U.S. Department of Labor

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

BRB No. 21-0110 BLA

NOAH N. SHEPHERD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 01/24/2022
	)	
Respondent	)	
	)	
	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Noah N. Shepherd, Oneida, Kentucky.

Olgamaris Fernandez (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Denying Benefits (2019-BLA-06050)

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the administrative law

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 claim filed on November 16, 2017.[2]

The ALJ credited Claimant with thirteen years of coal mine employment and found he failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] He also 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) (2018); 20 C.F.R. §718.304. Because Claimant failed to establish total disability, an essential element of entitlement under 20 C.F.R. Part 718, he denied benefits.

On appeal, Claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (Director),[4] filed a response brief conceding remand is necessary on the issue of complicated pneumoconiosis because the ALJ admitted and considered x-ray readings in excess of the evidentiary limitations and erred in weighing the evidence on this issue.

In an appeal a claimant files without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the ALJ's findings of fact and conclusions of law if they are

---

judge's (ALJ) decision on Claimant's behalf, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co*., 19 BLR 1-88 (1995) (Order).

[2] Claimant filed a prior claim but withdrew it. Director's Exhibit 2. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306.

[3] 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); 20 C.F.R. §718.305.

[4] In light of the Director's concession that Shamrock Coal Company employed Claimant for less than one year, the ALJ dismissed it as the responsible operator. 20 C.F.R. §§725.494(c), 725.495(a)(1); Sept. 11, 2020 Order. Thus the Director, in his fiduciary role as trustee of the Black Lung Disability Trust Fund, assumed liability for this claim and the payment of any benefits. *See* 26 U.S.C. §9501(a)(2); 20 C.F.R. §§725.1(e), 725.101(a)(15), 725.360(a)(5).

rational, supported by substantial evidence, and in accordance 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).

Invocation of the Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act 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). 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 Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The ALJ found the x-ray and medical opinion evidence does not establish complicated pneumoconiosis.[6] 20 C.F.R. §718.304(a), (c); Decision and Order at 7-9. Weighing all the evidence together, he concluded the evidence does not establish complicated pneumoconiosis. Decision and Order at 7-9.

We agree with the Director that the ALJ erroneously admitted and considered evidence in excess of the evidentiary limitations in finding the x-rays do not establish complicated pneumoconiosis. 20 C.F.R. §718.304(a); Director's Brief at 3-8.

The regulations permit a claimant and the responsible operator to submit, in support of their affirmative cases, "no more than two chest [x]-ray interpretations." 20 C.F.R. §725.414(a)(2)(i), (3)(i). In rebuttal, each party may submit "no more than one physician's interpretation of each chest [x]-ray . . . submitted by" the opposing party "and by the Director pursuant to [20 C.F.R.] §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (iii). Where the responsible operator has been dismissed, however, the regulations authorize the Director to exercise the evidentiary rights of a responsible operator with the condition that the x-ray interpretation obtained as part of the Department of Labor (DOL)-sponsored complete pulmonary evaluation must be considered one of the Director's two affirmative

[5] We 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 (1989) (en banc); Director's Exhibit 5.

[6] The record contains no biopsy evidence. 20 C.F.R. §718.304(b).

x-ray interpretations. 20 C.F.R. §§725.406, 725.414(a)(3)(iii). Medical evidence that exceeds the evidentiary limitations "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

The ALJ dismissed Shamrock Coal Company (Shamrock Coal) as the responsible operator. Sept. 11, 2020 Order. Thereafter he admitted Director's Exhibits 1 through 63 into evidence, subject to the evidentiary limitations. Oct. 21, 2020 Order. Although the ALJ allowed the parties to submit additional evidence in addition to the Director's Exhibits, no party did. The Director's Exhibits included Dr. DePonte's December 13, 2017 x-ray reading conducted as part of Claimant's DOL-sponsored pulmonary evaluation. Director's Exhibit 13. Dr. DePonte interpreted this x-ray as positive for complicated pneumoconiosis, Category A. *Id.* The evidence also included two x-ray readings that Shamrock Coal submitted prior to being dismissed as the responsible operator. Director's Exhibits 18, 19. They included Dr. Seaman's interpretations of a December 13, 2017 x-ray as negative for complicated pneumoconiosis and a September 27, 2018 x-ray as negative for the disease. *Id.*

The ALJ weighed all three x-ray readings. 20 C.F.R. §718.304(a); Decision and Order at 4-6. He noted all of the interpreting physicians are dually-qualified as Board-certified radiologists and B readers. Decision and Order at 5-6. He found the readings of the December 13, 2017 x-ray in equipoise because an equal number of dually-qualified radiologists read it as positive and negative for complicated pneumoconiosis. *Id.* at 6. He found the September 27, 2018 x-ray is negative for complicated pneumoconiosis based on Dr. Seaman's unrebutted reading. *Id.* Weighing the x-ray evidence as a whole, the ALJ found the preponderance of the x-ray interpretations does not support a finding of complicated pneumoconiosis. *Id.*

As the Director concedes, the ALJ erred in admitting and considering both negative x-ray readings from Dr. Seaman. 20 C.F.R. §725.414(a)(3)(iii); Director's Response Brief at 4-6. Because the Director, as the party opposing entitlement, exercised the evidentiary rights of the dismissed responsible operator, he was entitled to submit two affirmative x-ray readings. 20 C.F.R. §725.414(a)(3)(i), (iii). In accordance with the regulations, one of the two readings included Dr. DePonte's interpretation of the DOL-sponsored December 13, 2017 x-ray. 20 C.F.R. §§725.406, 725.414(a)(3)(iii). Thus, in further support of the Director's affirmative case, he was only entitled to submit one of the two affirmative x-ray readings from Dr. Seaman.[7] *Id.*

[7] Dr. Seaman's reading of the December 13, 2017 x-ray cannot be considered as rebuttal evidence because a party can only rebut another party's evidence. See 20 C.F.R. 725.414(a)(2)(ii); (a)(3)(ii).

The ALJ is obligated to enforce the evidentiary limitations even if no party objects. *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004) (the evidentiary limitations set forth in the regulations are mandatory and, as such, are not subject to waiver). Because he failed to apply the evidentiary limitations with respect to the x-ray readings, he abused his discretion and therefore we must vacate his finding that Claimant failed to establish complicated pneumoconiosis based on the x-ray evidence. *McClanahan v. Brem Coal Co.*, 25 BLR 1-171, 1-175 (2016); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-236 (2007) (en banc); 20 C.F.R. §718.304(a).

We also agree with the Director that the ALJ failed to critically analyze the narrative comments accompanying Dr. Seaman's x-ray readings. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712 (6th Cir. 2002); *Melnick*, 16 BLR at 1-37; Director's Response Brief at 4-6. Although Dr. Seaman excluded complicated pneumoconiosis, she diagnosed a large mass consistent with cancer or a healed infection. Director's Exhibits 18, 19. The ALJ should address whether the x-ray reading from Dr. Seamon that he ultimately admits is credible in light of her additional comments. *See, e.g., Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287 (4th Cir. 2010) (physicians' "equivocal and speculative" diagnoses for masses on x-ray do not "constitute affirmative evidence . . . that the opacities were not due to pneumoconiosis").

Because the ALJ's consideration of the x-ray evidence affected the weight he assigned to the medical opinion evidence, we also vacate his finding that Dr. Ajjarapu's opinion does not establish complicated pneumoconiosis and his finding all of the relevant evidence does not establish complicated pneumoconiosis. 20 C.F.R. §718.304(a), (c); Decision and Order at 7-9. We therefore vacate his finding that Claimant failed to invoke the Section 411(c)(3) presumption, and the denial of benefits. We remand for reconsideration of the issue of complicated pneumoconiosis.

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

As Claimant is unrepresented, we also address the ALJ's finding that Claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) and thus did not invoke the Section 411(c)(4) presumption or establish entitlement at 20 C.F.R. Part 718 without benefit of the presumption. A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, 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 Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (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 correctly noted the only pulmonary function study of record and the only arterial blood gas study of record, both conducted on December 13, 2017, were non-qualifying.[8] Decision and Order at 9-10, Director's Exhibit 15. Consequently, we affirm the ALJ's findings that this evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(i), (ii). Because there is no evidence of record indicating Claimant suffers from cor pulmonale with right-sided congestive heart failure, the ALJ properly found Claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 8.

In considering whether the medical opinion evidence establishes total disability, the ALJ correctly found Dr. Ajjarapu did not opine Claimant is totally disabled independent of her assessment that he has complicated pneumoconiosis. She noted his objective testing showed no impairment and he "has the [pulmonary] capacity to do his previous [coal mine] work," but should be considered totally disabled because he meets the criteria for complicated pneumoconiosis. Director's Exhibit 15. As the record contains no other medical opinions, we affirm the ALJ's finding that the medical opinion evidence does not establish total disability independent of whether Claimant is presumed totally disabled by establishing complicated pneumoconiosis. 20 C.F.R. §718.204(b)(2)(iv). Because we affirm the ALJ's finding that Claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm his finding Claimant unable to invoke the Section 411(c)(4) presumption or establish entitlement at 20 C.F.R. Part 718. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

Remand Instructions

On remand, the ALJ must first clarify the evidentiary record in accordance with the relevant regulations, properly applying the evidentiary limitations. 20 C.F.R. §§725.414, 725.456(b)(1). The ALJ must then address whether Claimant has established complicated pneumoconiosis based on the x-ray and medical opinion evidence. 20 C.F.R. §718.304(a), (c). If Claimant establishes complicated pneumoconiosis, the ALJ should address whether it arose out of his coal mine employment.[9] 20 C.F.R. §718.203. If Claimant establishes complicated pneumoconiosis arising out of his coal mine employment, he is entitled to

[8] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A non-qualifying study exceeds these values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] If Claimant establishes complicated pneumoconiosis, the disease is presumed to have arisen out of his coal mine employment because he worked more than ten years as a coal miner; the burden will then be on the Director, as the party opposing entitlement, to disprove disease causation. 20 C.F.R. §718.203(b).

benefits. 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.304, 718.203. If the ALJ finds Claimant did not establish complicated pneumoconiosis, he may reinstate the denial of benefits in light of Claimant's failure to establish total disability independent of a finding of complicated pneumoconiosis. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). He must critically analyze the record and adequately explain his findings as the Administrative Procedure Act requires. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge