b)(1); April 27, 2020 Order.

Employer and Carrier argue the ALJ misapplied the regulations in declining to consider this evidence on the liability issue. Employer's Brief at 37-50; Carrier's Brief at 2-7. It asserts Dr. Crum's positive reading of the CT scan did not exist when the claim was before the district director, and the regulations only apply to evidence that existed when the district director was processing the claim. *Id.* Insofar as the ALJ admitted this evidence into the record for purposes of determining the commencement date, Employer contends he could have considered it for liability purposes. *Id.* In addition, it argues it has established extraordinary circumstances because Claimant did not identify this evidence when Employer sought discovery, and the district director did not properly serve the Notice of Claim or Schedule for the Submission of Additional Evidence on Employer or the Carrier. *Id.* Further, Employer argues the ALJ's application of the regulations violates the Longshore and Harbor Workers' Compensation Act and the Administrative Procedure Act, and converted the district director into an inferior officer who was not appointed in a

[7] The regulations require that, absent extraordinary circumstances, liability evidence must be timely submitted to the district director. 20 C.F.R. §§725.414(d), 725.456(b)(1).

manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[8] Finally, Employer argues the ALJ violated its due process rights and erred in issuing his evidentiary ruling three days before issuing his Decision and Order. *Id.*, *citing L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc).

As discussed above, in considering when Claimant's benefits should commence, the ALJ found that neither the 2010 nor 2011 CT scans establish Claimant had complicated pneumoconiosis at those times. As we have affirmed that finding, these CT scans cannot assist Employer and Carrier in establishing they should be dismissed and liability transferred to the Trust Fund based on their proffered theory that Claimant was totally disabled prior to his employment with Employer. As the ALJ fully considered this evidence on the dispositive question of when Claimant's complicated pneumoconiosis became onset, Employer and Carrier have not explained how the additional alleged errors would make a difference. *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).

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[8] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

Accordingly, the 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