U.S. Department of Labor

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

BRB No. 24-0174 BLA

DENVER BROCK Claimant-Respondent v. UNICORN MINING INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 04/08/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Awarding Benefits (2022-BLA-05094) filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on February 26, 2020.[1]

The ALJ credited Claimant with 21.70 years of underground coal mine employment and found he established complicated pneumoconiosis. Thus, he determined 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, and established a change in an applicable condition of entitlement.[2] 20 C.F.R. §725.309. He also found Claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203, and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis and thus invoked the Section 411(c)(3) irrebuttable

[1] This is Claimant's second claim for benefits. Director's Exhibits 1, 69. Based on the case identification number, the ALJ estimated Claimant's initial claim was filed in 1994 and noted it was administratively closed. Decision and Order at 2; Director's Exhibit 69. At the formal hearing, Claimant's counsel indicated the record from the first claim was destroyed by the Federal Records Center, where it had been held. Hearing Transcript at 5. Thus, the ALJ indicated he would proceed as if this claim were a new one and Claimant had not established any element of entitlement in his prior claim. Decision and Order 2-3; Hearing Transcript at 5.

[2] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she 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 ALJ assumed Claimant failed to establish any element of entitlement in his prior claim, Claimant had to establish at least one element of entitlement in order to obtain review of the merits of the current claim. Decision and Order at 3.

presumption.[3] Claimant and the Acting Director, Office of Workers' Compensation Programs, did not file a response.

The Benefit 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.[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, 362 (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 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). 30 U.S.C. §921(c)(3); *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 the x-ray, computed tomography (CT) scan, and medical opinion evidence supports a finding of complicated pneumoconiosis.[5] 20 C.F.R. §§718.304(a), (c); Decision and Order at 22-28.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 21.70 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

[4] 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 Exhibits 4, 5.

[5] The record does not contain any biopsy evidence. 20 C.F.R. §718.304(b).

20 C.F.R. §718.304(a) – X-Rays

The ALJ considered nine readings[6] of four chest x-rays dated December 5, 2019, December 4, 2020, June 10, 2021, and March 16, 2022. Decision and Order at 10-11, 22-24. All of the physicians who interpreted the x-rays are dually qualified as B readers and Board-certified radiologists. The ALJ noted that, in addition to being dually qualified, Dr. DePonte has been a National Institute of Occupational Safety and Health (NIOSH) Coal Workers' Surveillance Program Reader from 2013 to the present. *Id*. at 9-11, 23. He therefore found Dr. DePonte's opinion entitled to more probative weight than those from the other dually-qualified physicians because "her position on the panel of surveillance readers required additional proficiencies in radiographic classifications for pneumoconioses under the NIOSH program regulations." *Id*. at 23.

Dr. DePonte read the December 5, 2019 x-ray as positive for both simple and complicated pneumoconiosis, Category A, whereas Dr. Meyer read the x-ray as positive for only simple pneumoconiosis. Director's Exhibits 20, 24. As the ALJ found Dr. DePonte's opinion to be entitled to greater weight, he found the December 5, 2019 x-ray supportive of a finding of simple and complicated pneumoconiosis. Decision and Order at 23-24.

Drs. DePonte and Ramakrishnan both read the December 4, 2020 x-ray as positive for simple and complicated pneumoconiosis, Category A, whereas Dr. Meyer read the x-ray as positive for only simple pneumoconiosis. Director's Exhibits 14 at 16; 22; 23. As Dr. DePonte, whose opinion the ALJ gave greater probative weight, and Ramakrishnan both opined the x-ray is positive for complicated pneumoconiosis, the ALJ found the December 4, 2020 x-ray supportive of a finding of simple and complicated pneumoconiosis. Decision and Order at 24.

Dr. Crum read the June 10, 2021 x-ray as positive for simple pneumoconiosis. Claimant's Exhibit 2. He did not check the box indicating complicated pneumoconiosis but noted a "borderline" Category A opacity that could be further evaluated with a CT scan. *Id*. at 3. Dr. Kendall read the x-ray as positive for simple pneumoconiosis and negative for complicated pneumoconiosis. Director's Exhibit 27. Finding Dr. Crum's reading was uncertain as to the presence of complicated pneumoconiosis, the ALJ concluded the x-ray was positive for simple pneumoconiosis only. Decision and Order at 24.

Dr. DePonte read the March 16, 2022 x-ray as positive for both simple and complicated pneumoconiosis, Category A, whereas Dr. Seaman read the x-ray as positive

[6] Dr. Lundberg read the December 4, 2020 x-ray for quality purposes only and found the x-ray to be acceptable. Director's Exhibit 17.

for only simple pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 1. As the ALJ found Dr. DePonte's reading to be entitled to greater weight, he found the March 16, 2022 x-ray supportive of a finding of simple and complicated pneumoconiosis. Decision and Order at 24.

Because the ALJ found three of the x-rays to be positive for simple and complicated pneumoconiosis and only one x-ray negative for complicated pneumoconiosis, he concluded the preponderance of the x-ray evidence is positive for complicated pneumoconiosis at 20 C.F.R. §718.304(a). Decision and Order at 24.

Employer asserts the ALJ failed to satisfy the explanatory requirements of the Administrative Procedure Act (APA)[7] by assigning additional probative weight to Dr. DePonte's opinions without also assessing the credentials of the other interpreting physicians. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); Employer's Brief at 9-13. Employer further argues the ALJ erred in weighing Dr. Crum's reading of the June 10, 2021 x-ray and indicates that he similarly erred when evaluating Dr. Ramakrishnan's notes on the December 4, 2020 x-ray. Employer's Brief at 7-9, 14. Employer's arguments have merit, in part.

Initially, we reject Employer's argument that the ALJ substituted his opinion for those of the medical experts when weighing the x-ray readings of Drs. Crum and Ramakrishnan. Employer's Brief at 3, 7-9, 14 n.2. Contrary to Employer's arguments, the ALJ did not consider Dr. Crum's interpretation as "tantamount to a complicated pneumoconiosis diagnosis." Employer's Brief at 8-9; *see* Decision and Order at 24. While weighing the readings of the June 10, 2021 x-ray, the ALJ noted Dr. Crum's interpretation "show[ed] uncertainty regarding the presence of complicated pneumoconiosis" and that Dr. Kendall found the x-ray to be negative for complicated pneumoconiosis. Decision and Order at 24. The ALJ indicated he "credited only one physician's interpretation, which was negative for complicated pneumoconiosis." *Id.* As Dr. Kendall provided the only negative complicated pneumoconiosis reading of the June 10, 2021 x-ray, it is evident that the ALJ was referring to his interpretation. *Id.*; *see* Director's Exhibit 27.

Further, contrary to Employer's assertion, we see no error with the ALJ's determination that it is unclear whether Dr. Ramakrishnan "intended to check the 'cg' box for 'calcified non-pneumoconiotic nodules' or to circle 'ca' notating cancer." Decision

[7] The Administrative Procedure Act provides that every adjudicatory decision must include "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).

and Order at 27 n.187; *see* Decision and Order at 10 n.62; Employer's Brief at 14 n.2; Director's Exhibit 22 at 3. As the ALJ noted, Dr. Ramakrishnan did not otherwise mention a cancer finding or recommend a physician follow-up to exclude a cancer diagnosis; rather, in the "other comments" section, he noted his observation of an "A opacity right upper zone superimposed anterior. Right 3rd rib + 3rd interspace." Decision and Order at 10 n.62 (quoting Director's Exhibit 22).

The ALJ permissibly found these inconsistencies did not detract from Dr. Ramakrishnan's unambiguous diagnosis of complicated pneumoconiosis. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); Decision and Order at 10 n.62. Moreover, even if, as Employer suggests, the ALJ erred in questioning Dr. Ramakrishnan's cancer notation, Employer does not explain how that error would have made any difference in his weighing of the evidence relevant to complicated pneumoconiosis. *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"); Employer's Brief at 14 n.2.

We agree with Employer's argument, however, that the ALJ did not adequately explain his decision to give additional weight to Dr. DePonte's opinions. Employer's Brief at 9-13. While the ALJ correctly noted that each reader is dually qualified, he failed to discuss the additional credentials of any of the physicians other than Dr. DePonte.[8] Decision and Order at 23. Although an ALJ has discretion to give greater weight to the opinions of an expert with qualifications he finds superior to those of the other x-ray readers, *see Melnick*, 16 BLR at 1-36-37; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-154 (1989) (en banc), he still must consider all the relevant evidence and apply the same level of scrutiny in determining the credibility of each physician. 30 U.S.C. §923(b); *see Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999) (en banc). Because the ALJ failed to consider the respective credentials of each physician, his findings at 20 C.F.R. §718.304(a) do not satisfy the APA. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); s*ee Director, OWCP v. Rowe*, 710 F.2d 251, 255-56 (6th Cir. 1983); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); Decision and Order at 23.

[8] Employer states the record supports that Drs. Meyer and Seaman "are both professors of radiology with prestigious appointments[,] . . . dozens of relevant publications, and robust clinical practices." Employer's Brief at 10-11. In addition, Dr. Seaman is an instructor in the ACR NIOSH B Reader Training and Examination Course, and Dr. Meyer was a co-director of that course. *Id*. at 11.

We therefore vacate the ALJ's finding that the x-ray evidence supports a finding that Claimant has complicated pneumoconiosis at 20 C.F.R. §718.304(a).[9] Decision and Order at 23.

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

CT Scan

The ALJ considered a September 21, 2021 CT scan, conducted during Claimant's treatment, which Dr. Ayos interpreted. Decision and Order at 25. Dr. Ayos observed a "noncalcified nodule in the right upper lobe measuring 4.1 x. 2.0 x 1.4 cm." Claimant's Exhibit 3. The ALJ noted Dr. Ayos did not make a specific finding as to the existence of pneumoconiosis but found the reading consistent with Drs. DePonte's and Ramakrishnan's x-ray interpretations of a large opacity in the right upper lung and supportive of Dr. Crum's identification of a "borderline" "A" opacity in the right lung. Decision and Order at 25. Thus, the ALJ determined that, although the CT scan evidence is inconclusive as to the presence of complicated pneumoconiosis, it supports the affirmative x-ray evidence. *Id.*

Employer argues the ALJ erred in finding the CT scan nevertheless supported the affirmative x-ray evidence. Employer's Brief at 13-15.

Although an ALJ has discretion to determine the weight to accord diagnostic testing that is silent on the existence of pneumoconiosis, *see Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984), because the ALJ's weighing of the x-ray evidence affected his weighing of the CT scan, we must also vacate his finding that the CT scan supports the presence of the large opacity diagnosed in the x-ray readings. 20 C.F.R. §718.304(c); Decision and Order at 25.

Medical Opinions

The ALJ considered the medical opinions of Drs. Forehand, Rosenberg, and Vuskovich. Decision and Order at 26-28. Dr. Forehand opined Claimant has complicated pneumoconiosis with progressive massive fibrosis based on the x-ray evidence and Claimant's employment history. Director's Exhibit 14 at 4. Dr. Rosenberg opined Claimant has simple clinical pneumoconiosis without progressive massive fibrosis.

[9] We reject Employer's contention that the ALJ improperly performed a headcount of the x-ray evidence as his findings incorporated both a qualitative and quantitative analysis. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); *see* Decision and Order at 22-24; Employer's Brief at 12-13.

Director's Exhibit 29 at 5. Dr. Vuskovich opined Claimant does not have complicated pneumoconiosis, reasoning that Drs. Meyer, Kendall, Crum, and Seaman did not find complicated pneumoconiosis on the x-rays they interpreted. Employer's Exhibit 4 at 13. He also opined the opacity on Claimant's CT scan was likely an "old scar, or new air space disease such as pneumonia." *Id*. at 12. The ALJ found that Drs. Rosenberg's and Vuskovich's opinions were contrary to his finding that the x-ray interpretations support a finding of complicated pneumoconiosis. Decision and Order at 27-28.

Employer contends the ALJ erred in his consideration of the medical opinions by crediting or discrediting opinions based upon whether they were consistent with his x-ray evidence findings. Employer's Brief at 17-20. Because the ALJ's erroneous weighing of the x-ray evidence may have influenced his credibility determinations regarding the medical opinion evidence, we must also vacate these findings. 20 C.F.R. §718.304(c). Consequently, based on the ALJ's errors, we vacate his finding that Claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(c) based on a consideration of the evidence as a whole. 20 C.F.R. §718.304; *see Melnick,* 16 BLR at 1-33-34; Decision and Order at 10-14. We therefore vacate the ALJ's finding that Claimant invoked the irrebuttable presumption, his determination that Claimant's complicated pneumoconiosis arose out of his coal mine employment, and the award of benefits. 20 C.F.R. §718.203(b); Decision and Order at 14-16.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant has established complicated pneumoconiosis. In weighing the x-ray evidence, the ALJ must resolve the conflicts in the readings of each individual x-ray and then reach an overall finding as to whether the x-ray evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.202(a)(1). In assessing the credibility of the readings, the ALJ must consider the readers' qualifications, analyze their notations on the International Labour Organization (ILO) x-ray forms that tend to either support or undermine their readings, and resolve conflicts in the evidence, prior to reaching a conclusion as to whether the x-ray evidence supports a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(a). *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016) (ALJ must perform both a qualitative and quantitative analysis of conflicting x-ray evidence).

He must also reconsider whether the CT scans, medical opinions, and any other evidence, including Claimant's treatment records,[10] support a finding of complicated

[10] On remand, the ALJ should also address Employer's arguments that the ALJ erred in not also counting as negative x-rays those interpretations in Claimant's treatment records that are silent as to the existence of complicated pneumoconiosis and in not discussing that

pneumoconiosis. 20 C.F.R. §718.304(b), (c). Finally, he must weigh all the relevant evidence together to determine if the evidence as a whole establishes complicated pneumoconiosis. 20 C.F.R. §718.304; *see Melnick*, 16 BLR at 1-33-34. In reaching all his determinations on remand, the ALJ must adequately explain the bases for his findings of fact and conclusions of law in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

If the ALJ determines Claimant has established the existence of complicated pneumoconiosis, thus invoking the Section 411(c)(3) presumption, Claimant also will have established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The ALJ must then reconsider whether Claimant has established the disease arose out of his coal mine employment. 20 C.F.R. §718.203(b). If the ALJ finds Claimant has established his complicated pneumoconiosis arose out of his coal mine employment, he may reinstate the award of benefits.

If Claimant cannot establish complicated pneumoconiosis, the ALJ must address whether Claimant has established total disability and a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b), 718.305(b), 725.309. If Claimant establishes total disability, he will have invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[11] 30 U.S.C. §921(c)(4), and the ALJ must then determine whether Employer has rebutted the presumption. *See* 20 C.F.R. §718.305(d). If the ALJ finds Claimant is not totally disabled by a respiratory or pulmonary impairment, he must deny benefits, as Claimant will have failed to establish a necessary element of entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). In rendering all of his findings on remand, the ALJ must comply with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Dr. DePonte's earlier treatment x-ray readings were negative for complicated pneumoconiosis. Employer's Brief at 12-13; *see Marra*, 7 BLR at 218-19 (ALJ has discretion to conclude whether treatment x-rays that are silent as to the presence of pneumoconiosis are probative of its absence).

[11] Section 411(c)(4) 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.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Awarding Benefits, and we remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge