U.S. Department of Labor

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

BRB Nos. 20-0285 BLA
and 20-0300 BLA

JOYCE MULLINS (o/b/o and Widow of WILLIAM R. MULLINS)	)	
Claimant-Respondent	)	
v.	)	
ICG HAZARD, LLC	)	
	)	DATE ISSUED: 08/31/2021
and	)	
ARCH RESOURCES, INCORPORATED	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order Awarding Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

Ann Marie Scarpino (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

BUZZARD, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge Jason A. Golden's Decision and Order Awarding Benefits (2016-BLA-05032 and 2019-BLA-05599) rendered on claims filed 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 May 19, 2014,[1] and a survivor's claim filed on November 27, 2018.[2]

The administrative law judge credited the Miner with twenty-seven years of coal mine employment based on Employer's concession, and found Claimant established complicated pneumoconiosis and invoked the irrebuttable presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). He also found the Miner's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203(b), and thus awarded benefits. In the survivor's claim, the administrative law judge found Claimant is entitled to derivative benefits pursuant to Section 422(*l*) of the Act. 30 U.S.C. §932(*l*) (2018).

[1] Administrative Law Judge Christopher Larsen awarded the Miner benefits on December 26, 2017. Upon Employer's appeal, the Benefits Review Board remanded the case for further proceedings in light of *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). *Mullins v. ICG Hazard, LLC*, BRB No. 18-0170 BLA (Apr. 30, 2018) (Order) (unpub.). The Miner died on October 8, 2018, while his case was on remand before the Office of Administrative Law Judges. Survivor's Claim (SC) Director's Exhibit 6; Hearing Transcript at 29. Subsequently, Claimant, the Miner's widow, filed her survivor's claim. SC Director's Exhibit 2. Her claim and the miner's claim were consolidated and assigned to Judge Golden, who conducted a hearing on October 22, 2019. May 21, 2019 Notice of Assignment at 1; Hearing Transcript at 4.

[2] Claimant is pursuing the miner's claim on her husband's behalf, along with her own survivor's claim. Hearing Transcript at 4.

On appeal, Employer challenges the constitutionality of the Affordable Care Act (ACA) and its reinstatement of the Section 411(c)(4) presumption and automatic survivor entitlement under Section 422(*l*).[3] It also argues the administrative law judge erred in finding the Miner had complicated pneumoconiosis. Claimant responds in support of the awards of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to decline to address Employer's constitutional argument because the administrative law judge did not rely on the Section 411(c)(4) presumption in awarding benefits in the miner's claim.[4] Employer replied to Claimant's and the Director's briefs. In response to the Director's position, Employer contends the Board must address its constitutional challenges to the ACA because they pertain to the administrative law judge's reliance on Section 422(*l*) of the Act in awarding survivor's benefits. Employer also reiterates its argument that Claimant did not establish complicated pneumoconiosis.[5]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had 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. 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).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established twenty-seven years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17.

[5] On December 10, 2020, the Board granted Employer's request for an extension to file a reply brief within ten days of its Order. *Mullins v. ICG Hazard, LLC*, BRB Nos. 20-0285 BLA and 20-0300 BLA (Dec. 10, 2020) (Order) (unpub.). Employer filed its reply brief with a January 13, 2021 certificate of service and informed the Board it did not receive the Board's December 10 order until January 5, 2021. In light of the above, we accept Employer's reply brief. 20 C.F.R. §802.217.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 34.

into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359, 361-62 (1965).

Constitutionality of the ACA

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 2 n.2, 18-21. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, U.S. , No. 19-840, 2021 WL 2459255 at *10 (Jun. 17, 2021.).

The Miner's Claim - Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner was totally disabled due to pneumoconiosis at the time of his death if he suffered 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 administrative law judge 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).

Employer contends the administrative law judge erred in finding Claimant established complicated pneumoconiosis based on the x-ray and medical opinions, and in considering the evidence as a whole.[7] 20 C.F.R. §718.304(a), (c). We disagree.

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

[7] The administrative law judge noted the record contains no biopsy or autopsy evidence, and thus Claimant could not establish the Miner had complicated pneumoconiosis based on those types of evidence. 20 C.F.R. §718.304(b); Decision and Order at 16.

The administrative law judge considered eleven interpretations of four x-rays 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 6-11. He found the physicians equally qualified to interpret x-rays for the presence of pneumoconiosis and noted all of them found the Miner had at least simple pneumoconiosis but disagreed as to the presence of complicated pneumoconiosis. Decision and Order at 10.

Drs. Crum and DePonte read the July 23, 2014 x-ray positive for complicated pneumoconiosis, Category A,[8] while Dr. Seaman read it as negative for complicated pneumoconiosis. Director's Exhibits 14, 18; Claimant's Exhibit 4. In resolving the conflict in these readings, the administrative law judge observed correctly that while Dr. Seaman identified simple pneumoconiosis on the International Labour Organization (ILO) form, profusion 1/0, she stated in her narrative report that there were no "[n]o radiographic findings consistent with coal worker[s'] pneumoconiosis." Director's Exhibit 18 at 3. The administrative law judge found Dr. Seaman's conflicting statements "detract[] from the overall weight to which her interpretation [of the July 23, 2014 x-ray] is entitled." Decision and Order at 11. He thus gave controlling weight to the preponderance of the positive readings by the dully-qualified physicians. *Id*. Because the administrative law judge properly conducted both a qualitative and quantitative analysis, taking into consideration the physicians' radiological qualifications, we affirm his finding that the July 23, 2014 x-ray is positive for complicated pneumoconiosis.[9] *See 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).

The administrative law judge found the three remaining x-rays, dated March 19, 2015, September 7, 2016, and September 20, 2016, each had an equal number of positive

[8] Dr. DePonte also reviewed the July 23, 2014 x-ray to assess its film quality. Director's Exhibit 14 at 1.

[9] We reject Employer's unsubstantiated argument that Dr. Seaman's conflicting statements were due to a typographical or scrivener's error. As the administrative law judge found, Dr. Seaman diagnosed simple pneumoconiosis on the ILO form but stated the opposite in her narrative report. Employer's Brief at 12, 16. The administrative law judge was not required to infer that Dr. Seaman's inconsistency was simply typographical; rather, he acted within his discretion in finding her diagnoses not credible based on the actual, conflicting statements she made.

and negative readings by dually-qualified physicians.[10] Thus, he found the readings of those x-rays in equipoise and, therefore, inconclusive as to the existence of complicated pneumoconiosis. Decision and Order at 11. Finding one x-ray positive for complicated pneumoconiosis and three inconclusive, the administrative law judge concluded Claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(a). *Id*. We affirm the administrative law judge's determination as it is supported by substantial evidence. *See* 20 C.F.R. §718.304(a); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); Decision and Order at 10-11.

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

Dr. Crum's CT scan reading and treatment record CT scans

Dr. Crum read an October 6, 2016 computed tomography (CT) scan as positive for "small opacities . . . consistent with dust exposure," but revealing "no definitive evidence of large opacit[ies]." Claimant's Exhibit 9. The administrative law judge gave it little weight because he found insufficient evidence in the record to establish the "medical acceptability and relevance" of the CT scan. 20 C.F.R. §718.107(b); Decision and Order at 11-12; Claimant's Exhibit 9. Employer asserts the administrative law judge's rationale is flawed, because when Dr. Crum read the July 23, 2014 x-ray as positive for complicated pneumoconiosis, he also stated that a CT scan "could confirm" his diagnosis. Employer's Brief at 10-11. Employer thus argues the administrative law judge should have found Dr. Crum's CT scan reliable and credited his identification of "no definitive evidence" of large opacities over his earlier identification of large opacities on x-ray. *Id*. at 11. We disagree.

As the trier-of-fact, the administrative law judge has the discretion to assess the credibility of the medical evidence and assign it weight; the Board may not reweigh the evidence or substitute its own inferences for the administrative law judge's. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Unlike x-ray evidence, which must be "conducted and classified in accordance with" specific regulatory criteria, *see* 20 C.F.R. §§718.102, 718.202, CT scans are considered "other medical evidence" pursuant to

[10] Drs. Crum and DePonte read the March 19, 2015 x-ray as positive for complicated pneumoconiosis with a Category A opacity, while Drs. Tarver and Seaman interpreted it as negative for complicated pneumoconiosis. Director's Exhibit 16; Employer's Exhibit 1; Claimant's Exhibits 3, 10. Dr. Crum read the September 7, 2016 and September 20, 2016 x-rays as positive for complicated pneumoconiosis with a Category A opacity, while Dr. Tarver read the same x-rays as negative for complicated pneumoconiosis. Claimant's Exhibits 1, 2; Employer's Exhibit 3, 4.

20 C.F.R. §718.107, for which the Department of Labor has not developed any quality standards. Instead, for "other medical evidence" such as a CT scan to constitute credible proof of the presence or absence of pneumoconiosis, the party submitting it must "demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(b). Thus, under the regulation, a party may submit a CT scan despite the lack of regulatory quality standards – but only if "the submitter satisfies the adjudicator as to its reliability and relevance." 79 Fed. Reg. 21,606, 21,608 (Apr. 17, 2014).

While CT scans are commonly submitted in black lung claims, the Board has explicitly rejected the argument that *all* CT scans are automatically medically acceptable, instead reaffirming that the regulation requires the administrative law judge to determine on a case-by-case basis whether the party proffering the CT scan has established both its medical acceptability and its relevance. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-132-33 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc); *see also Harris v. Old Ben Coal Co.*, 24 BLR 1-13, 1-16-17 (2007) (en banc recon.) (McGranery and Hall, JJ., concurring and dissenting), *aff'g* 23 BLR 1-98 (2006) (en banc) (McGranery and Hall, JJ., concurring and dissenting).

Contrary to Employer's argument, the administrative law judge was not required to find that burden met based on Dr. Crum's statement that the first positive x-ray "could be confirmed" by CT scan.[11] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (administrative law judge has broad discretion in evaluating the medical evidence). While

[11] Our dissenting colleague agrees with this argument, positing that a CT scan will meet the requirements of 20 C.F.R. §718.107 anytime a physician recommends one be taken. Under this analysis, it is difficult to envision any CT scan – or any medical test for that matter – failing to automatically meet the regulatory criteria for reliability. The Department of Labor, however, has explicitly rejected such an approach and instead requires certain tests such as x-rays to meet specific regulatory quality standards, and "other medical evidence" such as CT scans to be accompanied by evidence of its medical acceptability and relevance. To conclude that every medical test is reliable simply because it was done at the direction of a physician would in effect eliminate the requirements of the regulations. While our dissenting colleague disputes this characterization of his position, he confirms this very point by concluding that because Dr. Crum recommended a CT scan, a "reasoning mind" would find the later CT scan relevant. But the administrative law judge did not ignore that Dr. Crum read the CT scan; he permissibly declined to give it greater weight than Dr. Crum's positive x-ray reading because the record lacks sufficient evidence of the scan's reliability in accordance with the regulatory criteria.

that statement may address the relevance of obtaining a CT scan – to "confirm" the earlier x-ray diagnosis – it does not address the reliability of the CT scan Dr. Crum later interpreted.[12] The administrative law judge was neither required to accept Dr. Crum's statement as sufficient proof that the later CT scan is reliable nor credit that CT scan over Drs. Crum's and DePonte's readings of the July 23, 2014 x-ray, which were conducted in conformance with the regulatory quality standards and were found to be positive for large opacities of complicated pneumoconiosis.[13] The administrative law judge acted within his discretion in concluding that Dr. Crum's interpretation of the CT scan lacked adequate information to satisfy the requirements of 20 C.F.R. §718.107(b), and thus was entitled to little weight, as no party proffered evidence as to whether it was medically acceptable. 20 C.F.R. §718.107(b); *Webber*, 23 BLR at 1-132-33; Decision and Order at 11-12; Claimant's Exhibit 9. Consequently, we reject Employer's argument.

Regarding CT scans in the Miner's treatment records that did not include any findings of complicated pneumoconiosis,[14] the administrative law judge permissibly

[12] Our dissenting colleague alleges it was inconsistent or contradictory for the administrative law judge to find Dr. Crum's x-ray readings reliable while discrediting his CT scan as unreliable. To the contrary, the administrative law judge's analysis simply reflects a proper application of the regulatory standards. There is no dispute that Dr. Crum's x-ray readings were conducted in conformance with the regulatory quality standards at 20 C.F.R. §718.102 and to ILO specifications; meanwhile, the administrative law judge permissibly concluded there is insufficient evidence to establish the reliability of the CT scan as "other medical evidence" at 20 C.F.R. §718.107. Further, that the administrative law judge found Dr. Crum well-qualified to interpret x-rays does not automatically establish that his later CT scan is reliable; radiological qualifications are but one factor an administrative law judge must consider in determining the credibility of radiological evidence.

[13] We also note that in addition to the July 23, 2014 x-ray, Dr. Crum consistently interpreted the March 19, 2015, September 7, 2016, and September 20, 2016 x-rays as positive for complicated pneumoconiosis. Our dissenting colleague gives the mistaken impression that Dr. Crum specifically renounced his earlier x-ray diagnoses of complicated pneumoconiosis after reading the October 6, 2016 CT scan. Claimant's Exhibit 9. His CT scan interpretation, however, does not reference his x-ray diagnoses or attempt to compare his different findings. *Id*.

[14] The administrative law judge noted a January 28, 2015 CT scan showed evidence of scarring in the lungs, pleural thickening, and emphysematous bullae, but no evidence of a discrete mass, pneumothorax, or pleural effusion. Decision and Order at 12; Employer's

accorded them little weight because the qualifications of the interpreting physicians are unknown.[15] *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255; Decision and Order at 12-13; Claimant's Exhibit 5; Employer's Exhibits 5, 6, 14.

Medical Opinion Evidence and Treatment Records

The administrative law judge also considered three medical opinions that the parties designated, as well as physician notes and x-ray readings in the Miner's treatment records. He credited the opinions of Drs. Vernon, Nader, and Sood that the Miner had complicated pneumoconiosis,[16] and found the treatment records of little probative value as to whether the Miner had the disease. Decision and Order at 15-16; Director's Exhibits 14, 15; Claimant's Exhibits 2, 6.

Employer argues the administrative law judge should have credited the treatment records, which do not include diagnoses of complicated pneumoconiosis, as evidence refuting the positive x-ray evidence he credited at 20 C.F.R. §718.304(a). Employer's Brief at 14-15. We disagree. The administrative law judge noted correctly that the treatment records include diagnoses of numerous conditions affecting the Miner's lungs, but are silent with regard to the etiology of these conditions. Decision and Order at 14. He also permissibly found the "diagnoses of pneumoconiosis and black lung [in the treatment

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Exhibit 5. The administrative law judge summarized CT scans dated December 13, 2016, September 20, 2017, May 11, 2018, September 12 and 27, 2018, and October 1, 2018, as reflective of interstitial lung disease, pulmonary fibrosis, and progression of ground glass opacities in the upper and lower lobes, with no pulmonary embolism. Decision and Order at 12; Employer's Exhibit 14 at 11, 19, 68-69, 72-73, 78, 87, 101, 108.

[15] Here again, our dissenting colleague sees inconsistency or contradiction where none exists. The administrative law judge did not credit the treatment record CT scans simply because physicians interpreted them. He *rejected* them because the physicians' qualifications were not in the record. Having found the treatment record CT scans *and* Dr. Crum's October 6, 2016 CT scan unreliable for separate, permissible reasons, there is no basis to conclude the administrative law judge treated them in an inconsistent or disparate manner.

[16] The administrative law judge found that Dr. Dahhan did not address whether Claimant has complicated pneumoconiosis. Decision and Order at 16; Director's Exhibit 15 at 3-5.

records] are unsupported by adequate explanation of the bases for such diagnoses" and were of limited probative value because they neither support nor refute that the Miner had complicated pneumoconiosis. *Id.*; *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012) (administrative law judge's function is to weigh the evidence, draw appropriate inferences, and determine credibility); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984) (administrative law judge is not required to find an x-ray that is silent on the existence of pneumoconiosis is a negative reading). Similarly, the administrative law judge permissibly gave little weight to the treatment record x-rays because the qualifications of the interpreting physicians are unknown and the readings are silent regarding the presence or absence of pneumoconiosis.[17] *See Rowe*, 710 F.2d at 255; *Marra*, 7 BLR at 1-218-19; Decision and Order at 10; Employer's Brief at 17-18. We therefore affirm the administrative law judge's finding that the treatment record x-rays do not refute the ILO-classified x-rays from dually-qualified radiologists showing complicated pneumoconiosis.[18] Decision and Order at 10-16.

Lastly, Employer argues the administrative law judge erred in crediting the opinions of Drs. Vernon, Nader, and Sood that the Miner had complicated pneumoconiosis because they relied on the positive x-ray evidence. Employer's Brief at 7-8; *see* Director's Exhibits 14, 15; Claimant's Exhibits 2, 6. Having affirmed the administrative law judge's finding that Claimant established complicated pneumoconiosis based on the x-ray evidence, Employer's argument is without merit. Decision and Order at 15-16. We therefore affirm the administrative law judge's determination that the medical opinions support a finding that the Miner had complicated pneumoconiosis. 20 C.F.R. §718.304(c).

[17] The administrative law judge considered the treatment x-rays from 2012 through 2018. Decision and Order at 7-10; Claimant's Exhibit 5; Employer's Exhibits 5, 6, 14. He noted one film showed "[p]robable diffuse interstitial lung disease without evidence of confluent pneumonia." Decision and Order at 8; Claimant's Exhibit 5 at 18-20. He summarized three other treatment x-rays as showing "[n]o evidence of acute infiltrates." Decision and Order at 7; Employer's Exhibits 5, 6. He also summarized five other treatment x-rays showing changes consistent with pulmonary fibrosis. Decision and Order at 9-10; Employer's Exhibit 14 at 77, 95, 106, 113, 121.

[18] We reject Employer's argument that the administrative law judge erred in weighing the treatment x-rays with the x-rays that the parties designated. Employer's Brief at 17. Though he summarized all x-ray readings in one chart, the administrative law judge properly considered the parties' x-ray evidence at 20 C.F.R. §718.304(a) and the treatment x-rays at 20 C.F.R. §718.304(c). Decision and Order at 7-10.

Conclusion on Complicated Pneumoconiosis

Weighing all of the evidence together, the administrative law judge permissibly found the CT scan evidence and the Miner's treatment records insufficient to refute the positive x-ray findings by Drs. Crum and DePonte and the medical opinions diagnosing complicated pneumoconiosis. *See Rowe*, 710 F.2d at 255; Decision and Order at 16. As it is supported by substantial evidence, we affirm his determination that Claimant established the Miner had complicated pneumoconiosis. 20 C.F.R. §718.304(a), (c).

We further affirm, as unchallenged, the administrative law judge's finding that the Miner's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16-17. Thus, we affirm the administrative law judge's determination that Claimant invoked the irrebuttable presumption that the Miner was totally disabled due to pneumoconiosis and therefore affirm the award of benefits in the miner's claim. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 17.

Survivor's Claim

The administrative law judge found Claimant satisfied the eligibility requirements for derivative survivor's benefits pursuant to Section 422(*l*) of the Act. 30 U.S.C. §932(*l*) (2018); Decision and Order at 17-18. Employer raises no specific error with that finding other than to assert that the administrative law judge erred in awarding benefits in the miner's claim. Having affirmed the administrative law judge's award of benefits in the miner's claim, we affirm his determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(l) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 17-18.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur.

DANIEL T. GRESH
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the ALJ's finding of complicated pneumoconiosis and would remand for the ALJ to further explain his basis for crediting Dr. Crum's reading of the July 23, 2014 x-ray. Under the ALJ's rationale, Dr. Crum's interpretation of it is dispositive: relying on his identification of a large opacity of complicated pneumoconiosis the ALJ found it positive for the disease while finding the three other x-rays inconclusive; the ALJ further found the July 23, 2014 x-ray outweighed the other evidence of record. Decision and Order at 10-11, 16.

As Employer states, however, Dr. Crum indicated on the ILO form the presence of the opacity "[c]ould be confirmed with C.T. scan." Director's Exhibit 14 at 7; *see* Employer's Brief at 8. And upon reviewing an October 6, 2016 CT scan -- *after* offering his interpretations of the x-rays predating it -- Dr. Crum concluded "no definitive evidence" of a large opacity could be identified. Claimant's Exhibit 9. Finding that Dr. Crum did not establish that CT scans are generally medically acceptable and relevant in this particular case under 20 C.F.R. § 718.107, that Claimant did not otherwise establish either point, and that the Department of Labor has rejected the view CT scans are "sufficiently reliable that a negative result effectively rules out the existence of pneumoconiosis," the ALJ

acknowledged Dr. Crum's reading but -- without any further elaboration -- gave it "little weight." Decision and Order at 11-12, 13 (citation omitted).

He therefore did not discuss whether it diminished Dr. Crum's controlling x-ray reading. Decision and Order at 6-11, 16. But his reasons for doing so should not be affirmed.

Section 718.107 states "[t]he results of any medically acceptable test or procedure reported by a physician" not subject to the quality standards that "tends to demonstrate the presence or absence of pneumoconiosis" "shall be given appropriate consideration." 20 C.F.R. §718.107(a). The regulation places the burden to establish the general medical acceptability and specific relevance of a test in a particular claim on the party submitting it. 20 C.F.R. § 718.107(b).[19]

While an ALJ has discretion in determining the acceptability of CT scans, *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-132-33 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc), that discretion is not unlimited: the basis to admit or exclude evidence must be rational and consistent. *See, e.g.*, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc) (ALJ's evidentiary rulings are reviewed for abuse of discretion); *Gilaj v. Gonzales*, 408 F.3d 275, 288 (6th Cir.2005) (a tribunal abuses its discretion when it acts "in a way that is arbitrary, irrational, or contrary to law.") (citation omitted) Similarly, the weight an ALJ affords a medical procedure in the record must be supported by substantial evidence. *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005) (In deciding whether to affirm an ALJ's credibility finding, "we consider whether the ALJ adequately explained the reasons for crediting

[19] Significantly, Employer did not have the burden to establish the acceptability and relevance of CT scans; Claimant offered the CT scan reading. Director's Exhibit 14 at 7; Claimant's Exhibit 9. Regardless of the general medical acceptability of CT scans, Dr. Crum's statement that one would confirm his diagnosis demonstrates he considered the procedure medically appropriate and intrinsically relevant to *his* x-ray reading. Claimant's Exhibit 9. Employer therefore is under no burden to establish either to argue the ALJ's decision, which ignored that evidence, is inconsistent and incomplete. *See* 30 U.S.C. § 923(b) (all relevant evidence must be considered); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (en banc) (same).

certain testimony and documentary evidence over other testimony and documentary evidence.").

The ALJ's reasoning on the general reliability and relevance of the CT scans is neither rational nor consistent, and substantial evidence does not support the weight he gave Dr. Crum's July x-ray interpretation. It is irrational to credit an x-ray reading based on the radiological qualifications and expertise of a reader, but then to refuse to consider that reader's statement that the follow-up radiological procedure he recommended to confirm his diagnosis complicates his reading. It is inconsistent to infer, as the ALJ did here, that the CT scans in the miner's treatment records -- including the CT scan read by Dr. Crum -- formed "a reliable basis for making decisions regarding diagnosis and treatment of the Miner's condition," but then to conclude that CT scans generally are not medically acceptable to "demonstrate the presence of pneumoconiosis" or relevant in this particular case. Decision and Order at 13. And it is incorrect to find, as the majority does, that the ALJ's weighing of the x-ray evidence, and the evidence as a whole, is supported by substantial evidence when the ALJ's consideration of it ignores such an obvious conflict. *Ligon Preparation Co.,* 400 F.3d at 305 ("Substantial evidence is defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion."). Since the ALJ's rationale makes Dr. Crum's reading of the July 23, 2014 x-ray the key to deciding this case, these errors are not harmless.

I therefore would remand for the ALJ to consider the effect of Dr. Crum's CT scan interpretation on his reading of the July 23, 2014 x-ray and, if he finds it diminishes it, to reweigh the x-ray evidence and the evidence as a whole. But Dr. Crum's statement that the CT scan does not definitively establish the presence of a large opacity does not in itself require reversal of the ALJ's finding the Miner suffered from complicated pneumoconiosis. Claimant's burden is to establish it more likely than not he suffered from the disease; she not need prove it as a certainty. *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). Thus even if fully credited, Dr. Crum's statement the CT scan does not "definitively" establish a large opacity does not dictate a reversal. But the credibility and effect of his statement cannot be ignored in this context and must be weighed by the ALJ in the first instance. 30 U.S.C. § 923(b) (all relevant evidence must be considered); 20 C.F.R. §718.107 (medically acceptable and relevant tests and procedures "shall be given appropriate consideration"); *Dempsey v. Sewell Coal Corp.,* 23 BLR 1-47 (2004) (en banc). Dr. DePonte's comment that the opacity she identified on the same July 2014 x-ray is "subtle" and her notation to

therefore "correlate [it] with CT" are similarly relevant to Dr. Crum's CT scan reading. Claimant's Exhibit 4. *Id.* [20]

In addition to vacating and remanding on the Section 411(c)(3) presumption, I would instruct the ALJ on remand to consider whether the Miner is entitled to benefits

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[20] Notably, the majority opinion mischaracterizes this dissent by suggesting it holds: 1) that a CT scan should be considered acceptable and relevant any time a physician requests one; 2) that the ALJ was not entitled to give the physicians' readings of the CT scans in the treatment records little weight based on the lack of evidence of their credentials; and 3) that by considering Dr. Crum's CT scan statement in conjunction with his x-ray readings this opinion gives "the impression" the ALJ would be required to reverse his finding the Miner suffered from of complicated pneumoconiosis. None of that is true.

First, context matters. The ALJ was not required to find CT scans generally medically acceptable and relevant because Dr. Crum merely suggested in an x-ray reading that a follow-up CT scan would confirm his diagnosis. Rather, he was required to do so because Dr. Crum subsequently performed that CT scan reading, found no definitive evidence of an opacity, and Claimant offered that CT scan into evidence. A reasoning mind thus would find Dr. Crum's acknowledgement highly relevant in evaluating the x-ray the ALJ found controlling, particularly where the ALJ further found CT scans reliable for the diagnosis and treatment of Claimant's condition in evaluating the treatment records. *Martin v. Ligon Preparation Co.,* 400 F.3d 302, 305 (6th Cir. 2005). It is hard to see how those facts do not satisfy the acceptability and relevancy requirements of 20 C.F.R. § 718.107, and the ALJ never so explained.

Second, the question of whether CT scans have a sufficient foundation to be considered generally medically acceptable and relevant in a given case is a separate inquiry from the amount of weight the readings are entitled once that foundation is established. The ALJ first found the treatment CT scans in this case formed "a reliable basis for making decisions regarding diagnosis and treatment of the Miner's condition," but then gave their specific readings "little weight" because of the lack of evidence of the treating physicians' credentials. I agree with the majority to affirm those findings as within the ALJ's discretion. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). But those findings do not include Dr. Crum's credentials or the credibility of his CT scan reading, which the ALJ effectively ignored given his threshold misapplication of 20 C.F.R. § 718.107. *Ligon Preparation Co.,* 400 F.3d at 305.

Finally, as noted, Dr. Crum's statement does not compel a reversal on the existence of complicated pneumoconiosis, nor necessarily discredit his reading of any of the x-rays

under the 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018). Employer concedes the Miner had twenty-seven years of coal mine employment. Decision and Order at 17; Hearing Transcript at 39. All of the physicians agree the Miner suffered from simple clinical pneumoconiosis. Decision and Order at 10. If Claimant can establish the Miner was regularly exposed to coal dust or worked underground for at least fifteen years, and that he was totally disabled by a respiratory impairment, she is entitled to benefits unless Employer can establish pneumoconiosis played "no part" in his disability. 20 C.F.R. §718.305(d)(1)(ii). I would also instruct the ALJ to consider whether Claimant is entitled to benefits for legal pneumoconiosis for other respiratory conditions under the same presumption -- and if she does not establish entitlement under either the Section 411(c)(3) or (c)(4) presumptions, whether she nevertheless is entitled to benefits without their aid.[21]

JONATHAN ROLFE
Administrative Appeals Judge

given the language he used in interpreting the CT scan -- and there has been no intent to give the impression it does. The effect of the statement on those readings cannot be rationally ignored, however, and must be evaluated by the ALJ in determining their weight. 30 U.S.C. § 923(b); 20 C.F.R. §718.107; *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (en banc).

[21] Under Section 411(c)(4) Claimant is entitled to a rebuttable presumption the Miner was totally disabled due to pneumoconiosis if he had fifteen years of underground or substantially similar 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.