U.S. Department of Labor

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

BRB No. 21-0112 BLA

BELVRA CRIDER, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PERRY COUNTY COAL CORPORATION	)	
	)	
and	)	
	)	
NEW HAMPSHIRE INSURANCE, INCORPORATED/AIG	)	DATE ISSUED: 3/30/2022
	)	
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 Administrative Law Judge John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonburg, Kentucky, for Claimant.

Timothy J. Walker (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer and its Carrier.

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

BOGGS, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits (2019-BLA-05570) rendered on a claim filed on July 20, 2018, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with twenty-nine years of underground coal mine employment and concluded he established complicated pneumoconiosis arising out of coal mine employment. He therefore determined Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and awarded benefits.

On appeal, Employer argues the ALJ erred in concluding Claimant established the existence of complicated pneumoconiosis.[1] Claimant responds, urging affirmance of the ALJ's award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response.

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 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 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 an opacity 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, would

[1] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established twenty-nine years of underground coal mine employment and simple clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 14-15.

[2] 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.

be a condition that could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The ALJ must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis before determining Claimant has invoked the presumption. *Gray v. SLC Corp.*, 176 F.3d 382, 389-90 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The ALJ found the computed tomography (CT) scans establish complicated pneumoconiosis, while the chest x-rays[3] and medical opinions do not.[4] 20 C.F.R. §718.304(a), (c); Decision and Order at 7, 9, 13. Weighing all the evidence together, he concluded Claimant established the existence of complicated pneumoconiosis and invoked the irrebuttable presumption. 30 U.S.C. §921(c)(3); Decision and Order at 14-15.

The ALJ considered two readings of a CT scan dated May 8, 2019. 20 C.F.R. §718.304(c); Decision and Order at 7-9. Dr. Crum read this CT scan as positive for simple and complicated pneumoconiosis,[5] while Dr. Tarver read it as positive for simple pneumoconiosis but negative for complicated pneumoconiosis.[6] Claimant's Exhibits 3-4;

[3] The ALJ considered six interpretations of three x-rays dated December 26, 2014, February 18, 2016, and August 16, 2018. Decision and Order at 6-7. As the ALJ accurately observed, no physician reading the x-rays diagnosed complicated pneumoconiosis. *Id.* He therefore concluded the x-ray evidence does not establish complicated pneumoconiosis. *Id.* at 7; *see* 20 C.F.R. §718.304(a). As the parties do not challenge this finding, it is affirmed. *See Skrack*, 6 BLR 1-711.

[4] None of the experts providing medical opinions diagnosed complicated pneumoconiosis. Decision and Order at 10-13; Director's Exhibit 12; Employer's Exhibits 5-8, 14. The ALJ also found the treatment records neither weighed for nor against a finding of complicated pneumoconiosis. Decision and Order at 14; Director's Exhibit 17, Employer's Exhibits 3-4; Claimant's Exhibits 1-2. He further correctly noted there is no biopsy evidence in the record. 20 C.F.R. §718.304(b); Decision and Order at 13.

[5] Dr. Crum indicated the "CT scan shows bilateral subcentimeter pulmonary nodules . . ." consistent with pneumoconiosis. Claimant's Exhibit 3. He further indicated "within the right upper lobe on image 50 is a 1.03 cm large opacity. Also on image 82 is a 3 cm pseudo-plaque." *Id.* He opined these large opacities "measure over 1 cm in size" and would be consistent with Category A opacities if seen on chest x-ray. Claimant's Exhibit 4.

[6] Dr. Tarver opined the CT scan is consistent with simple pneumoconiosis, with "multiple scattered 2-3 mm nodules," but "no masses or nodules larger than 1 cm." Employer's Exhibit 12.

Employer's Exhibit 12. The ALJ noted that both physicians are dually-qualified as B readers and Board-certified radiologists. Decision and Order at 9. He found Dr. Crum's opinion better documented and more persuasive because Dr. Crum quantified the size of the opacities he observed, identified the specific scan images on which he identified large opacities, and stated how the opacities would appear on x-ray *Id.* He thus found the CT scan evidence weighs in favor of complicated pneumoconiosis. *Id.*

Employer argues the ALJ erred in finding Dr. Crum's opinion better documented. Specifically, Employer asserts the ALJ erroneously credited Dr. Crum's opinion because he provided specific measurements of the opacities he identifies while ignoring that Dr. Tarver also quantified the sizes of the opacities he identified. Employer's Brief at 14-15 (unpaginated). Employer's arguments have merit.

The ALJ indicated that Dr. Tarver observed "multiple small areas of pseudoplaque in the pleural peripheral region," and further conceded Claimant had simple pneumoconiosis, but did not provide measurements to counter the "exact" measurements provided by Dr. Crum. Decision and Order at 9. However, Dr. Tarver specifically opined the CT scan report documented "multiple scattered 2-3 mm nodules," "no masses or nodules larger than 1 cm,"[7] and that "there are no areas consistent with a large opacity" on images fifty or eighty-two. Employer's Exhibit 12. Thus, contrary to the ALJ's finding, Dr. Tarver provided specific measurements of the opacities he identified, and thus the ALJ did not provide a valid basis for crediting Dr. Crum's opinion over that of Dr. Tarver.[8] Decision and Order at 9; 20 C.F.R. §718.304(c); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305-06 (6th Cir. 2005) (an ALJ must adequately explain the reason for crediting certain evidence over other evidence); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985) (if the ALJ misconstrues relevant evidence, the case must be remanded for reevaluation of the issue to which the evidence is relevant).

We therefore vacate the ALJ's finding that the CT scan evidence supports a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(c) as well as his finding that Claimant invoked the irrebuttable presumption. Decision and Order at 14-15; 20 C.F.R. §718.304. On remand, the ALJ must resolve the conflict in the CT scan evidence, considering the entirety of Dr. Tarver's opinion, and must explain his credibility

[7] The ALJ acknowledges in his summary of the evidence that Dr. Tarver's opinion includes this measurement. Decision and Order at 8.

[8] The ALJ indicated both physicians were board-certified radiologists and B readers and found "no basis to distinguish between their interpretations based on their qualifications." Decision and Order at 9.

determinations in accordance with the Administrative Procedure Act (APA).[9] *See* 5 U.S.C. §557(c)(3)(A); 30 U.S.C. §932(a); 20 C.F.R. §718.304(a); *Director, OWCP v. Rowe*, 710 F.2d 251, 244-55 (6th Cir. 1983); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). He must then weigh all the evidence together as a whole to determine whether Claimant established complicated pneumoconiosis. 20 C.F.R. §718.304; *see Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33.[10]

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part, vacated in part, and remanded for further consideration consistent with this decision.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the award of benefits. The primary issue in this case concerns the ALJ's weighing of conflicting CT scan

[9] The Administrative Procedure Act (APA) 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).

[10] Employer argues that all the other evidence of record supports Dr. Tarver's interpretation. In this regard, our dissenting colleague supports the ALJ's dismissal of the x-ray evidence, none of which is positive for complicated pneumoconiosis, on the basis that CT scans are more sensitive than x-rays. We note that the x-rays remain relevant evidence for purposes of detecting the presence of complicated pneumoconiosis and the ALJ has not adequately explained why they have *no* bearing in resolving the issue in dispute.

interpretations regarding complicated pneumoconiosis. As the ALJ acted well within his discretion in finding Dr. Crum's positive interpretation more credible than Dr. Tarver's negative interpretation, I would affirm his determination that Claimant has complicated pneumoconiosis, invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and therefore is entitled to benefits.

Employer argues and the majority finds the ALJ mischaracterized Dr. Tarver's CT scan interpretation to find Dr. Crum's opinion more persuasive, indicating the ALJ incorrectly found Dr. Tarver did not quantify the sizes of the opacities he identified. Employer's Brief at 14-15 (unpaginated). Employer also argues that while the ALJ found Dr. Crum's report "more thoroughly stated," Dr. Tarver's report is actually more thorough. *Id.* at 15 (unpaginated). These arguments are meritless.

The record contains two interpretations of one CT scan dated May 8, 2019. Claimant's Exhibit 3; Employer's Exhibit 12. Dr. Crum opined the scan is positive for simple and complicated pneumoconiosis. Claimant's Exhibit 3. He identified simple pneumoconiosis in the form of "subcentimeter" pulmonary nodules corresponding to International Labor Organization x-ray categories R, T, and U—meaning round opacities between 3 and 10 mm, irregular opacities between 1.5 and 3 mm, and irregular opacities between 3 mm and 10 mm, respectively. *Id.* He also identified two opacities of complicated pneumoconiosis: a "1.03 cm large opacity" "within the right upper lobe on [CT] image 50" and a "3 cm pseudo-plaque" "on [CT] image 82." *Id.* In a supplemental statement, he added that the opacity and plaque are "consistent with a chronic dust disease of the lung such as pneumoconiosis," consistent with the Claimant's history of coal mining, and "consistent with [ILO Category A] large opacities seen on chest x-ray"—meaning they are greater than 1 cm but less than 5 cm. Claimant's Exhibit 4.

Meanwhile, Dr. Tarver opined the CT scan is positive for simple pneumoconiosis but not complicated pneumoconiosis. He generally identified "multiple scattered 2-3 mm nodules," "multiple small areas of pseudoplaque in the pleural peripheral region of the lung," and no masses or nodules "larger than "1cm." Employer's Exhibit 12. As for the specific CT images on which Dr. Crum identified a 1.03 cm opacity and a 3 cm pseudo-plaque of complicated pneumoconiosis, Dr. Tarver simply stated, with no further elaboration, that images 50 and 82 contain "no areas consistent with a large opacity." *Id.*

The ALJ properly considered the entirety of the physicians' opinions. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Although he found no basis to credit one physician over the other based on their equal qualifications as dually-qualified radiologists and B readers, the ALJ found Dr. Crum's interpretation "more thoroughly stated, well documented, and persuasive" because the physician "quantified the size of the

opacities he observed, identified specific CT scan[] slides he relied upon, and stated how the opacities would appear on x-ray." Decision and Order at 9. In contrast, he found that while Dr. Tarver disputed that the CT scan was positive for complicated pneumoconiosis, on the specific images where Dr. Crum identified complicated pneumoconiosis with "exact measurements" of 1.03 cm and 3 cm, Dr. Tarver "simply stated that there was no area 'consistent with a large opacity.'" *Id*. Thus, the ALJ found the CT scan interpretations weigh in favor of a finding that Claimant has complicated pneumoconiosis. *Id*. at 10.

Taking issue with this finding, the majority argues Dr. Tarver did provide specific measurements for the opacities he observed because he identified 2 mm to 3 mm small opacities and nothing "larger than 1cm." Employer's Exhibit 12. However, as the ALJ observed, his general statement that he saw no masses or nodules larger than 1 cm merely identifies the upper end of a range of measurements, not a specific measurement refuting Dr. Crum's measurement of 1.03 cm and 3 cm opacities. Importantly, when it came to evaluating the specific images on which Dr. Crum identified those measurements, Dr. Tarver merely stated there was nothing "consistent with a large opacity." Given that the specific size of an opacity matters when diagnosing complicated pneumoconiosis—only opacities greater than 1 cm meet the statutory definition, *see* 30 U.S.C. §921(c)(3)—the ALJ acted well within his discretion in finding Dr. Crum's ability to provide specific measurements rendered his CT scan interpretation "more thoroughly stated" and thus more credible than Dr. Tarver's. *See Crockett Colleries v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356 (6th Cir. 2007); *Rowe*, 710 F.2d at 255.

It is the province of the ALJ, as fact finder, to weigh the evidence, draw inferences, and determine credibility. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The Board cannot substitute its own inferences for those of the ALJ, but must affirm the ALJ's decision if it is supported by substantial evidence. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *see also Newport News Shipbldg. and Dry Dock Co. v. Ward*, 326 F.3d 434, 438 (4th Cir. 2003) (substantial evidence is "more than a scintilla but less than a preponderance") (citations omitted). Because the ALJ provided rational bases for crediting Dr. Crum's opinion over that of Dr. Tarver, and his findings are supported by substantial evidence, I would affirm his determination that the CT scans weigh in favor of a finding Claimant has complicated pneumoconiosis. *See Martin*, 400 F.3d at 305.

Employer's argument that Dr. Tarver's opinion is "in fact more thorough" than Dr. Crum's is belied by the evidence and constitutes a request for the Board to step into the shoes of the ALJ and reweigh the evidence, which we are not permitted to do. *Barrett*, 478 F.3d at 352-53; *Wiley v. Consolidation Coal Co.*, 892 F.2d 498, 500 (6th Cir. 1989);

Rowe, 710 F.2d at 254-55; *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989).

Employer's additional contention that Dr. Tarver's CT scan reading is more "consistent with the totality of the evidence," particularly the x-rays revealing simple but not complicated pneumoconiosis, also lacks merit. As the ALJ noted, Drs. Crum and Tarver both opined CT scans are more sensitive than x-rays for detecting and characterizing pulmonary abnormalities, including pneumoconiosis. Decision and Order at 12, 14; Claimant's Exhibit 4; Employer's Exhibit 12. He also noted the CT scan is the most recent diagnostic testing in the record and may be given greater weight than the x-rays because it demonstrates Claimant's condition has worsened. Decision and Order at 11-12, *citing Woodward v. Director, OWCP*, 991 F.2d 314, 319 (6th Cir. 1993). Thus, contrary to the majority's assessment, neither the ALJ nor I have concluded the x-rays are irrelevant. The ALJ rationally concluded the x-rays establishing simple pneumoconiosis do not undermine a finding of complicated pneumoconiosis based on Dr. Crum's "more recent and more sensitive" CT scan interpretation. Decision and Order at 12. I would affirm that finding.[11]

Finally, Employer argues that Dr. Sikder's treatment records weigh against a finding of complicated pneumoconiosis as she treated Claimant for years and consistently diagnosed pneumoconiosis but made no mention of complicated pneumoconiosis. Employer's Brief at 17-18. However, the ALJ permissibly concluded that the treatment records' silence as to the existence of complicated pneumoconiosis is insufficient to weigh against the CT scan evidence supporting the presence of the disease. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984) (whether an x-ray's silence as to the presence of pneumoconiosis may be inferred as a negative reading is a question of fact to be resolved by the ALJ).

The ALJ discussed all the relevant evidence, and his determination that Claimant established complicated pneumoconiosis by CT scan is supported by substantial evidence. *See Gray v. SLC Corp.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc). As Employer has identified no error in the ALJ's findings, I would affirm his determination that Claimant invoked the irrebuttable

[11] Employer does not dispute the ALJ's finding that the medical opinion evidence is worthy of little weight. Decision and Order at 13; Director's Exhibit 12; Employer's Exhibits 5-8, 13-14; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). This evidence, therefore, does not undermine Dr. Crum's credible CT scan reading.

presumption of total disability due to pneumoconiosis[12] and is entitled to benefits. 20 C.F.R. § 718.304; Decision and Order at 14-15.

GREG J. BUZZARD
Administrative Appeals Judge

[12] Employer did not challenge the ALJ's finding that Claimant's complicated pneumoconiosis arose out of his coal mine employment. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.203(b); Decision and Order at 15.