U.S. Department of Labor

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

BRB No. 22-0182 BLA

JEFFREY VARNEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARGUS ENERGY, LLC	)	
	)	
and	)	
	)	
NEW HAMPSHIRE INSURANCE COMPANY	)	DATE ISSUED: 04/26/2023
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Denying Benefits of Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

Jeffrey Varney, Delbarton, West Virginia.

Sarah Y. M. Himmel (Two Rivers Law Group P.C.), Christiansburg, Virginia, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals, without representation,[1] the Decision and Order Denying Benefits (2019-BLA-05843) of Administrative Law Judge (ALJ) Sean M. Ramaley rendered on a miner's claim filed on June 12, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (the Act).

The ALJ found Claimant did not establish complicated pneumoconiosis, and thus could not invoke 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. In addition, the ALJ credited Claimant with twenty-nine years of underground coal mine employment based on the parties' stipulation but found Claimant did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, he found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[2] or establish entitlement to benefits at 20 C.F.R. Part 718. Accordingly, the ALJ denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of his claim. Employer and its Carrier (Employer) respond in support of the denial. The Director, Office of Workers' Compensation Programs, did not file a response brief.

In an appeal filed without representation, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with law.[3] 33 U.S.C. §921(b)(3), as

[1] Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board review Administrative Law Judge (ALJ) Sean M. Ramaley's decision but is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See*

incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(3) Presumption

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffered from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yielded 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, yielded 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). 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 (1991) (en banc).

20 C.F.R. §718.304(a) – X-rays

The ALJ considered nine interpretations of two x-rays dated August 15, 2017, and May 25, 2018. Decision and Order at 18-19. He noted Drs. Seaman, DePonte, Crum, Tarver, Miller, and Adcock are dually qualified as Board-certified radiologists and B readers, while Dr. Gaziano is a B reader only.[4] Decision and Order at 17; Director's Exhibit 17; Claimant's Exhibits 1 at 3-4, 2 at 2-3, 3 at 3-6; Employer's Exhibits 1 at 2-5, 2 at 3-31, 4 at 3-7. Considering each physician's "radiology experience, publications related to black lung and/or with miners, professorships, and affiliation with a sizeable/teaching hospital," the ALJ found Drs. Seaman and Tarver are "the best qualified radiologists, followed by Drs. DePonte and Adcock."[5] Decision and Order at 17-18 (emphasis in the original). The

Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 18, 26.

[4] The ALJ accurately observed Dr. Gaziano is Board-certified in internal medicine and pulmonary medicine. Decision and Order at 17; Director's Exhibit 17 at 2.

[5] The ALJ made the following notations with respect to the physicians' qualifications. Dr. Seaman currently works as the Assistant Chief of Radiology at Durham Veterans Affairs Medical Center; she is an assistant professor at the Duke University Medical Center radiology department and "has contributed to four publications." Decision and Order at 17; Employer's Exhibit 4 at 3-7. Dr. Tarver is a professor of

ALJ did not further indicate the order in which he ranked the qualifications of Drs. Crum and Miller after Drs. DePonte and Adcock.

Regarding the August 15, 2017 x-ray, Drs. Gaziano, Miller, Crum, and DePonte read it as positive for simple pneumoconiosis and complicated pneumoconiosis, Category A, while Drs. Seaman, Adcock, and Tarver read the x-ray as negative for simple and complicated pneumoconiosis. Claimant's Exhibits 1-3; Employer's Exhibits 2, 4. Based on various comments included on the International Labour Organization (ILO) x-ray forms, the ALJ concluded:

> Of the physicians who found complicated pneumoconiosis, none offered definitive findings. Dr. Gaziano and Dr. Miller stated that the x-ray showed the possibility of complicated pneumoconiosis. Dr. Crum noted that the x-ray identified a probable large opacity. Dr. DePonte similarly observed the need to [*sic*] additional testing to differentiate between a large opacity and granuloma. Drs. Tarver and Adcock are likewise equivocal, noting that the x-ray findings were likely, or could be, pleural thickening, however, they ruled out complicated pneumoconiosis. Conversely, Dr. Seaman found the nodule consistent with sequelae of granulomatous infection. Since I find Dr. Seaman more qualified, I accord her reading more weight.

Decision and Order at 18.

We affirm the ALJ's assignment of less weight to Dr. Gaziano's positive reading because he is not a Board-certified radiologist. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order at 18. We also affirm the ALJ's crediting

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radiology at Indiana University School of Medicine, "the chest section editor for 'The Radiologist,' and "extremely well-published." Decision and Order at 17; Employer's Exhibit 2 at 3-31. Dr. DePonte is a radiologist in private practice and serves on an adjunct clinical faculty with DeBusk College of Osteopathic Medicine; "[s]he has published and presented." Decision and Order at 17; Claimant's Exhibit 2 at 2-3. Dr. Adcock formerly worked as a staff radiologist at Colorado Permanente Medical Group and an assistant professor with the University of Colorado Health Science Center's radiology department. Decision and Order at 17; Employer's Exhibit 1 at 2-5. Dr. Crum is a practicing radiologist, on the faculty at two schools of osteopathic medicine, and a lecturer with the Tennessee Academy of Physician Assistants. Decision and Order at 17; Claimant's Exhibit 1 at 3-4. Dr. Miller is currently Chief of Radiology Staff at Bluefield Regional Medical Center and BluRad PLLC. Decision and Order at 17; Claimant's Exhibit 3 at 3-6.

of Dr. Seaman's negative reading as he permissibly found Dr. Seaman is the most qualified radiologist.[6] *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174 (4th Cir 1997); Decision and Order at 18. Thus, we affirm the ALJ's determination that the August 15, 2017 is negative for complicated pneumoconiosis.

Dr. Crum read the May 25, 2018 x-ray as showing a Category A opacity that was "probable" for complicated pneumoconiosis versus neoplasm, while Dr. Adcock read it as negative for complicated pneumoconiosis. Director's Exhibits 20, 22. The ALJ permissibly credited Dr. Adcock's negative reading over Dr. Crum's positive reading because he considered Dr. Adcock more qualified and found Dr. Crum's reading to be equivocal. However, even if the ALJ did not adequately explain how he resolved the conflict in the readings, remand is not required. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Even assuming Dr. Crum's reading is not equivocal, there is one positive and one negative reading of the x-ray by two dually-qualified radiologists. As such, the x-ray readings are in equipoise and Claimant is unable to satisfy his burden of proof. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994). Thus, we affirm the ALJ's determination that the May 25, 2018 x-ray fails to support a finding of complicated pneumoconiosis.

Because the ALJ conducted both a qualitative and quantitative analysis of the conflicting x-ray readings, we affirm as supported by substantial evidence his determination that Claimant did not establish complicated pneumoconiosis at 20 C.F.R. §718.304(a). *See Adkins*, 958 F.2d at 52-53.

20 C.F.R. §718.304(b) – Biopsy Report

The ALJ considered a biopsy report dated July 6, 2015. Decision and Order at 19; Claimant's Exhibit 4. He accurately noted the report does not include a finding of complicated pneumoconiosis. Decision and Order at 19. Consequently, we affirm his finding that Claimant did not establish complicated pneumoconiosis based on the biopsy evidence at 20 C.F.R. §718.304(b).

[6] We consider any potential error by the ALJ in finding the positive readings by Drs. Miller, Crum, and DePonte equivocal to be harmless, as the readings of the August 15, 2017 x-ray are at best in equipoise as there are an equal number of positive and negative readings by dually-qualified radiologists. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *see also Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994).

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

Claimant submitted medical records from UVA-Stone Mountain Telemedicine Pulmonary Clinic dated September 15, 2020. Claimant's Exhibit 7. Dr. Harris noted Claimant's esophageal cancer was in remission and diagnosed coal workers' pneumoconiosis with possible progressive massive fibrosis, while indicating there were varying opinions as to Claimant's chest x-ray evidence.

The ALJ considered Dr. Adcock's readings of nine computed tomography (CT) scans. Decision and Order at 19; Claimant's Exhibits 5, 6, 8, 9; Employer's Exhibits 9-18. Although Dr. Adcock observed a large, right upper lobe pulmonary nodule on each of the scans, he specifically concluded that there was no evidence of simple or complicated pneumoconiosis. Decision and Order at 19. Because the ALJ permissibly found Claimant's treatment records and CT scans do not aid him in establishing complicated pneumoconiosis, we affirm his determination at 20 C.F.R. §718.304(c) that complicated pneumoconiosis was not diagnosed by other means.

Moreover, we affirm as supported by substantial evidence the ALJ's conclusion that the evidence overall does not establish complicated pneumoconiosis. We therefore affirm the ALJ's determination that Claimant is unable to invoke the irrebuttable presumption. *See Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 255-56; *Melnick*, 16 BLR at 1-33.

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[7] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232

[7] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

(1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ accurately noted that the three pulmonary function studies of record, dated August 15, 2017, June 19, 2019, and March 11, 2020, are non-qualifying and thus Claimant did not establish total disability at 20 C.F.R §718.204(b)(2)(i). Decision and Order at 21; *see* Director's Exhibit 15; Employer's Exhibits 5, 6. He also correctly found the single arterial blood gas study dated August 15, 2017, is non-qualifying. Decision and Order at 21; Director's Exhibit 15. We therefore affirm the ALJ's finding that Claimant did not establish total disability at 20 C.F.R §718.204(b)(2)(ii). Further as there is no evidence of cor pulmonale with right-sided congestive heart failure, Claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(iii).

Lastly, the ALJ considered three medical opinions. Decision and Order at 22; Director's Exhibit 15; Employer's Exhibits 7, 8. Based on Claimant's x-ray and objective test values, Dr. Gaziano opined Claimant "could do coal mine work but [is] precluded from mine work with complicated [coal workers' pneumoconiosis]" while Drs. Fino and McSharry opined Claimant is not totally disabled. Director's Exhibit 15 at 4; Employer's Exhibits 7, 8. The ALJ permissibly gave little weight to Dr. Gaziano's opinion because he concluded, in part, that Claimant is totally disabled based on his belief that Claimant has complicated pneumoconiosis, contrary to the ALJ's overall conclusion that Claimant did not prove the disease. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 22. We, therefore, affirm the ALJ's determination that Claimant is unable to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Because we affirm the ALJ's conclusion that Claimant is not totally disabled by a respiratory or pulmonary impairment, we affirm his determination that Claimant is unable to invoke the Section 411(c)(4) presumption. Claimant's failure to establish total disability, an essential element of entitlement, also precludes an award of benefits pursuant to 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc); Decision and Order at 30.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge