U.S. Department of Labor

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

BRB No. 21-0249 BLA

CHARLES R. MILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CAM MINING, LLC	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 9/30/2022
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for Claimant.

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

Before: BUZZARD, GRESH and JONES, Administrative Appeals Judges

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits (2018-BLA-05726) rendered on a claim filed on March 9, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with at least twenty-three years of underground coal mine employment and found he established complicated pneumoconiosis. Consequently, he 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. Thus he awarded benefits and set the date that benefits commence as March 2017.

On appeal, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis.[1] It also asserts he erred in determining the commencement date for benefits. 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).

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 a claimant has invoked the irrebuttable presumption, the ALJ must weigh all

[1] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least twenty-three years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 15.

[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 5; Hearing Tr. at 26-27.

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. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

When making that assessment, the ALJ found the computed tomography (CT) scans establish complicated pneumoconiosis, 20 C.F.R. §718.304(c), while the x-ray, biopsy, and medical opinion evidence does not. 20 C.F.R. §718.304(a)-(c); Decision and Order at 5-14. Weighing all of the evidence together, he concluded Claimant established complicated pneumoconiosis by a preponderance of the evidence and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 14.

CT scans – 20 C.F.R. §718.304(c)

Employer argues the ALJ erred in finding the CT scan evidence establishes complicated pneumoconiosis. Employer's Brief at 5-8.

The ALJ considered several CT scan readings contained in Claimant's treatment records. Decision and Order at 6-8; Claimant's Exhibits 11, 14, 15, 16, 18. Dr. Kendall read an August 23, 2016 CT scan as consistent with "multiple scattered bilateral pulmonary nodules," with the largest nodule in the left lung measuring nine and one-half millimeters and the largest nodule in the right lung measuring eleven millimeters. Claimant's Exhibit 15. He also read a January 31, 2017 CT scan as revealing a pulmonary nodule greater than one centimeter. *Id.* Dr. Sherman read a May 24, 2018 CT scan as evidencing "chronic nodularity throughout both lungs." Claimant's Exhibits 14, 16. Dr. Crum also read this CT scan as revealing a one-and-a-half centimeter "large opacity" in the right lung, a "1.02 [centimeter] left upper lobe large opacity," and "an approximately [two centimeter] large opacity" in the mid-left lung. Claimant's Exhibit 11 at 1-2. He concluded "those large opacit[ies] are most consistent with complicated pneumoconiosis or progressive massive fibrosis" in light of "the history of dust exposure and background of extensive nodularity." *Id.* Finally, Dr. Fraley read a June 21, 2018 CT scan as showing "[s]everal tiny and small pulmonary nodules, some of which show associated minimal and mild metabolic activity" and "[m]ild metabolic activity associated with mediastinal and hilar lymphadenopathy." Claimant's Exhibit 18.

With respect to the CT scan readings by Drs. Kendall, Sherman, and Fraley, the ALJ found the radiologists identified "large and chronic opacities greater than one centimeter in diameter." *Id.* Although "none of [these] . . . radiologists diagnosed complicated pneumoconiosis" on the scans they read, the ALJ found "they were not asked to provide opinions regarding the presence of the disease" and thus "[t]heir observations certainly do not weigh against finding the disease." *Id.* However, the ALJ found Dr. Crum's May 24, 2018 CT scan reading credible on the issue of complicated pneumoconiosis. Decision and

Order at 8. He further found the evidence sufficient to establish the May 24, 2018 CT scan testing is medically acceptable and relevant to establishing Claimant's entitlement to benefits. 20 C.F.R. §718.107(b); Decision and Order at 8. As Dr. Crum's reading of that CT scan was not undermined by the other CT scan readings of record, the ALJ found Claimant established complicated pneumoconiosis by a preponderance of the CT scans.

Employer first argues the ALJ erred in finding Dr. Crum's May 24, 2018 CT scan reading is medically acceptable and relevant to establishing Claimant's entitlement to benefits. 20 C.F.R. §718.107(b); Employer's Brief at 7. We disagree.

Unlike x-ray evidence, which must be "conducted and classified in accordance with" specific regulatory criteria, *see* 20 C.F.R. §§718.102, 718.202, CT scans are considered "other medical evidence" pursuant to 20 C.F.R. §718.107, for which the Department of Labor has not developed any quality standards. Instead, for "other medical evidence" such as a CT scan to constitute credible proof of the presence or absence of pneumoconiosis, the party submitting it must "demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(b). Thus, under the regulation, a party may submit a CT scan despite the lack of regulatory quality standards, but only if "the submitter satisfies the adjudicator as to its reliability and relevance." 79 Fed. Reg. 21,606, 21,608 (Apr. 17, 2014). Consequently, the applicable regulation requires the ALJ to determine on a case-by-case basis whether the party proffering the CT scan has established both its medical acceptability and its relevance. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-132-33 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc); *see also Harris v. Old Ben Coal Co.*, 24 BLR 1-13, 1-16-17 (2007) (en banc recon.) (McGranery and Hall, JJ., concurring and dissenting), *aff'g* 23 BLR 1-98 (2006) (en banc) (McGranery and Hall, JJ., concurring and dissenting).

Contrary to Employer's argument, substantial evidence supports the ALJ's determination that the May 24, 2018 CT scan, and Dr. Crum's reading of it, is medically acceptable and relevant to establishing complicated pneumoconiosis. First, the ALJ permissibly inferred that Dr. Crum considered the CT scan medically acceptable and relevant, as the doctor specifically relied on the scan to diagnose complicated pneumoconiosis. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002) (reviewing court should not reverse the conclusions of an ALJ that are supported by substantial evidence, even if the facts permit an alternative conclusion); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997) (an ALJ has the discretion to consider the evidence and draw inferences therefrom); Decision and Order at 8. Moreover, as the ALJ recognized, Dr. Jarboe testified that he reviewed Dr. Crum's reading of the May 24, 2018 CT scan and, although he disagreed with Dr. Crum's diagnosis, he agreed that "when available, . . . a CT scan [is] preferable or more likely to be diagnostic for the presence of

either simple or complicated pneumoconiosis than chest x-rays." Decision and Order at 13, *citing* Employer's Exhibit 7 at 31.

As it is supported by substantial evidence, we affirm the ALJ's finding that the May 24, 2018 CT scan is medically acceptable and relevant to establishing entitlement to benefits. *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence is defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion).

Employer next argues the ALJ erred in crediting Dr. Crum's May 24, 2018 CT scan reading because the doctor recommended follow-up testing to exclude neoplasm, and thus there is "uncertainty in his diagnosis." Employer's Brief at 7. We are not persuaded by this argument. The ALJ acknowledged Dr. Crum "added that other abnormalities, such as neoplasm should be excluded," but permissibly found his CT scan reading establishes complicated pneumoconiosis because the doctor stated "Claimant's history and young age" establish the opacities are "most consistent with complicated pneumoconiosis." Decision and Order at 8; *see Martin*, 400 F.3d at 305; *Napier*, 301 F.3d at 712-14.

Employer also argues Dr. Crum's CT scan reading is not credible because he read July 6, 2017 and October 5, 2018 x-rays as negative for complicated pneumoconiosis, and thus alleges Dr. Crum made contradictory findings. Employer's Brief at 6-7. This argument also is not persuasive. X-ray and CT scans are separate diagnostic tests, and Employer has not explained how Dr. Crum's opinion that x-rays do not evidence complicated pneumoconiosis undermines his opinion that CT scans do. *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).

Finally, we reject Employer's argument that the ALJ erred in finding the CT scan readings of Drs. Kendall, Sherman, and Fraley do not weigh against a finding of complicated pneumoconiosis. An ALJ has discretion to determine the weight to accord diagnostic testing that is silent on the existence of pneumoconiosis. *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). Because we see no error in the ALJ's consideration of these CT scan readings, we affirm his finding that they do not weigh against a finding of complicated pneumoconiosis.[3] *See Cumberland River Coal Co. v.*

[3] The ALJ summarized Claimant's treatment notes that reference numerous CT scans that are not in the record. Decision and Order at 6-8. Employer argues that because those CT scan readings are based on scans that are not in the record, it was error for the ALJ to find they support the conclusion that Claimant has complicated pneumoconiosis. Employer's Brief at 5. But the ALJ did not find the CT scan evidence establishes complicated pneumoconiosis based on CT scans outside of the records. Decision and Order at 8. Rather, he found Dr. Crum's reading of the May 24, 2018 scan establishes the

Banks, 690 F.3d 477, 489 (6th Cir. 2012) (ALJ's function is to weigh the evidence, draw appropriate inferences, and determine credibility); Decision and Order at 8.

As Employer raises no further challenge, we affirm the ALJ's finding that Claimant established complicated pneumoconiosis based on the May 24, 2018 CT scan. 20 C.F.R. §718.304(c).

Medical Opinions – 20 C.F.R. §718.304(c)

Employer also asserts the ALJ erred in discrediting the medical opinions of Drs. Dahhan and Jarboe that Claimant does not have complicated pneumoconiosis.[4] 20 C.F.R. §718.304(c); Employer's Brief at 8; Director's Exhibit 25; Employer's Exhibits 1, 2, 3, 7, 9. We disagree.

The ALJ found that although Drs. Dahhan and Jarboe reviewed the readings of the May 24, 2018 CT scan, their opinions were undermined because they did not review the numerous other CT scans contained in Claimant's treatment records that demonstrate "large opacities greater than one centimeter in diameter." Decision and Order at 12, 14. Employer does not specifically challenge this finding. Thus we affirm it. *See Banks*, 690 F.3d at 489; *Martin*, 400 F.3d at 305; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ further found Dr. Dahhan's opinion undermined because although he reviewed Dr. Crum's May 24, 2018 CT scan reading that was positive for complicated pneumoconiosis, he "did not provide any reason for concluding that [Claimant does] not have complicated pneumoconiosis" even though he was aware of Dr. Crum's positive diagnosis. Decision and Order at 12. Moreover, the ALJ noted Dr. Jarboe excluded a diagnosis of complicated pneumoconiosis based on Dr. Sherman's reading of the May 24, 2018 CT scan which, as noted above, the ALJ permissibly found does not weigh against Dr. Crum's finding of complicated pneumoconiosis. *Id*. at 14. In addition, Dr. Jarboe

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disease. *Id*. That reading is in the record. Moreover, the ALJ permissibly found treatment records that are silent on the existence of complicated pneumoconiosis do not weigh against a finding that Claimant has the disease. *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984); Decision and Order at 8.

[4] Employer does not challenge the ALJ's finding that the opinions of Drs. Alam, Chavda, and Baker do not weigh against a finding of complicated pneumoconiosis because they did not review the CT scan testing of record and are silent on whether Claimant has the disease. Decision and Order at 10-12. Thus we affirm this finding. *Skrack*, 6 BLR at 1-710.

erroneously assumed the May 24, 2018 CT scan is negative for complicated pneumoconiosis, contrary to the ALJ's finding that the test is positive for the disease. *Id*. Thus, the ALJ concluded the opinions of Drs. Dahhan and Jarboe are unpersuasive. *Id*. at 12-14.

In challenging these credibility findings, Employer reiterates its contention that the May 24, 2018 CT scan does not establish complicated pneumoconiosis. Employer's Brief at 8. As we have rejected this argument, we affirm the ALJ's finding that the opinions of Drs. Dahhan and Jarboe are unpersuasive and do not undermine the May 24, 2018 CT scan that establishes complicated pneumoconiosis. *See Banks*, 690 F.3d at 489; *Martin*, 400 F.3d at 305; *Skrack*, 6 BLR at 1-711.

Employer raises no further challenge to the ALJ's finding of complicated pneumoconiosis. Thus we affirm his 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. 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 14-15. Consequently, we affirm the ALJ's award of benefits.

Commencement Date for Benefits

The date for the commencement of benefits is the month in which Claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date is not ascertainable, benefits commence the month the claim was filed, unless evidence the ALJ credits establishes Claimant was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4 (4th Cir. 1986); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). If the ALJ finds Claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, the ALJ must determine whether the evidence establishes the onset date of complicated pneumoconiosis. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979).

We reject Employer's argument that the ALJ was required to find the benefits commencement date is the month in which Claimant's complicated pneumoconiosis was first diagnosed in the record. Employer's Brief at 10. Weighing all of the evidence, the ALJ found the CT scan evidence outweighs the other evidence of record and thus establishes Claimant has complicated pneumoconiosis. Decision and Order at 14. Although the ALJ found the May 24, 2018 CT scan establishes Claimant has complicated pneumoconiosis, he permissibly found "[t]he record does not establish precisely when the Claimant's simple pneumoconiosis became complicated pneumoconiosis" and "there is no

evidence demonstrating that Claimant did not have complicated pneumoconiosis at any point after he filed this claim." Decision and Order at 15-16; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

As the Board explained in *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990), the onset date is not established by the first medical evidence of record indicating total disability, as such medical evidence shows only that the Miner became totally disabled at some time prior to that date. *See also Meraschoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-109 (1985). Because it is supported by substantial evidence, we affirm the ALJ's finding that benefits commence in March 2017, the month and year in which Claimant filed his claim for benefits. 20 C.F.R. §725.503(b); Decision and Order at 15-16; Director's Exhibit 2.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge