U.S. Department of Labor

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

BRB No. 22-0074 BLA

BILLY J. SCALF Claimant-Respondent v. PONTIKI COAL CORPORATION and Self-Insured Through MAPCO, INCORPORATED c/o ALLIANCE RESOURCE PARTNERS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 5/26/2023 DECISION and ORDER

Appeal of Decision and Order Awarding Benefits on Remand of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

C. Phillip Wheeler, Jr. (Kirk Law Firm), Pikeville, Kentucky, for Claimant.

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Awarding Benefits on Remand (2017-BLA-05172) 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 claim filed on January 4, 2016, and is before the Benefits Review Board for a second time.

In a February 7, 2019 Decision and Order Awarding Benefits, the ALJ credited Claimant with fourteen years of coal mine employment and thus found he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. He further found Claimant established the existence of clinical pneumoconiosis arising out of coal mine employment, but not the existence of legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203. In addition, he found Claimant established complicated pneumoconiosis based on the medical opinion evidence 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); *see* 20 C.F.R. §718.304. He further found Claimant established that his complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203(b), and awarded benefits.

Pursuant to Employer's appeal, the Board affirmed the ALJ's finding that Claimant established the existence of clinical pneumoconiosis arising out of coal mine employment, and did not establish the existence of legal pneumoconiosis. *Scalf v. Pontiki Coal Corp.*, BRB No. 19-0225 BLA, slip op. at 6 n.6 (Mar. 31, 2020) (unpub.). However, the Board vacated the ALJ's findings that Claimant established complicated pneumoconiosis based on the medical opinion evidence and the evidence as a whole. *Scalf*, BRB No. 19-0225 BLA, slip op. at 5. The Board further vacated the ALJ's finding that Claimant invoked the irrebuttable presumption and remanded the case to the ALJ for reconsideration of the medical opinion evidence. *Id*.

On remand, the ALJ found Claimant established complicated pneumoconiosis based on the medical opinion evidence and the evidence as a whole, and therefore invoked the irrebuttable presumption. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304. He further found

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

Claimant established that his 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 Claimant established complicated pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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 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); *see* 20 C.F.R. §718.304. In determining 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 that even though the x-ray evidence is inconclusive[3] and there is no biopsy or autopsy evidence, the medical opinion evidence supports a finding of

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6; Hearing Tr. at 10.

[3] The ALJ considered six interpretations of two x-rays dated April 7, 2016, and May 12, 2016. Drs. Kendall and Seaman, who are dually-qualified as Board-certified radiologists and B readers, read the April 7, 2016 x-ray as positive for complicated pneumoconiosis, category A large opacities, while Dr. Adcock, also a dually-qualified radiologist, and Dr. Forehand, a B-reader, read the x-ray as negative for complicated pneumoconiosis. Director's Exhibit 18 at 2-4, Claimant's Exhibit 1; Employer's Exhibit 5. Dr. Jarboe, a B-reader, read the May 12, 2016 x-ray as positive for complicated pneumoconiosis, category A large opacities, while Dr. Adcock read the x-ray as negative

complicated pneumoconiosis. 20 C.F.R. §718.304(a), (b), (c); Decision and Order on Remand at 4, 6 n.40. Weighing the x-ray and medical opinion evidence together,[4] he found Claimant established complicated pneumoconiosis by a preponderance of evidence and therefore invoked the irrebuttable presumption. 20 C.F.R. §718.304; Decision and Order on Remand at 6.

Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis based on the medical opinion evidence and in consideration of the evidence as a whole. Employer's Brief at 5-6 (unpaginated).

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

The ALJ considered the medical opinions of Drs. Jarboe, Forehand, Dahhan, and Vuskovich. Decision and Order on Remand at 5-6. Dr. Jarboe opined Claimant has complicated pneumoconiosis while Dr. Forehand opined he does not. Claimant's Exhibit 2 at 4-5; Employer's Exhibit 3 at 30. Neither Dr. Dahhan nor Dr. Vuskovich rendered an opinion on whether Claimant has complicated pneumoconiosis, but Dr. Dahhan stated an x-ray reading indicating large type A opacities would constitute complicated pneumoconiosis. Director's Exhibit 17; Employer's Exhibits 1, 2 at 12-13. The ALJ found Dr. Jarboe's opinion better supported by the underlying evidence and by Dr. Dahhan's opinion and found that Dr. Jarboe's qualifications are superior to those of Dr. Forehand. Decision and Order on Remand at 6. He thus found Dr. Jarboe's opinion better reasoned and persuasive. *Id*. Further, he found Dr. Forehand's contrary opinion unpersuasive. *Id*. Thus he found Claimant established complicated pneumoconiosis based on Dr. Jarboe's opinion. *Id*.

Employer argues the ALJ erred in finding Dr. Jarboe's opinion reasoned because it is inconsistent with Dr. Adcock's negative reading of the May 12, 2016 x-ray and the ALJ's finding that the x-ray is negative for complicated pneumoconiosis. Employer's Brief at 5

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for complicated pneumoconiosis. Claimant's Exhibit 2 at 4-5; Employer's Exhibit 4. The ALJ found the April 7, 2016 x-ray positive for complicated pneumoconiosis because a majority of the dually-qualified radiologists read the x-ray as positive for the disease. Decision and Order on Remand at 4. Conversely, he found the May 12, 2016 x-ray negative for complicated pneumoconiosis because the negative reading of a dually-qualified radiologist outweighed the positive reading of a B reader. *Id*. He thus found the x-ray evidence inconclusive. *Id*.

[4] The ALJ stated he "found the weight of the x-ray evidence inconclusive, not negative, for complicated pneumoconiosis." Decision and Order on Remand at 5.

(unpaginated). It thus asserts the ALJ erred in finding Dr. Jarboe's opinion outweighed Dr. Forehand's contrary opinion. We disagree.

Contrary to Employer's argument, the ALJ is not required to discount a medical opinion because the physician did not consider all of the medical evidence of record.[5] *See Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986). Dr. Jarboe examined Claimant and noted he "worked on and off for [fourteen] years in and around coal dust," "[h]e says he never smoked cigarettes," and his May 12, 2016 x-ray showed "a large opacity measuring 1.5 [centimeters] in the left upper lung zone" and "[two] or [three] subcentimeter round nodules adjacent to the large opacity." Claimant's Exhibit 2. The ALJ accurately stated Dr. Jarboe noted "no history of tuberculosis, pneumonia, granulomatous disease or cancer," and the doctor opined Claimant has complicated pneumoconiosis based on his reading of the May 12, 2016 x-ray. Decision and Order on Remand at 5-6. In addition, the ALJ found two dually-qualified radiologists, Drs. Kendall and Seaman, "agreed" with Dr. Jarboe's opinion that Claimant has complicated pneumoconiosis,[6] while only one dually-qualified radiologist, Dr. Adcock, "agreed with Dr. Forehand." *Id*. at 6. He thus permissibly found Dr. Jarboe's opinion better supported by the underlying evidence and better reasoned. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.3d 179, 186 (6th Cir. 1989). Further, he permissibly found Dr. Jarboe "more highly qualified to give an opinion regarding the presence of a pulmonary disease" because he "is a [B]oard certified pulmonologist and B reader, whereas Dr. Forehand is a [B]oard certified allergist and immunologist." Decision and Order on Remand at 6; *see Scott v. Mason Coal Co.*, 14 BLR 1-37, 1-40 (1990) (en banc recon.); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988).

We also reject Employer's argument that the ALJ "applied an unequal standard" in evaluating the opinions of Drs. Jarboe and Forehand by not discrediting Dr. Jarboe's opinion "for failure to consider the entirety of the x-ray evidence." Employer's Brief at 5

[5] To the extent Employer further argues that the ALJ should have discredited Dr. Dahhan's opinion for failing to consider other x-ray interpretations of record, we disagree. Employer's Brief at 5 (unpaginated). As discussed above, the ALJ is not required to discount a medical opinion because the physician did not consider all of the medical evidence of record. *See Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986). As Employer provides no other arguments regarding the ALJ's finding that Dr. Dahhan's opinion supports Dr. Jarboe's opinion, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] This finding is not contested by Employer.

(unpaginated). Contrary to Employer's argument, the ALJ did not discredit Dr. Forehand's opinion because he failed to consider all of the x-ray evidence of record; rather, he permissibly found Dr. Jarboe's opinion better supported by the underlying evidence and better reasoned than Dr. Forehand's contrary opinion. Decision and Order on Remand at 5-6.

We therefore affirm the ALJ's finding that the medical opinion evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order on Remand at 6.

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 4-5 (unpaginated). As the ALJ permissibly found the weight of the medical opinion evidence established complicated pneumoconiosis at 20 C.F.R. §718.304(c), we affirm his finding that Claimant established complicated pneumoconiosis on the record as a whole. 20 C.F.R. §718.304; *see Gray*, 176 F.3d at 388-89; Decision and Order on Remand at 6. We also affirm the ALJ's unchallenged finding that Claimant established his complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 6. Consequently, we affirm the ALJ's finding that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge