U.S. Department of Labor

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

BRB No. 22-0503 BLA

PAUL V. BROWN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ICG KNOTT COUNTY LLC	)	
	)	DATE ISSUED: 01/22/2024
Employer-Petitioner	)	
	)	
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 in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for Claimant.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits in an Initial Claim (2020-BLA-05713) rendered on a claim filed

on March 7, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ credited Claimant with thirty-nine years of underground coal mine employment and found he has 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) (2018). 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 excluding Dr. Seaman's negative interpretation of a May 6, 2019 x-ray without giving prior notice and in finding complicated pneumoconiosis established by the x-ray evidence. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.[2]

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.[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).

Evidentiary Issue

Employer argues the ALJ erred in excluding from the record Dr. Seaman's interpretation of a May 6, 2019 x-ray without first giving Employer either an opportunity to argue good cause exists for admitting the reading in excess of the evidentiary limitations or to redesignate its x-ray evidence. Employer's Brief at 15 (citing *L.P.* [*Preston*] *v.*

[1] Claimant filed two prior claims which he withdrew. Director's Exhibits 1, 2. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306(b).

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

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 48 at 10.

Amherst Coal Co., 24 BLR 1-55, 1-63 (2008) (en banc)). It contends the ALJ's action "is a violation of standing precedent." *Id.* We disagree.

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 an ALJ's disposition of a procedural or evidentiary issue must establish the ALJ's action represented an abuse of discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

Pursuant to the regulatory evidentiary limitations, each party may submit: two x-ray readings as part of its affirmative case; one x-ray reading to rebut each x-ray reading submitted by the opposing party as part of its affirmative case; one x-ray reading to rebut the x-ray reading submitted by the Director as part of the Department of Labor (DOL)-sponsored complete pulmonary evaluation of the miner; and, finally, one piece of rehabilitative evidence for any of the party's affirmative x-rays that were rebutted by the opposing party. 20 C.F.R. §725.414(a)(2), (3). Importantly, medical evidence submitted in excess of these limitations "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

Employer designated Dr. Meyer's and Dr. Seaman's negative readings of a September 16, 2019 x-ray as its affirmative x-ray evidence. Employer's Evidence Summary Form dated June 18, 2021 at 2. It designated Dr. Meyer's negative reading of the May 6, 2019 x-ray to rebut the x-ray submitted by the Director as part of the DOL's complete pulmonary evaluation of Claimant.[4] Finally, it designated Dr. Seaman's negative reading of the May 6, 2019 x-ray as rebuttal to Claimant's affirmative x-ray evidence. *Id.* at 2-3.

Claimant, however, did not designate any x-rays as his affirmative evidence. Claimant's Evidence Summary Form dated June 17, 2021 at 2. Instead, he submitted Dr. Crum's reading of the May 6, 2019 x-ray to rebut the Director's DOL-sponsored x-ray, and Drs. Crum's and DePonte's readings of the September 16, 2019 x-ray to rebut Employer's affirmative x-ray evidence. *Id.*

[4] Dr. DePonte read the May 6, 2019 x-ray obtained in conjunction with Claimant's DOL-sponsored complete pulmonary evaluation.

In his Closing Brief dated July 19, 2021,[5] Claimant argued to the ALJ that he had not submitted any affirmative x-ray readings and, therefore, Dr. Seaman's interpretation of the May 6, 2019 x-ray should be excluded from the record because it was submitted in excess of the evidentiary limitations. *See* Claimant's Evidence Summary Form dated June 17, 2021 at 2; Claimant's Closing Brief at 7 n.7. The ALJ agreed with Claimant and thus did not consider Dr. Seaman's reading. Decision and Order at 2 n.2.

On appeal, Employer does not dispute that Dr. Seaman's reading in fact exceeds the evidentiary limitations. It alleges only that remand is necessary because the ALJ should have given notice of the issue and considered whether good cause exists to admit the x-ray reading or permitted it to redesignate its evidence. Contrary to Employer's argument, where a party has submitted evidence that exceeds the evidentiary limitations, that party – not the ALJ – is obligated to raise good cause on its own behalf. *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006) (ALJ is not obligated to conduct a good cause inquiry *sua sponte* but may consider the issue forfeited where the party submitting excess evidence does not attempt to make such a showing).

Despite the ALJ issuing his ruling in his Decision and Order, Employer should have been aware upon receipt of Claimant's June 19, 2021 Evidence Summary Form that he did not designate any affirmative x-ray evidence, but it does not assert it took any action thereafter to redesignate its evidence or argue good cause for admission of Dr. Seaman's x-ray. Further, Claimant explicitly argued to the ALJ in his July 19, 2021 Closing Brief that Dr. Seaman's x-ray was inadmissible, but again Employer fails to identify any effort it made to redesignate its evidence or argue good cause for its admission. In other words, Employer was aware of the issue and had the opportunity to make these arguments before the ALJ but failed to do so. Remanding this case to the ALJ to allow Employer to now argue good cause existed for the admission of Dr. Seaman's reading of the May 6, 2019 x-ray or to re-designate its evidence would undermine fairness and administrative efficiency. *See Preston*, 24 BLR at 1-63 (DOL's adoption of the evidentiary limitations at 20 C.F.R. §725.414 reflected a shift from a preference for the admission of all relevant evidence to a concern for fairness and the need for administrative efficiency).

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 was totally disabled due to pneumoconiosis if he suffered from a

[5] There was no hearing in this case; it was decided on the record. Order Granting Joint Motion for a Decision on the Record and Order Cancelling the Telephonic Hearing dated March 11, 2021.

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, 1-33-34 (1991) (en banc).

The ALJ found the x-ray and medical opinion evidence establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), (c), as does the weight of all of the evidence.[6] 20 C.F.R. §718.304; Decision and Order at 12, 15-16. Thus, he concluded Claimant established complicated pneumoconiosis by a preponderance of the evidence and therefore invoked the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 16-17.

X-rays

The ALJ considered seven interpretations of two x-rays dated May 6, 2019, and September 16, 2019. Decision and Order at 9-12. The ALJ noted all of the interpreting physicians – Drs. DePonte, Crum, Seaman, and Meyer – are dually qualified as Board-certified radiologists and B readers and "have held professorships in radiology or have served on the faculty of colleges teaching radiology." *Id*. at 8. However, the ALJ found that a majority of Drs. Crum's and DePonte's published research and lectures "are related to coal workers' pneumoconiosis," while only a "small percentage of Dr. Meyer's extensive publishing and lecturing experience concern silicosis and/or Occupational and Environmental Lung Disease." *Id*. In addition, the ALJ noted Dr. Seaman "did not reference any research or presentations that specifically concerned coal workers' pneumoconiosis, although she co-authored (with Dr. Meyer) a textbook chapter on Occupational and Environmental Lung Disease." *Id*. He, therefore, found that "Drs. DePonte and Crum are better qualified than Drs. Meyer and Seaman in interpreting chest x-rays for the purposes of detecting or diagnosing coal workers' pneumoconiosis, based on

[6] The ALJ accurately noted the record contains no biopsy evidence for consideration at 20 C.F.R. §718.304(b). Decision and Order at 6.

their radiological experience and on research and lectures specifically focused on coal workers' pneumoconiosis." *Id*. at 9.

Drs. DePonte and Crum each interpreted the May 6, 2019 x-ray as positive for both simple and complicated pneumoconiosis, Category A, while Dr. Meyer read it as positive for simple pneumoconiosis, but not for complicated pneumoconiosis. Director's Exhibits 15, 17, 21. The ALJ found the May 6, 2019 x-ray is positive for both simple and complicated pneumoconiosis as he gave more weight to the readings by Drs. DePonte and Crum because he determined those readers were better qualified than Dr. Meyer. Decision and Order at 11.

Drs. DePonte and Crum also interpreted the September 16, 2019 x-ray as positive for both simple and complicated pneumoconiosis, Category A, while Drs. Seaman and Meyer read it as positive for simple pneumoconiosis and negative for complicated pneumoconiosis. Director's Exhibit 21; Claimant's Exhibits 1-2. The ALJ found the September 16, 2019 x-ray is positive for complicated pneumoconiosis as he found the readings by Drs. DePonte and Crum outweigh the readings by Drs. Seaman and Meyer based on their "superior qualifications." Decision and Order at 11-12.

Having found both x-rays positive for complicated pneumoconiosis, the ALJ found Claimant established complicated pneumoconiosis by a preponderance of the x-ray evidence at 20 C.F.R. §718.304(a). Decision and Order at 12. Alternatively, the ALJ found that even if he considered the physicians equally qualified based on their dual qualifications as Board-certified radiologists and B-readers, he would still find Claimant established complicated pneumoconiosis because one x-ray is positive based on a preponderance of the readings by the dually-qualified radiologists while the readings of the other x-ray are in equipoise. Decision and Oder at 12 n.22.

Employer argues the ALJ failed to properly weigh the differing academic credentials of the physicians, and the publications and professional memberships that distinguish Drs. Meyer and Seaman as more qualified than Drs. Crum and DePonte. We disagree.

The ALJ specifically discussed each physician's qualifications and permissibly gave greater weight to Drs. DePonte's and Crum's readings because he found they have lectured more extensively on coal workers' pneumoconiosis than either Dr. Meyer or Dr. Seaman. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); Decision and Order at 7-9; Director's Exhibit 21 at 13-17, 23-26; Claimant's Exhibits 1 at 22-27; 2 at 3-6. Moreover, we see no error in the ALJ's assessment that all the readers have "satisfactory

credentials" to the extent they are all Board-certified radiologists and B readers. Thus, we affirm the ALJ's alternative finding that even if he considered the physicians equally qualified, he would still find Claimant established complicated pneumoconiosis because one x-ray is positive based on a preponderance of the readings by the dually-qualified radiologists while the readings of the other x-ray are in equipoise. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); Decision and Oder at 12 n.22; Director's Exhibits 15, 17, 21; Claimant's Exhibits 1, 2.

Employer also contends the ALJ erred by "counting heads" in finding the x-ray evidence established complicated pneumoconiosis. Employer's Brief at 12-14. However, the ALJ permissibly conducted both a qualitative and quantitative analysis of each x-ray, taking into consideration the physicians' radiological qualifications. *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995) (ALJ should consider the quantity of the x-ray evidence in light of the difference in qualifications of the readers); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993) (same); Decision and Order at 12 n.22; Director's Exhibits 15, 17, 21; Claimant's Exhibits 1, 2.

Employer's arguments in this appeal are a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the ALJ's permissible finding that the x-ray and medical opinion evidence establishes complicated pneumoconiosis at 20 C.F.R. §718.304(a), (c).[7] 20 C.F.R. §718.304. We also affirm the ALJ's unchallenged finding that Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16. Consequently, we affirm the ALJ's conclusion that Claimant invoked the irrebuttable presumption of total disability due

[7] We affirm, as unchallenged on appeal, the ALJ's crediting of Dr. Green's opinion that Claimant has complicated pneumoconiosis at 20 C.F.R. §718.304(c). *See Skrack*, 6 BLR at 1-711; Decision and Order at 12-15.

to pneumoconiosis and is entitled to benefits. 20 C.F.R. §718.304; Decision and Order at 16-17.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits in an Initial Claim.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge