



BRB No. 24-0017 BLA

SAMUEL L. CUMMINGS, JR.

Claimant-Petitioner

v.

ISLAND CREEK COAL COMPANY

Employer-Respondent

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

Party-in-Interest

NOT-PUBLISHED

DATE ISSUED: 02/25/2025

DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

Joseph D. Halbert (Halbert Legal PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Jerry R. DeMaio's Decision and Order on Remand Denying Benefits (2018-BLA-05696), rendered on a claim filed pursuant to Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This

case involves a subsequent claim filed on January 10, 2017,¹ and is before the Benefits Review Board for the second time.

In a Decision and Order Denying Benefits issued on September 18, 2019, the ALJ credited Claimant with at least twenty years of underground coal mine employment but determined he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.² 30 U.S.C. §921(c)(4) (2018). He further found the evidence did not 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.

In consideration of Claimant's appeal, the Board affirmed, as unchallenged, the ALJ's finding that the evidence did not establish total disability and, therefore, Claimant failed to invoke the Section 411(c)(4) presumption. *Cummings v. Island Creek Coal Co.*, BRB No. 20-0013 BLA, slip op. at 2 n.3 (Nov. 25, 2020) (unpub.). The Board further affirmed the ALJ's finding that the evidence failed to establish complicated pneumoconiosis and thus affirmed the denial of benefits. *Id.* at 10.

Claimant appealed the Board's decision to the United States Court of Appeals for the Sixth Circuit,³ which vacated the ALJ's finding that Claimant failed to establish complicated pneumoconiosis. *Cummings v. Island Creek Coal Co.*, No. 21-3032, 2021 WL 5873163 at 3 (6th Cir. Dec. 13, 2021). The Sixth Circuit held the ALJ erred in characterizing Drs. Crum's and Vuskovich's opinions and therefore erred in his weighing

¹ Claimant filed his first claim for benefits on March 20, 2000. Director's Exhibit 1. The district director denied the claim because Claimant failed to establish any element of entitlement. Director's Exhibit 40a. Claimant filed a second claim but subsequently withdrew it. Director's Exhibit 2. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

² Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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.

³ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 9-10.

of the medical opinion evidence. *Id.* at 2. The court thus remanded the case for the ALJ to reconsider the conflicting opinions of Drs. Crum and Vuskovich. *Id.*

On remand, the ALJ again found Claimant failed to establish complicated pneumoconiosis and thus failed to invoke the Section 411(c)(3) presumption. 20 C.F.R. §718.304. Consequently, he denied benefits.

In the current appeal, Claimant argues the ALJ erred in finding he failed to establish complicated pneumoconiosis. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order on Remand if it is rational, supported by substantial evidence, and in accordance with applicable law. 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) – Complicated Pneumoconiosis

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large 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, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In determining whether Claimant has invoked the irrebuttable presumption, the ALJ must weigh 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. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc). The ALJ found the medical opinion evidence and the evidence as a whole failed to establish complicated pneumoconiosis.⁴ Decision and Order on Remand at 4-5.

In his initial decision, the ALJ considered Drs. Chavda's and Majmudar's opinions that Claimant has complicated pneumoconiosis and Drs. Vuskovich's and Tuteur's opinions that he does not have the disease. The ALJ accorded Drs. Chavda's and Majmudar's opinions little weight because they relied solely upon the x-rays obtained in

⁴ The ALJ did not reconsider the x-ray or computerized tomography scan evidence, indicating the Board previously affirmed his weighing of this evidence and the Sixth Circuit did not disturb these findings. 20 C.F.R. §718.304(a), (c); Decision and Order on Remand at 2-3. There is no pathology evidence of record. 20 C.F.R. §718.304(b); Decision and Order on Remand at 3.

conjunction with their examinations. Decision and Order at 17. While not according Dr. Tuteur's opinion any specific weight, the ALJ noted the doctor pointed to Claimant's exposure to histoplasmosis in support of his conclusion that Claimant's opacities on x-ray imaging were due to granuloma rather than pneumoconiosis and thus his opinion does not support Claimant's burden. *Id.* The Board affirmed these credibility findings, and the Sixth Circuit did not disturb them. See *Cummings*, 2021 WL 5873163 at 2; *Cummings*, BRB No. 20-0013 BLA, slip op. at 9.

Dr. Vuskovich opined Claimant does not have complicated pneumoconiosis based in part on his belief that Dr. Crum indicated the large opacity he identified in Claimant's x-ray and computerized tomography (CT) scan imaging results regressed in size over time, which Dr. Vuskovich stated was inconsistent with complicated pneumoconiosis. Employer's Exhibit 4 at 16. The ALJ credited Dr. Vuskovich's opinion based solely on this factor, finding Dr. Crum "ha[d] not offered an explanation" for why the opacity is "not as well seen" in his most recent x-ray reading. Decision and Order at 17. Dr. Crum opined there was a Category A opacity consistent with complicated pneumoconiosis in Claimant's right middle lobe, based on his x-ray and CT scan readings. Claimant's Exhibit 9. The ALJ did not specifically weigh his opinion with the other medical opinions but noted that "even Dr. Crum believed" Claimant had histoplasmosis as well as complicated pneumoconiosis. Decision and Order at 17. Weighing the evidence together, the ALJ found that while there is some evidence of complicated pneumoconiosis, it is "at least equally possible" that the findings were due to "other factors" and Claimant had not met his burden to establish complicated pneumoconiosis. *Id.* at 17-18.

Contrary to the ALJ's finding, the Sixth Circuit held that Dr. Crum in fact explained that the large opacity he identified was more difficult to see in his most recent x-ray reading because Claimant's ribs obstructed a clear view. *Cummings*, 2021 WL 5873163 at 2; Claimant's Exhibit 9 at 32. The court thus instructed the ALJ to weigh Dr. Vuskovich's opinion against Dr. Crum's explanation and provided the following questions for the ALJ to consider in weighing the credibility of the evidence: "Was Dr. Crum's testimony believable? If so, are Dr. Vuskovich's findings as persuasive? What evidence supported Dr. Vuskovich's claim that the spot was regressing? Do Dr. Vuskovich's points still suggest no complicated pneumoconiosis?" *Cummings*, 2021 WL 5873163 at 2.

On remand, the ALJ noted the Sixth Circuit's instructions and that all other aspects of his original decision were previously affirmed by the Board and "untouched" by the Sixth Circuit. Decision and Order on Remand at 2. He found Dr. Crum's explanation that Claimant's ribs obstructed a clear view of the opacity in his most recent x-ray reading to be credible and found no evidence suggesting the opacity Dr. Crum identified regressed over time as Dr. Vuskovich indicated. *Id.* at 4. The ALJ therefore accorded Dr.

Vuskovich's opinion that Claimant did not have complicated pneumoconiosis no significant weight "because it was not based on reliable data or reasoning."⁵ *Id.*

Finding Dr. Vuskovich's opinion undermined, the ALJ next weighed the remaining opinions of Drs. Crum and Tuteur. Decision and Order on Remand at 4. Dr. Crum diagnosed complicated pneumoconiosis in the form of a Category A large opacity in Claimant's right middle lung. Claimant's Exhibit 9 at 30-33. The doctor indicated x-ray and CT scan imaging demonstrated opacities of pneumoconiosis as well as histoplasmosis based on the presence of calcified granulomas in Claimant's lungs and spleen. *Id.* at 26, 36-37. Dr. Tuteur, on the other hand, opined the opacities in Claimant's x-ray imaging are not due to coal mine dust exposure but demonstrate granulomatous disease due to histoplasmosis based on the nodules' locations in his lungs, which are "not a usual or even infrequent" location for pneumoconiosis, Claimant's normal pulmonary function study results, Claimant's prior diagnosis of histoplasmosis by his treating physician, and his specific exposure to bird droppings as a young man. Employer's Exhibit 3 at 2-3. In weighing the conflicting opinions, the ALJ found both Drs. Crum and Tuteur offered "at least equally reasonable explanation[s]" for the etiology of the opacities. Decision and Order on Remand at 4. Thus, he found the medical opinion evidence insufficient to support a finding that Claimant suffers from complicated pneumoconiosis. *Id.* at 5.

Claimant raises multiple arguments challenging the ALJ's determinations regarding complicated pneumoconiosis: 1) the ALJ misunderstood the Sixth Circuit's instructions regarding the various categories of relevant evidence and should have reconsidered each piece of evidence before reweighing all the evidence together, and 2) the ALJ mischaracterized or ignored relevant evidence. Claimant's Brief at 13-35. We disagree.

Initially, we reject Claimant's contention that the ALJ misunderstood the Sixth Circuit's instructions and thus erred in not reconsidering all categories of evidence. Claimant's Brief at 13-14. The Sixth Circuit noted Claimant raised "numerous" arguments but found it necessary to address only two.⁶ *Cummings*, 2021 WL 5873163 at 2. It found merit in Claimant's argument that the ALJ's basis for crediting Dr. Vuskovich's opinion was not consistent with the underlying evidence. *Id.* Noting the ALJ's explanation that the weight of the evidence was a "close call," the court held it could not determine the

⁵ We affirm this credibility finding as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 4.

⁶ The court rejected Claimant's argument that the ALJ applied the wrong legal standard in assessing the evidence. *Cummings v. Island Creek Coal Co.*, No. 21-3032, 2021 WL 5873163 at 3 (6th Cir. Dec. 13, 2021).

credibility or weight of the evidence as that task was for the ALJ. *Id.* Thus, it remanded the case for the ALJ to consider the credibility of Dr. Vuskovich's opinion after also considering evidence the ALJ previously overlooked and, in turn, determine if his credibility determination changed the weight of the evidence. *Id.* The ALJ specifically addressed the Sixth Circuit's instructions and questions in weighing the credibility of the evidence. Decision and Order on Remand at 2, 4.

Further, the Board previously affirmed the ALJ's findings that the x-ray evidence and CT scan evidence failed to establish complicated pneumoconiosis. *Cummings*, BRB No. 20-0013 BLA, slip op. at 7, 9. Similarly, the Board affirmed the ALJ's discrediting of Drs. Chavda's and Majmudar's opinions that Claimant has complicated pneumoconiosis. *Id.* at 9. The Sixth Circuit did not vacate these findings, and none were dependent on the ALJ's original crediting of Dr. Vuskovich's opinion over Dr. Crum's; therefore, these findings constitute the law of the case. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989-90 (1984); *see Cummings*, 2021 WL 5873163 at 2-3; Decision and Order at 7-9. Thus, we reject Claimant's argument that the ALJ was required to reweigh and reconsider every category of evidence. Claimant's Brief at 14-15, 21-32.

In addition, the ALJ did not mischaracterize Dr. Crum's opinion. Rather, he correctly stated that Dr. Crum opined that Claimant had histoplasmosis based on calcifications in his spleen and recognized histoplasmosis as a possible alternative explanation, while finding simple and complicated pneumoconiosis are present on Claimant's chest imaging. Decision and Order on Remand at 4-5; Claimant's Brief at 19-21, 32-35. As Dr. Crum acknowledged that Claimant had histoplasmosis, the ALJ was within his discretion to find his opinion "[j]ibed" with Dr. Tuteur's opinion that Claimant had histoplasmosis, which also lent credibility to Dr. Tuteur's explanation that the opacity he found is due to old granulomatous disease rather than complicated pneumoconiosis. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002) (it is within the purview of the ALJ to weigh the evidence, draw inferences, and determine credibility); Decision and Order on Remand at 5.

Therefore, substantial evidence supports the ALJ's finding that it is "equally likely" the opacity is due to histoplasmosis as it is due to coal mine dust exposure and thus the medical opinion evidence is insufficient to prove Claimant has complicated pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281 (1994) (equally weighted evidence does not carry the burden of proof); *Gray*, 176 F.3d at 388 ("The irrebuttable presumption does not apply until the presence of the chronic dust disease is established by evidence satisfactory to the ALJ."); *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983); Decision and Order on Remand at 5.

Furthermore, the ALJ was within his discretion to find Dr. Crum's opinion that Claimant has complicated pneumoconiosis, the only such opinion of record, is insufficient to outweigh the remaining evidence of record after addressing the Sixth Circuit's instructions. *Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33-34; Decision and Order on Remand at 5. Therefore, we also affirm the ALJ's finding that the evidence weighed together as a whole fails to establish complicated pneumoconiosis.⁷ Decision and Order on Remand at 5. We thus affirm the ALJ's conclusion that Claimant failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

⁷ Contrary to Claimant's argument, as the Board previously explained and as the Sixth Circuit did not disagree, the ALJ need not first determine whether Claimant has simple clinical pneumoconiosis before addressing whether he has complicated pneumoconiosis; he need only consider all relevant evidence in making his findings. *See* 20 C.F.R. §718.304; *Gray*, 176 F.3d at 388-89; *Cummings v. Island Creek Coal Co.*, BRB No. 20-0013 BLA, slip op. at 6-7 & 7 n.12 (Nov. 25, 2020) (unpub.); Claimant's Brief at 35-36. Similarly, we previously rejected Claimant's argument that the ALJ failed to consider Claimant's Exhibit 10 (video and photos submitted with Dr. Crum's deposition) and Claimant's Exhibit 11 (2011 Guidelines for the Use of International Labour Organization International Classification of Radiographs of Pneumoconioses). Claimant's Brief at 15-18. Again, the Sixth Circuit did not disagree with these holdings.

Accordingly, we affirm the ALJ's Decision and Order on Remand Denying Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge