U.S. Department of Labor

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

BRB No. 22-0335 BLA

CECIL G. DILLOW, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PREMIUM ENERGY, LLC	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 03/21/2023
	)	
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 Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson Kelly, PLLC), Charleston, West Virginia, for Employer and its Carrier.

Before: BOGGS, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Granting Benefits (2020-BLA-05584) 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 October 31, 2018.[1]

The ALJ credited Claimant with 30.21 years of coal mine employment and found he established complicated pneumoconiosis. Thus, she found Claimant 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) (2018); 20 C.F.R. §718.304. She also found Claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203, and awarded benefits.[2]

On appeal, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis and thus invoked the Section 411(c)(3) irrebuttable presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

[1] Claimant filed three prior claims. The ALJ noted "[t]wo of [Claimant's] prior claims were withdrawn." Decision and Order at 2 n.1 (citing Director's Exhibits 1, 3). A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306. She also stated one of Claimant's "prior filed claims is noted as 'closed' and 'unobtainable' from the Federal Records Center because the facility was closed due to COVID-19." Decision and Order at 2 n.1 (citing Director's Exhibit 2).

[2] When 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 that "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); *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). Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 by invoking the Section 411(c)(3) presumption. *See E. Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-12 (4th Cir. 2015).

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 30.21 years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

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.[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).

Invocation of the Section 411(c)(3) Presumption

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 chest 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). *See* 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. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Associated 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).

Employer contends the ALJ erred in finding Claimant established complicated pneumoconiosis based on the x-rays and medical opinions and in consideration of the evidence as a whole. 20 C.F.R. §718.304(a), (c); Decision and Order at 6-11; Employer's Brief at 8-23.

X-ray Evidence at 20 C.F.R. §718.304(a)

The ALJ considered nine readings of four x-rays taken on November 24, 2018,[5] July 20, 2019, August 12, 2020, and October 9, 2020. Decision and Order at 6-7. All interpreting physicians are dually-qualified B readers and Board-certified radiologists. Director's Exhibits 13, 14, 16; Employer's Exhibits 1, 2, 3, 5; Claimant's Exhibits 1, 2, 3. Drs. DePonte and Crum read the November 24, 2018 x-ray as positive for complicated pneumoconiosis, category A large opacities, whereas Dr. Seaman read the x-

[4] 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 14.

[5] Dr. Ranavaya, a B reader, read the November 24, 2018 x-ray for quality purposes only. *See* Director's Exhibit 14; Decision and Order at 7.

ray as positive for simple pneumoconiosis. Director's Exhibits 13, 16; Employer's Exhibit 1. Dr. Crum read the July 20, 2019 x-ray as positive for both simple and complicated pneumoconiosis, category A, while Dr. Seaman read the x-ray as positive for simple pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 2. Dr. DePonte read the August 12, 2020 x-ray as positive for complicated pneumoconiosis, category A large opacities, whereas Dr. Seaman read the x-ray as positive for simple pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 3. Dr. DePonte read the October 9, 2020 x-ray as positive for both simple and complicated pneumoconiosis, category A, whereas Dr. Meyer read the x-ray as positive for simple pneumoconiosis. Claimant's Exhibit 3; Employer's Exhibit 5.

The ALJ found the November 24, 2018 x-ray supports a finding of both simple and complicated pneumoconiosis. Decision and Order at 7. She also found the July 20, 2019 and October 9, 2020 x-rays do not support or refute a finding of complicated pneumoconiosis but support a finding of simple pneumoconiosis. *Id*. She thus concluded one x-ray supports a finding of complicated pneumoconiosis and three x-rays do not support or refute a finding of the disease and Claimant therefore established both simple and complicated pneumoconiosis based on the x-ray evidence. *Id*.

Employer argues the ALJ impermissibly "count[ed] heads" in determining the November 24, 2018 x-ray supports a finding of complicated pneumoconiosis and the remaining three x-rays do not. Employer's Brief at 13-15. We disagree.

Contrary to Employer's argument, the ALJ properly performed both a qualitative and quantitative analysis of the conflicting x-ray readings, taking into consideration the physicians' qualifications, their specific interpretations, and the number of readings of each film. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order at 6-7. She permissibly found all dually-qualified radiologists entitled to equal weight. *See Addison*, 831 F.3d at 256-57; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); Decision and Order at 7. Moreover, she was not compelled to give greater weight to Drs. Seaman's and Meyer's readings based on their additional professional qualifications and academic status as professors of radiology and authors of articles, as Employer suggests.[6] *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Clark v.*

[6] While an ALJ may rely on a reader's additional qualifications (such as teaching credentials or expertise demonstrated by lecturing and publishing articles) to accord greater weight to that physician's readings, she is not required to do so. *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); *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *see also J.V.S. v. Arch of West*

Karst-Robbins Coal Co., 12 BLR 1-149, 1-154 (1989) (en banc); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); Employer's Brief at 16-19. Having credited the positive readings of two of the three dually-qualified radiologists, we affirm the ALJ's determination that the November 24, 2018 x-ray is positive for complicated pneumoconiosis. 20 C.F.R. §718.202(a)(1); Decision and Order at 7. Additionally, the ALJ permissibly determined that the July 20, 2019 and October 9, 2020 x-rays "neither support nor refute" the existence of complicated pneumoconiosis based on the conflicting readings of each x-ray by two dually-qualified radiologists.[7] Decision and Order at 7; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994).

Employer also argues the ALJ erred in failing to weigh Drs. DePonte's and Seaman's conflicting readings of the August 12, 2020 x-ray and to provide reasons why the x-ray neither supports nor refutes a finding of complicated pneumoconiosis as the Administrative Procedure Act[8] requires. Employer's Brief at 8-9. Although the ALJ summarized Drs. DePonte's and Seaman's conflicting readings of the August 12, 2020 x-ray, she did not explain how she weighed the readings of the x-rays. Decision and Order at 7. Rather, she found "one of the four chest x-rays . . . fully supports a finding of complicated pneumoconiosis, while the remaining three x-rays neither support nor refute such a finding." Decision and Order at 7; *see Addison*, 831 F.3d at 256-57; *Underwood*, 105 F.3d at 949; *Adkins*, 958 F.2d at 52. Because the August 12, 2020 x-ray would, at best, be in equipoise because an equal number of dually-qualified radiologists read it as positive and negative for complicated pneumoconiosis, the ALJ's error in failing to provide a reason for her weighing of the x-ray is harmless. *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Claimant's Exhibit 2; Employer's Exhibit 3. Because the ALJ found the November 24, 2018 x-ray

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Virginia/Apogee Coal Co., 24 BLR 1-78, 1-90 n.13 (2008); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-65 (2004) (en banc).

[7] Employer's argument that the ALJ erred in failing to consider Dr. Seaman's criticisms of Dr. DePonte's x-ray readings is merely 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); Employer's Brief at 10-11, 19-22.

[8] The Administrative Procedure Act, 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

positive for complicated pneumoconiosis, a finding that we have affirmed, Claimant has still satisfied his burden of proof even if the remaining x-rays are in equipoise. *Ondecko*, 512 U.S. at 280-81.

We affirm the ALJ's determination 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); Decision and Order at 7.

Medical Opinion Evidence at 20 C.F.R. §718.304(c)[9]

The ALJ next considered the medical opinions of Drs. Green, Raj, Rajbhandari, Seaman, and Basheda. Decision and Order at 8-11. Drs. Green, Raj, and Rajbhandari opined Claimant has complicated pneumoconiosis while Drs. Seaman and Basheda opined he does not. Director's Exhibits 13, 17, 18; Claimant's Exhibits 2, 3; Employer's Exhibits 4, 6. The ALJ found the opinions of Drs. Green, Raj, and Rajbhandari "comport with the preponderance of the x-ray evidence,"[10] and thus are well-reasoned, well-documented, and entitled to great weight.[11] Decision and Order at 10. She further found the contrary opinions of Drs. Seaman and Basheda unpersuasive.[12] *Id.* at 11. Thus she found Claimant established complicated pneumoconiosis based on the medical opinions of Drs. Green, Raj, and Rajbhandari. *Id.*

Employer argues the ALJ erred in weighing Dr. Seaman's opinion as she failed to "substantively address" the doctor's review of Drs. DePonte's and Crum's readings of the November 24, 2018, June 20, 2019, and August 12, 2020 x-rays. Employer's Brief at 10-11. We disagree. Dr. Seaman diagnosed simple coal workers' pneumoconiosis but stated

[9] Employer does not point to any biopsy evidence in the record. 20 C.F.R. §718.304(b).

[10] The ALJ noted Drs. Green, Raj, and Rajbhandari based their opinions that Claimant has complicated pneumoconiosis on radiographic evidence and Claimant's coal mine dust exposure. Decision and Order at 10. She observed that their opinions are consistent with her overall finding at 20 C.F.R. §718.304(a). *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 10.

[11] Employer does not challenge the ALJ's weighing of Drs. Green's, Raj's, and Rajbhandari's opinions.

[12] Employer does not challenge the ALJ's weighing of Dr. Basheda's opinion.

she did "not see a large opacity on any of the radiographs" she read from October 2, 2007 to October 9, 2020. Employer's Exhibits 4. The ALJ stated that although Dr. Seaman's diagnosis of "simple clinical pneumoconiosis [is] consistent with the preponderance of the chest x-ray evidence," the doctor's opinion that she did "not see a large opacity is not consistent with the preponderance of the chest x-ray evidence, which supports a finding of complicated pneumoconiosis." Decision and Order at 11. As the ALJ accurately observed Dr. Seaman's opinion is not consistent with her overall finding at 20 C.F.R. §718.304(a), she permissibly found it entitled to less weight. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 11. We therefore affirm her determination that the medical opinion evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 11-12.

Employer's arguments at 20 C.F.R. §718.304 amount to a request for the Board to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 13-19. As the ALJ permissibly found the x-ray and medical opinion evidence established complicated pneumoconiosis at 20 C.F.R. §718.304(a), (c), we affirm her finding that Claimant established complicated pneumoconiosis on the record as a whole. 20 C.F.R. §718.304; *see Scarbro*, 220 F.3d at 255; Decision and Order at 11. 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*, 6 BLR at 1-711; Decision and Order at 11. Consequently, we affirm the ALJ's finding that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis and thereby established a change in an applicable condition of entitlement. 20 C.F.R. §§718.304, 725.309(c).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge