U.S. Department of Labor

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

BRB No. 21-0275 BLA

EDWARD WARGO Claimant-Respondent v. HELVETIA COAL COMPANY and ROCHESTER & PITTSBURGH COAL COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/29/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Deanna Lyn Istik (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2019-BLA-05736) rendered on a claim filed on November 29, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with twenty-three years of coal mine employment and found he established complicated pneumoconiosis. 20 C.F.R. §718.304. Consequently, 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). She further found Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203. Thus she awarded benefits.

On appeal, Employer asserts the ALJ erred in excluding evidence relevant to the issue of complicated pneumoconiosis and erred in finding Claimant established the disease.[1] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not 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 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).

Evidentiary Limitations

Employer first argues the ALJ erred in excluding deposition testimony from Dr. Meyer. Employer's Brief at 7. We disagree.

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

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[1] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-three years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2, 5.

[2] The Board will apply the law of the United States Court of Appeals for the Third Circuit because Claimant performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3 n.4; Hearing Tr. at 29.

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 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 challenge the ALJ's finding that 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. Basheda and Swedarsky as its affirmative evidence. *See* Dec. 20, 2020 Order Excluding Dr. Meyer's Deposition (Dec. 20, 2020 Order) at 1-2; Employer's Evidence Form. Thus Dr. Meyer's deposition testimony was not admissible under 20 C.F.R. §725.414(c) in the absence of good cause.

The ALJ found Employer did not allege good cause in this case. Dec. 20, 2020 Order at 3. Employer argues that during the hearing, it asserted "Dr. Meyer's testimony [is] needed due to conflicting reports that he had issued regarding this matter."[3] Employer's Brief at 7. Based on our review of the hearing transcript, we discern no such argument from Employer. *See* Hearing Transcript. Regardless, even if Employer had made this argument, relevancy alone is insufficient to establish good cause. *See Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d. 278, 297 n.18 (4th Cir. 2007) (if relevancy were enough to meet the good cause standard for exceeding black lung evidentiary limitations at Section 725.414, it would render those limitations "meaningless"). Because Employer has not established an abuse of discretion, we affirm the ALJ's exclusion of Dr.

[3] We reject Employer's argument that Claimant's failure to object to Dr. Meyer's deposition testimony constitutes waiver and thereby precludes application of the evidentiary limitations. Employer's Brief at 7. The ALJ is obligated to enforce the evidentiary limitations even if no party objects. *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004) (the evidentiary limitations set forth in the regulations are mandatory and, as such, are not subject to waiver).

Meyer's deposition. *Blake*, 24 BLR at 1-113; *Dempsey*, 23 BLR at 1-63; Employer's Exhibit 9.

Section 411(c)(3) Presumption- Complicated Pneumoconiosis

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 whether Claimant has invoked the irrebuttable presumption, the ALJ must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); *Truitt v. North Am. Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137 (3d Cir. 1980); *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The ALJ found the x-ray, biopsy, and medical opinion evidence establishes complicated pneumoconiosis, but the CT scan evidence does not.[4] 20 C.F.R. §718.304(a)-(c); Decision and Order at 8-20. Weighing all of the evidence together, she concluded Claimant established complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 22.

X-ray Evidence

Employer first argues the ALJ erred in weighing the x-ray evidence. Employer's Brief at 3-5. We disagree.

The ALJ considered four interpretations of four x-rays dated April 29, 2013, November 6, 2015, December 18, 2017, and May 29, 2019. 20 C.F.R. §718.304(a); Decision and Order at 8-10. She noted all of the interpreting physicians are dually-qualified as Board-certified radiologists and B readers. Decision and Order at 9-10. Dr. Meyer interpreted the April 29, 2013 and November 6, 2015 x-rays as negative for complicated pneumoconiosis. Employer's Exhibits 1, 4. Dr. Ahmed interpreted the

[4] Employer does not challenge the ALJ's finding the medical opinion evidence establishes complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 18. Thus we affirm it. *Skrack*, 6 BLR at 1-711.

December 18, 2017 x-ray as positive for complicated pneumoconiosis, Category A. Director's Exhibit 12 at 9. Dr. Meyer interpreted the May 29, 2019 x-ray as positive for complicated pneumoconiosis, Category A. Claimant's Exhibit 4; Employer's Exhibit 2.

Based on the unrebutted readings of each x-ray, the ALJ found the April 29, 2013 and November 6, 2015 x-rays negative for complicated pneumoconiosis but the December 18, 2017 and May 29, 2019 x-rays positive for the disease. Decision and Order at 10. She assigned controlling weight to the December 18, 2017 and May 29, 2019 positive x-rays because they are most recent and pneumoconiosis is a progressive and irreversible disease. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 315 (3d Cir. 1995); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); *Woodward v. Director, OWCP*, 991 F.2d 314, 320 (6th Cir. 1993); Decision and Order at 10.

Employer's assertion that the ALJ should have found Dr. Ahmed did not diagnose complicated pneumoconiosis because he stated the December 18, 2017 x-ray is "likely" consistent with complicated pneumoconiosis is without merit. Employer's Brief at 5. The ALJ permissibly found Dr. Ahmed interpreted the x-ray as positive for complicated pneumoconiosis based on his identification of a Category A large opacity and his statement that these findings are consistent with complicated pneumoconiosis. *See Soubik v. Director, OWCP,* 366 F.3d 226, 233 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 584 (3d Cir. 1997); *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006) ("refusal to express a diagnosis in categorical terms is candor, not equivocation"); Decision and Order at 8-10; Director's Exhibit 12. Thus we affirm the ALJ's finding that the December 18, 2017 x-ray is positive for complicated pneumoconiosis based on Dr. Ahmed's unrebutted reading.

We also reject Employer's argument that the ALJ erred in failing to consider Dr. Meyer's supplemental report as it relates to his reading of the May 29, 2019 x-ray. Employer's Brief at 5. In an August 30, 2019 report, Dr. Meyer reiterated his conclusions from his deposition. Employer's Exhibit 2. He stated that when he compared all the x-rays in series, and based on the additional records Employer's counsel provided, he no longer believed Claimant has complicated pneumoconiosis. *Id.* As discussed above, however, the ALJ excluded Dr. Meyer's deposition testimony because it constitutes a third medical report, and Employer failed to establish good cause to admit it. Dec. 20, 2020 Order. As Dr. Meyer reiterated his deposition testimony in his August 30, 2019 report, that evidence itself constitutes a third medical report and the ALJ did not err in declining to consider it as Employer already submitted its full complement of medical reports. 20 C.F.R. §725.414(a)(1), (c), 725.457(c).

In addition, Employer concedes that even if the ALJ had considered this supplemental report, she "should have found that the conflicting" readings make Dr.

Meyer's interpretation of the May 29, 2019 x-ray "unreliable" rather than positive for complicated pneumoconiosis. Employer's Brief at 5. Because we have affirmed the ALJ's finding that the December 18, 2017 x-ray is positive for complicated pneumoconiosis, and Employer does not challenge her finding that it is entitled to more weight because it is more recent than the negative x-rays, Employer has failed to set forth how the error it alleges with respect to Dr. Meyer's supplemental report makes a difference. *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). As it is supported by substantial evidence, 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 10.

Biopsy Evidence

Employer argues the ALJ erred in weighing the biopsy evidence. Employer's Brief at 8-13. We disagree.

The ALJ considered the biopsy reports of Drs. Perper, Shenouda, and Swedarsky. Decision and Order at 10-12; Claimant's Exhibit 5; Employer's Exhibits 7, 8, 11, 12. All three doctors reviewed the results of a needle core biopsy from a lesion in Claimant's right lung. Claimant's Exhibit 5; Employer's Exhibits 7, 8, 11, 12. The ALJ found Dr. Perper diagnosed complicated pneumoconiosis and progressive massive fibrosis based on the biopsy results, indicated the right lung lesion would appear on x-ray measuring at least one centimeter, and his opinion is reasoned and documented. Decision and Order at 11. She found Dr. Shenouda did not address whether the biopsy is consistent with complicated pneumoconiosis or if the nodule would appear on x-ray measuring at least one centimeter, but he diagnosed the nodule as being consistent with pneumoconiosis. *Id.* Thus, she determined his opinion is reasoned and documented and supports Dr. Perper's opinion. *Id.* Finally, she found Dr. Swedarsky rendered an equivocal opinion with respect to whether the right lung lesion is consistent with progressive massive fibrosis based on the biopsy sample. *Id.*

We first reject Employer's argument that the ALJ erred in discrediting Dr. Swedarsky's biopsy findings. Employer's Brief at 12-13. As Employer acknowledges, Dr. Swedarsky testified at his deposition that the biopsy sample is "extremely small" and, based on his review of the results alone, he could not "make a diagnosis of pneumoconiosis [but] could not exclude the diagnosis either." *Id.* at 10, *citing* Employer's Exhibit 11 at 29-33. The ALJ permissibly found Dr. Swedarsky equivocal as to whether the biopsy results are consistent with complicated pneumoconiosis. *See Mancia*, 130 F.3d at 584; *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882 (6th Cir. 2000); Decision and Order at 11.

We also reject Employer's argument that the ALJ erred in crediting Dr. Perper's opinion because, according to Employer, his identification of a mass greater than one centimeter does not necessarily mean he diagnosed complicated pneumoconiosis and he failed to consider that the mass "could be the onset of some other disease." Employer's Brief at 11-12. Contrary to Employer's arguments, Dr. Perper concluded that the biopsy is consistent with progressive massive fibrosis because it shows "fibro-hyaline tissue with focal areas showing clusters of cells with different degrees of degeneration to necrosis consistent with central area of anthracosilicotic nodules." Claimant's Exhibit 5 at 13. He also noted that "hyaline component showed . . . focally numerous fine granules of coal dust, with silica crystals observed under polarized light," further supporting the existence of progressive massive fibrosis. *Id.* Specifically, he explained "typical nodules of silicotic (anthracosilicotic nodules in pneumoconiosis) consist of compact central hyaline tissue poorly cellular and mild anthracotic pigmentation surrounded by a corona of fibro-anthracosis with marked chronic inflammation." *Id.* at 14. Thus, the ALJ permissibly found Dr. Perper's opinion reasoned and documented, and supports a finding of complicated pneumoconiosis.[5] *Soubik*, 366 F.3d at 234; *Mancia*, 130 F.3d at 584; Decision and Order at 11.

Employer's argument that the ALJ should have found Dr. Swedarsky's biopsy conclusions better reasoned than Dr. Perper's conclusions is a request 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). Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established complicated pneumoconiosis based on the biopsy evidence.[6] 20 C.F.R. §718.304(b).

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[5] Employer argues the ALJ erred in finding Dr. Shenouda's biopsy report supports a finding of complicated pneumoconiosis. Employer's Brief at 11-12. We disagree. Dr. Shenouda stated the biopsied mass measured "1.9 x 4.1" centimeters and is consistent with pneumoconiosis. Employer's Exhibit 12. Thus, the ALJ's finding that the doctor's opinion supports Dr. Perper's diagnosis of complicated pneumoconiosis is supported by substantial evidence. *Mancia v. Director, OWCP*, 130 F.3d 579, 584 (3d Cir. 1997) (substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion); Decision and Order at 11.

[6] Even if there was merit to Employer's argument that the ALJ should have found the biopsy evidence negative for complicated pneumoconiosis, the regulations specifically provide that "[a] negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis." 20 C.F.R. §718.106(c). Thus error by the ALJ, if any, in weighing the biopsy evidence would be harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009)

CT-scan Evidence

Employer contends the ALJ erred in considering the CT scan evidence. Employer's Brief at 5-7. Dr. Meyer initially read CT scans of Claimant done on May 16, 2017 and May 18, 2018 as consistent with complicated pneumoconiosis. Claimant's Exhibits 1, 2. After he reviewed an earlier CT scan done on January 22, 2016, he retracted his opinion that the mass present on all three CT scans is consistent with complicated pneumoconiosis. Employer's Exhibit 3. He explained the mass increased in size too quickly between the timing of the three scans and thus is consistent with rheumatoid nodules rather than complicated pneumoconiosis. *Id.* The ALJ was not persuaded by Dr. Meyer's rationale because she noted the mass increased in size when comparing the 2016 to 2018 CT scans but decreased in size when comparing the 2016 CT scan to the 2017 CT scan, and the doctor did not address this decrease in size. Decision and Order at 20. Ultimately, the ALJ concluded the "CT scan readings describe large opacities . . . but do not persuasively address the cause of the opacities, so neither support nor refute a finding of complicated pneumoconiosis." *Id.* at 22.

Employer does not specifically challenge the ALJ's finding that Dr. Meyer's exclusion of complicated pneumoconiosis after comparing all three CT scans is not persuasive. Decision and Order at 20. Thus we affirm this finding. *See Cox v. Director*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b); Employer's Brief at 6-7. Rather, Employer contends the defects that the ALJ identified in Dr. Meyer's CT scan interpretations would have been resolved if she had "reviewed Dr. Meyer's deposition transcript." Employer's Brief at 7. As discussed above, we have affirmed the exclusion of this evidence. Thus, Employer's argument is moot.

Finally we reject Employer's argument that the ALJ was required to weigh the pulmonary function and arterial blood gas testing against the evidence of complicated pneumoconiosis. Employer's Brief at 13. Claimant need not establish that he has a respiratory impairment to invoke the irrebuttable presumption at Section 411(c)(3). *See E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 257 (4th Cir. 2000) (the Act "betrays no intent to incorporate a purely medical definition" of complicated pneumoconiosis); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999) ("The statute does not mandate use of the medical definition of complicated pneumoconiosis."); *see also* 65 Fed. Reg. 79,920, 79,932 (Dec. 20, 2000) (explaining that

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(appellant must explain how the "error to which [it] points could have made any difference").

the "lack of a pulmonary function study does not affect the probative value of the x-ray reading(s) as evidence of complicated pneumoconiosis under 30 U.S.C. §921(c)(3)(A), because a pulmonary function study is not relevant to that means of invoking the irrebuttable presumption").

As Employer raises no further challenge to the ALJ's finding of complicated pneumoconiosis, we affirm her determination that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; *Melnick*, 16 BLR at 1-33; Decision and Order at 22. We further affirm, as unchallenged on appeal, the ALJ's 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 22-23.

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