BRB No. 24-0040 BLA

DAVID H. SMYCHYNSKY Claimant-Petitioner v. TANOMA MINING COMPANY, INCORPORATED and AMERICAN MINING INSURANCE COMPANY, a/k/a BERKLEY CASUALTY COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 03/25/2025 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Sean B. Epstein (Thomas, Thomas & Hafer, LLP), Pittsburgh, Pennsylvania, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits on Remand (2021-BLA-05429) rendered on a claim filed on February 4, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). The case is before the Benefits Review Board for the second time.

In his initial October 13, 2023 Decision and Order Denying Benefits, the ALJ credited Claimant with at least fifteen years of underground coal mine employment but found he did not establish total disability. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). He further 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); 20 C.F.R. §718.304. Consequently, the ALJ denied benefits.

Pursuant to Claimant's appeal, the Board affirmed the ALJ's findings that Claimant established at least fifteen years of underground coal mine employment but did not establish total disability. *Smychynsky v. Tanoma Mining Co., Inc.*, BRB No. 22-0324 BLA, slip op. at 2 n.2 (Aug. 17, 2023) (unpub.). The Board also affirmed the ALJ's findings that the x-ray evidence does not support a finding of complicated pneumoconiosis and there is no biopsy evidence in the record. *Id.* at 3 n.4. However, the Board vacated the ALJ's finding the computed tomography (CT) scan evidence does not support a finding of complicated pneumoconiosis. *Id.* at 6. Thus, the Board vacated the ALJ's finding that Claimant did not establish complicated pneumoconiosis and remanded the case for further consideration. *Id.*

In his October 13, 2023 Decision and Order Denying Benefits on Remand (Decision and Order on Remand), the ALJ again found Claimant did not establish complicated pneumoconiosis and, therefore, could not invoke the Section 411(c)(3) presumption. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304. Thus, he denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish complicated pneumoconiosis. Employer responds in support of the denial of benefits. The Director, Office of Worker's Compensation Programs did not file a response brief.

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

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.[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, 361-62 (1965).

Invocation of the 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 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, 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. 30 U.S.C. §923(b); *Truitt v. North Am. Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137 (3d Cir. 1980); *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

On remand, the ALJ again found Claimant failed to establish complicated pneumoconiosis by any method. 20 C.F.R. §718.304(a)-(c); Decision and Order at 18, 22. Claimant contends the ALJ erred in finding the CT scan evidence does not support a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(c) or when weighing the evidence as a whole. Claimant's Brief at 7-11. Thus, Claimant asserts the ALJ erred in determining he did not invoke the irrebuttable presumption of total disability due to pneumoconiosis. *Id.*

The ALJ considered Drs. DePonte's, Seaman's, Tarver's, and Fino's readings of a CT scan dated September 22, 2020. Decision and Order on Remand at 18-22. The ALJ acknowledged that Drs. DePonte, Seaman, and Tarver are dually-qualified as Board-certified radiologists and B readers whereas Dr. Fino is a B reader and Board-certified in internal medicine. Decision and Order on Remand at 20-21. He found Drs. DePonte, Seaman, and Tarver are similarly qualified and that their opinions are thus entitled to equal

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

weight on the basis of their qualifications, whereas Dr. Fino's opinion is entitled to less weight because he is not dually-qualified.[3] *Id.* at 21.

Dr. DePonte read the CT scan as showing "fine nodular interstitial opacities predominating in the upper lobes and superior segments of the lower lobes."[4] Claimant's Exhibit 2 at 1. She stated a "coalescence of the nodules is present with the formation of opacities exceeding [one centimeter in] diameter consistent with large opacites of complicated coal workers' pneumoconiosis." *Id*. Further, she stated "[t]he largest [opacity] is 2.2 [centimeters] located in the right upper lobe" and is consistent with a Category A opacity. *Id.*

At her deposition, Dr. DePonte reiterated her opinion that the CT scan reveals nodules "along the pleura [that] are a bit larger than the ones that are more central."[5] Claimant's Exhibit 3 at 13. Although she opined the nodules vary in size, she stated some are at least one centimeter in diameter, including the nodule she identified "in the right upper lobe that was [twenty-two] millimeters . . . peripherally at the level of the transverse aorta." *Id*. She concluded this nodule is "consistent with a category A opacity, and [it is]

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Dr. Fino's CT scan reading and opinion are entitled to less weight. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 21.

[4] The Board previously affirmed the ALJ's finding that Dr. DePonte's CT scan reading and deposition testimony are sufficient to establish CT scans are medically acceptable and relevant to determining pneumoconiosis. *Smychynsky v. Tanoma Mining Co., Inc.*, BRB No. 22-0324 BLA, slip op. at 4 n.5 (Aug. 17, 2023) (unpub.).

[5] Dr. DePonte set forth the process she utilizes when reading CT scans. Claimant's Exhibit 3 at 10-11. She first identifies whether the CT scan has adequate "slice thickness." *Id*. As the September 22, 2020 CT scan has a slice thickness of two millimeters and two and one-half millimeters on reconstruction, she opined it is "perfectly adequate for an accurate interpretation." *Id*. Then she looks for interstitial lung disease in the lung parenchyma followed by the "mediastinum, which is the central portion of the chest, to look at lymph nodes." *Id*. at 11-12. Thereafter she views the "great vessels, the aorta, [] the heart, [and] the pericardium," and looks "for the pleural findings to see if [there is] pleural effusion or plaques." *Id*. Finally, she views the "upper abdomen and the chest wall structures." *Id*.

in the form of a pseudoplaque."[6] *Id*. When asked to define a pseudoplaque, Dr. DePonte explained:

> A pseudoplaque is an opacity [that is] actually in the lung parenchyma that rests along the pleura, which is the outside lining of the lung. It is different from a true plaque, hence the term pseudoplaque. Pseudo means not real, simulated, whatever. And on a chest radiograph, this can look like a plaque. But on CT [scan], you can see that [it is] actually within the lung and [it is] not a pleural plaque or pleural thickening.

Id. at 14. She testified that her diagnosis of complicated pneumoconiosis was not based solely on the presence of a large opacity with a background of simple pneumoconiosis, but rather a "constellation of findings." *Id*. at 17. Specifically, she explained it was based on the appearance of the opacities and their location, the background of the other larger subpleural nodules that are present, the evidence of coalescence of those nodules, and an assessment that the "peripheral opacity" is clearly . . . in the lung." *Id*.

Dr. Seaman first read the CT scan as showing "mild upper zone predominant centrilobular/perilymphatic nodules" but stated there are "no large opacities of coal workers' pneumoconiosis." Employer's Exhibit 1. She stated there "are normal sized mediastinal and hilar lymph nodes." *Id*. In a supplemental report, Dr. Seaman stated she agreed with Dr. DePonte that the CT scan shows "small nodules with an upper zone predominate distribution," but opined the CT scan is not consistent with complicated pneumoconiosis because she did not measure a nodule greater than eight millimeters. Employer's Exhibit 5. She acknowledged "mild subpleural pseudoplaque formation in the upper lobes." *Id*.

Dr. Tarver read the CT scan as showing "multiple peripheral upper lobe [four-to-five millimeter] nodules, consistent with pseudoplaques." Employer's Exhibit 3. He also identified "pseudoplaques in the edge of the right minor fissure." *Id*. But he opined the pseudoplaques are not consistent with coal workers' pneumoconiosis and there is no basis to diagnose simple or complicated pneumoconiosis. *Id*.

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[6] When asked to address Dr. Seaman's CT scan reading, Dr. DePonte stated that in the past, Dr. Seaman has recognized "pseudoplaques as complicated coal workers' pneumoconiosis." Claimant's Exhibit 1 at 16. As Dr. DePonte noted pseudoplaques are "clearly evident in this case," she was not sure why Dr. Seaman would not recognize them or make a "statement as to having observed those opacities and arriving at a different conclusion." *Id*.

Dr. Fino reviewed the CT scan and identified "a 2.12 [centimeter] ovoid density in the periphery of the right upper lobe." Claimant's Exhibit 4 at 4. He diagnosed simple pneumoconiosis but stated he "cannot rule out complicated disease."[7] *Id.*

In weighing the conflicting evidence, the ALJ initially found Claimant failed to establish pseudoplaques can constitute complicated pneumoconiosis. Decision and Order on Remand at 21-22. He further found Drs. DePonte's and Tarver's contrasting readings regarding the size of the pseudoplaques are in equipoise. *Id.* at 22. Thus, observing no reader other than Dr. DePonte identified an opacity, lesion, or pseudoplaque greater than one centimeter in diameter, he found the CT scan evidence is, at best, in equipoise. *Id.* Consequently, the ALJ found Claimant failed to meet his burden of proof to establish the CT scan evidence supports a finding of complicated pneumoconiosis. *Id.*

Claimant initially contends the ALJ erred in finding pseudoplaques cannot constitute complicated pneumoconiosis. Claimant's Brief a 9-10. Specifically, Claimant correctly notes the ALJ stated that in order for pseudoplaques to constitute complicated pneumoconiosis, the regulations, preamble, or case law must support that conclusion. *Id.* (quoting Decision and Order on Remand at 21). The irrebuttable presumption under Section 411(c)(3) of the Act does not refer to the triggering condition for invocation of the presumption as "complicated pneumoconiosis," and the Act does not "incorporate a purely medical definition" of complicated pneumoconiosis. Instead, the Act provides an irrebuttable presumption based on the presence of the "congressionally defined condition" it describes. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 257 (4th Cir. 2000); *see also Double B Mining v. Blankenship*, 177 F.3d 240, 244 (4th Cir. 1999) ("[t]he statute does not mandate use of the medical definition of complicated pneumoconiosis"). Consequently, "to the extent there is a divergence between the medical and legal standards for complicated pneumoconiosis, [the ALJ] must apply the standard established by Congress." *Scarbro*, 220 F.3d at 257. Thus, the ALJ erred to the extent that he required that pseudoplaques fit within a medical definition of "complicated pneumoconiosis," rather than the legal definition established by the Act.

[7] After reviewing additional medical records, including additional CT scans, Dr. Fino stated in a subsequent medical opinion that his opinion has not changed, and the CT scans confirm the presence of simple pneumoconiosis, although he opined Claimant does not have a totally disabling respiratory or pulmonary impairment. Employer's Exhibit 6 at 3.

To invoke the Section 411(c)(3) irrebuttable presumption, Claimant need only establish it is more likely than not he has a chronic dust[8] disease of the lung that when diagnosed by other means such as a CT scan would appear as a Category A, B, or C opacity on x-ray. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *Scarbro*, 220 F.3d at 255-56; 20 C.F.R. §718.304. The absence of a specific statement of equivalency by a physician is not a bar to establishing complicated pneumoconiosis. *See Scarbro*, 220 F.3d at 258. The ALJ thus erred in focusing on whether medical literature defines pseudoplaques as "complicated pneumoconiosis." Decision and Order on Remand at 21-22.

Nevertheless, the ALJ found that even assuming pseudoplaques may constitute complicated pneumoconiosis, Claimant failed to establish by a preponderance of the evidence that the CT scan evidence demonstrates the existence of any opacities greater than one centimeter in size. Decision and Order on Remand at 22. As the ALJ observed, Dr. DePonte diagnosed complicated pneumoconiosis in the form of a pseudoplaque measuring twenty-two millimeters, whereas Dr. Tarver identified pseudoplaques no greater in size than five millimeters, and Dr. Seaman stated she did not measure an opacity greater than eight millimeters in size. Decision and Order on Remand at 19-22; Claimant's Exhibits 2 at 1; 3 at 13; Employer's Exhibits 1; 3; 5. Thus, weighing Drs. DePonte's, Tarver's, and Seaman's readings together, the ALJ found the CT scan evidence is, at best, in equipoise regarding the presence of any opacity greater than one centimeter in size. Decision and Order on Remand at 22.

Claimant contends the ALJ erred by not discrediting Dr. Tarver's reading because he did not diagnose simple pneumoconiosis, contrary to the ALJ's finding that Claimant established the presence of the disease, and asserts the ALJ should have credited Dr. DePonte's reading over Dr. Seamen's "conclusory" opinion. Claimant's Brief at 10. Claimant's assertion that the ALJ should have credited Dr. DePonte's "thorough and reasoned" reading and opinion over those of Drs. Tarver and Seaman is a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *see Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211 (3d Cir. 2002); *Kertesz*, 788 F.2d at 163.

The ALJ properly conducted both a qualitative and quantitative analysis of the conflicting x-ray and CT scan readings, taking into consideration the physicians' radiological qualifications. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002); *Kertesz*, 788 F.2d at 163; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-

[8] "Dust" means the dust to which a miner is exposed in coal mine employment. *See* 20 C.F.R. §§718.201(a), 718.304.

155 (1989) (en banc); Decision and Order on Remand at 22. Moreover, even if the ALJ had discredited Dr. Tarver's CT scan reading, the remaining CT scan readings of Dr. DePonte and Dr. Seaman are, as the ALJ found, in equipoise. Because it is supported by substantial evidence, we affirm the ALJ's finding that the CT scan evidence does not support a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(a), (c); Decision and Order on Remand at 22. Further, we affirm his finding that Claimant did not establish complicated pneumoconiosis in consideration of all the relevant evidence weighed together, *see Melnick*, 16 BLR at 1-33, and thus did not invoke the Section 411(c)(3) presumption. We therefore affirm the denial of benefits.

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge