U.S. Department of Labor

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

BRB Nos. 22-0478 BLA
and 22-0479 BLA

KATHY M. BLACKWELL (o/b/o and Widow of LONNIE R. BLACKWELL)	)	
Claimant-Respondent	)	
v.	)	
S & D COAL COMPANY	)	
and	)	
TRAVELERS INSURANCE COMPANY	)	DATE ISSUED: 11/08/2023
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 in Miner's Claim and Awarding Benefits in Survivor's Claim of Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

Kyle L. Johnson (Fogel Keller Walker, PLLC), Louisville, Kentucky, for Employer and its Carrier.

William M. Bush (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 and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decisions and Order Awarding Benefits in Miner's Claim and Awarding Benefits in Survivor's Claim (2021-BLA-05215 and 2021-BLA-05319) pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on February 22, 2019,[1] and a survivor's claim filed on January 6, 2020.[2]

The ALJ credited the Miner with 8.38 years of underground coal mine employment and found Claimant established complicated pneumoconiosis. Thus, 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) (2018); 20 C.F.R. §718.304. She further found the Miner's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203(b), and awarded benefits in the miner's claim. Because the Miner was entitled to benefits at the time of his death, the ALJ also determined Claimant is automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[3]

On appeal, Employer argues it was deprived of due process because the district director sent Employer the Department of Labor (DOL)-sponsored examination more than thirty days after it was performed. Employer also asserts the ALJ erred in finding Claimant

[1] Employer's appeal in the miner's claim was assigned BRB No. 22-0478 BLA, and its appeal in the survivor's claim was assigned BRB No. 22-0479 BLA. The Benefits Review Board has consolidated these appeals for purposes of decision only.

[2] The Miner died on December 9, 2019, while his claim was pending before the ALJ. Survivor's Claim (SC) Director's Exhibit 8. Claimant, the Miner's widow, is pursuing his claim on his behalf, as well as her own survivor's claim. SC Director's Exhibit 3.

[3] Section 422(*l*) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

established complicated pneumoconiosis and in determining the commencement date for benefits.[4] Claimant did not file a response. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging the Benefits Review Board to reject Employer's due process 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).

Due Process Challenge

The Miner filed his claim for benefits on February 22, 2019. Director's Exhibit 2. He underwent a DOL-sponsored complete pulmonary examination by Dr. Forehand on April 9, 2019. Director's Exhibit 21. The district director received Dr. Forehand's evaluation on May 31, 2019. However, the evaluation did not contain Dr. Forehand's signature. Director's Exhibit 21 at 7 (unpaginated). Dr. Forehand later signed the evaluation on November 15, 2019. Director's Exhibit 22. Consequently, Employer received the evaluation on December 13, 2019, when the district director issued the Schedule for Submission of Additional Evidence. Director's Exhibit 42. The district director explained the evaluation was not "complete" until Dr. Forehand signed it and thus did not provide the evaluation to Employer until after it was signed. Director's Brief at 9.

Citing 20 C.F.R. §725.413, Employer requests the Board vacate the ALJ's Decision and Order and transfer liability to the Black Lung Disability Trust Fund (Trust Fund) because the district director sent Employer the DOL-sponsored evaluation more than thirty days after it was performed, which it alleges constitutes a due process violation. Employer's Brief at 14. The Director argues Employer has not been prejudiced by any

[4] To the extent Employer argues the ALJ erred in finding total disability based on Dr. Dahhan's medical opinion, we reject this argument as the ALJ correctly noted Employer stipulated to total disability in its post-hearing brief before the ALJ. Employer's Brief at 11-12; Employer's Post-Hearing Brief at 12 ("Employer stipulates, based on Dr. Dahhan's testimony, that Claimant had a disabling pulmonary impairment."); Decision and Order at 9. Employer is bound by its stipulation. *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013); *Richardson v. Director, OWCP*, 94 F.3d 164, 167 (4th Cir. 1996).

[5] 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.

delay in receiving the DOL-sponsored evaluation and cannot establish a due process violation. Director's Brief at 9-11. We agree with the Director's argument.

Due process requires a party be afforded notice of the claim and the opportunity to respond. *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799 (4th Cir. 1998). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has emphasized that "it is not the mere fact of the government's delay that violates due process, but rather the prejudice resulting from such delay." *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 183 (4th Cir. 1999).

Although the Miner died prior to Employer receiving a copy of the DOL-sponsored evaluation, Employer still had notice of the claim and ample opportunity to respond. The district director provided timely notification to Employer of its potential liability in the claim and of the initial finding of entitlement under the applicable regulations. Director's Exhibit 38. Moreover, as the Director correctly notes, Employer had the opportunity to mount a defense and, as it has fully participated in the proceedings since receiving notice, availed itself of such opportunity. Director's Brief at 10.

Employer generally speculates that, had the district director provided it the DOL-sponsored complete pulmonary evaluation within thirty days of it being performed and before the Miner died, Employer could have "obtain[ed] its own x-ray, [pulmonary function tests], [arterial blood gas studies], and ha[d] a physician personally examine the Miner." Employer's Brief at 15. However, it has failed to adequately explain how it was deprived of notice and opportunity to respond. Even assuming the district director erred by not timely providing Employer a copy of the DOL-sponsored complete pulmonary evaluation, given that Employer still developed and submitted its own medical evidence, the record does not support a conclusion that Employer was deprived of the opportunity to mount a meaningful defense in the miner's claim. Thus Employer has not demonstrated how any alleged error by the district director prejudiced it or rose to the level of a due process violation. *See Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (recognizing "litigation is rarely pristine and is filled with risk," and the Due Process Clause's interest is only in whether an adjudicative procedure as a whole is sufficiently fair and reliable that the law should enforce its result); *see also N. Am. Coal Co. v. Miller*, 870 F.2d 948, 951 (3d Cir. 1989) (due process is violated when a party is given no opportunity to fully present its case). We therefore reject Employer's assertions that it was deprived of due process and that liability should be transferred to the Trust Fund. *Id.*

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 supports a finding of complicated pneumoconiosis, while the biopsy evidence, computed tomography (CT) scans, medical opinions, and the Miner's treatment records do not. Decision and Order at 13-22. Weighing all of the evidence together, the ALJ concluded Claimant established complicated pneumoconiosis and therefore invoked the irrebuttable presumption of total disability due to pneumoconiosis. *Id.* at 23.

Employer contends the ALJ erred in weighing the x-ray and medical opinion evidence and that she did not adequately explain her conclusion that Claimant established complicated pneumoconiosis.[6] Employer's Brief at 7-16. We are not persuaded.[7]

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

The ALJ considered five interpretations of two x-rays dated March 1, 2019, and April 9, 2019. Decision and Order at 11-12; Director's Exhibits 21, 28, 32, 57; Claimant's Exhibit 1. All interpreting physicians are dually-qualified as B readers and Board-certified radiologists, except Dr. Forehand, who is a B reader only. *Id.*

[6] The Administrative Procedure Act (APA) requires every adjudicatory decision to include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[7] We affirm, as unchallenged on appeal, the ALJ's finding the biopsy evidence does not establish complicated pneumoconiosis. *See* 20 C.F.R. §718.304(c); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15, 21-22; Employer's Exhibits 2-6.

Dr. Crum opined the March 1, 2019 x-ray is positive for complicated pneumoconiosis, while Dr. Adcock opined it is negative. Director's Exhibits 28, 32. Drs. Forehand and DePonte opined the April 9, 2019 x-ray is positive for complicated pneumoconiosis, while Dr. Adcock opined it is negative. Director's Exhibits 21, 57; Claimant's Exhibit 1. The ALJ found the interpretations of the March 1, 2019 x-ray in equipoise and the overall weight of the interpretations of the April 9, 2019 x-ray positive for complicated pneumoconiosis. Decision and Order at 12. Weighing the x-ray evidence together, the ALJ found it supports a finding of complicated pneumoconiosis. *Id.* at 13.

Employer argues the ALJ erred in failing to weigh Dr. Ramakrishnan's interpretation of the March 1, 2019 x-ray. Employer's Brief at 7-10. We disagree. Dr. Ramakrishnan's treatment record[8] diagnoses simple pneumoconiosis on the March 1, 2019 x-ray but did not address complicated pneumoconiosis.[9] Director's Exhibit 29. An ALJ has discretion to determine the weight to accord diagnostic testing that is silent on the existence of complicated pneumoconiosis. *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). The ALJ acknowledged Dr. Ramakrishnan's reading, Decision and Order at 11 n.13, and found it is entitled to no weight. *Id.* Because Dr. Ramakrishnan was silent on the presence of complicated pneumoconiosis, we affirm the ALJ's finding this x-ray does not weigh against a finding of complicated pneumoconiosis. *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); Decision and Order at 13, 22. Thus, the ALJ's determination that the x-ray evidence supports a finding of complicated pneumoconiosis is affirmed.

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

[8] Aside from its contention that the ALJ failed to consider Dr. Ramakrishnan's treatment record x-ray interpretation, Employer raises no other challenges to the ALJ's weighing of the Miner's treatment records. To the extent Employer does not challenge the ALJ's findings regarding the remainder of the treatment records, we affirm them. *Skrack*, 6 BLR at 1-711; Decision and Order at 15, 21-22; Employer's Exhibits 2-6.

[9] Neither party designated Dr. Ramakrishnan's x-ray interpretation as affirmative x-ray evidence, but it was contained in the Miner's treatment records that Employer submitted. Employer's Evidence Summary Form; Director's Exhibit 29. Dr. Ramakrishnan did not complete an International Labour Organization (ILO) x-ray form but, rather, conveyed his diagnosis of "nodular interstitial changes due to simple pneumoconiosis" via a narrative statement. Director's Exhibit 29 at 2; *see* 20 C.F.R. §718.102 (criteria for interpreting x-rays).

CT Scans

The ALJ considered three CT scans dated June 13, 2018, April 2, 2019, and April 15, 2019. Employer's Exhibits 3, 4; Director's Exhibit 32. The ALJ found "none of the interpretations [of the June 13, 2018, and April 2, 2019 CT scans] provided any information on the size of the nodules." Decision and Order at 16. Dr. Adcock interpreted the April 15, 2019 CT scan and opined there were "a few coalescences" that were seven to eight millimeters in size, but no larger than nine millimeters. Director's Exhibit 32; Employer's Exhibit 7 at 15. The ALJ determined the CT scan evidence does not support a finding that the Miner had complicated pneumoconiosis. Decision and Order at 21. Nevertheless, weighing the evidence together, the ALJ found the other medical evidence, including the CT scan evidence, does not outweigh the x-ray evidence of complicated pneumoconiosis. Decision and Order at 21, 23.

Employer asserts the ALJ erred in finding Dr. Adcock's reading of the April 15, 2019 CT scan does not undermine the x-ray evidence of complicated pneumoconiosis. Employer's Brief at 9-10. We disagree. The ALJ permissibly found Dr. Adcock did not provide any information about what size that the nodules he found on the CT scan would generate on an x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999); Decision and Order at 21; Director's Exhibit 32; Employer's Exhibit 7 at 15. Further, the ALJ correctly noted that in Dr. Adcock's deposition, he acknowledged but did not dispute Dr. DePonte's x-ray finding of an opacity one centimeter in diameter. Decision and Order at 22; Employer's Exhibit 7 at 14-16. Because it is supported by substantial evidence, we affirm the ALJ's finding that the CT scan evidence does not outweigh the x-ray evidence of complicated pneumoconiosis. 20 C.F.R. §718.304(c).

Medical Opinions

Employer also asserts the ALJ erred in considering Dr. Forehand's medical report because the physician did not sign the DOL examination form. Employer's Brief at 13-14. We disagree.

When considering "any clinical test or examination," an ALJ must determine whether they are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.104(a), (b); *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). If an examination or study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). The ALJ, as the fact-finder, must determine the probative weight to assign the examination or study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). The party challenging the validity of an examination or study has

the burden to establish it is suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

Dr. Forehand conducted an examination and the full range of testing that the regulations require, and he addressed each element of entitlement on the DOL examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 21. The ALJ properly noted that "while Dr. Forehand did not [initially] sign the [DOL examination form signature page], he did sign other portions of his report." Decision and Order at 18 n.21; *see* Director's Exhibit 21 at 8, 11, 14, 16, 17 (unpaginated). Further, as the ALJ noted, Dr. Forehand submitted a signed copy of the DOL examination form signature page in November 2019. Decision and Order at 18 n.21; *see* Director's Exhibit 22. The ALJ did not find, nor does Employer identify, anything in regard to Dr. Forehand's report that was suspect or unreliable. Thus, we affirm the ALJ's weighing of Dr. Forehand's report.

Weighing the Evidence as a Whole

We also reject Employer's assertion that the ALJ did not adequately explain how she weighed the contrary evidence or her conclusion that Claimant established complicated pneumoconiosis and invoked the presumption. The ALJ found the biopsy evidence, CT scans, and the Miner's treatment records do not outweigh the "multiple x-ray interpretations that are positive for complicated pneumoconiosis," and thus concluded Claimant established the Miner had the disease. Decision and Order at 23. Specifically, the ALJ discussed all the relevant evidence, interrelating the categories of evidence to reach a conclusion on the existence of complicated pneumoconiosis, with the burden of proof on Claimant to establish complicated pneumoconiosis by a preponderance of the evidence. As the ALJ adequately explained her credibility determinations in accordance with the APA, and her conclusion that the Miner had complicated pneumoconiosis is supported by substantial evidence, we affirm it. *See Soubik v. Director, OWCP*, 366 F.3d 226, 233 (3d Cir. 2004) (substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); *see also Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354 (3d Cir. 1997); *Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (duty of explanation under the APA is satisfied as long as the reviewing court can discern what the ALJ did and why she did it).

We further affirm, as unchallenged on appeal, the ALJ's determination that the Miner's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 24. We therefore affirm the ALJ's conclusion that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis and, therefore, the award of benefits in the miner's claim. 20 C.F.R. §718.304; Decision and Order at 24.

Commencement Date for Benefits

Finally, Employer challenges the ALJ's determination that the Miner's benefits commence in March 2019, the month of the Miner's earliest positive x-ray reading of complicated pneumoconiosis. Employer's Brief at 12-13.

The date for the commencement of benefits is the month in which the Miner 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 the Miner 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 Section 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).

The ALJ found the onset date of the Miner's total disability due to pneumoconiosis is not ascertainable from the record and thus awarded benefits commencing in March 2019, the month of the earliest x-ray evidence of complicated pneumoconiosis. Decision and Order at 25. Employer maintains benefits must commence in April 2019 as the ALJ found the interpretations of the March 2019 x-ray in equipoise. We agree.

In finding Claimant established complicated pneumoconiosis, the ALJ determined the x-ray evidence establishes the existence of the disease. 20 C.F.R. §718.304(a); Decision and Order at 13, 23. In weighing the interpretations, the ALJ found the March 1, 2019 x-ray in equipoise for complicated pneumoconiosis and the April 9, 2019 x-ray positive for complicated pneumoconiosis. *Id.* at 12.

As Employer argues, because the ALJ found the date of onset unascertainable and the interpretations of the March 1, 2019 x-ray in equipoise, the earliest the ALJ could set a commencement date for benefits in this case is April 2019. Employer's Brief at 13; *Williams*, 13 BLR at 1-30; 20 C.F.R. §725.503(b).

Notwithstanding the ALJ's error, the facts of this case do not mandate a remand for further consideration of this issue because the ALJ nevertheless rendered dispositive findings. *See Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187 (4th Cir. 2014). As discussed above, the record reflects there is no credited evidence establishing the Miner had complicated pneumoconiosis before April 2019. Thus, we conclude April 2019 is the correct commencement date for benefits and modify the ALJ's commencement date determination accordingly. *Williams*, 13 BLR at 1-30; 20 C.F.R. §725.503(b).

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the award in the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); *Skrack*, 6 BLR at 1-711.

Accordingly, the ALJ's Decisions and Order Awarding Benefits in Miner's Claim and Awarding Benefits in Survivor's Claim is affirmed, as modified to reflect a commencement date of April 2019 for the payment of benefits in the miner's claim.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge