U.S. Department of Labor

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

BRB No. 21-0382 BLA

JOHN H. FULLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	
	)	DATE ISSUED: 6/23/2022
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

John H. Fuller, Swords Creek, Virginia.

Charity A. Barger (Street Law Firm, LLP), Grundy, Virginia, for Employer.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Denying Benefits (2020-BLA-05097)

[1] Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board review the Administrative Law

Judge's (ALJ) decision on Claimant's behalf, but Ms. Combs is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

rendered on a claim filed on May 1, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with at least eighteen years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). But she further found Employer rebutted the presumption by establishing Claimant has neither clinical nor legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Thus she denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits.[3] Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal by an unrepresented Claimant, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

Rebuttal of the Section 411(c)(4) Presumption

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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.

[3] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established at least eighteen years of underground coal mine employment, total disability, and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 30 U.S.C. §921(c)(4) (2018); Decision and Order at 5, 9.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Tr. at 12-13.

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither clinical[5] nor legal[6] pneumoconiosis or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer rebutted the presumption by establishing Claimant has neither clinical nor legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Clinical Pneumoconiosis

To disprove clinical pneumoconiosis, Employer must establish Claimant does not have any of the diseases "recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §§718.305(d)(1)(i)(B), 718.201(a)(1).

The ALJ considered ten interpretations of four x-rays dated April 28, 2017, June 26, 2018, April 17, 2019, and July 17, 2020. Decision and Order at 10-11. She noted that of the interpreting physicians, Drs. Adcock, Crum, DePonte, Miller, Ramakrishnan, Simone, and Tarver are dually-qualified as Board-certified radiologists and B-readers, whereas Drs. Fino and Forehand are B-readers only. Decision and Order at 10-11.

Dr. DePonte interpreted the April 28, 2017 x-ray as positive for pneumoconiosis, while Dr. Tarver interpreted it as negative for the disease. Director's Exhibit 21; Employer's Exhibit 1. Drs. Forehand and Miller interpreted the June 26, 2018 x-ray as

[5] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[6] "Legal pneumoconiosis" includes any "chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

positive for pneumoconiosis, while Dr. Simone interpreted it as negative.[7] Director's Exhibits 17, 21; Employer's Exhibit 2. Dr. Ramakrishnan interpreted the April 17, 2019 x-ray as positive for pneumoconiosis, while Drs. Adcock and Fino interpreted it as negative. Director's Exhibit 22; Claimant's Exhibit 1; Employer's Exhibit 3. Dr. Crum interpreted the July 17, 2020 x-ray as positive for pneumoconiosis, while Dr. Adcock interpreted it as negative. Claimant's Exhibit 2; Employer's Exhibit 4.

The ALJ found the readings of the April 28, 2017 and July 17, 2020 x-rays are in equipoise because an equal number of physicians read each x-ray as positive and negative for pneumoconiosis. Decision and Order at 10-11. She found the June 26, 2018 x-ray supports a finding of pneumoconiosis because two of the three physicians read it as positive for the disease. *Id.* at 10. Conversely, she found the April 17, 2019 x-ray negative because two of the three physicians read it as negative for pneumoconiosis. *Id.* at 11. Thus the ALJ found one x-ray positive for pneumoconiosis, one x-ray negative for pneumoconiosis, and the readings of two x-rays in equipoise. *Id*. Notwithstanding, she determined Employer rebutted the presumption of clinical pneumoconiosis because "the overall x-ray evidence does not support a finding of pneumoconiosis." *Id*.

However, in evaluating whether Employer rebutted the presumption of clinical pneumoconiosis, the ALJ erroneously placed the burden of proof on Claimant to establish he has the disease. Specifically, she improperly assessed whether the preponderance of the evidence establishes the existence of pneumoconiosis. This was error. Clinical pneumoconiosis is presumed to exist in this case where invocation of the Section 411(c)(4) presumption is established. The ALJ was tasked with evaluating whether Employer disproved its existence by establishing Claimant does not have clinical pneumoconiosis by a preponderance of the evidence. *See W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 134-35 (4th Cir. 2015); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 554-59 (4th Cir. 2013).

Further, in evaluating the x-ray evidence on the issue of clinical pneumoconiosis, the ALJ improperly considered Dr. Fino's negative reading of the April 17, 2019 x-ray as Employer submitted this reading in excess of the evidentiary limitations. In support of their affirmative cases, the regulations permit a claimant and the responsible operator to submit "no more than two chest [x]-ray interpretations." 20 C.F.R. §725.414(a)(2)(i), (3)(i). In rebuttal, each party may submit "no more than one physician's interpretation of each chest [x]-ray . . . submitted by" the opposing party "and by the Director pursuant to [20 C.F.R.] §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (iii). Medical evidence

[7] Dr. Gaziano read the June 26, 2018 x-ray for quality purposes only. Director's Exhibit 19.

submitted in excess of these limitations "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

As part of his affirmative case, Claimant designated one x-ray reading, Dr. DePonte's positive interpretation of the April 28, 2017 x-ray. Claimant's Oct. 6, 2020 Evidence Form. Employer designated two x-ray readings as part its affirmative case, Dr. Adcock's negative readings of the April 17, 2019 and July 17, 2020 x-rays. Employer's Oct. 26, 2010 Evidence Form at 2. To rebut Claimant's sole affirmative positive x-ray reading, Employer designated Dr. Tarver's negative reading of the April 28, 2017 x-ray. *Id*. It also designated Dr. Simone's negative reading of the June 26, 2018 x-ray to rebut the Department of Labor-sponsored positive x-ray reading. *Id*.

As Employer submitted its full complement of affirmative x-ray readings, it could not designate Dr. Fino's negative reading of the April 17, 2019 x-ray as a third affirmative reading. 20 C.F.R. §725.414(a)(3)(i). Nor could it submit Dr. Fino's negative reading as a rebuttal x-ray because it is not responsive to a specific x-ray reading that Claimant submitted. 20 C.F.R. §725.414(a)(3)(ii). As noted, Claimant submitted only Dr. DePonte's positive reading of the April 28, 2017 x-ray as part of his affirmative case.

Because Dr. Fino's negative x-ray reading did not fit into any of Employer's designated x-ray interpretation slots, and as Employer did not attempt to argue good cause for permitting the reading to be admitted in excess of the evidentiary limitations,[8] the ALJ should have excluded Dr. Fino's negative reading of the April 17, 2019 x-ray from the record and not weighed it. 20 C.F.R. §725.456(b)(1).

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) (evidentiary limitations set forth in the regulations are mandatory and, as such, are not subject to waiver). Her failure to apply the evidentiary limitations with respect to the x-ray readings constitutes an abuse of discretion. *McClanahan v. Brem Coal Co.*, 25 BLR 1-171, 1-175 (2016); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-236 (2007) (en banc); 20 C.F.R. §718.304(a).

[8] Before the ALJ, Employer conceded the record contains "four (4) chest x-ray[] readings [that] are classified as negative for pneumoconiosis and five (5) [that] are classified as" positive for the disease. Employer's Post-Hearing Brief at 6-7. Thus, Employer did not even argue that the ALJ should weigh Dr. Fino's April 17, 2019 negative x-ray interpretation.

Notwithstanding the above errors, the facts of this case do not mandate a remand for further consideration of the issue of clinical pneumoconiosis. While factual determinations are the province of the ALJ, reversal is warranted where no factual issues remain to be determined and no further factual development is necessary. *See Collins v. Pond Creek Mining Co*., 751 F.3d 180, 187 (4th Cir. 2014); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989).

The ALJ rendered dispositive findings. Employer was required to rebut the presumption of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B). As discussed above, the ALJ found that where an equal number of physicians read an x-ray as positive and negative for pneumoconiosis, the readings of the x-ray are in equipoise. Decision and Order at 10-11. She found the readings of the April 28, 2017 and July 17, 2020 x-rays in equipoise because two dually-qualified radiologists read each x-ray as positive and negative. Decision and Order at 10-11. After excluding Dr. Fino's negative reading, the readings of the April 17, 2019 x-ray are also in equipoise on the issue of clinical pneumoconiosis because an equal number of dually-qualified radiologists read it as positive and negative for the disease – Dr. Ramakrishnan as positive and Dr. Adcock as negative. Claimant's Exhibit 1; Employer's Exhibit 3.

When x-ray readings are in equipoise, their weight neither confirms nor disproves clinical pneumoconiosis. *See Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 843 (6th Cir. 2016), *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014). Disregarding the three x-rays that are in equipoise, the record contains only one x-ray the ALJ found positive for pneumoconiosis, the June 26, 2018 x-ray, and no negative x-rays. Thus we reverse the ALJ's finding that the x-ray evidence rebuts the presumption of clinical pneumoconiosis. *Collins*, 751 F.3d at 187; *Adams*, 886 F.2d at 826.

Moreover, the ALJ failed to address the physicians' medical opinions on clinical pneumoconiosis. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016). Notwithstanding the ALJ's error, the facts of this case also do not mandate a remand for further consideration of this issue. *See Collins*, 751 F.3d at 187; *Adams*, 886 F.2d at 826. The only two medical opinions supporting Employer's burden on rebuttal, Drs. Fino's and McSharry's, are not sufficient to rebut the presence of clinical pneumoconiosis as a matter of law because they are mere restatements of x-ray interpretations.[9] *See Anderson*

[9] Dr. Fino stated he did not diagnose clinical pneumoconiosis based on his negative reading of the April 17, 2019 chest x-ray. Director's Exhibit 22. In subsequent reports, he noted that although he had reviewed additional x-ray readings, he had not changed his opinion regarding clinical pneumoconiosis which was based on his initial negative x-ray reading. Employer's Exhibit 7. Dr. McSharry noted Dr. Adcock had interpreted

v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-113 (1989) (mere restatement of an x-ray reading is not a reasoned medical opinion); Director's Exhibit 22; Employer's Exhibits 5, 6, 7.

There is no other evidence in the record to support Employer's burden of proof on rebuttal of the existence of clinical pneumoconiosis. Consequently, we reverse the ALJ's finding that Employer rebutted the presumption of clinical pneumoconiosis. *Collins*, 751 F.3d at 187; *Adams*, 886 F.2d at 826; 20 C.F.R. §§718.202(a)(1), 718.305(d)(1)(i)(B); Decision and Order at 10-11. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1)(i); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015).

Disability Causation

To disprove disability causation, Employer must establish "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The ALJ did not consider whether Employer established rebuttal by disproving disability causation. Nevertheless, remand for consideration of this issue is also unnecessary.

The record contains the opinions of Drs. Fino and McSharry. In three separate reports, Dr. Fino opined Claimant does not have clinical pneumoconiosis, but has a totally disabling obstructive impairment caused by cigarette smoking. Director's Exhibit 22, Employer's Exhibits 6, 7. Dr. McSharry also opined Claimant does not have clinical

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Claimant's chest x-ray as negative for clinical pneumoconiosis and indicated he agreed with that assessment. Employer's Exhibit 5.

[10] The ALJ also erred in weighing the evidence on the issue of legal pneumoconiosis as her summary finding that the opinions of Drs. Fino and McSharry are sufficient to rebut the existence of legal pneumoconiosis does not comply with the explanatory requirements of the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. 932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 11. As discussed below, however, we also conclude Employer cannot establish no part of Claimant's total disability is due to clinical pneumoconiosis and thus it cannot establish rebuttal of the second prong. 20 C.F.R. §718.305(d)(1)(ii). Because Claimant is entitled to benefits in this case based on the evidence relevant to clinical pneumoconiosis, we need not remand the claim for the ALJ to explain her legal pneumoconiosis findings. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

pneumoconiosis, but is totally disabled by chronic pulmonary disease and emphysema due to smoking. Employer's Exhibit 5.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that where a physician erroneously fails to diagnose pneumoconiosis, his opinion as to disability causation "is not worthy of much, if any, weight." *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995); *see also Oak Grove Res., LLC v. Director, OWCP* [*Ferguson*], 920 F.3d 1283, 1289 (11th Cir. 2019). This is so regardless of whether Claimant establishes pneumoconiosis by affirmative evidence or by operation of the Section 411(c)(4) presumption. *Id.*

Neither Dr. Fino nor Dr. McSharry offered any explanation for their opinions that no part of Claimant's total disability was caused by pneumoconiosis other than their erroneous belief that Claimant does not suffer from the disease. *Toler*, 43 F.3d at 116 (requiring "specific and persuasive reasons" for crediting disability causation opinion where physician erroneously fails to diagnose pneumoconiosis); Director's Exhibit 22, Employer's Exhibits 5-7. Thus, substantial evidence does not exist to find the doctors provided specific and persuasive reasons to credit their opinions that no part of Claimant's total disability is due to pneumoconiosis. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (substantial evidence is such evidence "that a reasonable mind would accept to support a conclusion"). As there is no other evidence in the record that could support Employer's burden of disproving disability causation, Employer has failed to establish rebuttal by proving no part of Claimant's total disability was caused by clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(ii).

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and Employer did not rebut the presumption, Claimant is entitled to benefits.

Accordingly, the ALJ's Decision and Order Denying Benefits is reversed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge