U.S. Department of Labor

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

BRB No. 23-0134 BLA

DARRELL L. KAUFMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KEYSTONE COAL MINING CORPORATION, c/o CONSOL ENERGY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 02/09/2024
ROCHESTER & PITTSBURGH COAL COMPANY, c/o SMARTCASUALTY CLAIMS	)	
	)	
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.

Toni J. Williams (SutterWilliams, LLC), Pittsburgh, Pennsylvania, 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 (2022-BLA-05313) rendered on a claim filed on September 30, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with sixteen years and nine months of coal mine employment and found he established complicated pneumoconiosis. 20 C.F.R. §718.304. Consequently, he found Claimant 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). He further found Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203. Thus he awarded benefits.

On appeal, Employer asserts the ALJ erred in excluding evidence relevant to the issue of complicated pneumoconiosis and in finding Claimant established the existence of the disease.[1] Claimant and the Director, Office of Workers' Compensation Programs, have not filed response briefs.

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 (1965).

Evidentiary Limitations

Employer argues the ALJ erred in excluding evidence relevant to the issue of complicated pneumoconiosis. Employer's Brief at 8-12. We disagree.

ALJs exercise broad discretion in resolving procedural and evidentiary matters. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc). A party seeking to

[1] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established sixteen years and nine months of 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 Third Circuit because Claimant performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 7; Director's Exhibit 3.

overturn the disposition of an evidentiary issue must establish the ALJ abused his discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

At the hearing, Employer submitted Employer's Exhibit 10, consisting of Dr. Basheda's June 14, 2021 medical report based on his examination of Claimant on May 6, 2021; Employer's Exhibit 10A, consisting of Dr. Basheda's interpretation of the August 19, 2021 x-ray; and Employer's Exhibit 10B, consisting of Dr. Basheda's interpretation of the March 9, 2021 computed tomography (CT) scan. Hearing Transcript at 14. Claimant objected to the admission of Employer's Exhibits 10A and 10B, arguing they amounted to affirmative x-ray and CT scan readings that exceed the evidentiary limitations.[3] *Id*. at 15. In response, Employer contended the x-ray and CT scan constituted Dr. Basheda's supplemental medical reports rather than new pieces of affirmative evidence. *Id*. at 16-17.

In his November 22, 2022 Order Ruling on Evidentiary Objections (Evidentiary Order), the ALJ considered the parties' arguments and sustained Claimant's objections to Employer's Exhibits 10A and 10B. Evidentiary Order at 2-3. The ALJ noted the exhibits consisted of Dr. Basheda's readings of the x-ray and the CT scan, respectively, along with narratives of his reading of the relevant image. *Id.* at 2.

Considering Employer's Exhibit 10A, the ALJ noted the evidentiary limitations at 20 C.F.R. §725.414 limit the responsible operator to two affirmative x-ray interpretations. 20 C.F.R. §725.414(a)(3)(i); Evidentiary Order at 2. He noted Employer already had designated Dr. Meyer's readings of the September 14, 2020 and July 19, 2021 x-rays, Employer's Exhibits 4 and 5, as its two affirmative readings. Evidentiary Order at 2; Employer's Evidence Summary Form. Further, the regulations provide that any study or test that appears in a medical report must be admissible under the evidentiary limitation provisions. 20 C.F.R. §§725.414(a)(2), 725.457(d). The ALJ found Employer's Exhibit 10A exceeds the evidentiary limits as it was not a rebuttal x-ray reading and Employer already had reached its limit of affirmative readings. Thus, the ALJ excluded it. Evidentiary Order at 2.

Considering Employer's Exhibit 10B, the ALJ correctly noted the parties are limited to one affirmative and one rebuttal reading of each CT scan in the record. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-135 (2006) (en banc); 20 C.F.R. §718.107;

[3] The regulations provide that each party is entitled to submit two affirmative x-ray interpretations and medical reports in support of its case. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Additionally, the Board has held the parties are limited to one affirmative interpretation of each CT scan of record. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-135 (2006) (en banc); 20 C.F.R. §718.107.

Evidentiary Order at 2. He further noted Employer already had designated an affirmative reading of the March 9, 2021 CT scan by Dr. Meyer, Employer's Exhibit 7, and a rebuttal reading of the same CT scan by Dr. Seaman, ALJ Exhibit 3. Evidentiary Order at 2. Thus, he found admitting Employer's Exhibit 10B would exceed Employer's permitted number of readings of the March 9, 2021 CT scan. *Id*.

The ALJ further found Employer did not establish good cause to admit either exhibit in excess of the evidentiary limitations. 20 C.F.R. §725.456; Evidentiary Order at 2.

Employer does not challenge the ALJ's finding that it submitted its full complement of affirmative x-ray and CT scan readings, nor does it argue that it established good cause to exceed the evidentiary limitations. Evidentiary Order at 2; Employer's Evidence Summary Form. It instead argues Employer's Exhibits 10A and 10B constitute supplements to Dr. Basheda's June 14, 2021 report, rather than new pieces of affirmative evidence, and thus were not subject to the limitations applied by the ALJ. Employer's Brief at 8-10. We disagree.

The regulations allow supplemental medical reports to be considered as part of a physician's initial report, rather than new pieces of affirmative evidence. 20 C.F.R. §725.414(a)(1). However, "[a] physician's written assessment of a single objective test, such as a chest X-ray . . . , is not a medical report for purposes of [the evidentiary limitations at 20 C.F.R. §725.414]." 20 C.F.R. §725.414(a)(1). As the ALJ permissibly found both Employer's Exhibits 10A and 10B were readings of a single objective imaging study with an accompanying "narrative pertaining directly to [Dr. Basheda's] own reading," we see no error in his finding them subject to, and in excess of, the evidentiary limitations.[4] *See Soubik v. Director, OWCP*, 366 F.3d 26, 234 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 584 (3d Cir. 1997); Evidentiary Order at 2. As Employer has not established

[4] We further reject Employer's argument that the ALJ erred in admitting Dr. Alexander's reading of the November 4, 2020 x-ray as Claimant's rebuttal reading of the x-ray reading conducted as part of Claimant's Department of Labor-sponsored complete pulmonary evaluation. Employer's Brief at 10-12. Employer argues that because the reading associated with Claimant's pulmonary evaluation was favorable for his case, Claimant is not entitled to submit a reading to rebut it. *Id*. Contrary to Employer's argument, however, rebuttal evidence submitted by a party pursuant to 20 C.F.R. §725.414(a)(2)(ii) need not contradict the specific item of evidence to which it is responsive, but rather need only refute the case presented by the opposing party. *See J.V.S.* [*Stowers*] *v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-83 (2008).

an abuse of discretion, we affirm the ALJ's exclusion of Employer's Exhibits 10A and 10B.

Section 411(c)(3) Presumption - Complicated Pneumoconiosis

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. In determining whether Claimant has invoked the irrebuttable presumption, the ALJ must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); *Truitt v. North Am. Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137 (3d Cir. 1980); *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The ALJ found the x-ray, CT scan, and medical opinion evidence establish complicated pneumoconiosis.[5] 20 C.F.R. §718.304(a), (c); Decision and Order at 15, 19, 21. 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 21.

X-ray Evidence

Employer first argues the ALJ erred in weighing the x-ray evidence. Employer's Brief at 13-15. We disagree.

The ALJ considered seven readings of three x-rays, all by physicians dually-qualified as Board-certified radiologists and B-readers. Decision and Order at 13-15. Dr. DePonte read the September 14, 2020 x-ray as positive for complicated pneumoconiosis with a category A large opacity, while Dr. Meyer read it as positive for simple pneumoconiosis only. Claimant's Exhibit 3; Employer's Exhibit 4. Drs. DePonte and Alexander read the November 4, 2020 x-ray as positive for complicated pneumoconiosis, category A, while Dr. Seaman read it as positive for simple pneumoconiosis only. Employer's Exhibit 1; Director's Exhibits 13, 14. Dr. Alexander read the July 19, 2021 x-ray as positive for complicated pneumoconiosis, category A, while Dr. Meyer read it as

[5] The ALJ found there was no biopsy evidence of record. 20 C.F.R. §718.304(b); Decision and Order at 15.

positive for simple pneumoconiosis only. Employer's Exhibit 5; Director's Exhibits 15, 19.

The ALJ found the readings of the September 14, 2020 and July 19, 2021 x-rays to be in equipoise concerning complicated pneumoconiosis due to the equal number of positive and negative readings by the dually-qualified radiologists. Decision and Order at 14-15. He found the November 4, 2020 x-ray to be positive for complicated pneumoconiosis as two of the three readings identified the disease. *Id*. at 14. Considering the x-ray evidence as a whole, he found it established complicated pneumoconiosis. *Id*. at 15.

Employer argues the ALJ erred in determining Dr. Alexander read the November 4, 2020 and July 19, 2021 x-rays as positive for complicated pneumoconiosis. Employer's Brief at 14-15. It contends the ALJ should have found Dr. Alexander's readings equivocal based on the narrative comments accompanying his readings. *Id*. We disagree.

On the International Labour Organization (ILO) form for the November 4, 2020 x-ray, Dr. Alexander read the x-ray as positive for a Category A large opacity, denoted by checking a box as required on the ILO form. Director's Exhibit 14. In the comments section of the form, he stated there were opacities in the "right upper zone where there is coalescence and also an apparent category A large opacity of complicated [c]oal [w]orkers['] [p]neumoconiosis. Confirmation could be obtained with a chest CT scan." *Id*. at 2. On the ILO form for the July 19, 2021 x-ray, Dr. Alexander again identified a Category A large opacity, and wrote in the comments that there was "an upper zone density seen on the lateral view which might represent a category A large opacity of complicated [c]oal [w]orkers['] [p]neumoconiosis." Director's Exhibit 15 at 2.

The ALJ considered Employer's argument that Dr. Alexander's narrative comments rendered his readings equivocal, but found they support complicated pneumoconiosis because he clearly checked the box identifying Category A large opacities on the ILO x-ray forms.[6] Decision and Order at 14 n.17, 15. Further, the ALJ found Dr. Alexander's narrative comments did not undermine his identification of the presence of large opacities. *Id*.

[6] "Complicated pneumoconiosis" is a chronic dust disease of the lung which, when diagnosed by chest x-ray, "yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labour Organization" (ILO System). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

Claimant's burden of proof is to establish it is more likely than not that he suffers from complicated pneumoconiosis; he need not prove it to a certainty. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 272-76 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 736 (3d Cir. 1993); *see Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282-83 (4th Cir. 2010). And in doing so, a physician's "refusal to express a diagnosis in categorical terms is candor, not equivocation." *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006). Thus, although Dr. Alexander couched his interpretations in measured terms and stated a confirmation could be made by CT scan, he nevertheless identified Category A opacities on the ILO x-ray form. Thus, we see no error in the ALJ's conclusion that Dr. Alexander's readings of the November 4, 2020 and July 19, 2021 x-rays support a finding that Claimant has complicated pneumoconiosis. *See* 30 U.S.C. §921(c)(3); 20 C.F.R §§718.201, 718.304(c); *Perry*, 469 F.3d at 366; Decision and Order at 14 n.17.

As it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established complicated pneumoconiosis based on the x-ray evidence. 20 C.F.R. §718.304(a); Decision and Order at 15.

CT Scan Evidence

Employer contends the ALJ erred in his consideration of the CT scan evidence. Employer's Brief at 15-16. We again disagree.

The ALJ considered seven interpretations of three CT scans. Decision and Order at 16-19. Drs. DePonte and Meyer opined the June 23, 2016 CT scan demonstrated complicated pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 6. The ALJ found this scan supports a finding of complicated pneumoconiosis based on the two positive interpretations. Decision and Order at 17.

Dr. DePonte opined the March 9, 2021 CT scan demonstrated complicated pneumoconiosis, while Drs. Seaman and Meyer opined it did not. Claimant's Exhibit 1; Employer's Exhibits 7, 8. The ALJ assigned less weight to Dr. Seaman's interpretation of this scan and found the readings of it in equipoise based on the opinions of Drs. DePonte and Meyer. Decision and Order at 18.

Lastly, Dr. Ames read the May 28, 2021 CT scan as showing possible simple pneumoconiosis only, while Dr. DePonte opined it demonstrated complicated pneumoconiosis. Claimant's Exhibit 4; Employer's Exhibit 9. The ALJ assigned greater weight to Dr. DePonte's reading based on her superior qualifications, and thus found it supports complicated pneumoconiosis. Weighing all the CT scan evidence together, he found it supports complicated pneumoconiosis. Decision and Order at 19.

Employer generally argues the ALJ should have discredited Dr. DePonte's readings of the CT scans, and that the CT scan evidence does not support a finding of complicated pneumoconiosis. Employer's Brief at 15-16. Its argument is a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As Employer identifies no specific error in the ALJ's findings and raises no further argument on this issue, we affirm the ALJ's determination the CT scan evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c).

Medical Opinions

Finally, we address the ALJ's consideration of the medical opinion evidence. The ALJ considered Dr. Celko's opinion diagnosing Claimant with complicated pneumoconiosis and Dr. Basheda's contrary opinion. 20 C.F.R. §718.304(c); Decision and Order at 19-21. The ALJ credited Dr. Celko's opinion and discredited Dr. Basheda's, and he therefore found the medical opinion evidence supports a finding of complicated pneumoconiosis. Decision and Order at 21.

We disagree with Employer that the ALJ erred in discrediting Dr. Basheda's opinion. Employer's Brief at 16-18. In his report, Dr. Basheda opined Claimant had simple pneumoconiosis, but that the presence of complicated pneumoconiosis was uncertain based on the conflicting readings of the November 4, 2020 x-ray by Drs. Meyer and DePonte. Employer's Exhibit 10 at 13-14, 17. At his deposition, Dr. Basheda summarized his interpretation of the March 9, 2021 CT scan and opined Claimant does not have complicated pneumoconiosis based on his own measurement of the visible opacities. Employer's Exhibit 11 at 22-25. The ALJ permissibly found Dr. Basheda's opinion unpersuasive because he relied upon his own interpretation of the March 9, 2021 CT scan which was not admitted into the record. *See Soubik*, 366 F.3d at 234; *Mancia*, 130 F.3d at 584; Decision and Order at 21. He further permissibly found Dr. Basheda's opinion not credible because it was contrary to his finding that both the x-ray and CT scan evidence establish complicated pneumoconiosis. *Id*.

We therefore affirm the ALJ's finding Dr. Basheda's opinion does not undermine the x-ray and CT scan evidence. Decision and Order at 21. Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established complicated pneumoconiosis based on a consideration of all relevant evidence and therefore invoked the irrebuttable presumption of total disability due to pneumoconiosis.[7] *Truitt*, 2 BLR at 1-199; 20 C.F.R. §718.304.

[7] Employer further argues the ALJ erred in crediting Dr. Celko's opinion that Claimant has complicated pneumoconiosis. Employer's Brief at 16. However, because

We also affirm, as unchallenged on appeal, the ALJ's finding Claimant's complicated pneumoconiosis arose out of his coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.203. We therefore affirm the award of benefits.

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

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the ALJ permissibly discredited the only medical opinion weighing against complicated pneumoconiosis, and we affirm the ALJ's finding the x-ray and CT scan evidence establish the disease, error if any in the ALJ's crediting of Dr. Celko's opinion would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).