U.S. Department of Labor

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

BRB Nos. 21-0250 BLA
and 21-0542 BLA

CARL G. SIGLER	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
WINDSOR COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 01/27/2023
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
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 and Cross-Appeal of the Supplemental Order Granting Attorney Fees of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Timothy J. McGrath's Decision and Order Awarding Benefits on Remand and Claimant cross-appeals the ALJ's Supplemental Order Granting Attorney Fees (2017-BLA-05182), rendered on a claim filed pursuant to Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1] This case involves a miner's claim filed on December 21, 2015, and is before the Benefits Review Board for the second time.

In a Decision and Order Denying Benefits, issued August 8, 2018, the ALJ credited Claimant with at least twenty years of underground coal mine employment, but determined Claimant did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant did 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).[2] He further found the evidence insufficient to establish complicated pneumoconiosis and, therefore, concluded Claimant did 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. Consequently, the ALJ denied benefits.

In consideration of Claimant's appeal, the Board affirmed, as unchallenged, the ALJ's findings that Claimant established at least twenty years of underground coal mine employment but did not establish total disability at 20 C.F.R. §718.204(b)(2) and, therefore, failed to invoke the Section 411(c)(4) presumption. *Sigler v. Windsor Coal Co.*, BRB No. 18-0599 BLA, slip op. at 2 n.2 (Dec. 30, 2019) (unpub.). However, the Board held he erred in weighing the x-ray and CT scan evidence on the issue of complicated pneumoconiosis and thus vacated the denial of benefits. *Id.* at 5-6. The Board remanded the case for the ALJ to reconsider the issue of complicated pneumoconiosis. *Id.* at 7.

[1] Employer's appeal of the ALJ's Decision and Order Awarding Benefits on Remand was assigned BRB No. 21-0250 BLA, and Claimant's cross-appeal of the ALJ's Supplemental Order Granting Attorney Fees was assigned BRB No. 21-0542 BLA. The Benefits Review Board has consolidated these appeals for purposes of decision only.

[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.

On remand, the ALJ found Claimant established complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). 20 C.F.R. §718.304. He further 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 complicated pneumoconiosis established. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response to Employer's appeal. On cross-appeal, Claimant challenges the ALJ's Supplemental Order Granting Attorney Fees. Neither Employer nor the Director, Office of Workers' Compensation Programs, have filed a response brief to Claimant's cross-appeal.

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc*., 380 U.S. 359, 361-62 (1965).

Section 411(c)(3) - 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 large 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, is a condition that would yield results 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 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).

On remand, the ALJ found the x-ray evidence and computed tomography (CT) scan evidence establish complicated pneumoconiosis, 20 C.F.R. §718.304(a), (c), while the

[3] 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 30-31.

medical opinion evidence does not.[4] 20 C.F.R. §718.304 (c); Decision and Order on Remand at 7, 11, 14. Weighing all of the evidence together, he concluded Claimant established complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 20 C.F.R. §718.304; Decision and Order on Remand at 14-15.

We first address Employer's argument that the ALJ erred in finding the x-ray evidence establishes complicated pneumoconiosis. Employer's Brief at 8-15.

The ALJ considered six interpretations of two x-rays dated January 27, 2016 and June 8, 2017. 20 C.F.R. §718.304(a); Decision and Order on Remand at 4-7. He found all the interpreting physicians are dually-qualified Board-certified radiologists and B readers, except Dr. Selby, who is a B reader only. *Id.* at 5. The ALJ summarized each of the dually-qualified physicians' academic experience and found they all have similar relevant experience. *Id.* He then resolved the conflict in each x-ray.

Drs. Crum and Alexander interpreted the January 27, 2016 x-ray as positive for complicated pneumoconiosis, Category A, whereas Drs. Meyer and Adcock interpreted it as negative for the disease.[5] Director's Exhibit 11; Claimant's Exhibits 1, 2; Employer's Exhibits 5, 16. Dr. Crum interpreted the June 8, 2017 x-ray as positive for complicated pneumoconiosis, Category A, but Dr. Selby interpreted the x-ray as negative for the disease. Claimant's Exhibit 4; Employer's Exhibit 13.

The ALJ found the interpretations of the January 27, 2016 x-ray in equipoise because an equal number of dually-qualified radiologists read the x-ray as positive and negative for complicated pneumoconiosis. Decision and Order on Remand at 6. Further, he found the June 8, 2017 x-ray positive for complicated pneumoconiosis because he afforded Dr. Crum's interpretation as a dually-qualified radiologist greater weight than Dr. Selby's interpretation as a B-reader only. *Id.* Contrary to Employer's argument, the ALJ permissibly assigned greater weight to Dr. Crum's interpretation as a dually-qualified radiologist. *See Adkins v. Director, OWCP,* 958 F.2d 49, 52 (4th Cir. 1992); Decision and Order on Remand at 6; Employer's Brief at 6.

Weighing all of the x-ray evidence together, he found it positive for complicated pneumoconiosis because there is one positive x-ray and the interpretations of one in

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

[5] Dr. DePonte read the January 27, 2016 x-ray for quality purposes only. Director's Exhibit 12.

equipoise, and the positive June 8, 2017 x-ray "is the most recent x-ray of record and reflects a progression of the disease." *Id.* Employer doesn't specifically challenge this finding; thus we affirm it. *Skrack*, 6 BLR at 1-711. Because we affirm the ALJ's finding that the more recent June 2017 x-ray outweighs the January 2016 x-ray, we need not address Employer's argument with respect to the manner in which the ALJ resolved the conflict in the January 2016 x-ray interpretations to find the interpretations of that x-ray in equipoise. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Therefore, we affirm the ALJ's finding the x-ray evidence considered in isolation would establish complicated pneumoconiosis. 20 C.F.R. §718.304(a); Decision and Order on Remand at 6-7; *see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

The ALJ next considered the CT scan evidence, noting there are twelve interpretations of eight CT scans.[6] Employer's Exhibits 1, 6-8, 13.

The ALJ considered interpretations by Drs. Crum and Adcock,[7] both dually-qualified Board-certified radiologists and B-readers, of three CT scans dated May 10, 2012, November 29, 2012, and July 24, 2014.[8] Decision and Order on Remand at 7-10. The ALJ

[6] The February 8, 2012, March 12, 2012, July 11, 2013, and January 9, 2014 CT scans were part of Claimant's medical treatment records. Employer's Exhibit 2. The ALJ noted none of the physicians who interpreted these CT scans made a determination regarding the presence of pneumoconiosis. Decision and Order on Remand at 7. He therefore accorded them minimal weight. *Id.* Contrary to Employer's argument, the ALJ permissibly gave them little weight because they are silent regarding the presence or absence of pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984); Decision and Order at 7-10; Employer's Brief at 13-17.

[7] The ALJ noted Dr. Adcock's interpretations of these CT scans each included a statement sufficient to establish, pursuant to Section 718.107(b), that CT scans are a medically accepted procedure and relevant to determining pneumoconiosis. Decision and Order on Remand at 7.

[8] Each of these CT scans was also interpreted by a physician as part of Claimant's medical treatment records. Employer's Exhibit 2. The ALJ afforded the treating physicians' interpretations minimal weight because they were silent regarding the presence or absence of pneumoconiosis. Decision and Order on Remand at 6.

noted there were an equal number of conflicting readings for each of these scans; Dr. Adcock interpreted each scan as negative for complicated pneumoconiosis while Dr. Crum interpreted each scan as positive for the disease. *Id.* Thus, he found these readings were in equipoise on their face. *Id.* at 10.

The ALJ noted the record also contained a June 8, 2017 CT scan, which was interpreted by Drs. Crum and Perkins.[9] Claimant's Exhibit 5; Employer's Exhibit 13.[10] Dr. Perkins identified old granulomatous disease with scattered calcified granulomata; however, he found no evidence of coal workers' pneumoconiosis. Employer's Exhibit 13. Dr. Crum identified partially calcified and non-calcified bilateral subcentimeter pulmonary nodules which he noted would be consistent with pneumoconiosis given an appropriate work history. Employer's Exhibit 5. He also noted a large opacity in the left upper lobe measuring 1.7 centimeters. *Id.* He stated

> [t]he opacity has changed in makeup with calcifications now noted within the large opacity and a central round calcification also now noted. Although complicated black lung disease has been known to exhibit calcifications, granulomatous disease would also have to be a consideration. . . . the opacity has changed compared to the previous study now with large calcification and peripheral calcifications therefore granulomatous disease as well as complicated black lung disease would be considerations.

Id.

The ALJ declined to rely on the interpretations of the June 8, 2017 CT scan because he found the record does not contain a statement that this scan is a medically accepted procedure and relevant to determining pneumoconiosis. Decision and Order on Remand at 7.

Weighing the CT scan evidence as a whole, the ALJ found the conflicting readings by Drs. Crum and Adcock of the May10, 2012, November 29, 2012, and July 24, 2014 CT scans were in equipoise. Decision and Order on Remand at 10. He concluded, however, that Dr. Crum's readings were more persuasive than Dr. Adcock's and therefore found

[9] Dr. Perkins is a board-certified radiologist. Employer's Exhibit 13.

[10] This CT scan was also interpreted by a physician as part of Claimant's medical treatment records. Employer's Exhibit 2. As noted above, the ALJ afforded the treating physician's interpretation minimal weight because it was silent regarding the presence or absence of pneumoconiosis. Decision and Order on Remand at 6.

them entitled to more probative weight. *Id.* at 10-11. Thus, the ALJ found the weight of the CT scan evidence supports a finding of complicated pneumoconiosis. *Id.* at 11.

Employer contends the ALJ erred in excluding the June 8, 2017 CT scan from consideration. Employer's Brief at 21-22. Employer's argument has merit. Pursuant to Section 718.107(b), the ALJ must determine, on a case-by-case basis, whether the proponent of the "other medical evidence," *i.e.*, test or procedure, has established it is "medically acceptable and relevant to entitlement." *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (en banc), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (en banc). The "party submitting the test or procedure pursuant to [20 C.F.R. §]718.107(b) bears the burden to demonstrate that the test or procedure is medically acceptable." *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004); *see* 65 Fed. Reg. at 79,945, citing the preamble to 20 C.F.R. §718.107, 62 Fed. Reg. 3338, 3343 (Jan. 22, 1997). As the Employer correctly notes, it proffered the testimony of Dr. Selby, the physician who ordered the June 8, 2017 CT scan, explaining, specifically in the context of discussing the results of the June 8, 2017 scan, that CT scanning is medically acceptable and relevant to determining pneumoconiosis. Employer's Brief at 21-22; Employer's Exhibit 14 at 13-15.

Accordingly, the ALJ incorrectly stated there was no evidence demonstrating this CT scan is a medically acceptable procedure and relevant to entitlement.[11] Thus, the ALJ failed to consider all relevant evidence. *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). Because the ALJ did not consider all relevant CT scan evidence, we vacate his determination that the weight of the CT scan evidence is positive for complicated pneumoconiosis.[12] *Id.*; Decision and Order on Remand at 11. Additionally, because the ALJ relied on his CT scan findings when weighing the medical opinion evidence, we must

[11] Additionally, having credited similar statements to find the other CT scans are medically acceptable procedures, the ALJ either overlooked Dr. Selby's statement or may have imposed an additional burden on Employer with respect to the June 8, 2017 CT scan.

[12] Because we vacate the ALJ's finding that the CT scan evidence established complicated pneumoconiosis on this basis, and because the ALJ's consideration of the June 8, 2017 CT scan may affect his credibility determinations regarding the earlier CT scan interpretations, we decline to address Employer's remaining arguments that the ALJ erred in considering the CT scan evidence. *See* Employer Brief at 13, 19-20.

also vacate his determination that the medical opinion evidence does not support a finding of complicated pneumoconiosis.[13]

Because the ALJ failed to weigh all the relevant evidence, we must vacate his finding a preponderance of the evidence establishes complicated pneumoconiosis and Claimant invoked the irrebuttable presumption at Section 411(c)(3) of the Act, and remand the case for further consideration. *See* 30 U.S.C. §923(b) (fact finder must address all relevant evidence); *Compton*, 211 F.3d at 208-11*; McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (failure to discuss relevant evidence requires remand); 20 C.F.R. §§718.202, 718.304; Decision and Order on Remand at 14-15.

Remand Instructions

On remand, the ALJ must consider the interpretation of the June 8, 2017 CT scan and weigh all of the CT scan evidence together to determine if it supports finding complicated pneumoconiosis, resolving conflicts in the evidence appropriately and providing valid bases for his determinations. 20 C.F.R. §718.304(c); *Compton*, 211 F.3d at 208-11; *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 (4th Cir. 1999) ("[T]he 'substantial evidence' standard is tolerant of a wide range of findings on a given record."); *Melnick*, 16 at 1-33.

The ALJ must also reevaluate the medical opinion evidence in light of his CT scan findings on remand. *See* 20 C.F.R. §718.304(c). He should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441. In addition, he must weigh together all the relevant evidence at Section 718.304(a)-(c) before determining whether Claimant invoked the Section 411(c)(3) presumption. 20 C.F.R. §718.304; *Cox, 602 F.3d at 283; Scarbro, 220 F.3d at 255-56; Melnick, 16 BLR at 1-33.*

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. 20 CFR 718.304. The ALJ must then consider whether Claimant's complicated pneumoconiosis arose out of his coal mine employment, applying the relevant rebuttable presumption. 20 CFR 718.203(b). If the ALJ finds Claimant has invoked the Section 411(c)(3) irrebuttable presumption, and the Claimant's pneumoconiosis arose out

[13] The ALJ considered Dr. Chavda's opinion diagnosing complicated pneumoconiosis, and the contrary opinions of Drs. Castle and Selby. Decision and Order On Remand at 11-14; Director's Exhibit 11; Employer's Exhibits 10-11, 13-15.

of his coal mine employment, he may reinstate the award benefits. If the ALJ determines Claimant has not established complicated pneumoconiosis, the ALJ must deny benefits as we previously affirmed his earlier finding Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2) and, therefore, failed to invoke the Section 411(c)(4) presumption. *Sigler*, BRB No. 18-0599 BLA, slip op. at 2 n.2. The ALJ must consider and weigh all relevant evidence and adequately explain his findings as the Administrative Procedure Act requires.[14] *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

At this time, we decline to consider Claimant's cross-appeal of the ALJ's Supplemental Order Granting Attorney Fees. Counsel is entitled to fees for services only if there has been a successful prosecution of the claim. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993). If, on remand, the ALJ again awards benefits, Claimant's counsel may submit a revised fee petition for attorney's fees for work performed before the ALJ. 20 C.F.R. §802.203(c). If the claim is still pending before the OALJ, the Board, or the Courts of Appeal, an award of fees may be made contingent on the ultimate success of the award. *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995) (attorney fee award does not become effective, and thus is not enforceable, until there is a successful prosecution of the claim); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1993) (same). Because we must vacate, in part, the ALJ's award of benefits on remand, there has not yet been a successful prosecution of this claim, and thus, Claimant's cross appeal of the ALJ's Supplemental Order Granting Attorney Fees is premature.

[14] The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge