U.S. Department of Labor

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

BRB No. 21-0167 BLA

RONNIE LYNN HALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PONTIKI COAL CORPORATION	)	
	)	
and	)	
	)	
ALLIANCE COAL CORPORATION	)	DATE ISSUED: 5/24/2022
	)	
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 Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

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

Paul E. Jones and Denise Hall Scarberry (Jones & Jones Law Office, PLLC), Pikeville, Kentucky, for Employer and its Carrier.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2019-BLA-05912) rendered on a claim filed on March 22, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with nine years of underground coal mine employment and found he has complicated pneumoconiosis. He therefore 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. He further found Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b). Alternatively, the ALJ found Claimant established he is totally disabled due to clinical pneumoconiosis arising out of his coal mine employment. 20 C.F.R. §718.204(b)(2)(c). Accordingly, he awarded benefits and set a benefits commencement date of March 2018.

On appeal, Employer asserts the ALJ erred in determining Pontiki Coal Corporation (Pontiki) is the responsible operator. It also asserts the ALJ erred in finding Claimant established complicated pneumoconiosis and is entitled to the irrebuttable presumption at Section 411(c)(3). Furthermore, it argues the ALJ erred in finding Claimant totally disabled due to simple clinical pneumoconiosis notwithstanding. Finally, it argues the ALJ incorrectly set the date for the commencement of benefits.[1] Claimant filed a response brief in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging rejection of Employer's responsible operator argument.

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] We affirm, as unchallenged, the ALJ's findings that Claimant established nine years of coal mine employment, simple clinical pneumoconiosis, and a totally disabling respiratory impairment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 25, 29.

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).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner.[3] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or another potentially liable operator that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c)(2); *RB&F Coal, Inc. v. Mullins*, 842 F.3d 279, 282 (4th Cir. 2016).

A "successor operator" is "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such prior operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a). It is created when an operator ceases to exist due to reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3). Where an operator is considered a successor operator, any employment with a prior operator "is deemed to be employment with the successor." 20 C.F.R. §725.493(b)(1).

Before the ALJ, Employer asserted Pontiki should be dismissed as the responsible operator because two coal mine operators, Universal Coal Services (Universal) and its

[2] We will apply the law of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 16, 35.

[3] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e). Employer does not contest it is a potentially liable operator. We thus affirm this finding. *Skrack*, 6 BLR at 1-711.

successor, Apollo Mining Services, Incorporated (Apollo), more recently employed Claimant for at least one year. Employer's Post-Hearing Brief at 6-7. Rejecting this argument, the ALJ found the evidence insufficient to establish a successor relationship between Universal and Apollo. Decision and Order at 5.

Employer argues the ALJ erred in finding no evidence demonstrating a successor relationship between Apollo and Universal, as Claimant's Social Security Administration (SSA) earnings records report the same address for the two companies. Employer's Brief at 4. It further argues the ALJ erred in failing to consider Claimant's deposition testimony that "consistently established" these companies are the same. *Id.* at 5, *citing* Director's Exhibit 35.

The Director argues the ALJ was correct in determining Employer failed to present sufficient evidence to prove Apollo is a successor to Universal, as there is "absolutely no evidence" to indicate Universal transferred mines, any assets, or mining operations to Apollo, nor is there any evidence Universal "ceased to exist and became Apollo." Director's Brief at 3. We agree with the Director.

While Employer points to Claimant's SSA earnings records to show Apollo and Universal shared a mailing address, the ALJ permissibly found this does not demonstrate a transaction occurred between the two resulting in any acquisition of Universal, or its mines or assets, by Apollo to establish a successor relationship.[4] Decision and Order at 5; *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504 (4th Cir. 2015). In addition, while Employer generally asserts Claimant's deposition testimony establishes Apollo and Universal are the same company,[5] Employer's Brief at 4-5, it does not explain how his testimony supports its argument or otherwise explain how it undermines the ALJ's contrary finding. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107, 109 (1983). We therefore affirm the ALJ's finding there

[4] As the Director observed, while the mailing addresses listed in Claimant's SSA earnings records are the same for both Apollo and Universal, their employer identification numbers are different. Director's Brief at 3, *citing* Director's Exhibit 11.

[5] Claimant testified he thought Apollo and Universal were the same company, noting he believed, but was "not really sure," that Rex Faulk owned both companies, Director's Exhibit 35 at 17-18. However, nowhere did Claimant indicate knowledge of the corporate structure of the companies or any transactions between the two, let alone any knowledge suggesting Apollo acquired Universal's mines, assets, or mining business. *See* 20 C.F.R. §725.492(a); Director's Exhibit 35 at 17, 19.

is inadequate evidence to establish Apollo was a successor operator of Universal.[6] Decision and Order 5.

Because it is supported by substantial evidence, we affirm the ALJ's determination that Employer failed to establish another potentially liable operator more recently employed Claimant, and that Pontiki is the properly designated responsible operator. 20 C.F.R. §§725.407, 725.494(a)-(e), 725.495(a)(1); Decision and Order at 5.

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; 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. 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); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc). The ALJ found the x-ray evidence supports a finding of complicated pneumoconiosis.[7] Decision and Order at 21, 25.

Employer argues the ALJ erred in weighing the x-ray evidence to find Claimant established complicated pneumoconiosis. Employer's Brief at 5-6. We disagree.

The ALJ considered eleven interpretations of four x-rays dated May 18, 2018, July 9, 2018, July 23, 2019, and October 4, 2019. Decision and Order at 19-20. All of the

[6] Because we affirm the ALJ's finding that the record does not establish Apollo was a successor operator to Universal, we need not address Employer's arguments with respect to the district director's failure to provide a statement indicating Apollo is not financially capable of assuming liability. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §725.495(d).

[7] The ALJ noted there is no biopsy or autopsy evidence of record, nor is there "other medical evidence," such as CT scans. Decision and Order at 16, 24.

interpreting physicians are dually-qualified B readers and board-certified radiologists, except Dr. Forehand, who is a B reader only. Decision and Order at 17-18; Director's Exhibit 24; Claimant's Exhibits 1-2, 4-6; Employer's Exhibits 1-4, 7.

Dr. Ramakrishnan interpreted the May 18, 2018 x-ray as positive for simple pneumoconiosis but identified no large opacities. Employer's Exhibit 1. Dr. Adcock interpreted this x-ray as negative for pneumoconiosis, but noted "focal pleural thickening superolateral left hemithorax, query old trauma." Employer's Exhibit 4. Dr. Crum read this x-ray as positive for simple and complicated pneumoconiosis with a Category A large opacity, noting he suspected "coalescence [left upper lobe] and probable A opacity [left upper lobe] suggesting [progressive massive fibrosis]." Claimant's Exhibit 5. Dr. DePonte interpreted this x-ray as positive for simple and complicated pneumoconiosis, noting the existence of "[p]seudoplaques in the upper lung zones forming category A large opacities." Claimant's Exhibit 6. Noting that two readings of this x-ray by dually-qualified physicians are positive for complicated pneumoconiosis and two, also by dually-qualified physicians, are negative for the disease, the ALJ found the readings of the May 18, 2018 x-ray to be in equipoise. Decision and Order at 20.

Drs. Forehand and Ramakrishnan both interpreted the July 9, 2018 x-ray as positive for simple pneumoconiosis but did not identify any large opacities. Director's Exhibit 24 at 8; Employer's Exhibit 2. Dr. Crum read this x-ray as positive for simple and complicated pneumoconiosis, noting "likely [category] A opacity suggesting [progressive massive fibrosis]." Claimant's Exhibit 2. Because the majority of interpretations did not identify large opacities, the ALJ found the July 9, 2018 x-ray does not establish complicated pneumoconiosis. Decision and Order at 20.

Dr. Adcock read the July 23, 2019 x-ray as negative for pneumoconiosis but also noted "[m]inimal bilateral superolateral focal pleural plaques." Employer's Exhibit 3. Dr. DePonte interpreted the same x-ray as positive for simple and complicated pneumoconiosis. Claimant's Exhibit 1. Because both physicians are equally qualified, the ALJ found the readings of the July 23, 2019 x-ray to be in equipoise. Decision and Order at 20.

Dr. Adcock interpreted the October 4, 2019 x-ray as negative for pneumoconiosis but noted "[m]inimal bilateral superolateral focal pleural plaques." Employer's Exhibit 7. Dr. DePonte read the same x-ray as positive for simple and complicated pneumoconiosis, noting "Category A opacities in the left upper lung zone in the form of pseudoplaques. Confirm or exclude with CT." Claimant's Exhibit 4. The ALJ accorded less weight to Dr. Adcock's reading of this x-ray because he identified "pleural plaques, but did not address those in relation to the potential for a large opacity." Decision and Order at 20. In contrast, he noted Dr. DePonte indicated the pseudoplaques she identified constituted Category A

large opacities. *Id.* Thus, the ALJ found the October 4, 2019 x-ray positive for complicated pneumoconiosis. *Id.*

Considering the x-ray evidence as a whole, the ALJ noted one x-ray is positive for complicated pneumoconiosis, one negative, and the readings of two were in equipoise, with the most recent x-ray being positive. Decision and Order at 20. Weighing the x-rays together, the ALJ found it appropriate to give more weight to the most recent, positive x-ray because it reflected that Claimant's condition worsened. *Id.* He determined that, though Dr. Adcock read the July 23 and October 4, 2019 x-rays as negative for pneumoconiosis, he also noted the existence of focal pleural plaques, which demonstrated a worsening of Claimant's condition because he had not identified them in his reading of the May 18, 2018 x-ray. *Id.*; Employer's Exhibits 3-4, 7. The ALJ further concluded Dr. Adcock's notes regarding the existence of focal pleural plaques bolstered Dr. DePonte's finding of a large opacity with pseudoplaques. *Id.* Thus, he found Clamant established complicated pneumoconiosis at 20 C.F.R. §718.304(a). *Id.* at 21.

Employer does not contest the ALJ's findings that Dr. DePonte's reading of the October 4, 2019 x-ray is entitled to greater weight than Dr. Adcock's and, therefore, the x-ray is positive for complicated pneumoconiosis. Rather, it contends that because the ALJ found one x-ray negative for complicated pneumoconiosis, one-x-ray positive for the disease, and the readings of two x-rays in equipoise, "the x-ray evidence is at best in equipoise."[8] Employer's Brief at 5-6. We disagree.

The United States Court of Appeals for the Fourth Circuit has recognized that due to the progressive and irreversible nature of pneumoconiosis, an ALJ may permissibly credit later evidence over earlier evidence if it shows the miner's condition has worsened. *Adkins v. Director*, OWCP, 958 F.2d 49, 52 (4th Cir. 1992) ("All other considerations aside, the later evidence is more likely to show the miner's current condition."). Thus, having found the most recent x-ray positive for complicated pneumoconiosis, the ALJ permissibly gave it greater weight on the basis that it demonstrated a worsening in Claimant's condition. *Id.*; Decision and Order at 20; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012).

Moreover, while an additional finding was not required to support his determination that the most recent x-ray is entitled to the greatest weight, we find no error in the ALJ's

[8] Because Employer does not contest the ALJ's findings that the readings of the May 18, 2018 and July 23, 2019 x-rays are in equipoise, the July 9, 2018 x-ray is negative for complicated pneumoconiosis, and the October 4, 2019 x-ray is positive for the disease, they are affirmed. *Skrack*, 6 BLR at 1-711.

determination that Dr. Adcock's identification of pleural plaques and thickening in the 2019 x-rays supports a finding that Claimant's disease progressed. Decision and Order at 20; Employer's Exhibit 4 (noting pleural thickening in left hemithorax in 2018); Employer's Exhibits 3, 7 (noting bilateral pleural plaques in 2019). Contrary to the Employer's implication, the ALJ did not find Dr. Adcock's interpretations supported a finding of complicated pneumoconiosis; rather, he reasonably found Dr. Adcock's differing notes supported a finding that Claimant's lung condition worsened, and Dr. DePonte's diagnosis of complicated pneumoconiosis on the October 4, 2019 x-ray outweighed Dr. Adcock's contrary view.[9] *See Looney*, 678 F.3d at 316-17 (4th Cir. 2012) (it is the ALJ's duty as the trier of fact to make findings of facts and resolve conflicts in the evidence); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Piney Mountain Coal Co. v. Mays,* 176 F.3d 753, 756 (4th Cir. 1999).

As Employer raises no additional contentions of error regarding the ALJ's findings on the issue, we affirm his finding that Claimant established complicated pneumoconiosis[10] and invoked the irrebuttable presumption of total disability due to pneumoconiosis.[11] 20 C.F.R. § 718.304. Thus, we affirm the ALJ's award of benefits.

Onset Date for the Commencement of Benefits

Employer challenges the ALJ's onset date for the commencement of benefits as March 2018, asserting benefits should not begin until at least July 23, 2019, when it alleges

[9] Because the ALJ permissibly gave greater weight to the October 4, 2019 x-ray and reasonably found Dr. Adcock's interpretations demonstrate Claimant's lung condition worsened over time, any potential error in finding Dr. Adcock's notes documenting pleural plaques corroborate Dr. DePonte's reading of pseudoplaques is harmless. *See Larioni*, 6 BLR at 1-1276; Decision and Order at 20-21; Employer's Brief at 6.

[10] The ALJ found that, although Claimant had insufficient coal mine employment to invoke the 20 C.F.R. §718.203(b) presumption that his complicated pneumoconiosis arose out of his coal mine employment, he established this element based on the credible opinions of Drs. Raj and Nader. Decision and Order at 26. Employer does not contest this finding; thus, it is affirmed. *Skrack*, 6 BLR at 1-711.

[11] Because we affirm the ALJ's finding that Claimant invoked the irrebuttable presumption at Section 411(c)(3), we need not address Employer's argument that the ALJ erred in concluding Claimant established total disability due to simple clinical pneumoconiosis under Section 718.204(c). *See Larioni*, 6 BLR at 1-1276; Decision and Order at 32; Employer's Brief at 6-7.

the arterial blood gas evidence established a disabling impairment. Employer's Brief at 7. We disagree.

If a claim is awarded, benefits are payable beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §725.503(b). However, if the evidence does not establish the month of onset, benefits are payable from the month in which the claim was filed. *Id.*

The ALJ considered the relevant evidence and found the record did not establish an onset date of Claimant's disability due to pneumoconiosis. Decision and Order at 31-32 n.19, *citing Tobrey v. Director, OWCP*, 7 BLR 1-407, 1409 (1984) (date of the medical evidence first demonstrating total disability does not establish the onset date; it merely indicates the miner became disabled some time prior to that date). Therefore, contrary to Employer's assertion, the ALJ correctly awarded benefits in the month that Claimant filed his claim. 20 C.F.R. §725.503(b).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge