

U.S. Department of Labor

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



BRB No. 21-0146 BLA

BIRCHEL NOLAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTOVER MINING COMPANY	)	
	)	DATE ISSUED: 5/31/2022
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits in a Subsequent Claim of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

ROLFE and GRESH:

Employer appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Granting Benefits in a Subsequent Claim (2017-BLA-05973), rendered on a miner's

claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).<sup>1</sup>

The ALJ credited Claimant with eight years of underground coal mine employment, based on the parties' stipulation, and found he has 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 therefore establishing a change in an applicable condition of entitlement.<sup>2</sup> 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).

On appeal, Employer argues the ALJ erred in finding complicated pneumoconiosis.<sup>3</sup> Neither Claimant nor the Director, Office of Workers' Compensation Programs, has 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.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

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<sup>1</sup> Claimant filed one previous claim. Director's Exhibit 1. ALJ Thomas P. Phalen denied it on September 17, 2009, because Claimant failed to establish total disability. *Id.* 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.

<sup>2</sup> Where a miner files a claim for benefits more than one year after the final denial of a previous claim, 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.

<sup>3</sup> We affirm, as unchallenged on appeal, the ALJ's finding of eight years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13.

<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for

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 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. Consol. Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found the x-ray and medical opinion evidence establish complicated pneumoconiosis, whereas the biopsy evidence neither proves nor disproves the existence of the disease. 20 C.F.R. §718.304(a)-(c); Decision and Order at 10-11. Weighing all the evidence together, he concluded Claimant established complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 12.

Employer argues the ALJ erred in finding the biopsy and medical opinion evidence do not undermine the positive x-ray readings and establish that the large opacities are not complicated pneumoconiosis. Employer's Brief at 5-12. We agree, in part.

As the ALJ observed, Claimant underwent a bronchoscopy and biopsy with Drs. Alam<sup>5</sup> and Anga on February 10, 2011. Decision and Order at 10. Dr. Alam reported the bronchoscopy demonstrated "generalized deposition in both lungs with anthracosilicosis" and revealed no "obvious endobronchial tumor." Claimant's Exhibit 6 at 1. In her pathology report, Dr. Anga noted a noncaseating granuloma and found no evidence of malignant cells. *Id.* at 3. Her report did not document the presence or absence of pneumoconiosis. *Id.* Noting that a biopsy examines only a small portion of the lung, the ALJ found that, while the pathology report shows evidence of granuloma, "it does not prove or disprove the existence of complicated pneumoconiosis. The two are not mutually

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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); Decision and Order at 4; Director's Exhibits 4-7; Hearing Transcript at 15.

<sup>5</sup> The ALJ refers to the physician as Dr. Alam Mahmood. Decision and Order at 10. However, the surgical report and attached curriculum vitae demonstrate the operating physician was Dr. Mahmood Alam. Claimant's Exhibit 6.

exclusive and the evidence clearly shows anthracosilicosis from [Dr. Alam's] findings." Decision and Order at 10.

Contrary to Employer's contention, because "lung biopsies are usually unrepresentative of the whole lung," 45 Fed. Reg. 13,678, 13,684 (Feb. 29, 1980), the regulations specifically provide that "[a] negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis." 20 C.F.R. §718.106(c). The ALJ thus permissibly concluded the biopsy report did not weigh against the positive x-ray evidence. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984) (ALJ may find an x-ray that is silent on the existence of pneumoconiosis is a negative reading for the disease but is not required to do so); Decision and Order at 10. Because we see no error in the ALJ's analysis, we affirm his weighing of the biopsy evidence. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012) (ALJ's function is to weigh the evidence, draw appropriate inferences, and determine credibility).

Turning to the medical opinion evidence, the ALJ considered the opinion of Dr. Ajjarapu that Claimant has complicated pneumoconiosis, and the opinions of Drs. Rosenberg and Vuskovich that he does not. Decision and Order at 10-11; Director's Exhibit 10; Employer's Exhibits 1, 7-8. The ALJ permissibly discredited Dr. Rosenberg's opinion because, though he opined the biopsy demonstrates the large opacity seen on x-ray is a noncaseating granuloma and not complicated pneumoconiosis, he did not explain how the presence of a granuloma excludes the presence of complicated pneumoconiosis. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002).

However, we agree with Employer that the ALJ erred in evaluating Dr. Vuskovich's opinion. Employer's Brief at 10-12. 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; the 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. 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. Employer's Exhibit 7 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 did not address Dr. Vuskovich's rationale for opining Claimant does not have complicated pneumoconiosis. Employer's Brief at 10-12. Rather, the ALJ indicated Dr. Vuskovich relied on x-ray readings and treatment records not contained in the record. Decision and Order at 11. It is unclear, however, what specific readings or 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 reports from Dr. Ramakrishnan. Claimant's Exhibits 5-7; 8 at 19. The ALJ further discredited Dr. Vuskovich because he is not a board-certified pulmonologist, indicating he gave greater weight to the opinions from pulmonologists. Decision and Order at 11. However, no board-certified pulmonologist submitted an opinion in this case; Dr. Ajarapu is board-certified in family medicine, Dr. Rosenberg is board-certified in internal medicine, and Dr. Vuskovich is board-certified in occupational medicine.<sup>6</sup> Director's Exhibit 24 at 9; Employer's Exhibits 1 at 8; 7 at 16. We are, therefore, unable to discern on what basis the ALJ discredited Dr. Vuskovich's opinion.

We further agree with Employer that the ALJ did not adequately explain his conclusion that the preponderance of the medical opinions weigh in favor of a finding that Claimant has complicated pneumoconiosis. *See* Employer's Brief at 9. The ALJ did not indicate what weight he gave Dr. Ajarapu's opinion, instead characterizing her opinion as essentially "just a restatement" of Dr. DePonte's x-ray findings. Decision and Order at 11. The ALJ did not explain whether Dr. Ajarapu's opinion is documented or reasoned, and he did not provide a rationale for crediting it over the contrary opinions of Drs. Rosenberg and Vuskovich. Because the ALJ did not adequately explain how he evaluated the medical

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<sup>6</sup> Our dissenting colleague asserts the ALJ's statement that Dr. Vuskovich is not a pulmonologist merely underscores why his opinion does not overcome the diagnoses of complicated pneumoconiosis based on the x-ray readings of the dually qualified readers. However, the ALJ did not simply discredit Dr. Vuskovich due to his not being a pulmonologist but rather specifically stated he gave "greater weight" to the opinions of "the pulmonologists in the record," Decision and Order at 11, but the only Board-certified pulmonologist in the record is Dr. Alam, Employer's Exhibit 5 at 14, who performed a bronchoscopy and did not provide a medical opinion as to whether Claimant has complicated pneumoconiosis. Likewise, while our colleague notes the ALJ faulted Dr. Vuskovich for relying on biopsy and treatment record evidence documenting the existence of pneumoconiosis, Decision and Order at 11, evidence documenting the existence of clinical pneumoconiosis does not inherently provide evidence for the existence of complicated pneumoconiosis. Indeed, despite Dr. Alam's diagnosis of anthracosilicosis, the ALJ determined the biopsy evidence neither supports nor weighs against a diagnosis of complicated pneumoconiosis. Decision and Order at 10.

opinions 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).<sup>7</sup> 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 must therefore vacate his determination that Claimant established 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 at 11-12. 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 a finding of complicated pneumoconiosis, giving a specific rationale for crediting or discrediting each opinion and setting forth his findings in accordance with the APA. *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 (1991). If the ALJ finds complicated pneumoconiosis established on remand, he may reinstate the award of benefits.<sup>8</sup>

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<sup>7</sup> 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).

<sup>8</sup> Employer does not challenge the ALJ’s finding that Claimant’s complicated pneumoconiosis, if established, arose out of his coal mine employment. 20 C.F.R. §718.203(b). Thus, we affirm this finding. *See Skrack*, 6 BLR at 1-711.

Accordingly, the ALJ's Decision and Order Granting Benefits in a Subsequent Claim is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JONATHAN ROLFE  
Administrative Appeals Judge

DANIEL T. GRESH  
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 is whether the ALJ permissibly weighed the conflicting medical opinion evidence regarding complicated pneumoconiosis. As the ALJ acted within his discretion in discrediting Dr. Vuskovich's opinion, and as Dr. Ajarapu's diagnosis is consistent with and does not undermine the ALJ's finding that the x-ray evidence establishes complicated pneumoconiosis, I would affirm his determination that 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 is therefore entitled to benefits.

Employer argues and the majority finds the ALJ did not adequately explain his reasons for discrediting Dr. Vuskovich's opinion. Employer's Brief at 10-12. It also argues the ALJ did not adequately explain his reasons for crediting Dr. Ajarapu's opinion. *Id.* at 9. But Employer is incorrect.

In rejecting Dr. Vuskovich's opinion, the ALJ observed that "Dr. Vuskovich diagnosed Claimant with granulomas and not complicated pneumoconiosis . . . based . . . on the biopsy report and the evidence of past sarcoidosis in the treatment records." Decision and Order at 11; Employer's Exhibit 7 at 10-11, 13-14. The ALJ permissibly found the physician's reliance on those records to exclude a diagnosis of any form of pneumoconiosis, including complicated pneumoconiosis, unconvincing as "both of these [records] also note findings of pneumoconiosis." Decision and Order at 11; Claimant's Exhibits 6 at 1; 8 at 3. Of particular note, the ALJ credited Dr. Alam's identification of

anthracosilicosis, which *is* pneumoconiosis, on Claimant’s February 2011 biopsy. Decision and Order at Decision and Order at 10; 20 C.F.R. §718.201(a)(1) (definition of pneumoconiosis includes anthracosilicosis). While Dr. Vuskovich relied on Dr. Anga’s separate identification of granuloma on the biopsy to exclude a diagnosis of pneumoconiosis, the ALJ found Dr. Anga “did not address the presence of pneumoconiosis like the prior reading by Dr. [Alam]” and the two diagnoses (granuloma and pneumoconiosis) are not “mutually exclusive.”<sup>9</sup> Decision and Order at 10. In light of Dr. Vuskovich’s failure to explain his diagnosis of granuloma and no pneumoconiosis, when the biopsy evidence “clearly shows” pneumoconiosis, Decision and Order at 10, the ALJ permissibly discredited his opinion as to whether Claimant’s pneumoconiosis was complicated.

Nor did the ALJ err in finding that Dr. Vuskovich’s opinion is entitled to less weight than “the opinions of the pulmonologists” in the record. Giving diminished weight to a physician based on lesser credentials is clearly within the ALJ’s authority. *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 307 (6th Cir. 2005). Specifically, Dr. Alam—whose identification of anthracosilicosis, i.e., pneumoconiosis, was credited by the ALJ and served as the basis for the ALJ’s rejection of Dr. Vuskovich’s opinion on the matter—is Board-certified in pulmonary medicine. Claimant’s Exhibit 6.

Moreover, Dr. Vuskovich’s reliance on Dr. Wolfe’s x-ray readings to exclude a diagnosis of complicated pneumoconiosis further undermines his opinion. Employer’s Exhibit 7 at 11-12; Claimant’s Exhibit 5. The ALJ explicitly discredited Dr. Wolfe’s opinion that the x-ray he reviewed may not show complicated pneumoconiosis and further found the x-ray evidence as a whole is positive for complicated pneumoconiosis based on the weight of Dr. DePonte’s reading. Decision and Order at 9-10; Director’s Exhibit 10;

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<sup>9</sup> The majority expresses concern that a biopsy finding of clinical pneumoconiosis does not necessarily prove that Claimant has the complicated form of the disease. But the ALJ did not err in that regard—he explicitly acknowledged that fact. Of greater relevance, the ALJ also specifically found the biopsy does not undermine a finding of complicated pneumoconiosis on x-ray because it represents only a “small portion” of the lung. *See E. Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255 (4th Cir. 2000); (“[I]f the x-ray evidence vividly displays opacities exceeding one centimeter, its probative force is not reduced because the evidence under some other prong is inconclusive or less vivid.”); 20 C.F.R. §718.106(c) (providing that even a negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis). The majority cannot credibly contest that finding, nor can it credibly contest the ALJ’s additional finding that Dr. Vuskovich’s diagnosis of no pneumoconiosis at all, despite clear evidence of it on biopsy, undermines his opinion that Claimant does not have the complicated form of the disease.

Claimant's Exhibit 5. The ALJ's finding that Dr. Vuskovich's opinion is entitled to less weight because he lacks pulmonology credentials underscores why his opinion does not overcome the credible diagnosis of complicated pneumoconiosis on x-ray by Dr. DePonte, a dually-qualified B reader and Board-certified radiologist. Decision and Order at 11; Director's Exhibit 10 at 23.

As ALJ acted well within his discretion in discrediting Dr. Vuskovich's opinion, I would affirm his finding. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Employer further argues and the majority holds the ALJ failed to sufficiently explain why he credited Dr. Ajarapu's opinion over those of Drs. Vuskovich and Rosenberg. Employer's Brief at 9. The ALJ stated Dr. Ajarapu's opinion was a "restatement of"—and thus consistent with—the x-ray evidence of complicated pneumoconiosis. Decision and Order at 11. Even assuming the ALJ should have provided more detail for crediting Dr. Ajarapu's opinion, the alleged error is irrelevant as her opinion cannot undermine the ALJ's finding of complicated pneumoconiosis on x-ray. Decision and Order at 11; Director's Exhibit 10 at 7. Having permissibly rejected the opinions of Drs. Rosenberg and Vuskovich, the medical opinion evidence would be in equipoise even if Dr. Ajarapu's opinion were accorded no weight. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consol. Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc). Employer therefore cannot explain how the "error to which [it] points could have made any difference" in the finding of complicated pneumoconiosis on x-ray. *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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*, 12 BLR at 1-155. 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 his findings, I would affirm his determination that Claimant invoked the irrebuttable presumption of total disability due to

pneumoconiosis and is entitled to benefits. 20 C.F.R. §718.304; Decision and Order at 11-13.

GREG J. BUZZARD  
Administrative Appeals Judge