U.S. Department of Labor

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

BRB No. 23-0437 BLA

ADELINE B. PRESLEY (Widow of HARVEY L. PRESLEY) Claimant-Respondent v. VP #5 MINING COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 01/30/2025 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Dierdra M. Howard, Administrative Law Judge, United States Department of Labor.

William S. Mattingly and Abigail C. Wearden (Jackson Kelly, PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Dierdra M. Howard's Decision and Order Granting Benefits (2022-BLA-05122) rendered on a survivor's claim filed on August 24, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with twenty-four years of coal mine employment, based on the parties' stipulation, and found Claimant[1] established the Miner had complicated pneumoconiosis arising out of coal mine employment, thereby invoking the irrebuttable presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.203(b), 718.304. Thus, she awarded benefits.

On appeal, Employer argues the ALJ erred in finding the Miner had complicated pneumoconiosis.[2] 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.[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, 361-62 (1965).

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

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner's death was due to pneumoconiosis if he suffered 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. The ALJ must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis and then must weigh the evidence together at subsections (a), (b), and (c) before determining whether Claimant has invoked the irrebuttable presumption. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Associated 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)

[1] Claimant is the widow of the Miner, who died on July 29, 2020. Director's Exhibit 9.

[2] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant established the Miner had twenty-four years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3 n.15.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 11.

(en banc). Claimant bears the burden of proof to establish the existence of complicated pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994).

The ALJ found that the x-ray, computed tomography (CT) scan, and medical opinion evidence supports a finding of complicated pneumoconiosis and that the Miner's treatment records neither support nor refute complicated pneumoconiosis. Decision and Order at 6-11. Weighing the evidence together, the ALJ found it established the Miner had complicated pneumoconiosis. *Id.* at 11-12.

Employer contends the ALJ erred in finding the x-ray, CT scan, and medical opinion evidence supports a finding of complicated pneumoconiosis because she failed to consider x-ray and CT scan readings contained in the Miner's treatment records. Employer's Brief at 6-17. We agree.

Treatment Records

The parties submitted the Miner's treatment records from Wellmont Medical Associates, Ballad Health, the Department of Veterans Affairs, and a May 14, 2020 emergency department visit. Director's Exhibits 12, 13, 57; Claimant's Exhibits 2, 3; Employer's Exhibit 3. The ALJ observed the treatment notes document a variety of diagnoses, including: coronary artery disease, hyperlipidemia, hypertension, degenerative disc disease, chronic airway obstruction, paroxysmal ventricular tachycardia, cardiomyopathy, Parkinson's Disease, back pain, pneumonia, and precordial pain. Decision and Order at 10-11 (citing Director's Exhibits 12, 13; Claimant's Exhibits 2, 3). She concluded the treatment records do not independently establish complicated pneumoconiosis, neither support nor negate a finding of complicated pneumoconiosis, and merit limited probative value. *Id.* at 11-12.

As Employer contends, however, the Miner's treatment records also include three chest x-ray interpretations and seven CT scan readings that the ALJ did not consider. Employer's Brief at 6-14. Dr. Harris read the January 6, 2015 x-ray and, while she noted a right apical ten-millimeter nodule, she also noted it could represent a cavitary nodule and opined the x-ray was suspicious for malignancy. Employer's Exhibit 3 at 16. Dr. Carr read the January 20, 2015 x-ray and opined the nodular densities seen on the January 6, 2015 x-ray had decreased in prominence whereas there were new increased densities elsewhere in the right lung not seen on the previous x-ray. *Id.* at 14-15. He diagnosed "new abnormal findings/changes." *Id.* Dr. Qayum read the February 17, 2015 x-ray, and noted the continued appearance of chronic interstitial markings and reticulonodular densities. *Id.* at 13-14.

Dr. Messinger read the March 5, 2015 CT scan and identified "innumerable micronodules," most smaller than five millimeters in diameter, but noted a nodule in the peripheral subpleural lateral segment of the right middle lobe measuring eight millimeters by eight millimeters by ten millimeters. Employer's Exhibit 3 at 12. She noted this nodule could be related to coal workers' pneumoconiosis and recommended a follow up in three months. *Id.* Dr. Jain read the August 13, 2015 CT scan and diagnosed "[p]rominent chronic interstitial changes . . . with extensive bilateral predominantly centrilobular nodules," including a "new 1.1 [centimeter] groundglass nodular densit[y]" in the right upper lobe as well as a six-centimeter nodule in the right apex. *Id.* at 10. Dr. Clopton read the November 15, 2015 CT scan and opined the "previously described 1.1 [centimeter] right upper lobe groundglass nodule appears less confluent" and "blend[s] into the background apical predominant nodules." *Id.* at 8-9. Dr. Wilson read the March 16, 2016 CT scan and opined it was stable since the prior CT scan without significant change. *Id.* at 7. She opined the opacities identified are likely simple coal workers' pneumoconiosis while also identifying other possible etiologies and recommending a follow-up CT scan. *Id.*

Dr. Clopton read the March 22, 2017 CT scan and, while he did not state the size of any specific opacity, he opined it showed a "[s]light progression in fibrotic lung changes, primarily in the lung bases," as compared to the previous CT scan. Employer's Exhibit 3 at 5. Dr. Qayum read the July 28, 2018 CT scan, he again noted progression in the pulmonary fibrosis since the previous exam, and he identified nodules measuring six to seven millimeters in diameter. *Id.* at 3. Finally, Dr. Jain read the March 7, 2019 CT scan and identified an eleven-millimeter density in the right upper lobe and a sixty-seven millimeter by fourteen-millimeter opacity in the right lower lobe that were "significantly more prominent since the prior study;" he also diagnosed either a superimposed infection or progression of scarring. *Id.* at 1-2.

Because the ALJ failed to consider these x-ray and CT scan readings documenting opacities both larger and smaller than one centimeter in diameter, with notations bearing on the nature of the opacities, the ALJ's determination that the Miner's treatment records neither support nor weigh against a finding of complicated pneumoconiosis is unsupported by substantial evidence and not sufficiently explained in accordance with the Administrative Procedure Act (APA).[4] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir.

[4] 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).

2016); *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989); *McCune v. Central Appalachian Coal Co*., 6 BLR 1-996, 1-998 (1984) (failure to discuss relevant evidence requires remand). We must, therefore, vacate her determinations that Claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(c) and that the evidence as a whole establishes complicated pneumoconiosis. 20 C.F.R §718.304; Decision and Order at 10-12.

20 C.F.R. §718.304(a): X-ray Evidence

The ALJ considered three interpretations of two x-rays, dated August 13, 2019 and September 10, 2019, which were both interpreted by physicians dually qualified as Board-certified radiologists and B readers. Decision and Order at 5-7. Dr. Crum interpreted the August 13, 2019 x-ray as positive for complicated pneumoconiosis, Category A. Director's Exhibit 11. The ALJ found this x-ray positive for complicated pneumoconiosis. Decision and Order at 7. Dr. Meyer read the September 10, 2019 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Adcock interpreted it as negative for the disease. Claimant's Exhibit 1; Employer's Exhibit 4. The ALJ gave minimal weight to Dr. Adcock's interpretation of this x-ray because his conclusion that it revealed no large opacities was inconsistent with the positive August 13, 2019 x-ray as well as the opacities seen on the CT scans designated by the parties. Decision and Order at 7. Thus, crediting Dr. Meyer's reading over Dr. Adcock's, she found the preponderance of the x-ray evidence supports a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(a). Decision and Order at 7, 11.

Employer does not specifically challenge the ALJ's findings that the August 13, 2019 and September 10, 2019 x-rays are positive for complicated pneumoconiosis, and we therefore affirm them. 20 C.F.R. §718.304(a); Decision and Order at 6-7; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). As discussed above, however, Employer correctly asserts the ALJ failed to consider x-rays in the Miner's treatment records that may affect the way she weighs the x-ray evidence as a whole. Employer's Brief at 6-14; *see Addison*, 831 F.3d at 256-57; *Wojtowicz*, 12 BLR at 1-165; *McCune*, 6 BLR at 1-998. Thus, we vacate the ALJ's determination that the x-ray evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(a); Decision and Order at 7, 11.

20 C.F.R. §718.304(c): "Other" Medical Evidence

In addition to the Miner's treatment records, addressed above, the record contains CT scan evidence and medical opinions designated by the parties as affirmative and rebuttal evidence. Decision and Order at 7-8; Claimant's Evidence Summary Form; Employer's Evidence Summary Form. The ALJ considered fifteen interpretations of seven

CT scans dated March 5, 2015, August 13, 2015, November 13, 2015, March 16, 2016, March 22, 2017, July 16, 2018, and March 4, 2019.[5] Decision and Order at 7-8; Claimant's Exhibits 4-6; Employer's Exhibit 1. Dr. Adcock reviewed all seven CT scans and identified various opacities and evolving changes consistent with diffuse disease but opined none of the CT scans documented any large opacities consistent with complicated pneumoconiosis. Employer's Exhibit 1 at 1-14. Dr. Crum reviewed all seven CT scans and diagnosed complicated pneumoconiosis, category A with large opacities as first noted on the July 16, 2018 and March 4, 2019 scans with opacity measurements ranging from 1.3 to 1.5 centimeters. Claimant's Exhibit 6 at 1-2. Dr. Harris reviewed Drs. Adcock's and Crum's readings of the CT scans and independently interpreted the March 4, 2019 CT scan to diagnose complicated pneumoconiosis in the form of discrete nodules in areas of coalescence measuring 1.7 and 1.4 centimeters. Claimant's Exhibit 5 at 4.

The ALJ accorded great weight to Dr. Crum's opinion because he is a Board-certified radiologist and his conclusions are consistent with the x-ray readings. Decision and Order at 8. While the ALJ noted Dr. Harris is not a Board-certified radiologist, she nevertheless gave his CT scan interpretation "some weight" because he is a pulmonologist familiar with black lung disease and its radiological manifestations and because his conclusions are consistent with both Dr. Crum's interpretations as well as the x-ray evidence. *Id.* She also noted Dr. Adcock is a Board-certified radiologist and that he diagnosed simple pneumoconiosis. *Id.* However, she gave his opinion only "some weight" as his conclusion that the CT scans do not document any large opacities is inconsistent with Drs. Crum's and Harris's diagnoses as well as the x-ray evidence. *Id.* Thus, weighing the CT scan evidence together, the ALJ found it supports a finding of complicated pneumoconiosis. *Id.* at 11.

Employer does not specifically challenge the ALJ's credibility determinations with regard to Drs. Crum's and Harris's interpretations of the CT scans, and we therefore affirm them. 20 C.F.R. §718.304(c); Decision and Order at 8; *see Skrack*, 6 BLR at 1-711. As is discussed above, however, Employer correctly contends the ALJ failed to consider or

[5] Claimant also submitted Dr. DePonte's readings of the CT scans. At the hearing, Employer objected to the number of CT scans submitted by Claimant as in excess of the evidentiary limitations. Hearing Transcript at 7-8. In her post-hearing brief, Claimant stated she and Employer had agreed during post-hearing discussions that, if the ALJ found she had exceeded the evidentiary limitations, the ALJ should rely on Drs. Crum's and Harris's interpretations. Claimant's Post-Hearing Brief at 2. The ALJ ultimately found Dr. DePonte's CT scan readings in excess of the evidentiary limitations and thus declined to consider them. Decision and Order at 3 n.11. We affirm this finding as unchallenged on appeal. *See Skrack*, 6 BLR at 7-11.

discuss the CT scan readings of Drs. Jain, Qayum, Wilson, Clopton, or Messinger, which, Employer asserts, support Dr. Adcock's interpretations of the CT scans. Employer's Brief at 6-14; *see Addison*, 831 F.3dat 256-57; *Wojtowicz*, 12 BLR at 1-165; *McCune*, 6 BLR at 1-998. Thus, we vacate the ALJ's determination that the CT scan evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 8, 11.

Medical Opinions

The ALJ considered the medical opinions of Drs. Forehand, Fino, and Harris. Decision and Order at 8-10. Dr. Forehand diagnosed complicated pneumoconiosis based on the CT scan and x-ray evidence. Claimant's Exhibits 3 at 1-2; 4 at 3; Employer's Exhibit 2 at 4. Dr. Fino noted the Miner's lower lung zone interstitial fibrosis with honeycombing and diagnoses of simple pneumoconiosis, arthritis, Parkinson's disease, coronary artery disease, hypertension, and hyperlipidemia and determined he did not have complicated pneumoconiosis based on the lack of an abnormality in his lung function studies. Employer's Exhibits 5 at 4-5; 7 at 9-12. Dr. Harris diagnosed complicated pneumoconiosis and further indicated he disagreed with Dr. Fino's conclusions because, he opined, honeycombing is the final stage of pulmonary fibrosis, and the radiological evidence of large opacities supports a finding of complicated pneumoconiosis. Claimant's Exhibit 5 at 4, 6; Employer's Exhibit 6 at 14-15.

The ALJ accorded great weight to Dr. Forehand's opinion because it is based on his own observations and diagnostic testing, which is consistent with the preponderance of the evidentiary record. Decision and Order at 9. The ALJ gave little weight to Dr. Fino's opinion as inconsistent with the preponderance of radiographic and physical evidence. *Id*. The ALJ accorded significant weight to Dr. Harris's report because it is based on the opinions of board-certified radiologists, as well as the x-ray and CT scan evidence, and because it highlighted the shortcomings of opinions inconsistent with the diagnostic evidence. *Id*. at 10. Thus, weighing the evidence together, she found the medical opinion evidence supports a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(c). *Id*. at 11.

Employer contends the ALJ erred in discrediting Dr. Fino's opinion. Employer's Brief at 14-17. Because the ALJ's determinations on remand concerning the x-ray, CT scan, and treatment record evidence may affect her consideration of the medical opinion evidence, we vacate the ALJ's discrediting of Dr. Fino's opinion as well as her conclusion that the medical opinion evidence as a whole supports a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(c). Decision and Order at 11. We thus vacate the ALJ's determination that Claimant established complicated pneumoconiosis by a

preponderance of evidence and invoked the Section 411(c)(3) presumption, and we vacate the award of benefits. 20 C.F.R. §718.304; Decision and Order at 12.

Remand Instructions

On remand, the ALJ must reconsider whether the x-ray evidence, CT scan evidence, treatment records, and medical opinion evidence support a finding of complicated pneumoconiosis. 20 C.F.R. §718.304. Specifically, she must consider the x-ray and CT scan interpretations contained in the Miner's treatment records and must reconcile any conflicts between these interpretations and the interpretations of these x-rays and CT scans found elsewhere in the record. *Id.*; *see Scarbro*, 220 F.3d at 255-56. She must also consider the explanations for the physicians' conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their diagnoses, including evaluating the diagnoses the readers provided for the scarring and opacities they identified in the Miner's lungs. *See Cox*, 602 F.3d at 283 (ALJ must consider all relevant evidence and may discount x-ray readings where there is no evidence of the alternative diagnoses for large masses present on the x-rays); *Milburn Colliery v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); 20 C.F.R. §718.304(a); *Melnick*, 16 BLR at 1-33.

In addition, the ALJ must reconsider whether the medical opinion evidence and the Miner's treatment records support a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c); *see Cox*, 602 F.3d at 283; *Melnick*, 16 BLR at 1-33. She must further weigh each category of evidence together to determine whether Claimant has established complicated pneumoconiosis. *See Scarbro*, 220 F.3d at 255-56. In rendering her findings, the ALJ must set forth and adequately explain all her findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

If the ALJ finds Claimant has met her burden to establish complicated pneumoconiosis, Claimant will have invoked the irrebuttable presumption of total disability due to pneumoconiosis and the ALJ may reinstate the award of benefits. 20 C.F.R. §718.304. If, however, she finds Claimant has not established complicated pneumoconiosis, she must then determine whether Claimant can establish entitlement under Section 411(c)(4)[6] or 20 C.F.R. Part 718. 30 U.S.C. §§901, 921(c)(4); 20 C.F.R. §§718.3, 718.202-718.204, 718.305.

[6] Section 411(c)(4) provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Granting Benefits, and we remand this case to the ALJ for further proceedings consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge