



BRB No. 24-0098 BLA

BIRCHEL NOLAN

Claimant-Respondent

v.

EASTOVER MINING COMPANY

Employer-Petitioner

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

Party-in-Interest

NOT-PUBLISHED

DATE ISSUED: 06/20/2025

DECISION and ORDER

Appeal of the Decision and Order Granting Benefits on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Granting Benefits on Remand (2017-BLA-05973) rendered on a subsequent claim filed on July 20, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).¹ This case is before the Board for a second time.

¹ Claimant filed one previous claim, which ALJ Thomas P. Phalen denied on September 17, 2009, because Claimant failed to establish total disability. Director's

In his initial Decision and Order Granting Benefits in a Subsequent Claim dated November 24, 2020, the ALJ credited Claimant with eight years of underground coal mine employment. The ALJ also found Claimant established complicated pneumoconiosis, thereby invoking 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), and establishing a change in an applicable condition of entitlement.² 20 C.F.R. §§718.304, 725.309(c). He further found Claimant's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203(b).

Pursuant to Employer's appeal, the Board affirmed the ALJ's findings that Claimant established eight years of underground coal mine employment and that his complicated pneumoconiosis, if established, arose out of his coal mine employment. *Nolan v. Eastover Mining Co.*, BRB No. 21-0146 BLA, slip op. at 2 n.3, 6 n.8 (May 31, 2022) (unpub.). The Board also affirmed the ALJ's finding that the biopsy evidence neither supports nor weighs against a finding of complicated pneumoconiosis. *Id.* at 4. However, the Board vacated the ALJ's finding that the medical opinion evidence supports a finding of complicated pneumoconiosis. *Id.* at 5-6. Thus, the Board vacated the ALJ's finding that Claimant invoked the Section 411(c)(3) presumption and remanded the case to the ALJ to reconsider the medical opinion evidence and reweigh all the evidence together as a whole. *Id.* at 6.

On remand, the ALJ found the medical opinion evidence neither proves nor disproves a finding of complicated pneumoconiosis. Considering the evidence as a whole, he gave the greatest weight to the x-ray evidence and therefore found Claimant established complicated pneumoconiosis based on the evidence as a whole. Thus, the ALJ again found Claimant invoked the Section 411(c)(3) presumption and established a change in an

Exhibit 1 at 85-86. The Benefits Review Board affirmed the denial of benefits. *Nolan v. Eastover Mining Co.*, BRB No. 10-0116 BLA (Oct. 14, 2010) (unpub.). Claimant took no further action until filing the current claim. Director's Exhibit 3.

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 he 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). Because Claimant did not establish total disability in his first claim, he had to submit new evidence establishing this element in order to obtain review of his current claim on the merits. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3; Director's Exhibit 1.

applicable condition of entitlement. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §§718.304, 725.309(c).

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

The Board's scope of review is defined by statute. The ALJ's Decision and Order must be affirmed 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).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is total disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by chest 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, yields massive lesions in the lung; or (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 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 (1991) (en banc).

On remand, the ALJ found the medical opinion evidence neither supports nor weighs against a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order on Remand at 4. Weighing the evidence as a whole, he gave the greatest weight to the x-ray evidence, which he had previously determined supported a finding of complicated pneumoconiosis, and determined Claimant established the disease. 20 C.F.R. §718.304; Decision and Order on Remand at 2, 4.

Employer contends the ALJ erred in discrediting Dr. Vuskovich's opinion that Claimant has sarcoidosis and not complicated pneumoconiosis.⁴ Employer's Brief at 7-11. We agree.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

⁴ The ALJ permissibly discredited Dr. Ajjarapu's opinion that Claimant has complicated pneumoconiosis as merely a restatement of the x-ray findings. Decision and Order on Remand at 3; 20 C.F.R. §§718.202(a)(1), (4), 725.414(a); *see Eastover Mining*

Dr. Vuskovich diagnosed pulmonary sarcoidosis, opining small nodules of small granulomas can coalesce to form opacities that look like complicated pneumoconiosis on x-rays. Employer's Exhibit 7 at 13. He based his opinion on Claimant's treatment records documenting a treatment history for pulmonary sarcoidosis; a biopsy report, which he opined is consistent with pulmonary sarcoidosis; and the x-ray evidence, as Drs. Wolfe and Simone both indicated the large opacity seen on x-ray could be sarcoidosis. *Id.* at 11-13; Claimant's Exhibits 5; 6; 8 at 19. He explained the International Labour Organization classification system notes only the appearance of a large opacity but "does not establish a diagnosis," as an opacity "could always represent some other condition." Employer's Exhibit 7 at 12. Furthermore, he noted Dr. Ramakrishnan's x-ray reports show that the opacity seen on x-ray shrunk from 3 centimeters in size on the November 12, 2013 x-ray to 1.8 to 2 centimeters in size on the June 30, 2016 x-ray, which he opined is inconsistent with a diagnosis of complicated pneumoconiosis. *Id.* at 5; Claimant's Exhibit 7. He thus opined Claimant has pulmonary sarcoidosis unrelated to coal mine employment. Employer's Exhibit 7 at 13-14.

As Employer correctly notes, in discrediting Dr. Vuskovich's opinion, the ALJ once again did not address Dr. Vuskovich's rationale for opining Claimant does not have complicated pneumoconiosis. Employer's Brief at 7-11. Rather, the ALJ indicated Dr. Vuskovich relied on x-ray readings and treatment records not contained in the record. Decision and Order on Remand at 4. It is unclear, however, what specific x-ray readings or treatment records the ALJ is referencing because the record contains treatment notes documenting Claimant's treatment history for pulmonary sarcoidosis, as well as the x-ray reports of Drs. Wolfe and Simone and both x-ray reports from Dr. Ramakrishnan. Claimant's Exhibits 5-7; 8 at 19. The ALJ further discredited Dr. Vuskovich's opinion because he did not explain how he determined the opacities identified on x-ray must represent sarcoidosis instead of complicated pneumoconiosis. Decision and Order on Remand at 4. However, as Employer asserts, Dr. Vuskovich explained the opacity seen on x-ray decreased in size over time, which is inconsistent with a diagnosis of complicated pneumoconiosis.⁵ Employer's Brief at 9-10; Employer's Exhibit 7 at 5. As the ALJ did

Co. v. Williams, 338 F.3d 501, 514 (6th Cir. 2003); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The Board previously affirmed his discrediting of Dr. Rosenberg's opinion. *Nolan v. Eastover Mining Co.*, BRB No. 21-0146 BLA, slip op. at 4 (May 31, 2022) (unpub.).

⁵ The ALJ also stated that, because Dr. Vuskovich is not Board-certified in pulmonology, internal medicine, radiology, or pathology, he declined to credit the doctor's opinion "over the original interpretations of the x-rays or original biopsy findings." Decision and Order on Remand at 4. However, the ALJ found the biopsy findings "revealed evidence of granuloma" but do not support or weigh against a finding of

not address this rationale, we are unable to discern on what valid basis the ALJ discredited Dr. Vuskovich's opinion.

Because the ALJ did not adequately explain how he evaluated Dr. Vuskovich's opinion or resolved the conflicts in the evidence, his determination that the preponderance of the medical evidence supports a finding of complicated pneumoconiosis does not satisfy the explanatory requirements of the Administrative Procedure Act (APA).⁶ 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore vacate his determination that the medical opinion evidence neither supports nor weighs against a finding of 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 on Remand at 4-5. We further vacate his finding that Claimant invoked the Section 411(c)(3) presumption and the award of benefits.

On remand, the ALJ must reconsider whether the medical opinion evidence supports or weighs against a finding of complicated pneumoconiosis, giving a specific rationale for crediting or discrediting Dr. Vuskovich's opinion and setting forth his findings in accordance with the APA, including specifically identifying what, if any, evidence the doctor considered that is not included in the record. *Wojtowicz*, 12 BLR at 1-165. He must then determine if the evidence as a whole establishes complicated pneumoconiosis. 20 C.F.R. §718.304; *Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33. If the ALJ finds the evidence establishes complicated pneumoconiosis on remand, he may reinstate the award of benefits.⁷

complicated pneumoconiosis. *Id.* at 3. It is thus unclear how the biopsy findings undermine Dr. Vuskovich's opinion.

⁶ The Administrative Procedure Act 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 The Board previously affirmed the ALJ's finding that Claimant's complicated pneumoconiosis, if established, arose out of his coal mine employment. *Nolan*, BRB No. 21-0146 BLA, slip op. at 6 n.8.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge