U.S. Department of Labor

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

BRB No. 21-0449 BLA

GLEN D. STEPP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 03/13/2023
PEABODY ENERGY CORPORATION	)	
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for Employer and its Carrier.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits (2019-BLA-05160) 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 subsequent claim filed on March 9, 2016.[1]

The ALJ found Eastern Associated Coal Company (Eastern) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. She credited Claimant with 17.5 years of coal mine employment, and determined he established the presence of complicated pneumoconiosis and thus 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); 20 C.F.R. §718.304. Consequently, she found Claimant established a change in an applicable condition of entitlement.[2] 20 C.F.R. §725.309(c). The ALJ further determined Claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203(b), and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Peabody Energy is the liable carrier. On the merits, it contends the ALJ erred in finding Claimant established

[1] On September 20, 2011, the district director denied Claimant's prior claim for failure to establish any element of entitlement. Director's Exhibit 1; Decision and Order at 6.

[2] Where a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c)(1); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant did not establish any element of entitlement in his prior claim, he had to submit new evidence establishing any element to obtain review of the merits of his current claim. *White*, 23 BLR at 1-3; Director's Exhibit 1.

complicated pneumoconiosis and thus invoked the irrebuttable presumption.[3] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds urging the Benefits Review Board to affirm the ALJ's determination that Employer is liable for benefits.

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.[4] 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).

Responsible Insurance Carrier

Employer does not challenge the ALJ's finding that Eastern is the correct responsible operator and it was self-insured by Peabody Energy on the last day Eastern employed Claimant; thus, we affirm these findings.[5] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 9, 14; Employer's Brief at 13. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund (the Trust Fund).[6] Employer's Brief at 11-26.

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[3] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant established 17.5 years of coal mine employment. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 6-7.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 61; Decision and Order at 3.

[5] Employer argues there is no evidence of record that Peabody Energy Corporation (Peabody Energy) was the self-insurer of Eastern Associated Coal Company (Eastern). Employer's Brief at 12-13. However, the Notice of Claim specifically identifies Peabody Energy as Eastern's self-insurer, Director's Exhibit 30, and other arguments Employer raises apparently acknowledge that Peabody Energy was the self-insurer of Eastern at the time of Claimant's last date of employment. *See, e.g.*, Employer's Brief at 16 (arguing there is "no regulation that says the self-insurer is the self-insurer on the last day of employment.").

[6] Employer contends the Black Lung Disability Trust Fund (Trust Fund) was not put on notice of this claim as a potentially responsible party. Employer's Brief at 2-3. We

Patriot was initially another Peabody Energy subsidiary. Employer's Exhibits 5-9. In 2007, after Claimant ceased his coal mine employment with Eastern, Peabody Energy transferred a number of its other subsidiaries, including Eastern, to Patriot. Employer's Exhibit 9. That same year, Patriot was spun off as an independent company. *Id*. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. *Id.* at 3. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Eastern, Patriot later went bankrupt and can no longer provide for those benefits. Employer's Exhibits 5-9. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Eastern when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 11-14.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated the self-insured carrier in this claim and the Trust Fund, not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 11-26. It argues: (1) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (2) the Department of Labor (DOL) released Peabody Energy from liability; (3) before transferring liability to Peabody Energy, the DOL must establish it exhausted any available funds from the security bond Patriot gave to secure its self-insurance status; (4) the Director is equitably estopped from imposing liability on Peabody Energy; and (5) the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's bond and failing to comply with its duty to monitor Patriot's financial health. *Id*. It maintains that a separation agreement – a private contract between Peabody Energy and Patriot – released it from liability and the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. *Id.* at 18-21.

The Board has previously considered and rejected these arguments in *Bailey v. E. Assoc. Coal Co*., BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc); *Howard v. Apogee Coal Co*., BLR , BRB No. 20-0229 BLA, slip op. at 5-17 (Oct. 18, 2022); and *Graham v. E. Assoc. Coal Co*., 25 BLR 1-289, 1-295-99 (2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments. Thus, we affirm the ALJ's determination that Eastern and Peabody Energy are the

reject this argument as the Act provides that the Director is a party in all black lung claims and represents the interests of the Trust Fund. 30 U.S.C. §932(k); *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 502 n.5 (4th Cir. 1999); *see also Boggs v. Falcon Coal Co.*, 17 BLR 1-62, 1-65-66 (1992); *Truitt v. N. Am. Coal Corp.*, 2 BLR 1-199, 1-202 (1979).

responsible operator and carrier, respectively, and are liable for this claim. Decision and Order at 9-14.

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 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. The ALJ must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether Claimant has invoked the irrebuttable presumption. *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).

The ALJ found complicated pneumoconiosis established by the x-ray evidence, medical opinion evidence, and the evidence as a whole.[7] Decision and Order at 19, 31-33.

X-Ray Evidence

The ALJ considered seven readings of four chest x-rays dated May 19, 2016, November 2, 2017, June 3, 2019, and June 28, 2019. Decision and Order at 16-19; Director's Exhibits 17, 19; Employer's Exhibits 1-2, 15; Claimant's Exhibits 1, 4. All the interpreting physicians were dually-qualified as B readers and Board-certified radiologists. Decision and Order at 18-19.

There were three interpretations of the May 19, 2016 x-ray. Both Drs. DePonte and Crum interpreted it as positive for pneumoconiosis, with Category A large opacities. Director's Exhibits 17, 19. Dr. Godwin interpreted the x-ray as negative for pneumoconiosis, but noted emphysema and calcified granulomas. Employer's Exhibit 2. Finding the physicians equally-qualified, the ALJ afforded more weight to the two interpretations of Drs. DePonte and Crum over Dr. Godwin's single interpretation to find

[7] The ALJ found the CT scan evidence and Claimant's treatment records do not support a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 21-22. The record contains no biopsy evidence, so Claimant cannot establish complicated pneumoconiosis under 20 C.F.R. §718.304(b). Decision and Order at 20.

the May 19, 2016 x-ray positive for complicated pneumoconiosis. Decision and Order at 18-19.

The ALJ next considered the sole reading of the November 2, 2017 x-ray by Dr. Godwin, which was negative for pneumoconiosis. Employer's Exhibit 1. The ALJ found the unrebutted x-ray negative for both simple and complicated pneumoconiosis. Decision and Order at 18.

The ALJ also considered the sole reading of the June 3, 2019 x-ray, which Dr. DePonte interpreted as positive for pneumoconiosis, 1/1 profusion, with Category A large opacities. Claimant's Exhibit 1 at 22. As there were no conflicting readings, she found the June 3, 2019 x-ray positive for complicated pneumoconiosis. Decision and Order at 18.

Finally, the ALJ considered the conflicting readings of the June 28, 2019 x-ray. Dr. DePonte read this x-ray as positive for pneumoconiosis, 1/1 profusion, with Category A large opacities. Claimant's Exhibit 4 at 21. Dr. Godwin opined the x-ray was negative for pneumoconiosis, and noted emphysema and "atelectasis or scar in the upper lobes." Employer's Exhibit 15. As the ALJ found the two physicians equally-qualified, she found the June 28, 2019 x-ray evidence in equipoise for complicated pneumoconiosis. Decision and Order at 19.

While noting the x-ray evidence was preponderantly positive for complicated pneumoconiosis given the two positive x-rays, she also gave "additional weight" to both positive x-rays. Decision and Order at 19. She gave additional weight to the May 19, 2016 x-ray as it was the only x-ray to be read consistently by two different, dually-qualified physicians, and additional weight to the June 3, 2019 x-ray because it demonstrated progression of Claimant's disease. *Id.* Weighing the evidence together, she found the two x-rays that were positive for complicated pneumoconiosis outweighed the conflicting negative x-ray. *Id.*

Employer contends the ALJ mischaracterized the record when she gave the positive x-rays additional weight. Employer's Brief at 8-9. It also argues Dr. DePonte's x-ray readings do not demonstrate progression of Claimant's disease, as her readings are "identical." *Id.* at 6. We disagree.

The ALJ properly weighed the readings of each x-ray, qualitatively and quantitatively, to find two x-rays were positive for complicated pneumoconiosis, one was

negative for the disease, and the readings of one were in equipoise.[8] *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Decision and Order at 18-19. Even without the additional weight she gave the two positive x-rays, the preponderance of the x-ray evidence supports a finding of complicated pneumoconiosis. Decision and Order at 19. While contesting the weight provided to certain x-rays, Employer does not specifically challenge the ALJ's findings regarding whether or not each x-ray supports a finding of complicated pneumoconiosis and has further failed to explain how any error in her according additional weight to the positive x-rays would have made a difference in the outcome. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

Moreover, the ALJ permissibly found the time between the earlier negative x-ray and later positive x-rays was adequate to demonstrate a discernible progression in Claimant's disease and thus permissibly found the June 3, 2019 x-ray worthy of more weight. Decision and Order at 19; 20 C.F.R. §718.201(c); *Adkins*, 958 F.2d at 52; *see also Tokarcik v. Consolidation Coal Co.*, 6 BLR 1-666, 1-667-668 (1983) (ALJ did not err in according more weight to positive x-ray taken seven months after negative x-rays). While Employer argues Dr. DePonte's readings are identical and thus do not show progression, the ALJ did not find progression of the disease based on her readings alone, but on the x-ray interpretations overall. Decision and Order at 19.

Finally, Employer argues the ALJ failed to determine whether Dr. DePonte found that the large opacities she saw on the x-rays she read were greater than one centimeter in diameter in order to diagnose complicated pneumoconiosis. It contends she noted linear opacities and did not specifically state whether the large opacities are at least one centimeter in diameter. Employer's Brief at 9 n.1. Employer's argument is unpersuasive.

As Employer acknowledges, Dr. DePonte classified each x-ray she interpreted as positive for a "Category A" opacity on the International Labour Organization (ILO) forms she completed. Employer's Brief at 6; Director's Exhibit 17; Claimant's Exhibits 1, 4. By definition, a "Category A" classification means the physician assesses that a large opacity greater than one centimeter in diameter is present. *See* 30 U.S.C. §921(c)(3)(a); 20 C.F.R. §718.304(a); 20 C.F.R. §718.102(d). Thus, the ALJ properly found Dr. DePonte's x-ray readings consistent with a finding of complicated pneumoconiosis.

[8] Employer does not challenge the ALJ's finding that the interpreting physicians are all equally-qualified to interpret the x-ray evidence. Decision and Order at 18-19.

Based on the foregoing, we affirm the ALJ's findings that the x-ray evidence supports a finding of complicated pneumoconiosis, as it is supported by substantial evidence. 20 C.F.R. §718.304(a); *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); Decision and Order at 19.

Computed Tomography (CT) Scans

Next, the ALJ found Claimant's September 15, 2010 and August 24, 2015 CT scans do not establish complicated pneumoconiosis. Decision and Order at 21; Employer's Exhibits 10, 16. However, she found the CT scans were worthy of little weight relative to the more recent, positive x-ray evidence. Decision and Order at 32-33.

Employer argues the ALJ improperly discredited the August 24, 2015 CT scan showing no pneumoconiosis. It contends she did not consider the impact of the results of the CT scan on the x-ray evidence, when the May 10, 2016 x-ray the ALJ found positive for complicated pneumoconiosis was taken just nine months after the negative 2015 CT scan. Employer's Brief at 6-7. We disagree.

The ALJ permissibly found the CT scan evidence worthy of less weight than the more recent x-ray evidence because the regulations recognize pneumoconiosis as a progressive disease. Decision and Order at 32-33; *see Adkins*, 958 F.2d at 51-52; 20 C.F.R. §718.201(c). Moreover, the ALJ found the 2010 CT scan, which demonstrated simple pneumoconiosis, "casts doubt" on the accuracy of the 2015 CT scan, which was read entirely negative for pneumoconiosis. Decision and Order at 33; *Adkins*, 958 F.2d at 51-52; *see also Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993) (explaining that if a later test shows the miner's condition has improved, the reasoning for the later evidence rule "simply cannot apply": one test must be incorrect -- "and it is just as likely that the later evidence is faulty as the earlier"). Employer does not specifically contest this credibility determination; thus, it is affirmed. *See Skrack*, 6 BLR at 711.

Employer's arguments are a request to reweigh the evidence, which we are not permitted to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the ALJ's finding that the negative CT scan evidence is worthy of little weight as it is supported by substantial evidence. *Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441.

Medical Opinions

The ALJ next considered the medical opinions of Drs. Habre, Raj, Cordasco, Zaldivar, and Tuteur. Decision and Order at 23-32. Drs. Habre, Raj, and Cordasco all diagnosed complicated pneumoconiosis based on the positive x-ray readings obtained in

conjunction with their respective examinations. Director's Exhibit 17; Claimant's Exhibits 1, 4. Drs. Zaldivar and Tuteur opined that Claimant has neither simple nor complicated pneumoconiosis and the opacities seen in the radiographic evidence are due to granulomatous disease or bullous emphysema, unrelated to coal mine dust exposure.[9] Employer's Exhibits 3-4, 13-14. The ALJ found Drs. Habre's, Raj's, and Cordasco's opinions consistent with the weight of the x-ray evidence and accorded their opinions probative weight. Decision and Order at 31. She found they outweighed the contrary opinions of Drs. Zaldivar and Tuteur, both of which she found unreasoned. *Id.* at 31-32. Weighing the medical opinion evidence together, she found it supported a finding of complicated pneumoconiosis. *Id.*

Employer contends the ALJ erred in finding the opinions diagnosing complicated pneumoconiosis to be well-reasoned when they relied solely on the x-ray readings obtained in conjunction with their exams. Employer's Brief at 10-11. We disagree. The ALJ permissibly found Drs. Habre's, Raj's, and Cordasco's opinions consistent with the preponderance of the x-ray evidence. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; Decision and Order at 31-32; Director's Exhibit 17; Claimant's Exhibits 1, 4.

Further, the ALJ permissibly accorded little weight to the opinions of Drs. Zaldivar and Tuteur because they relied primarily on an outdated 2015 CT scan. The ALJ found they provided no plausible explanation as to how the 2015 CT scan could reasonably demonstrate the absence of clinical pneumoconiosis when the 2010 CT scan showed clinical pneumoconiosis. Decision and Order at 32-33; *see Adkins*, 958 F.2d at 51-52; *Woodward*, 991 F.2d at 319-20. She further found their opinions undermined because, although they considered all the radiographic readings, they relied solely on Dr. Godwin's negative readings without providing an adequate explanation why the positive readings by Drs. DePonte and Crum were wrong, given that they are both qualified to interpret radiographs for pneumoconiosis.[10] Decision and Order at 31-32. It is the province of an

[9] In Employer's argument heading in its brief, it indicates that Claimant's treatment evidence and the medical opinion evidence demonstrate the large opacity seen on x-ray was due to "multiple pneumonias." Employer's Brief at 4. However, none of the experts in this case so opined.

[10] The ALJ acknowledged Dr. Zaldivar's statement that if a large opacity were observed during Claimant's treatment, given his smoking history the large opacity finding would lead to a cancer "workup," which did not occur in this case. Employer's Exhibit 13 at 21-22. However, the ALJ noted no evidence of record that could either support or oppose Dr. Zaldivar's assumption and thus found it not well-reasoned. Decision and Order at 32 n.25.

ALJ to evaluate medical opinions. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000) (ALJ is not required to accept the opinion or theory of any medical expert). As it is supported by substantial evidence, we affirm the ALJ's discrediting of Drs. Zaldivar's and Tuteur's medical opinions. Decision and Order at 31-32.

Thus, we affirm the ALJ's finding that the medical opinion evidence weighs in favor of a finding of complicated pneumoconiosis. Decision and Order at 32.

Weighing the Evidence Together

Finally, Employer argues the ALJ failed to weigh all the evidence together and instead only weighed the evidence category by category, then used the x-ray readings of Drs. DePonte and Crum as the "final arbiter and determiner upon which all other contrary probative evidence breaks." Employer's Brief at 4-5, 8.

Contrary to Employer's arguments, the ALJ considered each category of evidence and then weighed all the evidence together before making her finding regarding complicated pneumoconiosis. Decision and Order at 32-33. As addressed above, the ALJ permissibly found the x-ray evidence supported complicated pneumoconiosis. Moreover, the ALJ provided permissible bases for finding the contrary medical opinion evidence undermined. Finally, she permissibly afforded the x-ray evidence more weight than the negative CT scan evidence given the age of the CT scans.[11] Thus, the ALJ reasonably weighed all the relevant evidence together. *See Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 256 (while the ALJ is required to review the evidence under each prong, a finding of complicated pneumoconiosis may be based on evidence presented under a single prong); *Melnick*, 16 BLR at 1-33-34; Decision and Order at 32-33.

Employer's arguments amount to a request to reweigh the evidence, which we are not permitted to do. *Anderson*, 12 BLR at 1-113. Thus, we affirm the ALJ's finding that Claimant established complicated pneumoconiosis by a preponderance of the evidence and

[11] Employer submits the ALJ erred in according more weight to the x-ray readings of Drs. DePonte and Crum when they were unaware of the CT scan evidence. Employer's Brief at 7. The ALJ was not required to discredit Drs. DePonte's and Crum's opinions for not considering the earlier CT scan evidence. *See Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984).

therefore invoked the irrebuttable presumption that he is totally disabled due to pneumoconiosis.[12] 20 C.F.R. §718.304; Decision and Order at 33.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[12] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack*, 6 BLR at 1-711; Decision and Order at 34.