U.S. Department of Labor

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

BRB No. 21-0641 BLA

BARRY MAGGARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KAT RAN ENTERPRISES, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 12/28/2022
COMMERCE & INDUSTRY/CHARTIS	)	
	)	
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 on Remand of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

C. Phillip Wheeler, Jr. (Kirk Law Firm, PLLC), Pikeville, Kentucky, for Claimant.

Kyle L. Johnson (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer and its Carrier.

Sarah M. Hurley (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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits on Remand (2017-BLA-05117) rendered on a subsequent claim filed on July 14, 2015,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for the second time.

In his initial Decision and Order Denying Benefits, the ALJ found the new biopsy evidence supports a finding of complicated pneumoconiosis, 20 C.F.R. §718.304(b), while the x-ray, CT scan, treatment record, and medical opinion evidence does not, 20 C.F.R. §718.304(a), (c). Weighing all of the evidence, he assigned diminished weight to the biopsy evidence because he found there is no indication Claimant continued to have complicated pneumoconiosis after the lung nodule was removed and evaluated. Thus he found 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. While he credited Claimant with fifteen years of coal mine employment, he found Claimant failed to establish a totally disabling respiratory or pulmonary impairment and thus 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), or establish a change in an applicable condition of entitlement. 20 C.F.R. §§725.309, 718.204(b)(2). He therefore denied benefits.

In consideration of Claimant's appeal, the Board vacated the ALJ's finding that the medical opinion evidence and the evidence as a whole does not establish complicated

[1] Claimant filed a prior claim on November 8, 2012, which the district director denied on May 31, 2013, for failure to establish total disability. Director's Exhibit 1.

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

pneumoconiosis and thus the denial of benefits. *Maggard v. Kat Ran Enterprises, Inc.*, BRB No. 18-0451 BLA, slip op. at 5 (Sep. 11, 2019) (unpub.); 20 C.F.R. §718.304(c). The Board held the ALJ erred in assigning diminished weight to the biopsy evidence based on his finding that there is no evidence of complicated pneumoconiosis after the nodule was surgically removed for pathological evaluation, and that his weighing of the medical opinion evidence and the evidence as a whole was based on a similarly flawed rationale. *Id*. The Board instructed the ALJ to reconsider whether the medical opinion evidence, and all evidence weighed together, establishes complicated pneumoconiosis.[3] *Id*.; *see* 20 C.F.R. §718.304. Employer requested reconsideration, which the Board denied. *Maggard v. Kat Ran Enterprises, Inc.*, BRB No. 18-0451 BLA (May 15, 2020) (unpub. Order on Recon.).

In his Decision and Order Awarding Benefits on Remand, the subject of this appeal, the ALJ found Claimant established complicated pneumoconiosis. Thus he found Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act and established a change in an applicable condition of entitlement.[4] 20 C.F.R. §§718.304, 725.309. Further, he found Claimant's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203(b).

On appeal, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis and invoking the irrebuttable presumption of total disability due to pneumoconiosis. Claimant and the Director, Office of Workers' Compensation Programs, respond in support of the award of benefits.

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

[3] Claimant filed a fee petition requesting a fee for legal services performed in this earlier appeal which is addressed below.

[4] When 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 "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). The district director denied Claimant's prior claim because he did not establish total disability; therefore, Claimant had to submit new evidence establishing that element in order to have his claim reviewed on the merits. 20 C.F.R. §725.309(c).

with applicable law.[5] 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).

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 chest x-ray yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy, 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 Claimant has invoked the irrebuttable presumption, the ALJ must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consol. Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found the biopsy and medical opinion evidence establishes complicated pneumoconiosis, whereas the x-ray and CT scan evidence neither proves nor disproves the existence of the disease. 20 C.F.R. §718.304(a)-(c); Decision and Order at 16-26. Weighing all the evidence together, he concluded Claimant established complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 28.

Employer argues the ALJ erred in finding the biopsy and medical opinion evidence, and the evidence as a whole, establishes complicated pneumoconiosis. Employer's Brief at 7-15. We disagree.

Initially, Employer contends that even if the biopsy evidence establishes complicated pneumoconiosis, the removal of the nodule that was biopsied defeats entitlement to benefits. Employer's Brief at 11-15. It argues the ALJ "committed legal error by concluding that once complicated pneumoconiosis is established, the irrebuttable presumption is triggered despite subsequent evidence establishing the condition is no longer present." *Id*. We disagree. The Board has already fully considered and rejected Employer's argument in Claimant's initial appeal of this case, as well as in its Order denying Employer's motion for reconsideration.[6] *Maggard*, BRB No. 18-0451 BLA, slip

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 11.

[6] Moreover, as the ALJ acknowledged, the Board rejected Employer's rationale in *McCauley v. DLR Mining, Inc.*, 25 BLR 1-259 (2019).

op. at 4-5; *Maggard v. Kat Ran Enterprises, Inc.*, BRB No. 18-0451 BLA (May 15, 2020) (unpub. Order on Recon); Employer Motion for Reconsideration at 2-3. The Board's holding remains the law of the case. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Because Employer has not shown the Board's decision was clearly erroneous or established any other exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *Id.*

Employer also generally argues the ALJ erred in relying on the biopsy evidence because all the other evidence was contradictory.[7] Employer's Brief at 8-10. It identifies no specific error in the ALJ's finding that the biopsy evidence and credible medical opinions of Drs. Baker and Crum diagnosing complicated pneumoconiosis outweigh the negative x-rays, CT scans, and medical opinions of Drs. Broudy and Rosenberg. Decision and Order at 17-18, 26-28; Employer's Brief at 8-10. The ALJ carefully reviewed and weighed all of the evidence in this case. We consider Employer's argument to be a request to reweigh the evidence, which we are not empowered to do.[8] *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

As Employer raises no further challenge to the ALJ's determination that Claimant established complicated pneumoconiosis, we affirm it and therefore his conclusion that Claimant invoked the irrebuttable presumption at 20 C.F.R. §718.304. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 1-711 (1983); Decision and Order at 28. We further affirm, as unchallenged on appeal, the ALJ's determination that Claimant's complicated

[7] Employer also argues the biopsy evidence alone is not sufficient to establish complicated pneumoconiosis because 20 C.F.R. §718.202(a)(2) states that "[a] finding in [a biopsy] of anthracotic pigmentation [must] not be considered sufficient, by itself, to establish the existence of pneumoconiosis." 20 C.F.R. §718.202(a)(2); Employer's Brief at 8-9. Contrary to Employer's contention, the biopsy reports did not only identify anthracotic pigmentation. Rather, the reviewing pathologist identified a calcified nodule with surrounding anthracotic pigment-laden reactive changes consistent with progressive massive fibrosis. Director's Exhibits 19, 21; Claimant's Exhibit 3.

[8] Employer argues, for the first time on appeal, that the ALJ impermissibly relied on the biopsy evidence to establish complicated pneumoconiosis because the surgical note from the biopsy was not submitted into evidence pursuant to 20 C.F.R. §718.106. Employers' Brief at 7-8. As Claimant notes, Employer has forfeited this argument as it failed to raise it to the ALJ or the Board previously. Claimant's Reply at 5-7. Consequently, we will not consider its argument. *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 937 F.3d 581, 591 (6th Cir. 2021).

pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack*, 6 BLR at 1-711; Decision and Order at 29.

Fee Petition

Claimant's counsel has filed an itemized fee petition requesting a fee for legal services performed in his prior appeal pursuant 20 C.F.R. §802.203. *Maggard*, BRB No. 18-0451 BLA. He requests a fee of $2,550.00 representing 8.5 hours at an hourly rate of $300. Employer's sole objection is that the fee petition is premature. Employer's response to Motion for Attorney Fee.

An award of attorney fees is only enforceable and payable at such time as an award of benefits is entered which reflects the successful prosecution of the claim. 33 U.S.C. §928; *see Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663 (7th Cir. 1982) (1982); *Spinner v. Safeway Stores, Inc.*, 18 BRBS 155 (1986); *aff'd mem sub nom. Safeway Stores, Inc. v. Director, OWCP*, 811 F.2d 676 (D.C. Cir. 1987). In the interest of judicial efficiency, and because Employer does not object to the amount of requested fees, we find the requested fee to be reasonably commensurate with the necessary services performed in appealing the prior denial of benefits. We thus approve a fee of $2,550.00, to be paid directly to Claimant's counsel by Employer.[9] 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203. Payment of the requested fee is subject to final adjudication of the claim. *See Temple v. Big Horn Coal Co.*, 7 BLR 1-573, 1-576 (1984).

[9] The Board's fee award in this matter is of no precedential value given that counsel's fee petition is unopposed.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge