U.S. Department of Labor

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

BRB No. 22-0290 BLA

GARY L. DORSEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BROOKS RUN MINING COMPANY, LLC c/o ANR INC/CONTURA ENERGY	)	
	)	
and	)	
	)	DATE ISSUED: 8/04/2023
ANR, INCORPORATED	)	
	)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2020-BLA-05915) rendered on a claim filed on April 9, 2019, pursuant the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with at least thirty-four years of underground coal mine employment. She found Claimant established complicated pneumoconiosis and thus 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); 20 C.F.R. §718.304. Further, she found Claimant's complicated 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 denying it the opportunity to submit a rebuttal interpretation of the June 10, 2019 computed tomography (CT) scan interpretation Claimant submitted as other medical evidence pursuant to 20 C.F.R. §718.107. Based on this alleged evidentiary error, Employer asserts the ALJ's finding that Claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(c) must be vacated.[1] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response.

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, 362 (1965).

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[1] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established thirty-four years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[2] 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); Hearing Tr. at 31, 47-48.

Employer argues it was improperly denied the opportunity to obtain and submit a post-hearing rebuttal interpretation of the June 10, 2019 CT scan pursuant to 20 C.F.R. §725.414(a)(3)(ii). Employer's Brief at 11-14. We agree.

An ALJ exercises broad discretion in resolving procedural and evidentiary matters. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). Thus, a party seeking to overturn the disposition of a procedural or evidentiary issue must establish the ALJ's action represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

Employer submitted Claimant's treatment records, which contained a CT scan dated June 10, 2019. Employer's Exhibit 4. Claimant then obtained and submitted an interpretation of the CT scan from Dr. DePonte diagnosing complicated pneumoconiosis. Claimant's Exhibit 4. Claimant provided the interpretation to Employer one day before the twenty-day deadline for exchanging evidence.[3] Hearing Tr. at 12, 20-21.

At the hearing, Employer objected to Claimant's Exhibit 4 and requested leave to obtain and submit a rebuttal interpretation of Dr. DePonte's interpretation. Hearing Tr. at 12. The ALJ admitted the exhibit and denied Employer's request because "[u]nder the regulations, [Employer] is not entitled to rebuttal of a CT scan. It is considered other evidence," and there is not rebuttal of other medical evidence.[4] Hearing Tr. at 18-23.

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[3] Section 725.456 requires any documentary evidence, such as a CT scan interpretation, which was not submitted to the district director to be sent to all other parties at least twenty days before the hearing is held. 20 C.F.R. §725.456(b)(2).

[4] To the extent the ALJ denied Employer's request for a rebuttal interpretation based on Employer's knowing Claimant was planning to obtain an interpretation of the CT scan, Employer argues the ALJ erred in finding Dr. DePonte's interpretation did not constitute surprise evidence to which it was entitled to respond pursuant to *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195, 1-200 (1985), *aff'd on recon*., 9 BLR 1-236 (1987) (en banc). Hearing Tr. at 20-23; Employer's Brief at 14-19. In *Shedlock,* the Board held that a party must be given an opportunity to respond to *evidence submitted* immediately prior to the twenty-day deadline that 20 C.F.R. §725.456 imposes. 9 BLR at 1-200. As in *Shedlock*, Claimant submitted Dr. DePonte's CT scan interpretation immediately prior to the twenty-day deadline. Nevertheless, as we reverse the ALJ's finding on other grounds, we need not decide whether this constitutes "surprise evidence" under *Shedlock* or address Employer's due process argument.

As Employer correctly notes, the regulations state that, "[i]n any case in which the claimant has submitted the results of other testing pursuant to [Section] 718.107, the responsible operator is entitled to submit one physician's assessment of each piece of such evidence in rebuttal." *See Blake,* 24 BLR at 1-113; 20 C.F.R. §725.414(a)(3)(ii); Employer's Brief at 13. Thus, the ALJ abused her discretion in finding Employer is not entitled to submit an interpretation in rebuttal of Claimant's CT scan interpretation which he affirmatively designated as a piece of other medical evidence under Section 718.107. 20 C.F.R. §725.414(a)(3)(ii).

Therefore, we reverse the ALJ's determination that Employer is not entitled to rebuttal of Claimant's CT scan interpretation. 20 C.F.R. §725.414(a)(3)(ii); Hearing Tr. at 18-23. Consequently, because the ALJ relied on the CT scan evidence,[5] we vacate the ALJ's finding Claimant established complicated pneumoconiosis and invoked the irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3); Decision and Order at 20, 25. Thus we vacate the award of benefits.

On remand, the ALJ must allow Employer the opportunity to obtain and submit an interpretation in rebuttal to Dr. DePonte's interpretation of the June 10, 2019 CT scan. 20 C.F.R. §725.414(a)(3)(ii). Thereafter, she must provide Claimant the opportunity to obtain an additional statement from Dr. DePonte pursuant to 20 C.F.R. §725.414(a)(2)(ii). If no additional evidence is admitted, the ALJ may reinstate the award of benefits.

If additional evidence is admitted into the record, the ALJ must reweigh the CT scan evidence with regard to complicated pneumoconiosis and reweigh 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). If the ALJ finds Claimant has met his burden to establish complicated pneumoconiosis, Claimant will have invoked the irrebuttable presumption of total disability due to pneumoconiosis and the ALJ may reinstate the award of benefits. 30 U.S.C. §921(c)(3). If she finds Claimant has not established complicated

[5] The ALJ found the x-ray and medical opinion evidence is in equipoise with regard to complicated pneumoconiosis, and credited Dr. DePonte's interpretation of the June 10, 2019 CT scan which diagnoses complicated pneumoconiosis. Decision and Order at 10-20; Claimant's Exhibit 4. Weighing the evidence together, she found the CT scan evidence supports the positive x-ray readings and the evidence overall establishes complicated pneumoconiosis. *Id.* at 20.

pneumoconiosis, she must consider whether Claimant is entitled to benefits under Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4).[6]

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[6] Section 411(c)(4) 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.