U.S. Department of Labor

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

BRB No. 22-0197 BLA

JONATHAN K. ELLIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HAMPDEN COAL LLC, c/o BLACKHAWK MINING	)	
	)	
and	)	
	)	DATE ISSUED: 7/24/2023
ROCKWOOD CASUALTY INSURANCE 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 Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for Claimant.

Joseph D. Halbert and Jarrod R. Portwood (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Patricia J. Daum's Decision and Order Denying Benefits (2019-BLA-05691) rendered on a claim filed on October 25, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant did not establish complicated pneumoconiosis and thus could 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). *See* 20 C.F.R. §718.304. She further found Claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)[1] and therefore could not invoke the rebuttable presumption at Section 411(c)(4)[2] or establish entitlement under 20 C.F.R. Part 718. 30 U.S.C. §921(c)(4) (2018). Accordingly, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish complicated pneumoconiosis.[3] Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive 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

[1] As Claimant did not establish total disability, the ALJ declined to determine Claimant's length of coal mine employment and whether Employer is the responsible operator. Decision and Order at 4, 6.

[2] 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the ALJ's finding Claimant did not establish total disability and thus could not invoke the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 29-30.

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) Presumption – 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 a 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 United States Court of Appeals for the Fourth Circuit holds that because prong (a) sets out an objective standard for diagnosing complicated pneumoconiosis, the ALJ must determine whether a condition which is diagnosed under prongs (b) or (c) would show as an opacity greater than one centimeter if it were seen on a chest x-ray. *See Scarbro*, 220 F.3d at 256; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999).

The ALJ found the x-ray evidence sufficient to establish simple clinical pneumoconiosis but not complicated pneumoconiosis. 20 C.F.R. §718.304(a); Decision and Order at 25. She noted there is no biopsy evidence and found the computed tomography (CT) scan and medical opinion evidence does not support a finding of the disease. 20 C.F.R. §718.304(b), (c); Decision and Order at 25-28. Weighing all the evidence together, she concluded Claimant does not have complicated pneumoconiosis and denied benefits.[5] 20 C.F.R. §718.304; Decision and Order at 28.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 15.

[5] Because Claimant failed to establish total disability, he can neither invoke the Section 411(c)(4) presumption nor establish one of the requisite elements of entitlement

Claimant asserts the ALJ weighed the evidence "in a vacuum," did not properly account for the positive CT scan evidence, failed to resolve inconsistencies in the evidence, and did not adequately explain her findings in accordance with the Administrative Procedure Act (APA).[6] Claimant's Brief at 4. We agree.

X-Ray Evidence at 20 C.F.R. §718.304(a)

The ALJ considered seven interpretations of two chest x-rays. Decision and Order at 8-12; Director's Exhibits 18, 19, 20 at 3-31, 28, 29; Claimant's Exhibits 1, 6; Employer's Exhibits 1, 2, 4-6. The ALJ noted all the interpreting physicians are dually-qualified B readers and Board-certified radiologists but found Dr. Tarver the most well-qualified reader due to his additional radiological qualifications.[7] Decision and Order at 8-11.

Dr. Crum read the November 29, 2017 x-ray as positive for simple and complicated pneumoconiosis, and recommended a CT scan "for further evaluation," while Drs. Tarver and Adcock read it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis.[8] Director's Exhibits 18; 20 at 3-4; 28; Employer's Exhibit 5. The ALJ found the November 29, 2017 x-ray negative for complicated pneumoconiosis based on

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under 20 C.F.R. Part 718. Therefore, his only avenue to receive benefits is to invoke the irrebuttable presumption at Section 411(c)(3) of the Act.

[6] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that 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).

[7] Except for Dr. Crum, whose curriculum vitae was not of record, the ALJ summarized and ranked each physician's additional qualifications, to include length of practice, academic or professional appointments, and relevant publications. The ALJ noted Dr. Tarver has a "long history of practice, prestigious academic appointment, and extensive publication history," while neither Dr. Adcock nor Dr. Kendell has any academic appointments. Decision and Order at 11. She further noted Dr. Tarver has a relevant publication history while Dr. Kendall is not published. *Id.* The ALJ ranked Dr. Tarver as "the most well-qualified reader," with Dr. Adcock "slightly more well-qualified than Dr. Kendall.

[8] Dr. Gaziano, a B reader, reviewed the November 29, 2017 x-ray for film quality purposes only. Director's Exhibit 19.

the preponderance of the negative readings by the dually-qualified radiologists. Decision and Order at 11-12, 24.

Dr. Tarver read the June 25, 2018 x-ray as positive for simple and complicated pneumoconiosis. Claimant's Exhibit 1. He identified a size A opacity in the right mid lung "in the same general location" Dr. Crum identified when reading the November 29, 2017 x-ray. *Id.* Conversely, Drs. Adcock and Kendall read the x-ray positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Employer's Exhibits 1, 6. Despite having ranked Dr. Tarver as the most qualified radiologist of record, the ALJ concluded his qualifications were not sufficiently superior to offset the two negative readings by two dually-qualified radiologists. Decision and Order at 12. Thus, the ALJ found the June 25, 2018 x-ray is negative for complicated pneumoconiosis. *Id.*

Weighing the x-ray evidence as a whole, the ALJ gave the June 25, 2018 x-ray significant weight because it was graded quality 1 by all the readers while the November 29, 2017 x-ray was graded quality 2 by all readers.[9] Decision and Order at 12. Moreover, having found both x-rays were negative, she concluded the x-ray evidence did not support a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(a). *Id.*

Other Evidence at 20 C.F.R. §718.304(c) and Weighing the Evidence as Whole

The ALJ next considered three interpretations of two CT scans. Dr. DePonte, a Board-certified radiologist and B reader, provided the sole reading of a January 8, 2018 CT scan and determined it is positive for complicated pneumoconiosis.[10] Claimant's

[9] The regulations do not require x-ray readings to be of optimal quality; they only need to "be of suitable quality for proper classification of pneumoconiosis." 20 C.F.R. §718.102(a).

[10] Dr. DePonte described:

> Fine nodular and irregular interstitial opacities are present in all lung zones bilaterally indicative of simple coal workers' pneumoconiosis. Subpleural nodularity is present as well, involving all lung zones with coalescence into larger opacities forming pseudoplaques, typical for coal workers' pneumoconiosis. One of the largest pseudoplaques, in the right upper lung zone, is 2 cm in diameter consistent with a large opacity. There are several other pseudoplaques whose diameter exceeds 1 cm also consistent with large opacities of coal workers' pneumoconiosis.

Exhibit 3. She stated the "CT is medically acceptable for [the] evaluation of pulmonary diseases," and it "is beneficial in confirming or denying the presence of simple coal workers' pneumoconiosis and can be beneficial in recognizing complicated coal workers' pneumoconiosis when it is not evident on the routine chest x-rays." *Id*. at 2. Specifically, she indicated the large opacities she observed on the CT scan "would measure similar in size and greater than one centimeter" in diameter on a standard x-ray. *Id*. Finding Dr. DePonte's interpretation uncontradicted and her opinion well-reasoned, the ALJ concluded the January 8, 2018 CT scan is positive for complicated pneumoconiosis. Decision and Order at 27.

Dr. Adcock read the June 25, 2018 CT scan as negative for complicated pneumoconiosis,[11] while Dr. Kendall read it as positive for the disease.[12] Claimant's

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> Coalescence is also present more centrally in the lungs with 13 mm and 11 mm large opacities in the right middle lobe. The sum total of the large opacities exceeds 5 cm and therefore would be classified as Category B.
>
> No consolidation. Few parenchymal bands or regions of plate-like atelectasis particularly in the lower lung zones.
>
> Minimal emphysema in the upper lung zones. No pleural abnormalities indicative of pneumoconiosis. Mild mediastinal and bilateral hilar adenopathy, some with calcification, typical for coal workers' pneumoconiosis. Heart and great vessels are unremarkable. Upper abdominal contents are unremarkable.

Claimant's Exhibit 3 at 1.

[11] Dr. Adcock indicated Claimant has non-calcified sub-centimeter centrilobular nodules in moderate profusion, predominating in the upper lobes; few coalescences in the right perihelium, but no large opacities; pleural pseudoplaque formation in the posterolateral right hemithorax and major fissure; no emphysema; large airways that are unremarkable; eggshell calcification of scattered nodes normal to mildly enlarged in size in the lymph node; and focal irregularity associated with pseudoplaques in the pleura. Employer's Exhibit 3.

[12] Dr. Kendall observed interstitial and pleural-based pulmonary nodules throughout the left and right lungs consistent with pneumoconiosis; perihilar and basilar large opacities consistent with complicated pneumoconiosis; a superimposed inflammatory or neoplastic process that cannot be ruled out; and a mild mediastinal and hilar adenopathy. Claimant's Exhibit 5. He stated a chest CT scan is more sensitive than a chest x-ray for detection and

Exhibit 5; Employer's Exhibit 3. The ALJ found the readings of this scan to be in equipoise. Decision and Order at 27.

However, when weighing the CT scan evidence as a whole, the ALJ indicated there was one positive CT scan and one *negative* CT scan, when in fact she had found one CT scan to be positive and the readings of the other one to be *in equipoise*.[13] Decision and Order at 28. She concluded the CT scan evidence did not support a finding of complicated pneumoconiosis. *Id*.

Considering the medical opinion evidence, the ALJ rejected Dr. Ammisetty's opinion that Claimant has complicated pneumoconiosis as inconsistent with the weight of the x-ray evidence. Decision and Order at 28. Although she considered Dr. Fino's opinion that Claimant does not suffer from complicated pneumoconiosis to be well-reasoned, she found it not well-documented because he relied exclusively upon evidence that is not of record.[14] *Id*. Thus, the ALJ determined that the other evidence at 20 C.F.R. §718.304(c) does not support a finding of complicated pneumoconiosis. *Id.*

Weighing all of the evidence together, the ALJ concluded:

> I found both chest x-rays to be negative for complicated pneumoconiosis. Nonetheless, I note that both films were found to be

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characterization of pulmonary parenchymal abnormalities; opined they are useful in confirming or refuting the presence of simple pneumoconiosis and complicated pneumoconiosis when not well demonstrated on routine chest x-rays; and concluded the June 25, 2018 CT scan is of good quality sufficient for evaluating the presence or absence of pneumoconiosis. *Id.*

[13] This distinction matters because when the readings of a CT scan are found to be in equipoise it is not a negative scan–it has an equal number of credible readings and therefore does not establish the presence or absence of pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994). The ALJ reverts to saying there is one positive CT scan and that the readings of the other one are in equipoise when weighing the CT scan evidence as a whole but it is unclear if she applied an accurate understanding of the difference between a negative CT scan and when the readings of a scan are in equipoise.

[14] Dr. Fino reviewed an x-ray and CT scan that were not designated by the parties. Employer's Evidence Summary Form at 5-6 (Oct. 22, 2019); Claimant's Evidence Summary Form at 5 (Sept. 24, 2019).

> positive by one dually qualified reader each. Additionally, one CT scan was positive for complicated pneumoconiosis and one was in equipoise. Dr. Kendall, who read an x-ray and a CT scan, changed his diagnosis from negative on the 6/25/18 x-ray *to positive on the 8/26/18 CT scan*, reviewing them both on the same day. I also find it noteworthy that Dr. Tarver changed his opinion on the existence of complicated pneumoconiosis from the first to the second x-ray reading, first opining that it did not exist and then opining that it did exist. Nonetheless, of two x-rays and two CT scans, only one CT scan was found to be positive for complicated pneumoconiosis.
>
> Thus, I find that one positive CT scan and one in equipoise cannot defeat two negative x- rays on record, despite one of the x-ray readers later changing his mind upon reviewing a CT scan, and despite both x-rays having one positive reading by a dually qualified reader each, one of whom also changed his mind upon reviewing a later x-ray. Overall, then, I find that the Claimant has failed to establish by a preponderance of evidence that he has complicated pneumoconiosis. Thus, the irrebuttable presumption is unavailable to him.

Decision and Order at 28 (emphasis added).[15]

Claimant's Arguments and Conclusion

Claimant correctly asserts that the ALJ failed to adequately explain her weighing of the CT scan evidence and did not properly consider the x-ray in conjunction with the CT scan evidence together in determining whether he has complicated pneumoconiosis. As noted previously, the ALJ made inconsistent findings in discussing the CT scan evidence– describing one CT scan as positive for complicated pneumoconiosis and another at various points in her decision as either having readings that were in equipoise or negative for the disease. Contrary to the ALJ's analysis, a CT scan whose readings are found to be in equipoise is not negative—its readings are equally balanced, so the CT scan neither establishes nor refutes the existence of complicated pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994). The ALJ therefore failed to adequately explain her conclusion that the CT scan evidence, considered in isolation, does not support a finding of complicated pneumoconiosis as there is one positive CT scan and one CT scan whose readings were found to be in equipoise.

The ALJ also failed to properly address inconsistencies in the evidence. First, the ALJ found it "noteworthy" that Dr. Tarver "changed his opinion" by first diagnosing no

[15] The ALJ misstates the date of the CT scan which actually is June 25, 2018.

complicated pneumoconiosis on the November 29, 2017 x-ray, but then diagnosing the disease on the more recent June 25, 2018 x-ray. She did not, however, adequately explain why Dr. Tarver's positive reading of the more recent x-ray as showing complicated pneumoconiosis did not detract from the probative value of his earlier negative reading. Decision and Order at 12; *see Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992).

Second, the ALJ's mere acknowledgement that Dr. Kendall read both an x-ray and a CT scan on the same day but provided contradictory interpretations regarding the presence of complicated pneumoconiosis lacks sufficient explanation as to how Dr. Kendall's opinion affects the weight of the x-ray evidence. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). The ALJ's analysis ignores that the x-ray and CT scan Dr. Kendall read were actually taken on the same day. Moreover, Dr. Kendall specifically explained that CT scans are more sensitive than x-rays in detecting pneumoconiosis. Claimant's Exhibit 5 at 1. Assuming Dr. Kendall's positive CT scan reading is credible, his negative x-ray reading apparently is not. Thus, the ALJ failed to adequately address whether the readings of the June 25, 2018 x-ray, that she found to be negative for complicated pneumoconiosis, are actually in equipoise or positive for pneumoconiosis based on the contradictory readings of Drs. Tarver and Adcock.[16] Without any further adequate explanation, the evidence in this case could be characterized as consisting of two x-rays whose readings are in equipoise, a CT scan whose interpretations are in equipoise, and a CT scan that is positive; or, alternatively, two positive x-rays, one CT scan in equipoise, and one positive CT scan.

In considering whether Claimant has complicated pneumoconiosis, the ALJ is required to consider all the relevant evidence and weigh it together in reaching an ultimate conclusion as to the credibility of the evidence. *See Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 255-56 (in determining the presence of complicated pneumoconiosis, an ALJ must weigh all of the relevant evidence, considering whether it supports or undercuts evidence from the same and other categories). Simply acknowledging that certain types of evidence are positive while others are negative does not satisfy the explanatory requirements of the APA.[17] *See* 5 U.S.C. §557(c)(3)(A); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*],

[16] As the ALJ found Dr. Tarver the most qualified radiologist, she did not adequately explain why she did not resolve the conflicting readings between Dr. Tarver and Dr. Adcock of the 2018 x-ray as establishing complicated pneumoconiosis based on Dr. Tarver's superior qualifications.

[17] Claimant also argues the ALJ failed to properly rank Dr. Crum's credentials along with the other physicians. Claimant's Brief at 3. We disagree. The ALJ accurately observed Dr. Crum's curriculum vitae was not submitted into the record and thus she could

137 F.3d 799, 803 (4th Cir. 1998); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Reviewing the record, there are four dually qualified radiologists identifying complicated pneumoconiosis, including Dr. Tarver, who the ALJ specifically identified as the most qualified radiologist, versus only one dually-qualified radiologist, Dr. Adcock, finding no evidence of the disease.[18] The ALJ's analysis does not adequately explain her rejection of the apparent preponderance of the positive evidence for complicated pneumoconiosis. Further, she mischaracterized the evidence, summarily dismissed evidence without adequate explanation, failed to resolve conflicts in the evidence that could affect the credibility of the x-ray and CT scan evidence, and did not properly evaluate all the relevant evidence together. Thus, we vacate her finding that Claimant did not establish complicated pneumoconiosis. *See* 5 U.S.C. §557(c)(3)(A); *Lockhart*, 137 F.3d at 803; *Wojtowicz*, 12 BLR at 1-165.

Consequently, we vacate the ALJ's conclusion that Claimant did not invoke the irrebuttable presumption at 20 C.F.R. §718.304 and her denial of benefits.

Remand Instructions

On remand, the ALJ must reconsider and weigh the x-ray and CT scan evidence together. She must critically examine all of the relevant medical evidence, resolve the conflict in the physicians' opinions, and explain her weighing of the evidence in accordance with the APA. 5 U.S.C. §557(c)(3)(A); *Wojtowicz*, 12 BLR at 1-165. If Claimant establishes complicated pneumoconiosis on remand, thus invoking the

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not assess whether Dr. Crum had any additional qualifications beyond being a dually-qualified radiologist. The ALJ correctly noted Dr. Crum is a Board-certified radiologist and B reader in her listing of the x-ray evidence because those qualifications are checked on his x-ray report, and the record confirms his status of a B reader when he read the November 29, 2017 x-ray on December 12, 2017. Director's Exhibit 29 (Dr. Crum's certificate indicates he was a B reader from July 1, 2016 through June 30, 2020). Moreover, any error is harmless, as the ALJ ultimately did not rely on her qualification rankings in determining the weight to accord the x-ray evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 12.

[18] There is also one medical opinion from Dr. Ammisetty diagnosing complicated pneumoconiosis. Because the ALJ found Dr. Fino's opinion excluding a diagnosis of complicated pneumoconiosis not well-documented, it does not constitute contrary evidence of the diagnoses of complicated pneumoconiosis on radiography in this case.

irrebuttable presumption of total disability due to pneumoconiosis, the ALJ must determine whether the disease arose out of his coal mine employment before awarding benefits. *Daniels Co. v. Mitchell*, 479 F.3d 321, 337 (4th Cir. 2007). If she awards benefits, she should address any remaining contested issues.[19] If the ALJ determines the evidence does not establish complicated pneumoconiosis on remand, she may reinstate her denial of benefits because Claimant has failed to establish total disability, an essential element of entitlement under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[19] We note, for example, the ALJ identified responsible operator as a contested issue but declined to render findings on it because she determined Claimant is ineligible for benefits. Decision and Order at 6.