

U.S. Department of Labor

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



BRB No. 21-0207 BLA

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| DARRELL HILL |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| CLINCHFIELD COAL COMPANY |) | DATE ISSUED: 01/24/2022 |
| |) | |
| 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 Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Kendra Prince (Penn, Stuart, & Eskridge), Abingdon, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Granting Benefits (2017-BLA-06218) rendered on a subsequent claim

filed on April 1, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).¹

The parties stipulated Claimant has 32.94 years of underground coal mine employment. The ALJ determined Claimant established complicated pneumoconiosis arising out of his coal mine employment and therefore invoked the irrebuttable presumption he is totally disabled due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2018). 20 C.F.R. §§718.203(b), 718.304. The ALJ thus found Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c),² and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis. Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.³

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 Claimant filed two prior claims for benefits. Decision and Order at 2. He filed his first claim on March 25, 1996, which the district director denied as abandoned on June 4, 1996. Director's Exhibit 1. Claimant filed his second claim on June 30, 2006, which the district director denied on May 14, 2007, because Claimant failed to establish total disability. Director's Exhibit 2.

² 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 she 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(c); *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). The district director denied Claimant's most recent prior claim because he did not establish total disability. Director's Exhibit 2. Consequently, he had to submit new evidence establishing total disability in order to have his claim reviewed on the merits. 20 C.F.R. §725.309(c).

³ We affirm, as unchallenged on appeal, the ALJ's finding of 32.94 years of underground coal mine employment. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

accordance with applicable law.⁴ 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).

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 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, 1-33-34 (1991) (en banc).

The ALJ found the x-ray evidence supported a finding of complicated pneumoconiosis.⁵ Decision and Order at 6, 9. She gave no weight to the computed tomography (CT) scan evidence,⁶ found the treatment records did not mention complicated

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 17.

⁵ The ALJ accurately noted there is no biopsy evidence. Decision and Order at 6-7; *see* 20 C.F.R. §718.304(b).

⁶ There is one newly-submitted CT scan, dated February 3, 2017. Claimant’s Exhibit 6. Dr. Haines (not Dr. Lyle as the ALJ referenced), who is a Board-certified radiologist, read the scan as showing changes of chronic obstructive pulmonary disease in Claimant’s peripheral lung fields; a “masslike density” in the right upper lobe measuring “2.8 x 3 cm with irregular margins”; a smaller “masslike density” in the right lower lobe with a “maximum diameter [of] 15 mm” and also “irregular margins”; and a density in the right middle lobe measuring 10 x 17 mm.” *Id.* at 1-2. He also found a “conglomerate masslike density in the left lower lobe measuring 3.9 cm x 4.4. cm with multiple calcifications.” *Id.* at 2. The radiologist opined that “[w]hile it all likely represents a complicated coal workers['] pneumoconiosis with progressive massive fibrosis, some of the spiculated lesions are such that a concurrent neoplasm cannot be excluded.” *Id.* The

pneumoconiosis, and determined the medical opinions are in equipoise.⁷ *Id.* at 7-9. Weighing all of the categories together, she found the other evidence did not diminish the x-rays' probative force. 20 C.F.R. §718.304(a)-(c); Decision and Order at 9. We reject Employer's argument that the ALJ erred.

X-Ray Evidence

The ALJ considered nine interpretations of four x-rays. Decision and Order at 6. All of the interpreting physicians are dually-qualified Board-certified radiologists and B readers, except Drs. Ranavaya and Fino, who are B readers only. *Id.* Dr. DePonte interpreted the March 25, 2016 x-ray as positive for simple pneumoconiosis and identified two opacities that "may represent category B opacities" for complicated pneumoconiosis. Director's Exhibit 21. Dr. Simone interpreted the same x-ray as negative for simple and complicated pneumoconiosis. Employer's Exhibit 4. Because Drs. DePonte and Simone are each dually qualified, the ALJ found the March 25, 2016 x-ray neither supports nor refutes a finding of complicated pneumoconiosis. Decision and Order at 6.

Drs. DePonte and Alexander each interpreted the May 2, 2016 x-ray as positive for simple and complicated pneumoconiosis.⁸ Director's Exhibit 20; Claimant's Exhibit 3. Dr. DePonte observed a "14 mm [millimeter] category A opacity lateral to left hilum," and suspected a "large opacity or mass inferior to left hilum." Director's Exhibit 20. Dr. Alexander noted a "20 x 15 mm category A large opacity in left upper zone" and a "[p]ossible 30 mm left infrahilar mass." Claimant's Exhibit 3. Dr. Colella interpreted the same x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis, although he noted a mass in the left lower lobe without addressing its etiology. Director's Exhibit 22. The ALJ found the May 2, 2016 x-ray supports a finding of complicated pneumoconiosis, based on the preponderance of the positive readings by the dually-qualified radiologists. Decision and Order at 6.

Dr. DePonte interpreted the October 21, 2016 x-ray as positive for simple and complicated pneumoconiosis, with Category B large opacities, identifying a "37 mm large opacity, right upper zone [and] at least [a] 21 mm large opacity, left lower lung zone."

ALJ gave no weight to the CT scan evidence because the radiologist did not provide an equivalency determination. Decision and Order at 7.

⁷ Dr. Ajarapu diagnosed complicated pneumoconiosis while Dr. McSharry did not. Director's Exhibits 20 at 9; 22 at 4; 24 at 1, 4.

⁸ Dr. Ranavaya reviewed the May 2, 2016 x-ray for quality only. Director's Exhibit 20.

Claimant's Exhibit 2. Dr. Fino interpreted the x-ray as positive for simple pneumoconiosis only. Director's Exhibit 22. Based on Dr. DePonte's superior radiological qualifications, the ALJ found the x-ray positive for complicated pneumoconiosis.⁹ Decision and Order at 6.

Dr. Crum interpreted the May 25, 2018 x-ray as positive for simple and complicated pneumoconiosis, Category B large opacities. Claimant's Exhibit 1. Dr. Simone interpreted the same x-ray as negative for both. Employer's Exhibit 5. Because of the equal number of positive and negative readings by the dually qualified physicians, the ALJ found the x-ray neither supports nor refutes a finding of complicated pneumoconiosis. Decision and Order at 6.

Based on two positive x-rays and two in equipoise, the ALJ found Claimant established complicated pneumoconiosis. Decision and Order at 6; 20 C.F.R. §718.304(a). Employer argues Dr. DePonte's readings were inconsistent because she identified Category B large opacities on the March 25, 2016 x-ray, Category A opacities on the May 2, 2016 x-ray, and Category B large opacities on the October 21, 2016 x-ray. Employer's Brief at 5, 7.

But the regulations do not require x-ray readings for complicated pneumoconiosis be consistent as to the category of large opacities in order to establish complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c). Rather, Claimant need only establish he has a chronic dust disease of the lung that yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C.¹⁰ *Id.* As Dr. DePonte consistently identified large opacities for complicated pneumoconiosis in accordance with the regulatory criteria, the ALJ permissibly relied on her readings. Director's Exhibits 20, 21; Claimant's Exhibit 2.

⁹ Employer incorrectly states the ALJ found the October 21, 2016 x-ray in equipoise. Employer's Brief at 5. We affirm, as unchallenged, the ALJ's finding that the October 21, 2016 x-ray is positive for complicated pneumoconiosis. *See Skrack*, 6 BLR at 1-711 ; Decision and Order at 6.

¹⁰ Generally speaking, a Category A large opacity is one "having the longest dimension up to about 50 mm," while a Category B opacity is one "having the longest dimension exceeding 50 mm." *See* Guidelines for the Use of the ILO International Classification of Radiographs, Revised Edition 2011, available at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_168260.pdf (last visited January 12, 2021).

We also reject Employer's argument that the ALJ improperly counted heads in finding the May 2, 2016 x-ray positive for complicated pneumoconiosis. Employer's Brief at 6.

In evaluating conflicting x-ray interpretations, the ALJ must consider the radiological qualifications of the interpreting physicians. 20 C.F.R. §718.202(a)(1). The ALJ properly did so and acted within her discretion in relying on the preponderance of the positive readings by the dually-qualified radiologists. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003); Decision and Order at 6; Director's Exhibits 20, 22; Claimant's Exhibit 3. As the ALJ permissibly conducted both a quantitative and qualitative analysis of the x-ray interpretations, we affirm her finding that the May 2, 2016 x-ray is positive for complicated pneumoconiosis.¹¹ *See Addison*, 831 F.3d at 256-57; *Adkins*, 958 F.2d at 52.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established complicated pneumoconiosis based on the x-ray evidence. Decision and Order at 6. As Employer raises no other challenges on appeal, we affirm the ALJ's finding that the evidence as a whole establishes complicated pneumoconiosis and that Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §§718.203, 718.304; *Daniels Co., Inc. v. Mitchell*, 479 F.3d 321, 337 (4th Cir. 2007); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9-10. Thus, we affirm the ALJ's finding that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 10.

¹¹ Furthermore, even if we accept Employer's contention that the May 2, 2016 x-ray is in equipoise, the ALJ's finding of complicated pneumoconiosis is otherwise supported by her crediting of the October 21, 2016 x-ray as positive for complicated pneumoconiosis. *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); 20 C.F.R. §718.304(a); Decision and Order at 6, 9; Director's Exhibits 20, 22; Claimant's Exhibits 2, 3.

Accordingly, we affirm the ALJ's Decision and Order Granting Benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge