U.S. Department of Labor

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

BRB No. 21-0532 BLA

DANNY W. RUSH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
THE MONONGALIA COUNTY COAL COMPANY	)	
	)	
and	)	
	)	
MURRAY ENERGY CORPORATION TRUST c/o SMARTCASUALTY CLAIMS	)	DATE ISSUED: 8/24/2022
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Modification 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.

Aimee M. Stern (Dinsmore & Shohl, LLP), Wheeling, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits on Modification (2020-BLA-05652) 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 request for modification of a miner's subsequent claim filed on January 28, 2016.[1]

In her January 29, 2018 Decision and Order Denying Benefits, ALJ Natalie A. Appetta credited Claimant with thirty-nine years of coal mine employment, with at least twenty-seven years in underground mines, but found he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018). In addition, she found Claimant failed to establish the existence of pneumoconiosis, and consequently did not establish a change in an applicable condition of entitlement. 20 C.F.R. §725.309. Thus, she denied benefits.

Claimant timely requested modification of the decision denying benefits on September 17, 2018. 20 C.F.R. §725.310; Director's Exhibit 45. On March 18, 2020, the district director denied Claimant's request for modification. Director's Exhibit 47. Claimant requested a hearing and the district director forwarded the case to the Office of Administrative Law Judges. Director's Exhibits 52, 53. ALJ Swank (the ALJ) held a hearing on May 11, 2021.

In his Decision and Order Denying Benefits on Modification dated July 19, 2021, the subject of the current appeal, the ALJ credited Claimant with thirty-nine years of underground coal mine employment. He found the evidence did not establish complicated

[1] This is Claimant's second claim for benefits. On October 23, 2014, the district director denied Claimant's first claim, filed on March 5, 2014, because he failed to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action until filing the current claim. Director's Exhibit 3.

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

pneumoconiosis, and therefore Claimant 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. Further, because the evidence did not establish a totally disabling respiratory or pulmonary impairment, he found Claimant could not invoke the Section 411(c)(4) presumption. Considering entitlement under 20 C.F.R. Part 718, the ALJ found the new evidence did not establish clinical or legal pneumoconiosis and total disability due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(c). He therefore found Claimant failed to establish a mistake in a determination of fact or a change in conditions, and denied benefits. 20 C.F.R. §725.310.

On appeal, Claimant argues the ALJ erred in finding he failed to establish complicated pneumoconiosis.[3] Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

In considering whether to grant modification of the prior denial of Claimant's subsequent claim, the ALJ was required to determine whether the denial contained a mistake in a determination of fact or whether the evidence submitted on modification,

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

[4] 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 Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 39 at 11, 13, 20.

along with the evidence previously submitted in this subsequent claim, is sufficient to establish a change in conditions, i.e., a change in an applicable condition of entitlement. 20 C.F.R. §§725.309(c); 725.310; *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998). In reviewing the record on modification, the ALJ has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Jessee v. Director, OWCP*, 5 F.3d 723, 724-25 (4th Cir. 1993); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994). Thus, the ALJ is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

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 suffers 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. The ALJ must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether Claimant has invoked the irrebuttable presumption. *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); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found the x-ray readings, biopsy evidence, and computed tomography (CT) scan readings of record, considered independently, insufficient to establish complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c); Decision and Order on Modification at 24-25. He further found all the relevant evidence weighed together insufficient to establish complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order on Modification at 25.

Claimant argues the ALJ erred in weighing the CT scan readings.[5] Claimant's Brief at 6-8.

The record contains three interpretations of an October 19, 2018 CT scan. Dr. DePonte diagnosed large opacities in the posterior segment of the left upper lobe and right middle lobe consistent with complicated coal workers' pneumoconiosis. Claimant's Exhibit 1. She opined "[t]he large opacities would measure similar in size and greater than one centimeter on a standard chest radiograph (x-ray)."[6] *Id*. Dr. Seaman opined "[t]here are no large opacities of coal worker's (sic) pneumoconiosis." Employer's Exhibit 1. She found "scattered calcified nodules consistent with sequelae of prior granulomatous infection" and "small bilateral pleural effusions." *Id*. She concluded the CT scan findings are "most consistent with prior fibrosis mediastinitis, which is resulting in areas of airway narrowing/occlusion with distal atelectasis." *Id*. Dr. Kupec found "bilateral consolidations involving the posterior right middle lobe and the medial left upper lobe . . . [which] may reflect infiltrates in the appropriate setting." Claimant's Exhibit 2. He also found enlarged and partially calcified bilateral hilar and mediastinal adenopathy," and "multiple calcified and noncalcified pulmonary nodules with interlobular septal thickening and groundglass opacities."[7] *Id*. He concluded the "appearance is suggestive of a chronic infectious/inflammatory process such as sarcoid or silicosis." *Id*.

The ALJ gave little weight to Dr. Kupec's opinion because his radiological expertise is unknown.[8] Decision and Order on Modification at 25. He gave equal weight to Drs. DePonte's and Seaman's opinions because he found them to have comparable credentials. *Id*. Because they disagreed as to whether Claimant's CT scan showed large opacities consistent with complicated pneumoconiosis, he found no reason to credit either doctor's

[5] We affirm, as unchallenged, the ALJ's findings that Claimant failed to establish the existence of complicated pneumoconiosis based on x-ray, biopsy or autopsy evidence. 20 C.F.R. §718.304(a), (b); *see Skrack*, 6 BLR at 1-711.

[6] Dr. DePonte noted a large opacity in the left upper lobe measured approximately 4 x 2 x 5 cm. Claimant's Exhibit 1. She also stated the size of the opacity "would place it in a category 'B' of large opacity." Claimant's Exhibit 4 at 9.

[7] Dr. Kupec noted a "9 mm nodule seen in the right upper lobe" and a "6 mm nodule seen." Claimant's Exhibit 2.

[8] Claimant does not challenge the ALJ's finding that Dr. Kupec's opinion is entitled to little weight; thus, we affirm this determination. *See Skrack*, 6 BLR at 1-711; Decision and Order on Modification at 25.

interpretation over the other. Consequently, the ALJ concluded the CT scan evidence is inconclusive as to the existence of complicated pneumoconiosis.

Claimant argues the ALJ should have given greater weight to Dr. DePonte's CT scan reading because she offered credible deposition testimony for her conclusions. Claimant's Brief at 6-8. We reject this contention. The ALJ acted within his discretion in assessing the weight to be given Drs. DePonte's and Seaman's CT scan readings. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *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). He correctly noted Drs. DePonte and Seaman are dually qualified as B-readers and Board-certified radiologists and have comparable credentials. Thus he rationally determined he could find no reason to credit one physician's reading over the other. We will not disturb an ALJ's credibility determinations where, as here, they are sufficiently reasoned and supported by the evidence. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. We therefore affirm the ALJ's conclusion that the CT scan evidence is in equipoise and does not establish complicated pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 734-35 (7th Cir. 2013) (court rejected employer's argument that ALJ's finding the x-ray and CT scan evidence in equipoise violated the APA because ALJ properly considered interpreting physicians' qualifications and found evidence equally balanced); 20 C.F.R. §718.304(c); Decision and Order on Modification at 25.

Further, based on all the relevant evidence weighed together, the ALJ properly found Claimant failed to establish the existence of complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c). *See Lester*, 993 F.2d at 1145-46; *Gray v. SLC Coal Co.*, 176 F.3d 382, 389 (6th Cir. 1999); *Gollie*, 22 BLR at 1-311; *Melnick*, 16 BLR at 1-33-34. Thus, we affirm the ALJ's finding that Claimant did not invoke the Section 411(c)(3) irrebuttable presumption. We also affirm the ALJ's unchallenged finding that Claimant failed to establish entitlement to benefits under Part 718. 20 C.F.R. §§718.202(a), 718.203(b), 718.204; *see Skrack*, 6 BLR at 1-711; Decision and Order on Modification at 8-23, 25-26. We therefore affirm the denial of benefits.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge