



BRB No. 22-0324 BLA

DAVID H. SMYCHYNSKY)

Claimant-Petitioner)

v.)

TANOMA MINING COMPANY,)
INCORPORATED)

and)

DATE ISSUED: 8/17/2023

AMERICAN MINING INSURANCE)
COMPANY, a/k/a BERKLEY CASUALTY)
COMPANY)

Employer/Carrier-)
Respondents)

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

Party-in-Interest)

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Drew A. Swank,
Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long),
Ebensburg, Pennsylvania, for Claimant.

Sean B. Epstein (Thomas, Thomas & Hafer, LLP), Pittsburgh, Pennsylvania,
for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits (2021-BLA-05429) rendered on a claim filed on February 4, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with at least fifteen years of underground coal mine employment but determined Claimant did not establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Thus, he found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.¹ He further found the evidence insufficient to establish complicated pneumoconiosis and, therefore, concluded Claimant did not invoke 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. Consequently, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding he failed to establish complicated pneumoconiosis.² Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to respond.

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

¹ 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.

² We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established at least fifteen years of underground coal mine employment, but did not establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2); Decision and Order at 4. Thus Claimant cannot invoke the Section 411(c)(4) presumption in this case. 20 C.F.R. §718.305.

accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner’s total disability is 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). *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); *see 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); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The ALJ found there is no biopsy or medical opinion evidence of record diagnosing complicated pneumoconiosis, and the x-ray and computed tomography (CT) scan evidence is insufficient to establish complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c); Decision and Order at 13-19. Weighing the evidence together, he found Claimant failed to establish complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 19.

Claimant argues the ALJ erred in weighing the CT scan evidence.⁴ Claimant’s Brief at 5-7. We agree with Claimant’s argument.

The ALJ considered four readings of one CT scan dated September 22, 2020. Decision and Order at 18-19; Claimant’s Exhibits 1, 3, 4; Employer’s Exhibits 1, 3, 5, 6.

Dr. DePonte read the CT scan as showing “fine nodular interstitial opacities predominating in the upper lobes and superior segments of the lower lobes.” Claimant’s

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibit 5.

⁴ As they are unchallenged, we affirm the ALJ’s findings that the x-ray evidence does not establish complicated pneumoconiosis and there is no biopsy or medical opinion evidence for consideration on the issue of complicated pneumoconiosis. *See* 20 C.F.R. §718.304(a)-(c); *Skrack*, 6 BLR at 1-711; Decision and Order at 13-19.

Exhibit 1. She stated a “coalescence of the nodules is present with the formation of opacities exceeding [one centimeter in] diameter consistent with large opacities of complicated coal workers’ pneumoconiosis.” *Id.* Further, she stated “[t]he largest [opacity] is 2.2 [centimeters] located in the right upper lobe” and is consistent with a Category A opacity. *Id.*

Dr. DePonte also testified in her deposition,⁵ stating a CT scan is a much better diagnostic tool for detecting simple and complicated coal workers’ pneumoconiosis than an x-ray.⁶ Claimant’s Exhibit 3 at 9-10. She reiterated the September 22, 2020 CT scan reveals nodules “along the pleura [that] are a bit larger than the ones that are more central.” *Id.* at 12. Although she opined the nodules vary in size, she stated some are at least one centimeter in diameter, including the nodule she identified “in the right upper lobe that was [twenty-two] millimeters or 2.2 centimeters . . . peripherally at the level of the transverse aorta.” *Id.* She concluded this nodule is “consistent with a category A opacity, and [it is] in the form of a pseudoplaque.”⁷ *Id.* When asked to define a pseudoplaque, Dr. DePonte set forth the following explanation:

⁵ The ALJ found Dr. DePonte’s CT scan reading and deposition testimony are sufficient to establish CT scans are medically acceptable and relevant to determining pneumoconiosis. Decision and Order at 17-18. We affirm this finding as unchallenged. *Skrack*, 6 BLR at 1-711

⁶ Dr. DePonte set forth the process she utilizes when reading CT scans. Claimant’s Exhibit 3 at 10-11. She first identifies whether the CT scan has adequate “slice thickness.” *Id.* As the September 22, 2020 CT scan has a slice thickness of two millimeters and two and one-half millimeters on reconstruction, she opined it is “perfectly adequate for an accurate interpretation.” *Id.* She then looks for interstitial lung disease in the lung parenchyma followed by the “mediastinum, which is the central portion of the chest, to look at lymph nodes.” *Id.* at 11-12. Thereafter she views the “great vessels, the aorta, [] the heart, [and] the pericardium,” and looks “for the pleural findings to see if [there is] pleural effusion or plaques.” *Id.* Finally, she views the “upper abdomen and the chest wall structures.” *Id.*

⁷ When asked to address Dr. Seaman’s CT scan reading, Dr. DePonte stated that in the past, Dr. Seaman has recognized “pseudoplaques as complicated coal workers’ pneumoconiosis.” Claimant’s Exhibit 1 at 16. As Dr. DePonte noted pseudoplaques are “clearly evident in this case,” she was not sure why Dr. Seaman would not recognize them or make a “statement as to having observed those opacities and arriving at a different conclusion.” *Id.*

[A] pseudoplaque is an opacity [that is] actually in the lung parenchyma that rests along the pleura, which is the outside lining of the lung. It is different from a true plaque, hence the term pseudoplaque. Pseudo means not real, simulated, whatever. And on a chest radiograph, this can look like a plaque. But on CT [scan], you can see that [it is] actually within the lung and [it is] not a pleural plaque or pleural thickening.

Id. at 14. She testified that her diagnosis of complicated pneumoconiosis was not based solely on the presence of a large opacity with a background of simple pneumoconiosis, but rather a “constellation of findings.” *Id.* at 17. Specifically, she explained it was based on the appearance of the opacities and their location, the background of the other larger subpleural nodules that are present, the evidence of coalescence of those nodules, and an assessment that the “peripheral opacity” is clearly . . . in the lung.” *Id.*

Dr. Seaman first read the CT scan as showing “mild upper zone predominant centrilobular/perilymphatic nodules,” but stated there are “no large opacities of coal workers’ pneumoconiosis.” Employer’s Exhibit 1. She stated there “are normal sized mediastinal and hilar lymph nodes.” *Id.* In a supplemental report, Dr. Seaman stated she agreed with Dr. DePonte that the CT scan shows “small nodules with an upper zone predominate distribution,” but opined the CT scan is not consistent with complicated pneumoconiosis because she did not measure a nodule greater than eight millimeters. Employer’s Exhibit 5. She acknowledged “mild subpleural pseudoplaque formation in the upper lobes.” *Id.*

Dr. Tarver read the CT scan as showing “multiple peripheral upper lobe [four to five millimeter] nodules, consistent with pseudoplaques.” Employer’s Exhibit 3. He also identified “pseudoplaques in the edge of the right minor fissure.” *Id.* But he opined the pseudoplaques are not consistent with coal workers’ pneumoconiosis and there is no basis to diagnose simple or complicated pneumoconiosis. *Id.*

Dr. Fino reviewed the CT scan and identified “a 2.12 [centimeter] ovoid density in the periphery of the right upper lobe.” Claimant’s Exhibit 4. He diagnosed Claimant with simple pneumoconiosis and stated he “cannot rule out complicated disease.”⁸ Claimant’s Exhibit 4.

⁸ After reviewing additional medical records, including additional CT scans, Dr. Fino stated in a subsequent medical opinion that his opinion has not changed and the CT scans confirm the presence of simple pneumoconiosis, although he opined Claimant does not have a totally disabling respiratory or pulmonary impairment.

In weighing the CT scan evidence, the ALJ acknowledged that Drs. DePonte, Seaman, and Tarver are dually-qualified as Board-certified radiologists and B-readers. Decision and Order at 18-19. He also set forth their additional credentials beyond being dually-qualified radiologists and found they all have “comparable credentials.” *Id.* After summarizing the findings of Drs. DePonte, Seaman, Tarver, and Fino, *id.*, he summarily concluded that, “[w]eighing the chest [x]-ray and CT scan evidence, [he] finds that the evidence does not support a finding of complicated pneumoconiosis.” *Id.* at 19.

We agree with Claimant’s argument that the ALJ’s finding does not satisfy the explanatory requirements of the Administrative Procedure Act (APA)⁹ as he failed to adequately explain how he resolved the conflict in the CT scan evidence. *See Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354-56 (3d Cir. 1997); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Further, simply acknowledging that certain types of evidence are positive while others are negative does not satisfy the explanatory requirements of the APA. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Witmer*, 111 F.3d at 354-56; *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 803 (4th Cir. 1998); *Gunderson v. United States Department of Labor*, 601 F.3d 1013, 1024 (10th Cir. 2010) (citing *Stalcup v. Peabody Coal Co.*, 477 F.3d 482 (7th Cir. 2007)) (ALJ’s mere statement that the evidence was “evenly balanced and should receive equal weight” failed to discharge his duty under the APA to explain, on scientific grounds, why a conclusion could not be reached as to the existence of pneumoconiosis); *Wojtowicz*, 12 BLR at 1-165.

Because we are unable to discern the basis for the ALJ’s determination that the CT scan evidence does not establish complicated pneumoconiosis, we vacate his finding and remand the case for further consideration of the evidence in accordance with the APA. *See* 20 C.F.R. §718.304(c); *Witmer*, 111 F.3d at 354-56; *Wojtowicz*, 12 BLR at 1-165.

Remand Instructions

On remand, the ALJ must reconsider whether the CT scans are sufficient to establish complicated pneumoconiosis. He must reconsider the CT scan reports of Drs. DePonte, Seaman, Tarver, and Fino. 20 C.F.R. §718.304(c). Specifically, he must consider the explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their diagnoses. *See Lango v. Director, OWCP*, 104 F.3d 573, 578 (3d Cir. 1997). He must then weigh all relevant evidence on the issue

⁹ The Administrative Procedure Act provides 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).

of complicated pneumoconiosis together, interrelating the evidence from each category, and apply the correct standard for the burden of proof (i.e., whether the evidence establishes it is more likely than not Claimant has a chronic dust disease of the lung meeting the diagnostic requirements of 20 C.F.R. §718.304). *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *Melnick*, 16 BLR at 1-33.

If the ALJ finds Claimant has met his burden to establish complicated pneumoconiosis, Claimant will have invoked the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304. The ALJ must then consider whether Claimant's complicated pneumoconiosis arose out of his coal mine employment, applying the relevant rebuttable presumption. 20 C.F.R. §718.203(b). If the ALJ finds Claimant has invoked the Section 411(c)(3) irrebuttable presumption, and the Claimant's pneumoconiosis arose out of his coal mine employment, he should award benefits.

If the ALJ finds Claimant is unable to invoke the irrebuttable presumption, he may reinstate the denial of benefits in light of Claimant's failure to establish total disability, a requisite element of entitlement under 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge