

U.S. Department of Labor

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



BRB No. 22-0345 BLA

WILLARD R. THORNE)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ARCH COAL INCORPORATED)	
)	
and)	
)	
ARCH RESOURCES INCORPORATED, c/o)	DATE ISSUED: 7/26/2023
SMART CASUALTY CLAIMS)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2021-BLA-05977) rendered on a claim filed on October 13, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with thirty-five years of underground coal mine employment and found he established complicated pneumoconiosis. 20 C.F.R. §718.304. Consequently, she found Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018). She further found Claimant's complicated pneumoconiosis arose out of his coal mine employment, and thus awarded benefits. 20 C.F.R. §718.203(b).

On appeal, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.¹

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.² 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), 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 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

¹ We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established thirty-five years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

² This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 21.

(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. *See E. Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243-44 (4th Cir. 1999); *Melnick v. Consol. Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found the x-ray evidence establishes the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), while the medical opinion evidence and Claimant’s treatment records do not aid him in establishing the existence of the disease.³ 20 C.F.R. §718.304(a), (c); Decision and Order at 11-17. Weighing all of the evidence together, she concluded Claimant established complicated pneumoconiosis and thus invoked the irrebuttable presumption. *Id.* at 17.

X-ray Evidence

Drs. Tarver, Seaman, Benjamin, and Zaldivar offered four interpretations of two x-rays dated November 2, 2020, and April 28, 2021. Decision and Order at 10-12. The ALJ noted Drs. Tarver and Seaman are dually qualified as Board-certified radiologists and B readers, Dr. Benjamin’s “credentials are unknown, beyond his being a radiologist,” and Dr. Zaldivar is neither a Board-certified radiologist nor a B reader.⁴ *Id.* at 11. Ranking the physicians based on her consideration of their additional radiological credentials, she found Dr. Tarver is the best qualified because he is a dually-qualified radiologist and “a full professor of radiology, has published widely in radiology topics, and is the chest section editor for ‘The Radiologist.’” *Id.* The ALJ ranked Dr. Seaman second because she is a dually-qualified radiologist, holds a position as an associate adjunct professor of radiology, and has radiology publications. *Id.* She ranked Drs. Benjamin and Zaldivar third and fourth, respectively, noting that Dr. Benjamin is a radiologist but his additional qualifications are unknown, and Dr. Zaldivar is not a radiologist and was not a current B reader at the time of his interpretation. *Id.*

Regarding the specific interpretations, Dr. Tarver read the November 2, 2020 x-ray as positive for complicated pneumoconiosis, while Drs. Benjamin and Seaman read it as

³ The ALJ accurately observed the record contains no biopsy evidence or autopsy evidence for consideration at 20 C.F.R. §718.304(b). Decision and Order at 12.

⁴ The ALJ accurately observed Dr. Zaldivar is a Board-certified pulmonologist and former B reader. Decision and Order at 12; *see* Employer’s Exhibit 1 at 36 (Zaldivar resume noting B reader certification expired in 2018).

negative for the disease. Director's Exhibits 24, 30-31. Crediting Dr. Tarver's reading as most persuasive based on his superior radiology qualifications, the ALJ found the x-ray positive for complicated pneumoconiosis. Decision and Order at 11.

Dr. Zaldivar read the April 28, 2021 x-ray as negative for complicated pneumoconiosis. Employer's Exhibit 1. As the record contains no other readings of this x-ray, the ALJ found it negative for the disease. Decision and Order at 11.

Considering the totality of the x-ray evidence, the ALJ found the November 2, 2020 x-ray outweighs the April 28, 2021 x-ray because Dr. Zaldivar's "qualifications as a pulmonologist and former B-reader do not permit his reading to be given much weight, especially in comparison to Dr. Tarver's superior qualifications." Decision and Order at 11-12. Consequently, the ALJ found Claimant established complicated pneumoconiosis by a preponderance of evidence at 20 C.F.R. §718.304(a). *Id.* at 12.

Employer generally asserts that the ALJ erred in finding the November 2, 2020 x-ray positive for complicated pneumoconiosis, instead of negative for the disease, since all of the interpreting physicians are dually-qualified radiologists.⁵ We disagree. The ALJ had discretion to determine the weight to accord the physicians' credentials and was required only to provide "some reasoned explanation" for her findings. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993) (relevant academic qualifications such as whether a physician is a professor of radiology may be considered by the ALJ in weighing the x-ray evidence). As the ALJ accurately characterized Dr. Tarver's credentials, we affirm her permissible

⁵ Employer argues the case should be remanded because the International Labour Organization (ILO) form Dr. Benjamin completed for the November 2, 2020 x-ray indicates that he is a dually-qualified radiologist and thus the ALJ failed to properly consider his qualifications in weighing the x-ray evidence. Employer's Brief at 12; Director's Exhibit 24. However, the ALJ credited Dr. Tarver based on consideration of qualifications beyond board certification and B reader status. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993). As the record contains no information pertaining to Dr. Benjamin's additional qualifications, we consider the ALJ's error, if any, harmless as it does not change the disposition of her rankings of the physician's qualifications. *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); Employer's Brief at 11-13.

finding that the November 2, 2020 x-ray is positive for complicated pneumoconiosis.⁶ See 20 C.F.R. §718.304(a); *Worhach*, 17 BLR at 1-108; Decision and Order at 11.

Regarding the ALJ's weighing of the x-ray evidence as a whole, Employer asserts Dr. Zaldivar's uncontradicted negative reading of the most recent x-ray of April 28, 2021 x-ray must be credited and to conclude otherwise, the ALJ is improperly relying on Dr. Tarver's reading of an earlier film. Employer further contends the ALJ's overall consideration of the x-ray evidence ignores that a preponderance of the readers conclude Claimant does not have complicated pneumoconiosis. Employer's Brief at 10. We disagree.

The ALJ properly addressed whether each x-ray of record was positive or negative for complicated pneumoconiosis prior to determining whether the x-ray evidence as a whole establishes the disease. See *Copley v. Arch of West Virginia, Inc.*, 28 F.3d 1208 (Table) (June 21, 1994) (ALJ must independently weigh the reliability of each piece of x-ray evidence by determining whether each x-ray is negative or positive prior to resolving the conflict between x-rays); Employer's Brief at 7-9. When resolving the conflict between one positive and one negative x-ray, the ALJ permissibly found Dr. Tarver's positive reading dispositive given Dr. Zaldivar was not a dually-qualified radiologist, or even a B reader, when he read the April 20, 2021 x-ray. See *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins*, 958 F.2d at 52-53; Decision and Order at 12. As the ALJ properly considered the physicians' radiological qualifications as the regulations require, and we discern no error in her permissible credibility findings, we affirm her conclusion that the x-ray evidence supports a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(a). *Addison*, 831 F.3d at 256-57; *Adkins*, 958 F.2d at 52-53; see also *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); Decision and Order at 11-12.

⁶ To support its argument that the ALJ's crediting of Dr. Tarver's opinion was "arbitrary and capricious," Employer provides a chart listing seven black lung cases in which Employer asserts the ALJ did not consider Dr. Tarver's additional qualifications and accorded dually-qualified radiologists the same weight. Employer's Brief at 12-13. Employer's argument ignores the ALJ has discretion to weigh the evidence and that the Board's scope of review is limited to whether substantial evidence supports the ALJ's credibility findings under the facts of this case. See 33 U.S.C. §921(b)(3); 20 C.F.R. §802.301(b); see generally *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174 (4th Cir 1997).

Other Evidence and Record as a Whole

The ALJ found Claimant's treatment records include diagnoses of pneumoconiosis but do not explain how the diagnoses were made or whether Claimant suffers from complicated pneumoconiosis. Decision and Order at 16-17; Director's Exhibit 29 at 4, 8, 12, 17, 21, 24, 27, 30. She therefore concluded that the treatment records, while failing to support Claimant's burden of proof, do not refute that he has complicated pneumoconiosis. Decision and Order at 17.

Employer asserts that the ALJ erred in not finding Claimant's treatment records probative evidence that he does not have complicated pneumoconiosis. Contrary to Employer's contention, while an ALJ may conclude that evidence not diagnosing complicated pneumoconiosis is probative of its absence, the ALJ is not required to do so. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 217-18 (1984). She also permissibly found that there was no reasoned physician's opinion addressing whether Claimant has either simple or complicated pneumoconiosis, or both diseases. *See U. S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 389 (4th Cir. 1999); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987) (reasoned opinion sets forth the clinical findings, observations, facts, and evidence that support the physician's assessment of a miner's health); Decision and Order at 16-17. Thus, we affirm the ALJ's determination regarding the weight to accord the treatment records.

As Employer raises no further challenge to the ALJ's weighing of the evidence, we affirm her conclusion that all relevant evidence considered together establishes that Claimant has complicated pneumoconiosis. *See Scarbro*, 220 F.3d at 255; *Blankenship*, 177 F.3d at 243-44; *Melnick*, 16 BLR at 1-33-34.

We further affirm, as unchallenged, the ALJ's finding that Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17. Consequently, we affirm the ALJ's conclusion that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge