U.S. Department of Labor

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

BRB No. 23-0201 BLA

LARRY L. BOWMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HAR LEE COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 03/22/2024
AIG PROPERTY AND CASUALTY COMPANY	)	
	)	
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 Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Awarding Benefits (2021-BLA-05370) rendered on a subsequent claim filed on October 11, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ credited Claimant with at least twenty years of coal mine employment. She found he established complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, and therefore established a change in an applicable condition of entitlement.[2] 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.304, 725.309(c). Further, she 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 Claimant established complicated pneumoconiosis.[3] Neither Claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief.

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

[1] This is Claimant's third claim for benefits. Director's Exhibit 52. The district director denied his prior claim, filed on July 27, 2017, for failure to establish total disability. Decision and Order at 3.

[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 deny the subsequent claim unless they find 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); *see 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 failed to establish total disability in his prior claim, he had to submit new evidence establishing this element to obtain review of the current claim on the merits. *Id.*

[3] We affirm, as unchallenged on appeal, the ALJ's finding Claimant established at least twenty years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2-3.

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, 361-62 (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 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;[5] 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). *See* 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. 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 (1991) (en banc).

The ALJ found the x-ray and computed tomography (CT) scan evidence support a finding of complicated pneumoconiosis, while the medical opinion and Claimant's treatment record evidence neither support nor undermine a finding of complicated pneumoconiosis.[6] 20 C.F.R. §718.304(a), (c); Decision and Order at 9-10, 13. Weighing all the evidence together, she found Claimant established complicated pneumoconiosis based on the x-ray and CT scan evidence. 20 C.F.R. §718.304(a), (c); Decision and Order at 13-14.

[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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Tr. at 22, 28-29.

[5] The ALJ found the record contains no biopsy or autopsy evidence. 20 C.F.R. §718.304(b); Decision and Order at 5 n.8.

[6] We affirm, as unchallenged on appeal, the ALJ's finding that the medical opinion evidence and Claimant's treatment records do not undermine a finding of complicated pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 10-13.

X-rays – 20 C.F.R. §718.304(a)

The ALJ considered nine readings of five x-rays taken August 17, 2016, September 20, 2017, January 22, 2020, October 8, 2020, and November 11, 2021. Decision and Order at 6-9. She noted all the physicians that interpreted the x-rays are dually-qualified as B readers and Board-certified radiologists. *Id.* at 7.

Dr. DePonte read the August 17, 2016 and September 20, 2017 x-rays as positive for complicated pneumoconiosis, Category A. Director's Exhibit 13; Claimant's Exhibit 1. Drs. DePonte and Crum read the January 22, 2020 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Colella read it as negative. Director's Exhibits 11 at 20; 14; 15. Dr. DePonte read the October 8, 2020 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Colella read it as negative. Claimant's Exhibit 2; Employer's Exhibit 1 at 37. Finally, Dr. Kendall read the November 11, 2021 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Adcock read it as negative. Claimant's Exhibit 3; Employer's Exhibit 2 at 30.

The ALJ found the August 17, 2016 and September 20, 2017 x-rays are positive for complicated pneumoconiosis because Dr. DePonte's readings are uncontradicted. Decision and Order at 8. She also found the January 22, 2020 x-ray is positive for complicated pneumoconiosis because a greater number of dually-qualified radiologists read it as positive than as negative. *Id.* Finally, she found the readings of the October 8, 2020 and November 11, 2021 x-rays are in equipoise because an equal number of dually-qualified radiologists read each x-ray as positive compared to negative for complicated pneumoconiosis. *Id.* Because three x-rays are positive for complicated pneumoconiosis and the readings of the remaining x-rays are in equipoise, the ALJ concluded the preponderance of the x-ray evidence supports a finding of complicated pneumoconiosis. *Id.* at 8-9. She also noted that three different equally qualified readers found the x-rays positive for complicated pneumoconiosis, while two found only simple pneumoconiosis. *Id.* at 8.

Employer argues the ALJ erred in finding the January 22, 2020 x-ray positive for complicated pneumoconiosis by impermissibly "counting heads" to resolve the conflict in the evidence. Employer's Brief at 4-5. 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 (4th Cir. 2016); Decision and Order at 7-8.

Employer also argues the ALJ improperly considered Dr. DePonte's readings of the August 17, 2016 and September 20, 2017 x-rays because they were considered in the

district director's denial of Claimant's prior claim, and Claimant is required to establish a change in condition based on new evidence. Employer's Brief at 3-4. While Employer is correct that an ALJ should not consider prior claim evidence to determine whether a claimant establishes a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c)(4), the alleged error in this claim is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). As Employer acknowledges, even if the ALJ had limited her change in applicable condition finding to the newly submitted January 22, 2020, October 8, 2020, and November 11, 2021 x-rays, she still found one of those x-rays positive for complicated pneumoconiosis and the readings of the other two x-rays in equipoise. Decision and Order at 8; Employer's Brief 4. Because the preponderance of the newly submitted x-ray evidence supports a finding of complicated pneumoconiosis even without including Dr. DePonte's readings from Claimant's prior claim, Employer has not explained how the error it alleges would make a difference.[7] *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni*, 6 BLR at 1-1278.

Therefore, because it is supported by substantial evidence, we affirm the ALJ's determination that the x-ray evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(a); Decision and Order at 8-9.

CT Scans – 20 C.F.R. §718.304(c)

The ALJ considered one reading of a July 31, 2019 CT scan. Decision and Order at 9-10. Dr. Wheeler read the CT scan as positive for progressive massive pulmonary fibrosis. Claimant's Exhibit 4. The ALJ found Dr. Wheeler's reading is "not controlling" but credible to support a finding of complicated pneumoconiosis. Decision and Order at 10.

To the extent Employer argues the ALJ erred in finding Dr. Wheeler's reading of the July 31, 2019 CT scan is supportive of a finding of complicated pneumoconiosis because Claimant has not demonstrated it is medically acceptable and relevant, we disagree. Employer's Brief at 6.

As Employer notes, the party who submits a CT scan "bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing

[7] Because any error in the ALJ's consideration of the prior claim evidence is harmless under these facts, we need not consider Employer's argument that the ALJ erred by crediting Dr. DePonte's x-ray readings from the prior claim without considering the "contradictory readings of the August 17, 2016 and September 20, 2017 x-rays that were [also] considered by the district director in the prior denial." Employer's Brief at 6 n.3; 20 C.F.R. §725.309(c)(4).

or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107. Employer acknowledges the ALJ addressed the reliability of the CT scan reading and recognized that "Dr. Wheeler's credentials are not in the record [and] he did not state whether the scan was of good quality for assessing the presence or absence of pneumoconiosis." Decision and Order at 10; Employer's Brief at 6. However, despite these deficiencies, she further found that the CT scan "was taken as part of Claimant's medical treatment and provides detail of the fibrosis and other changes in Claimant's lungs." Decision and Order at 10. Thus, as Employer notes, the ALJ "clearly stated the CT scan by itself [is] not controlling" but supports a finding of complicated pneumoconiosis. Employer's Brief at 6; Decision and Order at 10. Because Employer identifies no error in these findings, we affirm them.

Further, regardless of whether Dr. Wheeler's CT scan reading is reliable or credible, it is positive for complicated pneumoconiosis and thus cannot undermine the positive x-ray evidence that the ALJ found establishes complicated pneumoconiosis at 20 C.F.R §718.304(a). *See Shinseki*, 556 U.S. at 413 (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni*, 6 BLR at 1-1278.

As Employer raises no further argument, we affirm the ALJ's finding all the relevant evidence considered together establishes complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 13-14. We therefore affirm her conclusion 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); Decision and Order at 14. In addition, we affirm the ALJ's unchallenged finding that Claimant's complicated pneumoconiosis arose out of his coal mine employment. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.203(b); Decision and Order at 14. We thus affirm the award of benefits.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge