U.S. Department of Labor

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

BRB No. 21-0273 BLA

MILTON MARCUM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BEECHFORK PROCESSING, LLC	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS' MUTUAL INSURANCE	)	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 Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits (2019-BLA-05615) rendered on a claim filed on November 16, 2017,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant had thirty-five years of coal mine employment. He determined Claimant established complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. Finally, he found Claimant's complicated pneumoconiosis arose out of his coal mine employment and thus awarded benefits. 20 C.F.R. §718.203.

On appeal, Employer asserts the ALJ erred in finding Claimant established complicated pneumoconiosis.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a brief.

The Benefit 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.[3] 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).

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. In determining

[1] Claimant filed two prior claims that he later withdrew. Director's Exhibits 55, 57. As a withdrawn claim is considered not to have been filed, the ALJ treated the current claim as an initial claim. 20 C.F.R. §725.306(b); Director's Exhibit 3.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant had thirty-five years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 11, 14.

whether Claimant has invoked the irrebuttable presumption, the ALJ must consider 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. Consol. Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found the x-rays, medical opinions, and the evidence as a whole establishes complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 4-14.

Employer maintains the ALJ erred in finding the x-rays establish complicated pneumoconiosis. Employer's Brief at 4-6. We disagree.

The ALJ considered ten interpretations of five x-rays dated February 23, 2018, August 23, 2018, September 17, 2018, October 24, 2018, and July 25, 2019. Decision and Order 6. He noted all the physicians who read these x-rays are dually qualified as B readers and Board-certified radiologists. *Id.*

Drs. Alexander and DePonte read the February 23, 2018 x-ray as positive for complicated pneumoconiosis, Category A. Director's Exhibits 17, 18. Based on their uncontradicted readings, the ALJ found this x-ray positive for complicated pneumoconiosis. Decision and Order at 6-7. Dr. DePonte read the August 23, 2018, September 17, 2018, October 24, 2018, and July 25, 2019 x-rays as positive for complicated pneumoconiosis, Category A. Director's Exhibit 20 at 3, 5-6; Claimant's Exhibits 1, 2. Dr. Adcock read the August 23, 2018 and September 17, 2018 x-rays as negative for complicated pneumoconiosis, and Dr. Kendall read the October 24, 2018 and July 25, 2019 x-rays as negative for the disease. Director's Exhibit 24 at 4; Employer's Exhibits 1-3. The ALJ found the readings of the August 23, 2018, September 17, 2018, October 24, 2018, and July 25, 2019 x-rays in equipoise because an equal number of dually-qualified radiologists read each x-ray as positive and negative for complicated pneumoconiosis. Decision and Order at 7. Because he found the readings of four x-rays in equipoise and one x-ray positive for complicated pneumoconiosis, the ALJ found the x-rays establish the disease. *Id.*

Employer first argues the ALJ erred in failing to consider Dr. Adcock's negative interpretation of the February 23, 2018 x-ray, which it contends it submitted and designated as rebuttal evidence. Employer's Brief at 5. This argument has no merit.

Although the ALJ initially incorrectly stated Employer did not designate Dr. Adcock's February 23, 2018 x-ray reading on its evidentiary designation form,[4] he nevertheless determined that even considering Dr. Adcock's x-ray interpretation, he

[4] Employer indicated it was withdrawing Dr. Simone's reading of the February 23, 2018 x-ray. *See* Jan. 21, 2021 Employer's Evidence Summary Form at 1.

"would still find the weight of the February 23, 2018 x-ray positive for simple and complicated pneumoconiosis" based on the preponderance of positive readings by dually-qualified physicians. Decision and Order at 7 n.5. Because Employer does not challenge this alternative finding, we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Thus the ALJ's error in mischaracterizing Employer's x-ray evidence designations is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer next argues the ALJ erred in failing to consider Dr. Adcock's deposition testimony which, it maintains, "extended only to the x-ray films he had actually reviewed" and thus could be submitted along with its rebuttal x-ray readings.[5] Employer's Brief at 5-6; *see* Employer's Exhibit 6. It contends the ALJ improperly excluded this deposition testimony from the record because he found "Employer has already submitted two medical reports as part of its affirmative case."[6] Decision and Order at 6 n.3. This argument also has no merit.

ALJs exercise broad discretion in resolving procedural and evidentiary matters. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc). A party seeking to overturn the disposition of an evidentiary issue must establish the ALJ's action represented an abuse of discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

The regulations provide that "[n]o person shall be permitted to testify as a witness at the hearing, or pursuant to deposition . . . unless that person meets the requirements of 20 C.F.R 725.414(c)." 20 C.F.R. §725.457(c). Pursuant to 20 C.F.R. §725.414(c), "[a] physician who prepared a *medical report* admitted under this section may testify with

[5] Dr. Adcock interpreted the February 23, 2018, August 23, 2018, and September 17, 2018 x-rays and set forth his interpretations of each x-ray on ILO x-ray forms contained in Director's Exhibit 21 and Employer's Exhibits 1 and 2. Employer designated Director's Exhibits 21 and Employer's Exhibits 1 and 2 on its evidence form as its rebuttal x-ray readings. *See* Jan. 21, 2021 Employer's Evidence Summary Form. Employer also included Employer's Exhibit 6, consisting of Dr. Adcock's deposition testimony, in each rebuttal x-ray slot.

[6] Employer contends Claimant failed to object to its submission of Dr. Adcock's deposition testimony. Employer's Brief at 5-6. Contrary to Employer's argument, the ALJ is obligated to enforce the evidentiary limitations even if no party objects to the evidence. *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004) (the evidentiary limitations at 20 C.F.R. §725.414 are mandatory; they may be exceeded for good cause but may not be waived).

respect to the claim . . . by deposition." 20 C.F.R. §725.414(c) (emphasis added). A medical report "is a physician's written assessment of the miner's respiratory or pulmonary condition" and "may be prepared by a physician who examined the miner and/or reviewed the available admissible evidence." 20 C.F.R. §725.414(a)(1). A physician who has not prepared a medical report, but has reviewed objective tests, such as an x-ray, may also testify and his or her deposition may be admitted "in lieu of" a medical report if the party proffering the evidence has "submitted fewer than two medical reports" as part of its affirmative case. 20 C.F.R §725.414(c).

Employer does not dispute it submitted its full complement of medical reports under 20 C.F.R. §725.414(a)(3)(i), as it designated the medical opinions of Drs. Dahhan and Jarboe as its affirmative evidence. *See* Jan. 21, 2021 Employer's Evidence Summary Form. Thus Dr. Adcock's deposition testimony was not admissible under 20 C.F.R. §725.414(c) in the absence of good cause. As Employer did not allege good cause before the ALJ, nor does it do so before the Board, we affirm the ALJ's exclusion of this evidence.[7] *Blake*, 24 BLR at 1-113; *Dempsey*, 23 BLR at 1-63.

As Employer raises no further argument, we affirm the ALJ's finding that Claimant established complicated pneumoconiosis based on the x-ray evidence. 20 C.F.R. §718.304(a); Decision and Order at 7. We further affirm as unchallenged the ALJ's findings that Claimant established complicated pneumoconiosis based on the medical opinions and all relevant evidence considered together, 20 C.F.R. §718.304, and established complicated pneumoconiosis arising out of coal mine employment, 20 C.F.R. §718.203. *Skrack*, 6 BLR at 1-711.

[7] We find no merit to Employer's argument that the ALJ erred in only first notifying the parties he was excluding Dr. Adcock's deposition testimony in his Decision and Order Awarding Benefits rather than by issuing a separate evidentiary order. Employer's Brief at 6. The ALJ's actions in this case satisfy the principles of fairness and administrative efficiency. *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc). Employer sought to admit Dr. Adcock's deposition testimony notwithstanding the evidentiary limitations at 20 C.F.R. §725.414(a)(3)(i), (c). It did so by mischaracterizing the deposition testimony as rebuttal x-ray readings on its Evidence Summary Form, rather than arguing good cause existed for the admission of this evidence in excess of the evidentiary limitations. *See Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-312 (2003); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003). Remanding this case to allow Employer to now argue good cause or to re-designate its evidence impedes, rather than promotes, fairness and administrative efficiency. *Preston*, 24 BLR at 1-63.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge