U.S. Department of Labor

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

BRB No. 22-0344 BLA

VIRGINIA STRAWSER (o/b/o RICHARD R. STRAWSER)	)	
Claimant-Respondent	)	
v.	)	
POTOMAC COAL COMPANY	)	
and	)	
CONSOL ENERGY, INCORPORATED, c/o SMART CASUALTY CLAIMS	)	DATE ISSUED: 9/25/2023
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 Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2021-BLA-05552) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on October 8, 2019.[1]

The ALJ credited the Miner with thirty-three years of underground coal mine employment but found Claimant failed to establish the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] However, he found Claimant established the Miner had complicated pneumoconiosis and thus 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, and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). Further, he found the Miner's complicated

[1] The Miner filed one previous claim on September 29, 2013, which the district director denied on May 12, 2015, because he failed to establish total disability due to pneumoconiosis. 20 C.F.R. §718.204(c); Director's Exhibit 1. The Miner took no further action until filing the present claim. Director's Exhibit 3. The Miner died on December 5, 2021, while this claim was pending. Decision and Order at 2 n.1. Claimant, the Miner's widow, is pursuing the claim on behalf of his estate.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[3] Where 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 the Miner did not establish total disability due to pneumoconiosis in his prior claim, Claimant had to submit new evidence establishing that element of entitlement in

pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203.

On appeal, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

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 they 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* 20 C.F.R. §718.304. In determining whether a 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).

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order to obtain review of the current claim on the merits. *See* 20 C.F.R. §§718.204(c), 725.309(c)(3), (4); *White*, 23 BLR at 1-3.

[4] We affirm, as unchallenged on appeal, the ALJ's finding the Miner had thirty-three years of underground coal mine employment. Decision and Order at 4-5. We further affirm as unchallenged on appeal his finding that Claimant successfully established the existence of simple clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15, 22.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

The ALJ found the computed tomography (CT) scan evidence establishes complicated pneumoconiosis.[6] 20 C.F.R. §718.304(c); Decision and Order at 21-23. Employer contends the ALJ erred in weighing the CT scans. Employer's Brief at 5-9. We disagree.

The ALJ considered three interpretations of a March 1, 2021 CT scan. Claimant's Exhibits 1, 3; Employer's Exhibit 4. Dr. DePonte identified fine nodular opacities with coalescence consistent with simple pneumoconiosis, and peripheral large opacities in the left and right upper lobes measuring eleven and thirteen millimeters, respectively, consistent with complicated pneumoconiosis. Claimant's Exhibit 1. Dr. Fino identified fine nodular densities consistent with simple pneumoconiosis and a fourteen millimeter abnormality in the upper left lung which he opined could be either complicated pneumoconiosis or a pseudoplaque. Claimant's Exhibit 3. He therefore stated he could not rule out a diagnosis of complicated pneumoconiosis. *Id*. Finally, Dr. Tarver identified "peripheral nodules and/or pseudoplaques[,]" a six millimeter nodule in the right upper lobe, and a six millimeter right major fissural nodule, and opined these were most consistent with "interstitial fibrosis, likely post-inflammatory[,]" and there were "no CT findings consistent with coal workers' pneumoconiosis." Employer's Exhibit 4 at 3. The ALJ noted both Drs. DePonte and Tarver are dually-qualified as B readers and Board-certified radiologists.[7] Decision and Order at 19, 20.

The ALJ assigned little weight to Dr. Fino's reading of the CT scan because the doctor concluded he could not rule out complicated pneumoconiosis but did not render a definitive finding of the disease. Decision and Order at 21. He assigned great weight to Dr. DePonte's reading because he found it reasoned and documented. *Id*. Finally, he

[6] The ALJ found the x-ray evidence establishes simple, but not complicated, pneumoconiosis, and there is no autopsy or biopsy evidence of record. 20 C.F.R. §718.304(a), (b); Decision and Order at 19-20.

[7] We disagree with Employer's argument that the ALJ erred by failing to consider Dr. Tarver's additional qualifications as an instructor and author. Employer's Brief at 14. While an ALJ may accord greater weight to a physician based on additional credentials as a teacher, lecturer, or author, he is not required to do so and instead may permissibly accord equal weight to physicians who are dually-qualified as B readers and Board-certified radiologists. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993).

assigned diminished weight to Dr. Tarver's reading as he found it "incomplete" because the doctor did not "address the abnormal finding in the left upper lobe." *Id.* at 21-22.

Employer argues the ALJ did not adequately explain why he found Dr. DePonte's interpretation reasoned and documented. Employer's Brief at 6. We disagree.

The ALJ accurately explained that Dr. DePonte noted nodular opacities with coalescence consistent with simple pneumoconiosis as well as bilateral large opacities consistent with complicated pneumoconiosis. Decision and Order at 20. He correctly noted Dr. DePonte identified a large opacity measuring up to thirteen millimeters in the right upper lobe and a large opacity measuring up to eleven millimeters in the left upper lobe which would each measure larger than one centimeter on standard x-ray. *Id.* Further, the ALJ noted that Dr. DePonte made specific findings and explained why she concluded the opacities represented complicated pneumoconiosis. *Id.* at 21. Thus, the ALJ satisfied the Administrative Procedure Act (APA) by setting forth the reasons he found Dr. DePonte's interpretation reasoned and documented. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (The APA does not "impose a duty of long-windedness on an ALJ"; to the contrary, "if a reviewing court can discern what the ALJ did and why [he] did it, the duty of explanation under the APA is satisfied.") (citations omitted); *Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (duty of explanation under the APA is satisfied as long as the reviewing court can discern what the ALJ did and why he did it).

Employer next argues the ALJ did not adequately explain why he discredited Dr. Tarver's reading of the CT scan as "incomplete." Employer's Brief at 8. We again disagree.

Dr. Tarver concluded there were no small nodules or large masses consistent with pneumoconiosis but acknowledged the presence of peripheral and basilar fibrosis, as well as "peripheral nodules and/or pseudoplaques." Employer's Exhibit 4. Although he discussed the size of abnormalities in the right lung, he did not discuss if the abnormalities were present in the left lung. *Id.*

The ALJ found Dr. Tarver's discussion of left lung abnormalities to be "incomplete" and thus his CT scan reading entitled to diminished weight. Decision and Order at 21. Substantial evidence supports this finding, and we affirm it. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 174 (4th Cir 1997) (describing substantial evidence as more than a scintilla, but only such evidence that a reasonable mind could accept as adequate to support a conclusion, and holding that the findings of an ALJ may not be disregarded on the basis that other inferences could have been drawn from the evidence); *see also Newport News Shipbldg. and Dry Dock Co. v. Ward*, 326 F.3d 434, 438 (4th Cir. 2003) (substantial

evidence is "more than a scintilla but less than a preponderance") (citations omitted). Both Drs. DePonte and Fino noted an abnormality, measuring between eleven and fourteen millimeters, in the left upper lobe.[8] Claimant's Exhibits 1, 3. Moreover, CT scan interpretations in the Miner's medical treatment records identified nodules in both the right and left upper lobes as early as April 2015. Director's Exhibits 44 at 27, 29; 56 at 3-5.

Therefore, we affirm the ALJ's finding that the CT scan evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 22.

Employer next argues the ALJ erred in failing to weigh all the evidence of complicated pneumoconiosis together. Employer's Brief at 6-9. Specifically, Employer argues the ALJ erred by failing to weigh the x-ray evidence against the CT scan evidence. *Id.* We conclude any alleged error in this regard is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Both Dr. DePonte and Dr. Tarver explained the use of a CT scan is medically acceptable and relevant to establishing the existence of pneumoconiosis. Claimant's Exhibit 1 at 2; Employer's Exhibit 4 at 3. Moreover, both physicians specifically opined CT scans are useful in documenting the presence of complicated pneumoconiosis when it is not well demonstrated or not evident on routine chest x-rays, and Dr. Tarver explicitly opined CT scans are more sensitive than x-rays in identifying parenchymal abnormalities. *Id.* The ALJ found Dr. DePonte's CT scan reading is reasoned and documented and credibly supports a finding of complicated pneumoconiosis. Decision and Order at 20-21. No doctor opined x-rays are better diagnostic tools than CT scans and thus the probative value of the CT scan evidence is unrefuted. As no reasonable factfinder could credit the negative x-ray evidence over the credited, positive CT scan evidence in this case, we conclude remand is not necessary based on this alleged error. *See Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249 (6th Cir. 1995) ("If the outcome of a remand is foreordained, we need not order one."); *Sahara Coal Co. v. Director, OWCP* [*McNew*], 946 F.2d 554, 558 (7th Cir. 1991).

As Employer raises no further challenges to the ALJ's finding of complicated pneumoconiosis, we affirm his determination that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3). We further affirm, as unchallenged on appeal, the ALJ's finding that the Miner's complicated

[8] The ALJ discredited Dr. Fino's opinion for being equivocal regarding the etiology of the abnormality, not the presence of the mass. Decision and Order at 21. We affirm this finding as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

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 at 22.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge