U.S. Department of Labor

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

BRB No. 24-0115 BLA

RONALD L. DOLAN (deceased) Claimant-Respondent v. LEIVASY MINING CORPORATION and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 06/06/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Daniel K. Evans (Advanced Administrative Litigation Clinic, Washington and Lee University School of Law), Lexington, Virginia, for Claimant.

Chris M. Green and Wesley A. Shumway (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for Employer and its Carrier.

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

GRESH, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Awarding Benefits on Remand (2019-BLA-05124) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on August 7, 2017, and is before the Benefits Review Board for the second time.[1]

On July 29, 2020, the ALJ issued her initial Decision and Order Denying Benefits. She initially credited the Miner[2] with twenty-five years of underground coal mine employment. However, she found Claimant failed to establish the existence of complicated pneumoconiosis and therefore 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); 20 C.F.R. §718.304. The ALJ also found Claimant did not establish the Miner had a totally disabling respiratory impairment and thus could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018). Moreover, as Claimant failed to establish an essential element of entitlement under 20 C.F.R. Part 718, she denied benefits.

On February 5, 2021, the ALJ granted Claimant's Motion for Reconsideration and issued a Decision and Order Granting Reconsideration and Denying Benefits, amending some of her initial findings on complicated pneumoconiosis but still finding that the evidence was insufficient to establish complicated pneumoconiosis. Consequently, she again denied benefits.

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[1] We incorporate the procedural history of the case as set forth in the Board's prior decision. *Dolan v. Leivasy Mining Corp*., BRB No. 21-0277 BLA (Feb. 22, 2023) (unpub.).

[2] Claimant is the widow of the Miner, who died on January 25, 2021, while his claim was pending before the ALJ. Claimant's Appeal Brief at 2 n.1. She is pursuing the claim on behalf of his estate. *Id*.

[3] Section 411(c)(4) provides a rebuttable presumption that a miner was totally disabled 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. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

Pursuant to Claimant's appeal, the Board affirmed the ALJ's determination that Claimant established at least twenty-five years of coal mine employment and the existence of simple clinical pneumoconiosis. *Dolan v. Leivasy Mining Corp.*, BRB No. 21-0277 BLA, slip op. at 2 n.4 (Feb. 22, 2023) (unpub.). The Board further affirmed the ALJ's finding that Claimant did not establish total disability and therefore could not invoke the Section 411(c)(4) presumption. *Id.* at 8-10. In addition, the Board affirmed the ALJ's determination that the evidence did not establish complicated pneumoconiosis at 20 C.F.R. §718.304(a), (b). *Id.* at 3 n.6. However, the Board vacated the ALJ's weighing of the medical opinion evidence relevant to complicated pneumoconiosis and remanded the case for further consideration of the evidence at 20 C.F.R. §718.304(c). *Id.* at 6-8.

On remand, the ALJ found Claimant established complicated pneumoconiosis and therefore invoked the Section 411(c)(3) irrebuttable presumption. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. She further found the Miner's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203(b), and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis. Claimant responds in support of the award of benefits. Employer filed a reply brief reiterating its arguments on appeal. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The 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.[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) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption of total disability due to pneumoconiosis if a miner suffers from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray, yielded one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yielded massive lesions in the lung; or (c) when diagnosed by other means, was a condition which would have yielded results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c). The ALJ must examine all relevant evidence, determine whether the evidence in each category tends to establish the

[4] We will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 27.

existence of complicated pneumoconiosis, and then weigh the evidence together at subsections (a), (b), and (c) before determining whether a claimant has invoked the irrebuttable presumption. *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, 256 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

On remand, the ALJ reconsidered the "other evidence" at 20 C.F.R. §718.304(c),[5] finding that the medical opinion evidence and computed tomography (CT) scan support a finding of total disability while the Miner's treatment records do not. Decision and Order on Remand at 5-10. She therefore determined that the weight of the "other evidence" supports a finding of complicated pneumoconiosis. *Id*. at 10. Weighing the evidence as a whole, she found Claimant established complicated pneumoconiosis based on the medical opinion evidence and CT scan evidence. *Id.*

Employer asserts that the ALJ erred in weighing the medical opinion evidence, the other medical evidence, and the evidence as a whole. Employer's Brief at 18-38. We disagree.

As the ALJ noted, the only CT scan of record, dated September 19, 2018, was read by Dr. DePonte as positive for complicated pneumoconiosis. Decision and Order on Remand at 9; Claimant's Exhibit 3 at 1. She diagnosed large opacities of complicated pneumoconiosis measuring up to eleven millimeters that would appear as greater than one centimeter on x-ray. Claimant's Exhibit 3 at 1. Thus, the ALJ reaffirmed her prior determination that the CT scan evidence supports the existence of complicated pneumoconiosis. Decision and Order on Remand at 9.

[5] The ALJ initially found the computed tomography (CT) scan evidence supports a finding of complicated pneumoconiosis while the medical opinion evidence and the Miner's treatment records do not. Decision and Order on Reconsideration at 3-9; Decision and Order at 14-35. Weighing the evidence together at 20 C.F.R. §718.304(c), the ALJ found the weight of the "other" medical evidence does not establish complicated pneumoconiosis and, weighing the evidence as a whole, found Claimant failed to establish complicated pneumoconiosis. *Id*. at 9-10. The Board vacated the ALJ's weighing of the medical opinion evidence and therefore vacated her determination that the "other" medical evidence and the evidence as a whole do not establish complicated pneumoconiosis. *See Dolan*, BRB No. 21-0277 BLA, slip op. at 4-8.

Employer contends the ALJ erred in discrediting Dr. Spagnolo's opinion that Dr. DePonte's finding of an eleven-millimeter mass would not appear as more than one centimeter on an x-ray based on Dr. Go's contrary opinion. Employer's Brief at 38. To the extent Employer believes the ALJ should have found the CT scan evidence does not support a finding of complicated pneumoconiosis, we disagree. Contrary to Employer's argument, the ALJ permissibly found that, on the issue of whether the large mass seen on the CT scan would appear as greater than one centimeter on an x-ray,[6] Dr. DePonte "has the greatest expertise on this discrete issue" as a Board-certified radiologist and B reader, a finding Employer does not challenge. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); Decision and Order on Remand at 8. Thus, we affirm the ALJ's determination that the CT scan evidence supports a finding that the Miner had complicated pneumoconiosis. Decision and Order on Remand at 8.

The ALJ also reconsidered the medical opinions of Drs. Go and Spagnolo.[7] Decision and Order on Remand at 5-8. Dr. Go diagnosed both simple and complicated pneumoconiosis, while Dr. Spagnolo opined that the Miner had simple but not complicated pneumoconiosis. Claimant's Exhibits 1A at 2; 10 at 28-29; Employer's Exhibits 3 at 7; 5 at 22, 36. The ALJ found Dr. Go's opinion to be thoughtful, well-reasoned, and well-documented. Decision and Order on Remand at 8. Conversely, the ALJ found Dr. Spagnolo's opinion not well-reasoned or documented and accorded it little weight. *Id.* at 7-8.

[6] Dr. Spagnolo opined the large mass described by Dr. DePonte on the CT scan "probably" would not appear as greater than one centimeter on a chest x-ray as a CT scan shows more definition than an x-ray. Employer's Exhibit 5 at 20-21.

[7] The Board previously affirmed the ALJ's determination to accord little weight to the opinions of Drs. Gaziano, Swedarsky, and Durham, and the ALJ restated her determination on remand. *Dolan*, BRB No. 21-0277 BLA, slip op. at 5-6 n.10; Decision and Order on Remand at 5. However, the Board vacated the ALJ's weighing of Dr. Spagnolo's opinion, as the ALJ failed to consider whether Dr. Spagnolo relied on an incorrect understanding of the regulatory definition of complicated pneumoconiosis. *Id*. at 6-7. The Board also affirmed the ALJ's determination that Dr. Go adequately explained why he changed his opinion and found the Miner had complicated pneumoconiosis. *Id*. at 6 n.11.

Employer contends the ALJ erred in her weighing of the medical opinions of Drs. Go and Spagnolo. Employer's Brief at 18-38. We disagree.

Initially we reject Employer's argument that the ALJ was required to give greater weight to Dr. Spagnolo's opinion based on his "decades more experience" and academic appointments. Employer's Brief at 18-21. Rather the ALJ was only required to take the physicians' qualifications into account in determining the credibility of their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536 (4th Cir. 1998). The ALJ did so, finding them "generally equivalent" and permissibly declining to accord any additional weight to either physician's opinion based solely on their professional credentials. *Hicks*, 138 F.3d at 536; Decision and Order on Remand at 6.

Nor are we persuaded that the ALJ did not adequately explain her decision to credit Dr. Go's opinion despite the change in his diagnosis. Employer's Brief at 34. As the Board previously found, the ALJ permissibly found Dr. Go adequately explained the change of his opinion. *See Dolan*, BRB No. 21-0277 BLA, slip op. at 6 n.11, *citing Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000); Decision and Order on Remand at 8; Decision and Order at 27. Because Employer has not shown the Board's decision was clearly erroneous or set forth any other valid exception to the law of the case doctrine, we decline to disturb our prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989-90 (1984).

Nor are we persuaded by Employer's argument that the ALJ erred in discrediting Dr. Spagnolo's opinion. Employer's Brief at 18-38. Dr. Spagnolo opined that the large mass described by Dr. DePonte on the CT scan was not complicated pneumoconiosis but was instead likely scarring. Employer's Exhibit 5 at 20-21. He explained that he did not believe a mass of that size would appear as greater than one centimeter on an x-ray but did believe it was likely due to scarring from the biopsy, noting that the biopsy did not identify a large mass. *Id*.

The ALJ permissibly found that Dr. DePonte, who is a radiologist, is better qualified to interpret radiographic evidence than Dr. Spagnolo, a pulmonologist.[8] *See Addison*, 831 F.3d at 256-57; *Hicks*, 138 F.3d at 533; Decision and Order on Remand at 8. She therefore

[8] The ALJ also accurately noted that an x-ray taken the same day, as part of the Miner's treatment, did not note any scarring. Decision and Order on Remand at 8; Director's Exhibit 14 at 28. Further, the ALJ noted that Dr. Go opined that the lesion does meet the criteria for complicated pneumoconiosis. *Id.*; Claimant's Exhibit 1A at 2.

permissibly found Dr. Spagnolo's opinions that the mass would not appear on an x-ray as greater than one centimeter and is an area of scarring are entitled to less weight. *Addison*, 831 F.3d at 256-57; *Hicks*, 138 F.3d at 536; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order on Remand at 8. Moreover, the ALJ permissibly found Dr. Spagnolo's opinion entitled to less weight as he relied in part on Dr. Meyer's negative interpretation of the September 19, 2018 CT scan, a reading which is not in the record. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004); Employer's Exhibit 5 at 38. Consequently, because it is supported by substantial evidence, we affirm the ALJ's determination that Dr. Spagnolo's opinion should be accorded less weight.[9] *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Decision and Order on Remand at 8. We therefore affirm the ALJ's determination that the medical opinion evidence and "other" medical evidence support a finding of complicated pneumoconiosis.[10] 20 C.F.R. §718.304(c); Decision and Order at 10.

As Employer raises no further challenge to the ALJ's determination that Claimant established complicated pneumoconiosis, we affirm the ALJ's finding that the evidence as a whole establishes complicated pneumoconiosis and Claimant invoked the irrebuttable presumption as supported by substantial evidence. 20 C.F.R. §718.304; *Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 256; Decision and Order on Remand at 10-11. We further affirm, as unchallenged on appeal, the ALJ's determination that the Miner's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 11.

[9] Because the ALJ provided valid reasons for discrediting Dr. Spagnolo's opinion, we need not address Employer's remaining arguments regarding his credibility. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 18-33.

[10] The Board previously affirmed the ALJ's finding that the Miner's treatment records do not support a finding of complicated pneumoconiosis. *See Dolan*, BRB No. 21-0277 BLA, slip op. at 8.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I continue to believe that the ALJ's determinations in this case as initially presented to us were affirmable. *Dolan v. Leivasy Mining Corp.*, BRB No. 21-0277 BLA, slip op. at 11-14 (Feb. 22, 2023) (unpub.) (Boggs, J., concurring in part and dissenting in part). However, because the ALJ has the discretion to change her assessment of the evidence on further reflection, as she has here after the case was remanded, I concur in the results of this appeal. *See Dale v. Wilder Coal Co*., 8 BLR 1-119, 1-120 (1985).

JUDITH S. BOGGS
Administrative Appeals Judge