U.S. Department of Labor

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

BRB No. 22-0172 BLA

DENNY R. MAGGARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LONE MOUNTAIN PROCESSING, INCORPORATED	)	DATE ISSUED: 7/20/2023
	)	
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 of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Steven B. Berlin's Decision and Order Awarding Benefits (2019-BLA-06227) rendered on a claim filed on July 5, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 9.34 years of underground coal mine employment and did not 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,[1] 30 U.S.C. §921(c)(4) (2018). However, he found Claimant established complicated pneumoconiosis arising out of coal mine employment and thus found Claimant entitled to 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 §§718.203(b), 718.304. Thus he awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis and invoked the Section 411(c)(3) presumption. 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).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any element precludes an award of benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if they suffer from a chronic dust disease of the

[1] 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.

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 2-202 (1989) (en banc); Director's Exhibits 5, 28 at 19-20

lungs 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-rays, treatment record computed tomography (CT) scans, and medical opinions, standing alone, do not establish complicated pneumoconiosis.[3] 20 C.F.R. §718.304(a), (c); Decision and Order at 13-14. However, citing the decision of the United States Court of Appeals for the Fourth Circuit in *Westmoreland Coal Co. v. Director, OWCP* [*Cox*], 602 F.3d 276 (4th Cir. 2010), he found the evidence establishes complicated pneumoconiosis when weighed together. Decision and Order at 14-15. Employer argues the ALJ made several errors in considering the evidence and rendering this finding. Employer's Brief at 4-8. We agree.

Chest X-rays – 20 C.F.R. §718.304(a)

The ALJ considered seven readings of four x-rays by physicians dually-qualified as B readers and Board-certified radiologists.[4] Decision and Order at 4-5, 13. Dr. DePonte read the August 10, 2017 and June 13, 2018 x-rays as positive for complicated pneumoconiosis, Category A. Director's Exhibit 14; Claimant's Exhibit 1. Drs. Tarver, DePonte, and Ramakrishnan read the October 23, 2018 x-ray as positive for simple but negative for complicated pneumoconiosis. Director's Exhibits 11 at 6, 15; Claimant's Exhibit 3. Dr. Tarver read the April 29, 2021 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Kendall read it as negative. Claimant's Exhibit 2; Employer's Exhibit 2.

After listing the x-ray interpretations of record, the ALJ summarily found the x-ray readings "equivocal" overall, and that the preponderance of the x-ray readings, standing alone, do not establish the existence of complicated pneumoconiosis. Decision and Order at 13. We agree with Employer that the ALJ failed to resolve the conflicts in the x-ray evidence or explain why he found the x-ray readings "equivocal." Employer's Brief at 5-

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

[4] Dr. Ranavaya, a B reader only, read the October 23, 2018 x-ray just for quality purposes. Director's Exhibit 12.

6, 8; Decision and Order at 13. The record contains conflicting positive and negative readings of the April 29, 2021 x-ray by Drs. Tarver and Kendall. Claimant's Exhibit 2; Employer's Exhibit 2. The ALJ was required to resolve these conflicting interpretations, determine whether the x-ray supports a finding of complicated pneumoconiosis, and explain the basis for his finding. 20 C.F.R. §718.202(a)(1). Further, in his consideration of the x-ray evidence as a whole, he was required to explain how he found the x-ray readings "equivocal" or inconclusive overall in accordance with the explanatory requirements of the Administrative Procedure Act (APA).[5] *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because the ALJ failed to resolve conflicts in the evidence or provide adequate rationale for his findings, we vacate his finding that the x-ray readings are "equivocal" and insufficient to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) and remand the case for further consideration.[6] *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (Board lacks the authority to render factual findings to fill in gaps in the ALJ's decision).

Other Medical Evidence – 20 C.F.R. §718.304(c)

The ALJ next considered two medical opinions and four CT scans contained in Claimant's treatment records. *See* 20 C.F.R. §718.304(c); Decision and Order at 13-14.

The ALJ considered the medical opinions of Drs. Forehand and Jarboe. Decision and Order at 14. Dr. Forehand conducted Claimant's Department of Labor (DOL)-sponsored complete pulmonary examination and opined Claimant has simple coal workers' pneumoconiosis based on Claimant's occupational exposure to coal mine dust and Dr. DePonte's reading of the October 23, 2018 x-ray. Director's Exhibit 11 at 4. Dr. Jarboe opined Claimant has simple pneumoconiosis based on Dr. Kendall's reading of the April 29, 2021 x-ray. Employer's Exhibit 1 at 3-4. The ALJ noted neither physician diagnosed complicated pneumoconiosis and that each physician considered only a single x-ray

[5] The Administrative Procedure Act (APA), 5 U.S.C. §§500-591, 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).

[6] Because we vacate the ALJ's findings with respect to the x-ray evidence, we decline to address Employer's additional arguments regarding the ALJ's consideration of Dr. DePonte's readings of the August 10, 2017, June 13, 2018, and October 23, 2018 x-rays. Employer's Brief at 8.

interpretation. Decision and Order at 14. However, he did not render any explicit findings regarding their opinions. *Id*.

The ALJ also considered readings of four CT scans contained in Claimant's treatment records. Dr. McMurray read a May 20, 2013 CT scan as suggestive of coal workers' pneumoconiosis, noting small nodular opacities most prominent in the upper lobes. Claimant's Exhibit 6 at 5-6. Dr. Maldonado read a January 11, 2016 CT scan as demonstrating pneumoconiosis with "perhaps development of progressive massive fibrosis[,]" and suggested a possible differential diagnosis of sarcoidosis. Claimant's Exhibit 4 at 3-4. He also interpreted an August 10, 2016 CT scan as showing a 1.7 x 0.6 cm nodular conglomerate in the right upper lobe, an 0.8 cm right upper lobe nodule, a 1.04 cm right lower lobe perifissural nodule, and a 1 cm nodule along the major fissure in the left upper lobe. *Id*. at 14. In conclusion, he opined his findings regarding the August 2016 CT scan were compatible with Claimant's "known pneumoconiosis" and "not significantly changed compared to [the January 2016 CT scan]." *Id.* Finally, Dr. Maldonado reviewed a February 10, 2017 CT scan, noting a nodular conglomerate in the right upper lobe and a 0.9 cm nodule along the major fissure in the left upper lobe as the largest macronodules seen on the scan. *Id*. at 18. He again opined "there has not been any significant change" relative to the previous scan and stated there "is no evidence of any progressive fibrosis." *Id*.

The ALJ stated the CT scans "reflect progressive findings of . . . nodules exceeding 1 centimeter in size, concerning for pneumoconiosis . . . ." Decision and Order at 14. He found the CT scans thus support "x-ray designations of Category A opacities," but do not establish Claimant has masses in his lungs that would appear as opacities larger than one centimeter on x-ray. *Id*. Thus, he found the CT scans, standing alone, do not establish complicated pneumoconiosis. *Id*.

However, considering the evidence as a whole, the ALJ concluded Claimant's treatment record CT scans demonstrated his "physicians' concern about the developing process in his lungs, with the development of macro and micronodules, as well as nodular conglomerates." Decision and Order at 14. He then found that, weighed together with the positive x-ray interpretations by Drs. DePonte and Tarver, the evidence overall established complicated pneumoconiosis. *Id*.

As an initial matter, we agree with Employer's argument that the ALJ erred in his consideration of the CT scans. Employer's Brief at 6-8. As Employer correctly notes, the record contains conflicting evidence regarding the size of the nodules seen on Claimant's CT scans: Dr. Maldonado read the January 11, 2016 CT scan as demonstrating two nodules greater than 1 cm in size, but read the later February 10, 2017 CT scan as showing no nodules greater than 1 cm. Claimant's Exhibit 4 at 14, 18. The ALJ was required to

reconcile these conflicting readings in his consideration of the CT scans and explain his determination regarding whether they can support a finding of complicated pneumoconiosis under 20 C.F.R. §718.204(c). *See Wojtowicz*, 12 BLR at 1-165. Further, the ALJ's finding that the CT scans "reflect progressive findings of . . . nodules exceeding 1 centimeter in size" is not supported by substantial evidence, as Dr. Maldonado indicated there were no significant changes across the successive CT scans he read, and he read the most recent scan as showing nodules less than one centimeter in size. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Claimant's Exhibit 4 at 14, 18; Decision and Order at 13-14.

Thus the ALJ's consideration of the evidence, weighed together, is neither adequately explained nor supported by substantial evidence. Employer's Brief at 5-8. The ALJ did not provide adequate explanation for how he found Claimant's treatment record CT scans support a finding of complicated pneumoconiosis when weighed together with the other evidence, particularly in light of the conflicts in the CT scan evidence discussed above. *See Wojtowicz*, 12 BLR at 1-165.

Lastly, we agree with Employer's argument that the ALJ erred in finding that the x-ray readings, when weighed together with the other evidence, support finding complicated pneumoconiosis. Employer's Brief at 5-6. Having found the x-ray evidence "equivocal" overall on the issue of complicated pneumoconiosis, the ALJ did not adequately explain why he nonetheless found the positive readings of Drs. DePonte and Tarver support a finding of complicated pneumoconiosis when considered in conjunction with the other evidence.

We therefore vacate the ALJ's finding that the evidence, when weighed together, establishes complicated pneumoconiosis and that Claimant therefore invoked the Section 411(c)(3) presumption. 20 C.F.R. §718.304(a), (c). As a result, we also vacate his finding the evidence establishes Claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), Decision and Order at 14, and the award of benefits.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant has established complicated pneumoconiosis. The ALJ must first reconsider whether the x-ray evidence establishes the disease. 20 C.F.R. §718.304(a). He should specifically reconcile the conflicting interpretations of the April 29, 2021 x-ray and adequately explain the bases for his determinations. *See Wojtowicz*, 12 BLR at 1-165. Then he must reconsider whether the medical opinion evidence and treatment record CT scans support a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c). Finally, he must weigh all the relevant evidence

together to determine if the evidence as a whole establishes complicated pneumoconiosis.[7] *Gray*, 176 F.3d at 388-89; 20 C.F.R. §718.304. If he determines Claimant has established the existence of complicated pneumoconiosis, and thus invoked the Section 411(c)(3) presumption, he must then reconsider whether Claimant has established the disease arose out of his coal mine employment. 20 C.F.R. §718.203(b). If the ALJ finds Claimant has established his complicated pneumoconiosis arose out of his coal mine employment, he may reinstate the award of benefits.

If the ALJ instead finds Claimant did not establish complicated pneumoconiosis, he should deny benefits based on Claimant's failure to establish total disability independent of a finding of complicated pneumoconiosis. *Trent*, 11 BLR at 1-27. He must critically analyze the evidence of record and adequately explain all his findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

[7] We note the ALJ considered the evidence as a whole in accordance with *Cox* and other precedent of the United States Court of Appeals for the Fourth Circuit. Decision and Order at 12, *citing E. Associated. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250 (4th Cir. 2000), *Westmoreland Coal Co. v. Director, OWCP* [*Cox*], 602 F.3d 276 (4th Cir. 2010), *Clinchfield Coal Co. v. Lambert*¸ No. 06-1154, 206 Fed. Appx. 252, 255 (4th Cir. Nov. 17, 2006). While Fourth Circuit caselaw is informative, it is not precedential as the law of the Sixth Circuit applies in this case. *See supra* note 2.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge