

U.S. Department of Labor

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



BRB Nos. 21-0537 BLA  
and 21-0538 BLA

GLEND A ELLIS )  
(o/b/o and Widow of WILLARD R. ELLIS) )

Claimant-Respondent )

v. )

BETTY B COAL COMPANY, )  
INCORPORATED )

and )

SECURITY INSURANCE COMPANY OF )  
HARTFORD )

Employer/Carrier- )  
Petitioners )

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )

Party-in-Interest )

DATE ISSUED: 8/30/2022

DECISION and ORDER

Appeal of Decision and Order Granting Benefits of Susan Hoffman,  
Administrative Law Judge, United States Department of Labor.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for  
Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Susan Hoffman's Decision and Order Granting Benefits (2019-BLA 05949, 2020-BLA-05510) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).<sup>1</sup> This case involves a miner's subsequent claim filed on July 19, 2017,<sup>2</sup> and a survivor's claim filed on September 30, 2019.<sup>3</sup> Survivor's Claim (SC) Director's Exhibits 18; Miner's Claim (MC) Director's Exhibits 4.

The parties stipulated the Miner had clinical pneumoconiosis.<sup>4</sup> The ALJ thus found Claimant established a change in an applicable condition of entitlement.<sup>5</sup> 20 C.F.R.

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<sup>1</sup> Employer's appeal in the miner's claim was assigned BRB No. 21-0537 BLA, and its appeal in the survivor's claim was assigned BRB No. 21-0538 BLA. The Benefits Review Board has consolidated these appeals for purposes of decision only.

<sup>2</sup> ALJ Pamela Lakes Wood denied the Miner's first claim, filed on April 24, 1997, in a Decision and Order Denying Benefits dated April 15, 1999, based on the Miner's failure to establish pneumoconiosis. Miner's Director's Exhibit 1. The Miner filed his second claim on August 3, 2012, but subsequently withdrew it. Miner's Claim (MC) Director's Exhibit 2. A withdrawn claim is considered not to have been filed. *See* C.F.R. §725.306.

<sup>3</sup> Claimant is the widow of the Miner who died on August 26, 2019 while his claim was pending before the ALJ. Survivor's Claim (SC) Director's Exhibits 7. In addition to pursuing the Miner's claim on behalf of his estate, she is also pursuing her claim for survivor's benefits. Claimant's Post-Hearing Brief at 2.

<sup>4</sup> "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

<sup>5</sup> When a miner files a claim more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *see 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(d)(2). Because ALJ Wood denied the Miner's most recent prior claim for failure to establish

§725.309(c). Further, she found the Miner had complicated pneumoconiosis and therefore 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); 20 C.F.R. §718.304. She also found the Miner's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b). Thus, she awarded benefits in the miner's claim. Based on the award of benefits in the miner's claim, the ALJ found Claimant automatically entitled to survivor's benefits under Section 422(l) of the Act. 30 U.S.C. §932(l) (2018).

On appeal, Employer argues the ALJ erred in finding the Miner had complicated pneumoconiosis.<sup>6</sup> Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed 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 accordance with applicable law.<sup>7</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and 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 was totally disabled due to pneumoconiosis if he suffered from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yielded 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, yielded massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. In determining whether Claimant has invoked the irrebuttable presumption, the ALJ must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. *See*

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pneumoconiosis, Claimant had to submit new evidence establishing pneumoconiosis to obtain review of the merits of the Miner's subsequent claim. *See White*, 23 BLR at 1-3.

<sup>6</sup> We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established clinical pneumoconiosis and a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.202, 725.309(c); Decision and Order at 6.

<sup>7</sup> 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); MC Director's Exhibit 1 at 4-5.

*Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Assoc. 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 (1991) (en banc).

The ALJ found the x-ray evidence establishes complicated pneumoconiosis whereas the computed tomography (CT) scan, positron emission tomography - computed tomography (PET) scan, biopsy, and medical opinion evidence neither proves nor disproves the existence of the disease. 20 C.F.R. §718.304(a)-(c); Decision and Order at 15, 17, 31. Weighing all the evidence together, she concluded Claimant established complicated pneumoconiosis as the x-ray evidence was not undermined by the other evidence of record and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 32.

### **20 C.F.R. §718.304(a) – X-rays**

Employer argues the ALJ erred in weighing the x-ray evidence to find Claimant established complicated pneumoconiosis. Employer’s Brief at 8-13. We disagree.

The ALJ weighed eight interpretations of four x-rays dated October 16, 2017, December 9, 2017, February 16, 2018, and April 23, 2018.<sup>8</sup> Decision and Order at 8-15; MC Director’s Exhibits 14, 20-24, 26; Employer’s Exhibit 9. She noted all the physicians who read these x-rays are dually qualified as B readers and Board-certified radiologists. Decision and Order at 14.

Drs. DePonte and Crum read the October 16, 2017 x-ray as positive for complicated pneumoconiosis, Category B, while Dr. Adcock read it as positive for only simple pneumoconiosis but negative for complicated pneumoconiosis. MC Director’s Exhibits 14, 21, 22. Dr. DePonte read the December 9, 2017 x-ray as positive for complicated pneumoconiosis, Category B, while Drs. Adcock and Tarver read it as positive for only simple pneumoconiosis but negative for complicated pneumoconiosis. MC Director’s Exhibits 20,23; Employer’s Exhibit 9. Dr. Tarver read the February 16, 2018 x-ray as positive for simple pneumoconiosis but did not identify any large opacities consistent with complicated pneumoconiosis. MC Director’s Exhibit 24. Finally, Dr. Tarver also read the April 23, 2018 x-ray as negative for both simple and complicated pneumoconiosis. Employer’s Exhibit 9.

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<sup>8</sup> The ALJ assigned “very minimal weight” to the x-ray evidence developed in the Miner’s first claim, consisting of two x-rays conducted on May 23, 1997 and April 21, 1998. Decision and Order at 13-14; MC Director’s Exhibits 1. We affirm this finding as unchallenged. *See Skrack*, 6 BLR at 1-711.

Dr. DePonte also provided testimony regarding her x-ray interpretations. MC ALJ Exhibit 21 - Hearing Transcript at 17-40. Although she diagnosed an opacity in the Miner's right lung, she acknowledged it may be due to cancer. *Id.* at 30. Nevertheless, Dr. DePonte opined "[t]he only opacity that is fully suspicious [for cancer] is the right upper [lung] zone opacity, not the opacities in the left hemithorax." *Id.* at 35. She explained why she classified the large opacity she identified in the Miner's left lung on both the October 16, 2017 and December 19, 2017 x-rays as consistent with complicated pneumoconiosis rather than cancer. *Id.* Specifically, she noted "the opacity is rather ill-defined peripheral associated with a lot of overlying pleural thickening." *Id.* at 30-31. Further, she explained that "if you look at the background of the simple [pneumoconiosis], the coalescence and just the configuration of the opacities particularly in the left mid-lung field," it indicates the opacity "represents some complicated [pneumoconiosis]." *Id.* at 31. She added that complicated pneumoconiosis can be ill-defined in part due to adjacent coalescence. *Id.* Finally, Dr. DePonte explained how she distinguished the opacity as consistent with complicated pneumoconiosis rather than a metastasis of the Miner's cancer:

[T]he opacities of cancer tend to be different from those of complicated coal workers' pneumoconiosis when you look at the density, the background, coalescence, the orientation of the opacity. Some of these opacities in the left lung are actually elongated in their vertical dimension and one typically does not see that with metastatic disease. Metastatic disease is often hematogenous or spread through the bloodstream. The metastasis will appear as rounded nodules. One can have metastasis through the lymphatic symptom that presents as fine network sort of what we call reticular which is a spider web type configuration and that is not present in this case and neither are the opacities. The nodular opacities are ones that [one] expects from hematogenous spread. So, eliminating that . . . the opacities in the left lung are more consistent with complicated coal workers' pneumoconiosis than they are with malignancy.

*Id.* at 37.

In resolving the conflict in the x-ray evidence, the ALJ found Dr. Tarver's interpretations of the December 9, 2017, February 16, 2018 and April 23, 2018 x-rays entitled to reduced weight with respect to the issue of complicated pneumoconiosis. Decision and Order at 14. She explained his exclusion of simple, clinical pneumoconiosis on the April 23, 2018 x-ray is contrary to the consensus of all of the x-ray readings, including two of his own, that are positive for the disease. *Id.* Moreover, insofar as Dr. Tarver read the first two x-rays as positive for simple, clinical pneumoconiosis, but excluded the disease on the most recent x-ray, the ALJ found his overall readings inconsistent with the "recognized progressive and irreversible nature of" pneumoconiosis.

*Id.* Employer does not challenge these credibility findings. Thus we affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

With respect to the remaining x-ray readings, the ALJ found Dr. DePonte's positive interpretations of the October 16, 2017 and December 9, 2017 x-rays outweighed the x-ray interpretations of Drs. Crum and Adcock because Dr. DePonte's diagnosis of complicated pneumoconiosis is better reasoned. Decision and Order at 14-15. Thus, she found Claimant established complicated pneumoconiosis based on the x-rays. 20 C.F.R. §718.304(a).

Employer argues the ALJ erred in crediting Dr. DePonte's x-ray interpretations over those of Drs. Adcock and Crum. Employer's Brief at 8. Contrary to Employer's contentions,<sup>9</sup> the ALJ permissibly found Dr. DePonte's x-ray interpretations entitled to greater weight than those of Drs. Adcock and Crum "[b]ased on the thoroughness and quality of [Dr. DePonte's] explanations," and the persuasiveness of her explanation that "the large opacities in the left lung are much more consistent with complicated coal workers' pneumoconiosis rather than the unlikely occurrence of metastases or synchronized cancer." Decision and Order at 14-15; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). Because it is supported by substantial evidence, we affirm the ALJ's finding the x-ray evidence establishes complicated pneumoconiosis. Decision and Order at 14-15; 20 C.F.R. §718.304(a).

#### **20 C.F.R. §718.304(c) – CT and PET scans**

Employer also argues the ALJ erred in her consideration of the CT and PET scans. Employer's Brief at 9-13. We disagree.

The ALJ considered interpretations of CT and PET scans taken on December 5, 1997, March 4, 2009, July 30, 2015, October 25, 2017, April 16, 2018, and February 22, 2019.<sup>10</sup> 20 C.F.R. 718.304(c); Decision and Order at 17-19. She found the only report to

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<sup>9</sup> Employer argues the ALJ impermissibly discredited Drs. Crum and Adcock for failing to diagnose a large opacity of complicated pneumoconiosis in the Miner's right lung. Employer's Brief at 8. It contends that even Dr. DePonte acknowledged the Miner's right lung mass is consistent with lung cancer. *Id.* Contrary to the Employer's characterization of the ALJ's finding, she found Dr. DePonte's discussion of why the large opacity in the Miner's *left lung* is detailed and thorough, and thus entitled to more weight than the readings of Drs. Crum and Adcock. Decision and Order at 14.

<sup>10</sup> The ALJ considered biopsy evidence pursuant to 20 C.F.R § 718.304(b), which she found insufficient to establish complicated pneumoconiosis. Decision and Order at 15-

make a definitive finding of complicated pneumoconiosis was Dr. Saadeh's interpretation of the February 22, 2019 CT scan, noting "extensive underlying complicated [coal workers' pneumoconiosis]" and "[w]idespread micronodules, macronodules, pleural based nodules . . . bilaterally, as seen on previous exams, consistent with fairly advanced [coal workers' pneumoconiosis] without significant confluent masslike fibrosis." Decision and Order at 30. In his October 25, 2017 report, Dr. Saadeh noted a tumor in the right upper lobe of the Miner's lung, which he identified as recurrent cancer, and also noted a "left-sided metabolically active pleural-based nodule involving the LEFT diaphragmatic crus . . . also seen on the previous PET-CT and therefore likely related to [coal workers' pneumoconiosis.]" Director's Exhibit 25 at 25.

The ALJ found the CT and PET scan evidence inconclusive and neither supports nor contradicts the finding of complicated pneumoconiosis by the x-ray evidence. Decision and Order at 31. Nevertheless, she found Dr. Saadeh's CT scan readings corroborative of Dr. DePonte's classification of complicated pneumoconiosis in the Miner's left lung. *Id.*

Employer argues the ALJ erred in finding Dr. Saadeh's CT scan interpretations corroborate Dr. DePonte's x-ray findings. Employer's Brief at 9-13; 20 C.F.R. §718.304(c); MC Director's Exhibit 25 at 20; Claimant's Exhibit 4 at 24-30. However, given that the ALJ also found the CT and PET scan evidence inconclusive and therefore does not contradict the finding of complicated pneumoconiosis based on the x-ray evidence, Employer has failed to explain how the error it alleges would make any difference in the outcome of the case. *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Thus, we affirm the ALJ's finding the Miner had complicated pneumoconiosis based on all of the relevant evidence,<sup>11</sup> 20 C.F.R. §718.304, and Claimant is entitled to the irrebuttable presumption of

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17. She also considered medical reports from Drs. Kanwal, Swedarsky, McSharry, Raj, and Green, as well as the Miner's medical treatment records, under 20 C.F.R. 781.304(c). *Id.* at 19-30. The ALJ noted Drs. Kanwal and Swedarsky did not diagnose complicated pneumoconiosis, while Dr. McSharry did not offer an opinion regarding complicated pneumoconiosis. Decision and Order at 30. Although Drs. Raj and Green diagnosed complicated pneumoconiosis, the ALJ declined to give more than minimal weight to their opinions as they merely restated the radiological and pathological evidence. *Id.* Finally, the ALJ found the Miner's treatment records contained no findings of complicated pneumoconiosis, massive lesions, or progressive massive fibrosis. *Id.*

<sup>11</sup> Employer also argues the ALJ erred in finding the Miner had a thirty-pack year smoking history. Employer's Brief at 6-7; Decision and Order at 5. We disagree. The ALJ noted Claimant testified the Miner smoked close to a pack of cigarettes a day starting

total disability due to pneumoconiosis. *See Cox*, 602 F.3d at 238; *Scarbro*, 220 F.3d at 256.

Because Employer does not challenge the ALJ's finding that the Miner's complicated pneumoconiosis arose out of his coal mine employment, we also affirm it. *Skrack*, 6 BLR at 1-711; 20 C.F.R. 718.203. We therefore affirm the ALJ's award of benefits in the Miner's claim.

### **Survivor's Claim**

The ALJ determined Claimant established all the necessary elements for automatic entitlement to survivor's benefits. 30 U.S.C. §932(l); Decision and Order at 32. Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the award of benefits in the survivor's claim, we affirm it. 30 U.S.C. §932(l); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

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at age seventeen until he quit in 1997. Decision and Order at 5, *citing* Hearing Transcript at 46-47. She also considered the smoking history findings of Drs. Raj, McSharry, Kanwal, Fino, and Emery. Decision and Order at 5; MC Director's Exhibits 1 at 60, 143, 14 at 3, 24 at 6, 25 at 5. With the exceptions of the smoking histories reported by Drs. Fino and Emery, she noted the evidence consistently showed a history of the Miner smoking one pack per day for approximately 30 years, which equates to thirty pack-years. Decision and Order at 5. The length and extent of Claimant's smoking history is a factual, not medical, determination committed to the ALJ's discretion. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Further, the credibility of witnesses and the weight to be accorded to hearing testimony are within the discretion of the ALJ. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985). Because the record reflects the ALJ considered the complete range of Claimant's reported smoking histories, we affirm the ALJ's finding Claimant smoked for thirty pack years. *See Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 803 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989); Decision and Order at 5. Furthermore, Employer has not explained why any alleged error in calculating the Miner's smoking history would make a difference in this case. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).



Accordingly, the ALJ's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

JONATHAN ROLFE  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge