U.S. Department of Labor

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

BRB No. 22-0468 BLA

JASON BIRCHFIELD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FOOLS GOLD ENERGY COMPANY	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS' MUTUAL INSURANCE (KEMI)	)	DATE ISSUED: 11/06/2023
	)	
Employer/Carrier-Respondents	)	
	)	
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.

Joseph E. Wolfe and Cameron Blair (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Denying Benefits (2021-BLA-05104) rendered on a claim filed on February 15, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant did not establish complicated pneumoconiosis and thus could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Although the ALJ credited Claimant with twenty-one years of underground coal mine employment, she found Claimant did not establish a totally disabling respiratory or pulmonary impairment, and therefore 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); 20 C.F.R. §718.305. She also found Claimant did not establish pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) and denied benefits.

On appeal, Claimant argues the ALJ erred in finding the evidence as whole did not establish complicated pneumoconiosis. He asserts the ALJ erred in finding the medical opinion evidence contraindicates the x-ray evidence, which she found to be positive for complicated pneumoconiosis.[2] Employer responds in support of the decision denying benefits but alleges the ALJ erred in finding the x-ray evidence positive for complicated pneumoconiosis. The Director, Office of Workers' Compensation Programs, did not file 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

[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.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-one years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12-13.

accordance with applicable law.[3] 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).

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 chest 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). *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The ALJ must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether Claimant has invoked the irrebuttable presumption. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found the x-ray evidence establishes complicated pneumoconiosis, whereas the medical opinions do not support a finding of the disease.[4] 20 C.F.R. §718.304(b), (c); Decision and Order at 7-9. Weighing all the evidence together, she found Claimant failed to establish complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 9.

X-ray Evidence – 20 C.F.R. §718.304(a)

We reject Employer's contention that the ALJ erred in finding the x-ray evidence positive for complicated pneumoconiosis.[5] Employer's Brief at 6. The ALJ considered

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[4] The record contains no autopsy or biopsy evidence. 20 C.F.R. §718.304(b).

[5] Employer's arguments in its response brief are in support of another method by which the ALJ may reach the same result and deny benefits. Employer's Brief at 6. Therefore, these arguments are properly before the Board and no cross-appeal is required. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370 (4th Cir., 1994); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 133 (3d Cir. 1987); *Whiteman v. Boyle Land &*

eleven readings of five x-rays taken on April 3, 2019, July 2, 2019, December 16, 2019, August 11, 2021, and August 26, 2021. Decision and Order at 8. All interpreting physicians are dually-qualified B readers and Board-certified radiologists. Director's Exhibits 16, 20, 22-24, 27; Claimant's Exhibits 1, 2, 4; Employer's Exhibits 2, 4.

Drs. DePonte and Crum read the April 3, 2019 x-ray as positive for complicated pneumoconiosis, category A, while Dr. Adcock read it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibits 16, 20, 23. Dr. Crum read the July 2, 2019 and December 16, 2019 x-rays as positive for complicated pneumoconiosis, category A, while Dr. Adcock read them as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Director's Exhibits 22, 24, 27; Claimant's Exhibit 1. Dr. DePonte read the August 11, 2021 x-ray as positive for complicated pneumoconiosis, category A, while Dr. Simone read it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 2. Finally, Dr. Crum read the August 26, 2021 x-ray as positive for complicated pneumoconiosis, category A, while Dr. Kendall read it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Claimant's Exhibit 4; Employer's Exhibit 4. The ALJ found the April 3, 2019 x-ray supports a finding of complicated pneumoconiosis while the readings of the remaining x-rays are in equipoise. Decision and Order at 9. Consequently, she found the overall x-ray evidence establishes complicated pneumoconiosis. *Id.*

Contrary to Employer's argument, the ALJ did not merely engage in a headcount when resolving the conflicting x-ray readings. She properly performed both a qualitative and quantitative analysis of the x-ray evidence, taking into consideration the physicians' qualifications, their specific interpretations, and the number of readings of each film. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Employer's Brief at 6. She permissibly found the April 3, 2019 x-ray positive for complicated pneumoconiosis based on the preponderance of the positive readings by dually-qualified radiologists.[6] *Adkins*, 958 F.2d at 52; Decision

Fuel Co., 15 BLR 1-11, 1-18 (1991) (en banc); *King v. Tenn. Consolidated Coal Co.*, 6 BLR 1-87, 1-92 (1983).

[6] We also reject Employer's argument that the ALJ should have credited the more recent negative x-rays. Employer's Brief at 6. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held it is rational to credit more recent evidence, solely on the basis of recency, only if the more recent evidence shows that a miner's condition has progressed or worsened. *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (case involving x-rays); *see Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th Cir. 1993) (applying the holding in *Adkins* to medical opinions and

and Order at 8. Because it is supported by substantial evidence, we affirm the ALJ's finding that the x-ray evidence establishes complicated pneumoconiosis. 20 C.F.R. §718.304(a).

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

Claimant asserts the ALJ erred in weighing the medical opinion evidence and the evidence as a whole. Claimant's Brief at 10-13, 15. We agree. The ALJ considered the medical opinions of Drs. Nader, Zaldivar, and Jarboe. Decision and Order at 9. Dr. Nader diagnosed complicated pneumoconiosis. Director's Exhibit 16. Dr. Zaldivar initially did not make a finding regarding complicated pneumoconiosis but opined that because Claimant is a smoker, "any large masses in his lungs must be deemed suspicious for the appearance of cancer." Director's Exhibit 26. Subsequently, Dr. Zaldivar issued a supplemental report in which he diagnosed simple pneumoconiosis and opined complicated pneumoconiosis is "uncertain" but it is "most likely . . . not present." Employer's Exhibit 1. Dr. Jarboe opined "the preponderance of the evidence does not support a diagnosis of complicated pneumoconiosis." Employer's Exhibit 4. The ALJ "afford[ed] each opinion some weight" and found the overall medical opinion evidence does not support a finding of complicated pneumoconiosis. Decision and Order at 9.

We agree with Claimant's contention that, while the ALJ summarized the opinions of Drs. Nader, Zaldivar, and Jarboe, she did not make any findings regarding whether they were adequately reasoned and documented or specify the weight she accorded them. Decision and Order at 9, 11-12; Claimant's Brief 13-16. As the ALJ failed to adequately consider each medical opinion and explain how or if she determined they were reasoned and documented, her decision does not comply with the Administrative Procedure Act.[7] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Despite the ALJ's error, it is not necessary to remand this case for further consideration. 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) (reversing a denial, with directions to award benefits without further

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noting "[a] bare appeal to 'recency' is an abdication of rational decisionmaking"); *see also Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993).

[7] The Administrative Procedure Act requires the ALJ to consider all relevant evidence in the record, and to set forth her "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

administrative proceedings); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70 (4th Cir. 2002) (denial of benefits reversed where "only one factual conclusion is possible"); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989) (same). Where medical opinions, as here with Drs. Zaldivar and Jarboe, are mere restatements of x-ray interpretations,[8] as a matter of law, there is no factual basis in the record to support the ALJ's conclusion that such opinions are sufficient to diminish the probative force of the x-ray evidence supporting the presence of complicated pneumoconiosis. *See Anderson 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); *E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256 (4th Cir. 2000) (x-ray evidence of complicated pneumoconiosis can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be); Director's Exhibit 26; Employer's Exhibits 3, 4.

Moreover, as we affirm the ALJ's finding Claimant had twenty-one years of coal mine employment, Claimant's pneumoconiosis is presumed to have arisen out of such employment. 20 C.F.R. §718.103(b). The only evidence which could possibly rebut this presumption are the opinions of Drs. Zaldivar and Jarboe, both of whom acknowledged Claimant has at least simple pneumoconiosis without alleging it arose from something other than his coal mine work – with Dr. Jarboe specifically referring to it as "coal workers' pneumoconiosis." Director's Exhibit 26; Employer's Exhibit 4 at 5. And although they disputed that Claimant had the complicated form of the disease, their opinions were contrary to the ALJ's finding the x-ray evidence was positive for complicated pneumoconiosis. Director's Exhibit 26 at 4-5; Employer's Exhibit 4 at 5-6; Employer's Exhibit 3 at 1-2. Thus, neither of their opinions could rationally be credited to rebut the presumption of disease causation. *See Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 185 (4th Cir. 2014) (physician's opinion that "did not properly diagnose pneumoconiosis

[8] Dr. Zaldivar initially acknowledged Dr. DePonte's diagnosis of complicated pneumoconiosis, but he did not offer an opinion on its presence other than stating any large masses would be "suspicious" for cancer. Director's Exhibit 26 at 4-5 (unpaginated). He then summarized additional x-ray readings by Drs. Crum and DePonte, and a reading in Claimant's treatment records, to generally conclude that "there seemed to be evidence of simple pneumoconiosis" while complicated pneumoconiosis was "uncertain" but unlikely. Employer's Exhibit 1; *see* Claimant's Exhibit 3 at 12 (treatment record x-ray identifying "diffuse interstitial nodularity" and stating "[t]his is indeterminate"). Dr. Jarboe stated that the preponderance of the x-ray evidence does not support complicated pneumoconiosis. Employer's Exhibit 4 at 5-6. In a subsequent report, he noted that although he had reviewed the December 16, 2019 and August 11, 2021 x-ray readings, he had not changed his opinion regarding complicated pneumoconiosis, which was based on his initial negative x-ray reading. Employer's Exhibit 3 at 1-2.

can carry, at most, little weight"); *Scott v. Mason Coal Co.*, 289 F.3d 263, 270 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995).

Consequently, we reverse the ALJ's finding that Claimant did not establish complicated pneumoconiosis based on consideration of the evidence as a whole and therefore the denial of benefits. 20 C.F.R. §718.304.

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and reversed in part, and this case is remanded for entry of an award of benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge