



BRB No. 22-0294 BLA`

JANET PACK (o/b/o the Estate of FRED )  
PACK, JR.) )

Claimant-Respondent )

v. )

CONSOL OF KENTUCKY, )  
INCORPORATED )

DATE ISSUED: 8/15/2023

Employer-Petitioner )

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 a Subsequent Claim on Modification of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

C. Phillip Wheeler (Wheeler & Baker, PLLC), Pikeville, Kentucky for Claimant.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits in a Subsequent Claim on Modification (2020-BLA-05447)

rendered 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 September 18, 2017.<sup>1</sup>

The ALJ credited the Miner with twenty years of coal mine employment and found Claimant established complicated pneumoconiosis.<sup>2</sup> 20 C.F.R. §718.304. Thus he found Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §725.309.<sup>3</sup> Further, he found the Miner's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203. Thus he awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis.<sup>4</sup> Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, declined to file a response brief.

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<sup>1</sup> This is the Miner's fourth claim for benefits. The district director denied his most recent claim because he failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2); Director's Exhibit 3. The Miner died on February 16, 2019, while this claim was pending. Director's Exhibits 13, 14. Claimant, the Miner's widow, is pursuing the claim on his behalf. *Id.*

<sup>2</sup> This case involves a request for modification of a district director's denial of benefits. Director's Exhibit 55. In cases involving a request for modification of a district director's decision, the ALJ proceeds de novo and "the modification finding is subsumed in the [ALJ's] findings on the issues of entitlement." *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Motichak v. BethEnergy Mines, Inc.*, 17 BLR 1-14, 1-19 (1992).

<sup>3</sup> 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 he finds "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)(1); *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 Miner's prior claim was denied for failure to establish total disability, Claimant had to submit evidence establishing this element of entitlement to obtain review of the merits of the Miner's current claim. *Id.*

<sup>4</sup> We affirm, as unchallenged on appeal, the ALJ's finding Claimant established twenty years of coal mine employment. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

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>5</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

### **Invocation of the Section 411(c)(3) Presumption**

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner was totally disabled due to pneumoconiosis if he suffered 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, 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 ALJ must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); *Truitt v. North Am. Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137 (3d Cir. 1980); *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The ALJ found Claimant established complicated pneumoconiosis based on the x-rays, computed tomography (CT) scans, medical opinions, and the evidence as a whole.<sup>6</sup> 20 C.F.R. §718.304(a), (c); Decision and Order at 12, 15, 22.

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

Employer argues the ALJ erred in finding the x-rays establish complicated pneumoconiosis. Employer's Brief at 6-16. We disagree.

The ALJ considered nine interpretations of five x-rays dated September 3, 2002, June 2, 2015, November 2, 2017, April 12, 2018, and January 31, 2019. 20 C.F.R. §718.304(a); Decision and Order at 8-9; Director's Exhibits 3 (internally Director's Exhibit 21), 20, 22, 27, 28; Claimant's Exhibits 1-3. He noted all interpreting physicians are dually-qualified as Board-certified radiologists and B readers. Decision and Order at 9.

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<sup>5</sup> The Board will apply the law of the United States Court of Appeals for the Third Circuit because the Miner performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

<sup>6</sup> The ALJ found the record contains no biopsy or autopsy evidence. 20 C.F.R. §718.304(b); Decision and Order at 8.

Dr. Meyer interpreted the September 3, 2002 x-ray as negative for complicated pneumoconiosis. Director's Exhibit 27 at 2-3. Based on his uncontradicted reading, the ALJ found this x-ray negative for the disease. Decision and Order at 9.

Drs. Kendall and Meyer read the June 2, 2015 x-ray as negative for complicated pneumoconiosis. Director's Exhibits 3 (internally Director's Exhibit 21), 27 at 4-5. Based on the uncontradicted readings, the ALJ similarly found this x-ray negative for the disease.<sup>7</sup> Decision and Order at 9-10.

Drs. Kendall and Crum read the November 2, 2017 x-ray as positive for complicated pneumoconiosis, Category B. Director's Exhibit 20; Claimant's Exhibit 3. Dr. Meyer read it as negative for complicated pneumoconiosis. Director's Exhibit 27 at 6-7. He also identified a "worsening reticular opacity bilaterally, most severe in the mid and lower [lung] zones," along with a "more confluent opacity in the right mid zone." *Id.* He concluded the x-ray is consistent with "usual interstitial pneumonia (UIP)" as the "rapid worsening compared to 2015 is not consistent with [coal workers' pneumoconiosis] and more typical of UIP with acute exacerbation." *Id.* He stated the opacity in the right middle lung "may be [an] acute exacerbation, infection[,] or neoplasm." *Id.*

The ALJ permissibly found Dr. Meyer's discussion of alternative disease processes on the x-ray equivocal and speculative because the doctor "did not identify evidence in the record showing that the Miner had an acute exacerbation, infection, or neoplasm that could have accounted for the opacities . . . ." Decision and Order at 9-11; *see Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 286-87 (4th Cir. 2010); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507 (6th Cir. 1997). Further, the ALJ permissibly found that, even if he had not found Dr. Meyer's negative reading equivocal and speculative, he would have found this x-ray positive for complicated pneumoconiosis because a greater number of dually-qualified radiologists read it as positive for the disease. *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); Decision and Order at 9-11. Thus we affirm the ALJ's finding the November 2, 2017 x-ray is positive for complicated pneumoconiosis. Decision and Order at 11.

Dr. Crum read the April 12, 2018 x-ray as positive for complicated pneumoconiosis, Category B, but Dr. Meyer read it as negative for the disease. Director's Exhibit 28 at 2-3; Claimant's Exhibit 1. Dr. Meyer acknowledged the presence of an "ill-defined ground-glass opacity in the right mid [lung] zone with a nodular focus measuring approximately

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<sup>7</sup> Nonetheless, the ALJ found Dr. Meyer's discussion of pulmonary fibrosis on the x-ray is speculative and equivocal and thus his reading is entitled to diminished weight. Decision and Order at 9-10.

[fourteen millimeters]” along with a “second nodule [in] the left mid zone.” Director’s Exhibit 28 at 2-3. He again opined the x-ray is consistent with UIP and not coal workers’ pneumoconiosis. *Id.* In addition, he stated the “[d]eveloping nodules in the mid zones may be regions of superimposed infection, aspiration, or malignancy.” *Id.* The ALJ permissibly found Dr. Meyer’s reading of the April 13, 2018 x-ray not credible because he did not identify evidence in the record of “any infection, malignancy, . . . or any other factor that could account for the markings on the Miner’s lungs . . . .” Decision and Order at 12; *see Cox*, 602 F.3d at 286-87; *Smith*, 127 F.3d at 507. Thus we affirm the ALJ’s finding the April 12, 2018 x-ray is positive for complicated pneumoconiosis. Decision and Order at 12.

Next, Dr. Crum read the January 31, 2019 x-ray as consistent with complicated pneumoconiosis, Category B. Claimant’s Exhibit 2. Based on his uncontradicted reading, the ALJ found this x-ray positive for the disease. Decision and Order at 12.

Finally, the ALJ permissibly found the September 3, 2002 negative x-ray entitled to diminished weight because it is “almost thirteen years older than the next most recent designated x-ray, taken in 2015,” and the regulations recognize pneumoconiosis as a progressive and irreversible disease. 20 C.F.R. §718.201(c); *see also Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 315 (3d Cir. 1995); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); *Woodward*, 991 F.2d at 320; Decision and Order at 12. Because three of the four more recent x-rays are positive for complicated pneumoconiosis, the ALJ found the preponderance of the x-ray evidence supports complicated pneumoconiosis. Decision and Order at 12. The ALJ properly performed both a qualitative and quantitative analysis of the conflicting x-ray readings and explained his basis for resolving the conflict in the evidence. *See Sea “B” Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016); *Adkins*, 958 F.2d at 52-53.

Employer argues the ALJ should have assigned greater weight to Dr. Meyer’s interpretations than Dr. Crum’s interpretations because of his alleged superior credentials. Employer’s Brief at 15-16. We disagree. Contrary to Employer’s contention, credibility determinations are within the ALJ’s discretion. *Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986). He was not required to give greater weight to Employer’s expert based on qualifications such as professorships and publications, but instead permissibly assigned equal weight to readings by physicians dually-qualified as Board-certified radiologists and B readers. *Staton*, 65 F.3d at 59; *Woodward*, 991 F.2d at 321; *Worach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); Decision and Order at 9.

Employer also argues the ALJ should have considered Dr. Meyer’s deposition testimony when resolving the conflict in the x-ray evidence. Employer’s Brief at 6-7. It contends this “artificial segregation of the deposition as a medical opinion and failing to

consider it along with the x-rays . . . earlier in the decision is contrary to the Congressional directive that all relevant evidence must be considered.” *Id.*, citing 30 U.S.C. § 923(b). This argument misconstrues the ALJ’s decision as he considered and discredited Dr. Meyer’s deposition testimony as discussed below. *See Melnick*, 16 BLR at 1-33-34; Decision and Order at 20-22.

As it is supported by substantial evidence, we affirm the ALJ’s conclusion that the x-ray evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(a); Decision and Order at 12.

## **20 C.F.R. §718.304(c) - Other Medical Evidence**

### **CT Scan**

We are also not persuaded by Employer’s arguments with respect to the CT scan evidence. Employer’s Brief at 6-16.

The ALJ considered three interpretations of one CT scan dated November 21, 2017. Decision and Order at 13; Director’s Exhibit 28 at 29 (unpaginated). The Miner’s treating physician, Dr. Nguyen, observed on the CT scan a “[s]mall focal consolidation with associated air bronchogram” in the right upper lung. Director’s Exhibit 28 at 2. He also identified a “scattered area of subpleural reticular opacities . . . bilaterally and unchanged” since a prior CT scan. *Id.* He indicated the CT could be consistent with “infection or inflammatory process versus atelectasis.” *Id.* The ALJ permissibly found Dr. Nguyen’s opinion silent on the presence or absence of pneumoconiosis and thus entitled to little weight.<sup>8</sup> *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984) (ALJ has discretion to determine the weight to accord diagnostic testing that is silent on the existence of pneumoconiosis); Decision and Order at 14.

Dr. Crum observed a three and one-half centimeter large opacity “with a background setting of small opacities as well as [a] history of dust exposure” indicating the opacity is consistent with progressive massive fibrosis. Claimant’s Exhibit 4. He explained this was present on x-rays from 2017 to 2019. *Id.* He also observed a large opacity in the left upper

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<sup>8</sup> Employer argues Dr. Nguyen’s CT scan reading undermines a finding of complicated pneumoconiosis because his report “does not suggest opacities greater than [one centimeter] in diameter . . . .” Employer’s Brief at 11-12. As Dr. Nguyen did not state the opacities he identified would not appear on x-ray measuring at least one centimeter, substantial evidence supports the ALJ’s finding that his CT scan reading does not undermine a finding of complicated pneumoconiosis. *See Mancina v. Director, OWCP*, 130 F.3d 579, 584 (3d Cir. 1997) (substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion); Decision and Order at 14.

lung measuring two centimeters that he opined is a “pseudo-plaque also felt consistent with progressive massive fibrosis.” *Id.* Based on the foregoing, he opined the CT scan is consistent with Category B complicated pneumoconiosis. *Id.* The ALJ permissibly found Dr. Crum’s positive reading credible because he quantified the size of the opacities he observed, “explained that the large opacities had a background setting of small opacities,” and correlated his observations to the Miner’s history of dust exposure.<sup>9</sup> *Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; Decision and Order at 14.

Dr. Meyer observed a “subpleural reticular opacity,” fibrosis “extending along the bronchovascular bundle with focal areas of subpleural confluent opacity,” and a “rare subpleural honeycomb lung.” Director’s Exhibit 29. He opined that such fibrosis is “not typical of coal workers’ pneumoconiosis” but rather “characteristic of fibrotic organizing pneumonia or [UIP].” *Id.* He explained coal workers’ pneumoconiosis “characteristically begins as an upper zone predominant fine nodular process” and the CT scan reveals a “lower zone predominant linear process [that] is often idiopathic or seen in association with collagen vascular disease or drug toxicity.” *Id.* The ALJ permissibly found Dr. Meyer’s negative reading unpersuasive because he did not provide measurements of the opacity, fibrosis, and honeycombing he observed in contrast to Dr. Crum, and thus Dr. Meyer’s reading is less detailed. *Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; Decision and Order at 15. The ALJ also permissibly found Dr. Meyer’s reading not credible because he did not identify any evidence in the record “to support his theory that the Miner had collagen vascular disease or drug toxicity.” Decision and Order at 15; *see Cox*, 602 F.3d at 286-87; *Smith*, 127 F.3d at 507.

In addition, the ALJ permissibly found Dr. Meyer’s exclusion of complicated pneumoconiosis, based on the absence of upper lung zone opacities, conflicted with his deposition testimony the Miner had “an area of confluent opacity posteriorly in the right upper lobe” visible on the CT scan. Decision and Order at 14-15; *see Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; Employer’s Exhibit 2 at 25-26. The ALJ also permissibly found this reasoning unpersuasive because the regulations do not specify a particular lung zone for a finding of complicated pneumoconiosis. *Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; Decision and Order at 15.

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<sup>9</sup> The ALJ also permissibly found Dr. Crum’s statement, that the “combined maximum dimensions” of the opacities he observed indicate they are consistent with Category B large opacities, is sufficient to establish that the masses would appear on x-ray measuring at least one centimeter. Decision and Order at 14; *see Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14, 16 (3d Cir. 1981); Claimant’s Exhibit 4.

As it is supported by substantial evidence, we affirm the ALJ's conclusion that Dr. Crum's positive CT scan reading supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 15.

### **Medical Opinions**

The ALJ considered the medical opinions of Drs. Mettu, Jarboe, and Meyer. Decision and Order at 15-22. Dr. Mettu diagnosed complicated pneumoconiosis. Director's Exhibit 18 at 6 (unpaginated). Drs. Jarboe and Meyer excluded complicated pneumoconiosis and diagnosed UIP. Employer's Exhibits 1, 2. The ALJ found Dr. Mettu's opinion reasoned and documented and the opinions of Drs. Jarboe and Meyer unpersuasive and not supported by the record. Decision and Order at 15-21.

Employer does not challenge the ALJ's finding that Dr. Mettu's opinion is reasoned and documented. Decision and Order at 17, 21. Thus we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer also does not specifically challenge a number of credibility findings the ALJ made with respect to Drs. Jarboe and Meyer. The ALJ discredited their opinions because neither physician reviewed Dr. Crum's January 31, 2019 x-ray reading that is positive for complicated pneumoconiosis. *Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163; Decision and Order at 19, 21. In addition, the ALJ noted Dr. Jarboe cited the fact that the Miner did not have "intense" coal mine dust exposure as a basis to exclude complicated pneumoconiosis. Decision and Order at 19, *quoting* Employer's Exhibit 1 at 13. The ALJ found Dr. Jarboe "did not cite any evidence to support [this] view" and, further, "in his initial medical report, Dr. Jarboe reported that the Miner worked at the tippie and crusher and that the conditions inside the wash plant were dusty." *Id.*, *citing* Claimant's Exhibit 5 at 9; *see Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163.

Further, the ALJ noted Dr. Meyer cited the presence of linear t and u opacities on the CT scan as not consistent with pneumoconiosis. Decision and Order at 20-21, *citing* Employer's Exhibit 2 at 36. The ALJ found this rationale unpersuasive because the International Labour Organization "classification system specially provides that opacities" of pneumoconiosis "may be classified as round (p, q, r) or irregular (s, t, u)." <sup>10</sup> *Id.*; *see*

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<sup>10</sup> The International Labour Organization (ILO) x-ray form allows a radiologist to identify any parenchymal abnormalities consistent with pneumoconiosis. 20 C.F.R. §718.102 (standards for x-rays), *incorporating by reference Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses*, Revised edition 2011 (ILO Guidelines). If the radiologist indicates there are such abnormalities, he or she should identify the profusion, affected zones of the lung, shape (rounded or irregular), and size of any opacities. ILO Guidelines at 3-6. With respect to size and shape, a radiologist may



*Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163. Because Employer does not specifically challenge these findings, we affirm them. See *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Skrack*, 6 BLR at 1-711; *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Decision and Order at 19-21.

As the trier-of-fact, the ALJ has broad discretion to assess the credibility of the medical opinions and assign them appropriate weight. See *Kertesz*, 788 F.2d at 163. Although Employer generally argues the opinions of Drs. Jarboe and Meyer are well-reasoned and based on a consideration of a broad range of evidence, its argument amounts to a request to reweigh the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 6-16. Thus, we affirm the ALJ's determination that the medical opinions support a finding of complicated pneumoconiosis. Decision and Order at 21-22.

As Employer raises no further argument, we affirm the ALJ's findings that all the relevant evidence considered together establishes complicated pneumoconiosis and Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §§718.304, 725.309; Decision and Order at 22-24. We further affirm, as unchallenged, the ALJ's finding that the Miner's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); see *Skrack*, 6 BLR at 1-711; Decision and Order at 22-23.

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mark small, rounded opacities via the three size ranges denoted by the letters p, q, and r representing increasing size, or small, irregular opacities denoted by the letters s, t, and u representing increasing size. *Id.*

Accordingly, the ALJ's Decision and Order Awarding Benefits in a Subsequent Claim on Modification is affirmed.

SO ORDERED.

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge