U.S. Department of Labor

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

BRB No. 22-0351 BLA

MICHAEL D. PENNINGTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
B R & D ENTERPRISES, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS' MUTUAL INSURANCE	)	DATE ISSUED: 11/09/2023
	)	
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 Stewart F. Alford, Administrative Law Judge, United States Department of Labor.

W. Barry Lewis (Lewis and Lewis Law Offices), Hazard, Kentucky, for Employer and its Carrier.[1]

[1] Employer was previously represented by Paul E. Jones and Denise Hall Scarberry (Jones & Jones Law Office, PLLC), who filed Employer's Petition for Review and Supporting Brief. After briefing, but prior to a decision in the case, Jones & Jones moved to withdraw as Employer's counsel. Lewis and Lewis Law Offices moved to be substituted

Emma P. Cusumano (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Stewart F. Alford's Decision and Order Awarding Benefits (2019-BLA-05350) rendered on a subsequent claim filed on February 12, 2018,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Employer is the responsible operator. He accepted the parties' stipulation of twenty-two years of underground coal mine employment and found Claimant established complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act and establishing a change in an applicable condition of entitlement.[3] 30 U.S.C. §921(c)(3) (2018); 20 C.F.R.

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and requested all future service at their listed address. The Benefits Review Board grants Jones & Jones's request to withdraw and Lewis and Lewis's motion for substitution as counsel.

[2] The district director denied Claimant's prior claim, filed on November 5, 2015, for failure to establish total disability. Director's Exhibit 1 at 3-10.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the district director denied Claimant's prior claim for failure to establish total disability, he was required to submit new evidence establishing that element to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

§§718.304. 725.309(c). The ALJ further found Claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203, and awarded benefits.

On appeal, Employer asserts the ALJ erred in determining it is the responsible operator. On the merits, it argues the ALJ erred in finding Claimant established complicated pneumoconiosis.[4] Claimant has not filed a response. The Director, Office of Workers' Compensation Programs (Director), responds, urging rejection of Employer's arguments.

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.[5] 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).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year.[6] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant has twenty-two years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

[5] 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 16-17.

[6] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

for benefits or another potentially liable operator that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

The ALJ acknowledged Employer's argument that another coal miner operator, B&D Mining (B&D), should have been designated the responsible operator. Decision and Order at 27. He considered Claimant's Social Security Administration (SSA) earnings records as well as his deposition testimony. *Id.*; Director's Exhibits 7, 27, 29. As the ALJ accurately found, the SSA earnings records reflect Claimant worked for both Employer and B&D in multiple years, last working for both in 2003. Decision and Order at 27; Director's Exhibit 7 at 8. He further observed Claimant testified he stopped working in coal mine employment on March 12, 2003, and that he last worked in coal mine employment for Employer. Decision and Order at 27; Director's Exhibit 27 at 13, 17-18. Thus, weighing the evidence together, he rejected Employer's arguments that B&D or another entity last employed Claimant and found Employer is the properly designated responsible operator. Decision and Order at 27-28.

Initially, we reject Employer's argument that because B&D employed Claimant for at least one year, "it was error for the ALJ to exclude B&D Mining as a potentially liable operator." Employer's Brief at 6-8. The ALJ did not exclude B&D as a potentially liable operator; rather, he determined B&D is not the operator that most recently employed Claimant because Claimant worked for Employer after he worked for B&D. Decision and Order at 27; *see* 20 C.F.R. §725.495(a)(1).

We further reject Employer's assertion that the ALJ erred by not finding Cumberland Valley Contractors (CVC) to be the responsible operator. Employer's Brief at 4-6. The ALJ correctly observed that Claimant's SSA earnings records document no employment with CVC. Decision and Order at 27; Director's Exhibit 1. Although Employer generally points to evidence it asserts demonstrates an employment relationship between CVC and Claimant, Employer's Brief at 4-5, any error in failing to consider this evidence is harmless as Employer points to no evidence demonstrating CVC meets the requirements to be a potentially liable operator.[7] *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"); *Cox v. Director, OWCP*, 791 F.2d 445, 446-47 (6th Cir. 1986) (party challenging an ALJ's decision must do more than recite evidence, but must demonstrate

[7] We likewise reject Employer's assertion, without any supporting evidence, that CVC and B&D are "essentially one and the same." *Cox v. Director, OWCP*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

"with some degree of specificity" how substantial evidence supports its position); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §725.495(c)(2).

Employer finally asserts the ALJ erred in finding it is the responsible operator because "substantial evidence clearly demonstrates . . . Claimant was last employed by B&D." Employer's Brief at 6. We disagree.

As the ALJ correctly observed, Claimant's SSA earnings records demonstrate he worked for both Employer and B&D in 2003, earning $10,277 with Employer and $384 with B&D. Decision and Order at 27 (citing Director's Exhibit 7 at 8). Further, when asked where he was last employed, Claimant initially responded he last worked for Employer. Director's Exhibit 27 at 13. Employer points to testimony it asserts shows Claimant later contradicted himself, stating he last worked for B&D or CVC. Employer's Brief at 5-7; Director's Exhibit 27 at 13-19. However, the ALJ considered this testimony and permissibly found it ambiguous. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012) (ALJ's function is to weigh the evidence, draw appropriate inferences, and determine credibility); *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005). Employer points to no specific evidence showing that Claimant worked for B&D after he stopped working for Employer. We thus consider its arguments to be requests to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Therefore, we affirm the ALJ's determination that Employer was properly named as the responsible operator. 20 C.F.R. §725.495(a)(1); Decision and Order at 28.

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. *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 the x-ray, biopsy, and medical opinion evidence, considered separately, do not support a finding of complicated pneumoconiosis, whereas the computed tomography (CT) scan evidence, considered separately and with the rest of the evidence,

establishes complicated pneumoconiosis. Decision and Order at 29-34; *see* 20 C.F.R. §718.304. Employer argues the ALJ erred in weighing the evidence to find complicated pneumoconiosis. Employer's Brief at 9-12. We affirm the ALJ's findings.

20 C.F.R. §718.304(a): X-rays

The ALJ considered six interpretations of three chest x-rays dated March 5, 2018, April 3, 2019, and September 25, 2020, rendered by physicians who are all dually qualified as B readers and Board-certified radiologists. 20 C.F.R. §718.304(a); Decision and Order at 29-30. Dr. Crum read the March 5, 2018 x-ray as positive for simple and complicated pneumoconiosis, Category A, whereas Dr. Adcock read it as negative for both simple and complicated pneumoconiosis. Director's Exhibits 16 at 2; 24 at 3. The remaining x-ray readings are positive for simple pneumoconiosis but negative for complicated pneumoconiosis.[8] The ALJ found the totality of the x-ray evidence negative for complicated pneumoconiosis because he found Dr. Crum's positive reading of the March 5, 2018 x-ray "does not, standing by itself, support a finding of complicated pneumoconiosis." Decision and Order at 30.

20 C.F.R. §718.304(b): Biopsy Evidence

A miner may demonstrate complicated pneumoconiosis through biopsy evidence that yields massive lesions in the lungs. 20 C.F.R. § 718.304(b); *Gray*, 176 F.3d at 387. "A finding in a[ ] . . . biopsy of anthracotic pigmentation, however, must not be considered sufficient, by itself, to establish the existence of pneumoconiosis." 20 C.F.R. §718.202(a)(2). Dr. Barklow's October 2, 2017 fine needle biopsy revealed a "dark brown to black pigment" and no malignancies in Claimant's right lower lung. Claimant's Exhibit 2. Because the biopsy report did not contain any specific findings related to complicated pneumoconiosis or otherwise provide details concerning the size or diameter of any lesions

[8] Dr. DePonte read the March 5, 2018 x-ray as positive for clinical pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibit 17 at 21. Drs. Ramakrishnan and Kendall read Claimant's April 3, 2019 x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Employer's Exhibit 5 at 4; Employer's Exhibit 7 at 3-5. Dr. Kendall read Claimant's September 25, 2020 x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Employer's Exhibit 8 at 34-36. Dr. Rosenberg read the same x-ray as positive for both simple pneumoconiosis and Category A large opacities, but the ALJ correctly noted neither party designated this reading on their evidence summary form. Decision and Order at 8 n.9; Employer's Exhibit 8 at 37-38.

or nodules, the ALJ found the biopsy evidence, standing alone, does not establish complicated pneumoconiosis. Decision and Order at 30; *see Gray*, 176 F.3d at 390.

20 C.F.R. §718.304(c): CT Scans and Medical Opinion Evidence

The ALJ considered CT scans dated July 20, 2017, August 25, 2017, and March 20, 2019. Decision and Order at 31-33. Dr. DePonte read the July 20, 2017 scan as consistent with "coal workers' pneumoconiosis with progressive massive fibrosis involving the right lower lobe" and noted a large opacity in the right lower lobe perihilar region measuring at least 6.2 centimeters. Director's Exhibit 15 at 2. Dr. Simone read the same scan as positive for simple coal workers' pneumoconiosis but negative for large opacities of complicated pneumoconiosis. Employer's Exhibit 9 at 3. He noted a right hilar mass measuring 6.1 centimeters by 1.7 centimeters extending into the right lower lobe but opined it is "suspicious for neoplasm" and indicated it is likely unrelated to coal workers' pneumoconiosis because he observed an absence of large opacities in Claimant's upper lobe. *Id.* Dr. Jain read Claimant's August 25, 2017 scan as positive for progressive massive fibrosis. Claimant's Exhibit 3 at 2. She noted the density in the right lower lobe measured 7.7 centimeters by 3.3 centimeters and observed nodules in Claimant's right upper lobe. *Id.* Finally, Dr. DePonte read the March 20, 2019 scan as positive for simple and complicated pneumoconiosis with progressive massive fibrosis in Claimant's right lower lobe and "progressive coalescence" since the previous scan. Claimant's Exhibit 4 at 1. She further indicated a positron emission tomography (PET) scan demonstrated "low metabolic activity of 2.09 typical for a large opacity of coal workers' pneumoconiosis." *Id.*

The ALJ credited Drs. DePonte's and Jain's diagnoses of complicated pneumoconiosis over the contrary diagnosis of Dr. Simone. Decision and Order at 31-32. Therefore, he found the CT scan evidence weighs in favor of a finding of complicated pneumoconiosis. *Id.*

Employer initially contends the ALJ erred by considering the CT scans at all because it was "unable to obtain rebuttal interpretations" and the ALJ should thus have granted its motion to strike the CT scans. Employer's Brief at 10. We disagree. An ALJ has broad discretion to make procedural and evidentiary rulings. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc). Such orders may be overturned only if the party challenging them demonstrates the ALJ's action represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

As the ALJ noted, Employer did not object to the admission of the CT scan evidence at the hearing. Hearing Transcript at 6; March 8, 2021 Order Denying Mot. To Strike. Moreover, the ALJ granted Employer forty-five additional days to submit rebuttal

evidence. Hearing Tr. at 8. He explained that if Employer could not meet the deadline, Employer's counsel should file for an extension to keep the evidentiary record open. *Id.* at 32. Employer submitted Dr. Simone's reading of the July 20, 2017 CT scan prior to the deadline, but three months later it moved to strike the CT scan evidence submitted by Claimant. Mar. 8, 2021 Mot. To Strike. Noting the CT scans were admitted at the hearing without objection, that Employer submitted Dr. Simone's report, and that Employer failed to request an extension of time despite being invited to do so, the ALJ denied Employer's motion. Mar. 8, 2021 Order Denying Mot. To Strike.

On appeal, Employer argues filing for an extension of time would have only "prolong[ed] adjudication on the matter" and contends further efforts to obtain the CT scans to have them reviewed would have been futile as Claimant and the Department of Labor (DOL) rejected its significant efforts to obtain the CT scans, thus denying it a fair opportunity to submit crucial evidence. Employer's Brief at 10. As the Director notes, however, Claimant provided signed medical release forms to allow Employer to obtain the CT scans directly from the hospital. Director's Brief at 15 (citing Mar. 9, 2020 Letter from Robin Napier). Employer does not argue or point to any evidence suggesting it attempted to obtain the CT scans from the hospital. Thus, we find no abuse of discretion in the instant case. *See Blake*, 24 BLR at 1-113.

We further reject Employer's contention that the ALJ erred in crediting Dr. DePonte's reading of the March 20, 2019 CT scan because her conclusion that the metabolic activity of the opacity she identified is consistent with pneumoconiosis is based on generalizations and not specific to Claimant. Employer's Brief at 10. Contrary to Employer's argument, the ALJ permissibly credited Dr. DePonte's reading because she specifically opined the PET and CT scans demonstrate a "low metabolic activity of 2.09," which she indicated is "typical for a large opacity" of complicated pneumoconiosis. Claimant's Exhibit 4; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 32; Employer's Brief at 10. We therefore affirm the ALJ's finding that the CT scan evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 32.

The ALJ next considered the medical opinions of Drs. Ajjarapu, Dahhan, and Rosenberg. Decision and Order at 32-33. None of the physicians diagnosed complicated pneumoconiosis based on the x-ray evidence.[9] Director's Exhibit 8; Employer's Exhibits

[9] Dr. Ajjarapu diagnosed Claimant with simple pneumoconiosis based on Dr. DePonte's interpretation of the March 5, 2018 x-ray. Director's Exhibit 18 at 6. Dr. Dahhan opined Claimant does not have complicated pneumoconiosis based on the March 5, 2018 x-ray readings. Employer's Exhibit 3 at 13. Dr. Rosenberg opined Claimant does

3, 8. The ALJ gave little weight to the medical opinion evidence as none of the physicians reviewed the CT scan evidence. Decision and Order at 32-33.

Evidence as a Whole

Weighing the evidence together, the ALJ found the CT scan evidence, especially Dr. DePonte's interpretation of the most recent scan on March 20, 2019, the "most persuasive." Decision and Order at 33. He noted the biopsy report, though not supportive of complicated pneumoconiosis in and of itself, contradicted Dr. Simone's opinion that the March 20, 2019 CT scan is suggestive of neoplasm. Decision and Order at 33-34; Claimant's Exhibit 2; Employer's Exhibit 9. Further, he found the CT scan evidence consistent with Claimant's treatment records documenting a diagnosis of progressive massive fibrosis. Decision and Order at 34; Claimant's Exhibit 7 at 4. In addition, although noting the x-ray evidence in isolation does not establish complicated pneumoconiosis, the ALJ gave Dr. Crum's reading of the March 5, 2018 x-ray greater weight because it is most consistent with the CT scan evidence and the evidence as a whole. Decision and Order at 34; Director's Exhibit 16 at 2. Thus, weighing the evidence together, like and unlike, he found Claimant established complicated pneumoconiosis.

Employer contends the ALJ erred in finding the evidence as a whole establishes complicated pneumoconiosis because the biopsy evidence "negates any reliance" on the CT scans. Employer's Brief at 9-10. We disagree.

As the ALJ noted, the Dr. Barklow's October 2, 2017 biopsy report documents bronchial epithelium with reactive changes, dark brown to black pigment, and a lack of malignancies in Claimant's right lower lung. *See* Claimant's Exhibits 2, 4; Decision and Order at 33-34; Employer's Brief at 9. Thus, although Dr. Barklow's report is silent on the existence of complicated pneumoconiosis, the ALJ permissibly found that it undermines Dr. Simone's diagnosis of neoplasm, thus bolstering Drs. DePonte's and Jain's diagnoses of complicated pneumoconiosis. *See* Decision and Order at 33-34; *Rowe*, 710 F.2d at 255.

We further reject Employer's contention that the ALJ erred by "reweigh[ing] the x-ray evidence to credit Dr. Crum's x-ray reading with more weight because it is in agreement with the CT scan evidence." Employer's Brief at 11. Contrary to Employer's argument, the ALJ did not reweigh the x-ray evidence but rather permissibly found that, when considered with the evidence as a whole, Dr. Crum's reading of the March 5, 2018 x-ray as positive for complicated pneumoconiosis is more credible than Dr. Adcock's contrary

not have progressive massive fibrosis based on Dr. Kendall's reading of the September 25, 2020 x-ray. Employer's Exhibit 8 at 6.

reading. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; *Banks*, 690 F.3d at 489 (ALJ's function is to weigh the evidence, draw appropriate inferences, and determine credibility); Decision and Order at 34. Thus, we affirm the ALJ's finding that Claimant established complicated pneumoconiosis based on the evidence as a whole. 20 C.F.R. §718.304.

As Employer raises no further challenge to the ALJ's Decision and Order, we affirm his finding that Claimant invoked the irrebuttable presumption at 20 C.F.R. §718.304 and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). We further affirm, as unchallenged on appeal, the ALJ's finding that Claimant's complicated pneumoconiosis arose out of his coal mine employment. *See* 20 C.F.R. §718.203(b); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 36.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge