U.S. Department of Labor

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

BRB No. 22-0011 BLA

DONNIE P. DALTON Claimant-Petitioner v. ICG TYGART VALLEY LLC, c/o ARCH COAL COMPANY and ARCH COAL COMPANY, INCORPORATED, c/o SMART CASUALTY CLAIMS Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 5/10/2023 DECISION and ORDER

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

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

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

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits (2020-BLA-05527) rendered on a claim filed on October 25, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established fourteen years of coal mine employment and thus could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. He further found Claimant did not establish 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); *see* 20 C.F.R. §718.304. Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established the existence of legal pneumoconiosis,[2] 20 C.F.R. §718.202(a)(4), but did not establish the existence of clinical pneumoconiosis,[3] 20 C.F.R. §718.202(a), or a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b). He thus denied benefits.

On appeal, Claimant argues the ALJ erred in finding the evidence does not establish the existence of complicated pneumoconiosis.[4] Employer responds in support of the denial

[1] Section 411(c)(4) of the Act 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.

[2] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[3] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established fourteen years of coal mine employment and the existence of legal

of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[5] 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).

Invocation of the Section 411(c)(3) Presumption - Complicated Pneumoconiosis

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 or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b). *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The ALJ must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether 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, 255-56 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The ALJ found the x-ray, computed tomography (CT) scan, and medical opinion evidence does not support a finding of complicated pneumoconiosis.[6] 20 C.F.R. §718.304(a)-(c); Decision and Order at 10-15. Weighing all the evidence together, he

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pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 16. We also affirm, as unchallenged, the ALJ's finding that Claimant failed to establish total disability. *See Skrack*, 6 BLR at 1-711; Decision and Order at 22.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 23.

[6] The ALJ found there is no biopsy or autopsy evidence of record. 20 C.F.R. §718.304(b); Decision and Order at 12.

found Claimant did not establish the disease. 20 C.F.R. §718.304; Decision and Order at 15.

Claimant argues the ALJ erred in weighing the x-ray, CT scan, and medical opinion evidence. Claimant's Brief at 6-10. We agree.

20 C.F.R. §718.304(a) – X-ray Evidence

The ALJ considered five readings of two x-rays dated December 18, 2018,[7] and April 9, 2019.[8] Decision and Order at 9-12. Dr. Parker, a B reader, and Drs. DePonte and Tarver, who are dually-qualified as Board-certified radiologists and B readers, read the December 18, 2018 x-ray as positive for both simple and complicated pneumoconiosis, category B large opacities. Director's Exhibits 12, 15; Employer's Exhibit 2. Dr. Fino, a B reader, read the April 9, 2019 x-ray as negative for both simple and complicated pneumoconiosis, while Dr. Tarver read the x-ray as positive for both simple and complicated pneumoconiosis, category B large opacities. Director's Exhibit 16; Employer's Exhibit 5 at 4.

The ALJ found the December 18, 2018 x-ray supports a finding of complicated pneumoconiosis based on the readings of the dually-qualified radiologists. Decision and Order at 11. He found the April 9, 2019 x-ray does not support a finding of complicated pneumoconiosis based on the comments of Dr. Tarver, a dually-qualified radiologist, and the reading of Dr. Fino, a B reader. *Id*. Finding one x-ray positive for complicated pneumoconiosis and one x-ray negative for the disease, the ALJ concluded the x-ray evidence is in equipoise. *Id*. He thus found Claimant did not establish the existence of complicated pneumoconiosis based on the x-ray evidence.

We agree with Claimant's argument that the ALJ's consideration of the April 9, 2019 x-ray does not satisfy the explanatory requirements of the Administrative Procedure Act (APA).[9] Claimant's Brief at 6-8. Dr. Tarver read the April 9, 2019 x-ray as showing

[7] Dr. Gaziano read the December 18, 2018 x-ray for quality only. Director's Exhibit 13.

[8] Claimant argues Dr. DePonte interpreted an April 19, 2019 x-ray as positive for complicated pneumoconiosis, but the record does not contain the x-ray. Claimant's Brief at 8. Based on the context of Claimant's analysis of the x-rays in his brief, we conclude he inaccurately characterized the date of the April 9, 2019 x-ray as April 19, 2019. Claimant's Brief at 5-6, 8.

[9] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material

category B large opacities and noted complicated coal workers' pneumoconiosis versus old tuberculosis in a section of the report indicating other abnormalities. Employer's Exhibit 5 at 4. In a narrative report, he stated that "[b]y ILO [International Labor Organization] rules, I must classify these findings as being consistent with complicated coal worker's (sic) pneumoconiosis, though these findings may also be due to old tuberculosis." *Id*. at 3. He further stated that because a June 5, 2018 CT scan showed "findings of biapical fibronodular scarring, most consistent with old tuberculosis or histoplasmosis" and "no findings of coal workers' pneumoconiosis," he "would favor the findings of this chest [x-ray] as being most consistent with old tuberculosis." *Id*.

The ALJ stated the April 9, 2019 x-ray "was read as *possibly* demonstrating complicated coal workers' pneumoconiosis by a Board-certified radiologist and B-reader [i.e., Dr. Tarver] and as not demonstrating pneumoconiosis but rather emphysema and tuberculosis by a Board-certified pulmonologist and B-reader [i.e., Dr. Fino]." Decision and Order at 11 (citing Director's Exhibit 16; Employer's Exhibit 5). He then summarily concluded the April 9, 2019 x-ray is negative for pneumoconiosis. Decision and Order at 11; *see* Director's Exhibit 16, Employer's Exhibit 5. In doing so, the ALJ erred in failing to critically analyze Dr. Tarver's x-ray reading, render any findings as to the credibility of the doctor's ILO classification or narrative comments, or otherwise explain why he found the doctor's narrative comments more credible than the ILO classification. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016) (ALJ must still conduct an appropriate analysis of the evidence to support his or her conclusion and render necessary credibility findings); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998) (ALJ erred by failing to adequately explain why he credited certain evidence and discredited other evidence); *McCune v. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). Thus, we vacate the ALJ's finding that the x-ray evidence is insufficient to establish the existence of complicated pneumoconiosis and remand the case for further consideration. 20 C.F.R. §718.304(a). As Dr. Tarver is the only dually-qualified physician to read the April 9, 2019 x-ray, the ALJ may determine his reading of the x-ray is entitled to dispositive weight.[10] *See Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (en banc).

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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] In appearing to give equal weight to Drs. Fino's and Tarver's readings, the ALJ described Dr. Fino as "a Board-certified *pulmonologist* and B-reader." Decision and Order at 11 (emphasis added). We note, however, that unlike Dr. Tarver, Dr. Fino is not a Board-certified *radiologist* and the ALJ previously stated "more weight may be given to the reading of a Board-certified Radiologist and B-reader over one without those credentials . . . ." *Id*.; *see* 20 C.F.R. §718.202(a)(1) ("where two or more X-ray reports are in conflict,

20 C.F.R. §718.304(c) – "Other" Medical Evidence

The ALJ next considered whether the CT scans taken on June 5, 2018, December 1, 2020, and February 2, 2021, establish complicated pneumoconiosis. Decision and Order at 11.

Dr. Fino read the June 5, 2018 CT scan as showing granulomatous disease in the anterior upper zones, no small opacities consistent with pneumoconiosis, and bilateral masses in the upper zones caused by emphysema and possibly granulomatous disease, rather than complicated pneumoconiosis. Employer's Exhibit 1. Dr. Tarver read the June 5, 2018, December 1, 2020, and February 2, 2021 CT scans as showing no small nodules or large masses consistent with pneumoconiosis, and biapical fibronodular scarring "likely due" to granulomatous disease, such as tuberculosis or histoplasmosis. Director's Exhibit 21; Employer's Exhibits 6, 7.

Dr. DePonte read the December 1, 2020 and February 2, 2021 CT scans. Claimant's Exhibit 1. She noted three large opacities, which would measure greater than one centimeter when viewed via x-ray. *Id.* She stated one opacity "is in the typical location of a large . . . coal workers' pneumoconiosis[,]" a second opacity "may represent a cavitating large opacity of complicated coal workers' pneumoconiosis[,]" and a third opacity "may be related to complicated coal workers' pneumoconiosis." *Id*. at 1. Further, she stated that while she did not observe small nodular opacities, "it is well documented in literature that the profusion of small opacities will often tend to diminish as large opacities develop." *Id*. She thus found bilateral upper lobe opacities, cavitating on the left, "which may be related to complicated coal workers' pneumoconiosis." *Id*. at 2. The ALJ found Dr. DePonte's CT scan reading equivocal and therefore concluded Drs. Tarver's and Fino's CT scan readings are entitled to greater weight. He thus found the CT scan evidence does not support a finding of complicated pneumoconiosis. Decision and Order at 11.

Contrary to the ALJ's finding, Dr. DePonte's statements that the large opacities seen in the CT scan "may" indicate complicated pneumoconiosis do not render her opinion equivocal. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763 (4th Cir. 1999) (opinion that pneumoconiosis "could be" a complicating factor in miner's death was not equivocal); *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006) ("refusal to express a diagnosis in categorical terms is candor, not equivocation.") Dr. DePonte noted each large opacity that she found was consistent with complicated pneumoconiosis, made an equivalency finding regarding the size of the opacities, and specifically opined the

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in evaluating such X-ray reports consideration must be given to the *radiological qualifications* of the physicians interpreting such X-rays").

dearth of small nodular opacities classically seen in pneumoconiosis could be explained by the development of the large opacities.[11] *See Mays*, 176 F.3d at 763 (physician's opinion must be evaluated "in the full context of his report"). Nor are her statements internally inconsistent: she ultimately found "[t]he large opacities would measure similar in size and greater than one centimeter on a standard chest radiograph (x-ray)." Claimant's Exhibit 1 at 2; *see Amax Coal Co. v. Director, OWCP*, 993 F.2d 600, 602 (7th Cir. 1993) (medical opinion not "inconsistent" where there are no discernable "contradictions"). Thus the ALJ's rationale for discrediting Dr. DePonte's CT scan interpretations cannot be affirmed.

We therefore vacate the ALJ's finding that the CT scans do not establish complicated pneumoconiosis. 20 C.F.R. §718.304(c).

Further, the ALJ considered whether the medical opinions establish complicated pneumoconiosis. Decision and Order at 13-15. Dr. Allen opined Claimant has complicated pneumoconiosis while Drs. Fino and Tarver opined he does not. Director's Exhibits 12, 16; Employer's Exhibits 3, 4. The ALJ found Dr. Allen's opinion not well-reasoned because it is "at odds with the imaging evidence as [he] determined by this decision," and he found Drs. Fino's and Tarver's opinions well-reasoned because "[t]he imaging evidence supports [their] conclusions." Decision and Order at 15. Because we have vacated the ALJ's findings on the x-ray and CT scan evidence, which may have affected the weight he assigned to the medical opinion evidence, we also vacate his findings that the medical opinions and the evidence as a whole do not establish the existence of complicated pneumoconiosis. 20 C.F.R. §718.304(c).

Remand Instructions

On remand, the ALJ must reconsider whether the x-ray, CT scan, and medical opinion evidence establishes complicated pneumoconiosis. 20 C.F.R. §718.304(a), (c). He must weigh all evidence together to determine whether the evidence as a whole establishes complicated pneumoconiosis. *Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 255-56; 20 C.F.R. §718.304. If Claimant establishes complicated pneumoconiosis, the ALJ must address whether he has established that his complicated pneumoconiosis arose out of his

[11] We reject Claimant's argument that the ALJ should have discredited Dr. Tarver's readings of the CT scans as equivocal. Claimant's Brief at 9-10. While Dr. Tarver stated his finding of biapical fibrosis was "likely" due to, or "most consistent with granulomatous disease," he specifically opined there are "no CT findings" consistent with complicated pneumoconiosis. Director's Exhibit 21; Employer's Exhibits 6, 7.

coal mine employment.[12] 20 C.F.R. §718.203. If Claimant establishes complicated pneumoconiosis arising out of his coal mine employment, he is entitled to benefits. 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.304, 718.203. However, if the ALJ finds Claimant did not establish complicated pneumoconiosis, he may reinstate the denial of benefits in light of Claimant's failure to establish total disability independent of a finding of complicated pneumoconiosis. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). Finally, the ALJ must critically analyze the evidence of record and adequately explain his findings as the APA requires. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the ALJ for further proceedings consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[12] If Claimant establishes complicated pneumoconiosis, the disease is presumed to have arisen out of his coal mine employment because he established more than ten years of coal mine employment; consequently, the burden will then be on Employer, as the party opposing entitlement, to disprove disease causation. 20 C.F.R. §718.203(b).