



BRB No. 22-0304 BLA

SHANE D. SUTTON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
MIDDLETON MINING, LLC)	
)	
and)	
)	
NATIONAL UNION FIRE INSURANCE)	
COMPANY OF PITTSBURGH,)	DATE ISSUED: 10/23/2023
PENNSYLVANIA)	
)	
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 Theodore W. Annos,
Administrative Law Judge, United States Department of Labor.

Sarah Y.M. Himmel (Two Rivers Law Group, P.C.), Christiansburg,
Virginia, for Employer and its Carrier.

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

BUZZARD and JONES, Administrative Appeals Judges:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Awarding Benefits (2018-BLA-06207) rendered on a claim filed on January 20, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 18.71 years of qualifying coal mine employment based on the parties' stipulation. He also found Claimant established complicated pneumoconiosis and thus 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) (2018); 20 C.F.R. §718.304. 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 Claimant established complicated pneumoconiosis.¹ Neither Claimant nor the Director, Office of Workers' Compensation Programs, has 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.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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 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). 30 U.S.C. §921(c)(3); 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 E. Assoc. Coal Corp. v. Director [Scarbro]*, 220 F.3d

¹ We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 18.71 years of qualifying coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

² 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2.

250, 256 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found the computed tomography (CT) scans support a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(c), while the x-rays, treatment records, and medical opinions do not aid Claimant in establishing the disease.³ 20 C.F.R. §718.304(a), (c); Decision and Order at 7-14. Weighing all the evidence together, he found Claimant established complicated pneumoconiosis and thus invoked the irrebuttable presumption. Decision and Order at 15.

Employer argues the ALJ erred in weighing the CT scan and medical opinion evidence. Employer's Brief at 7-16. We disagree.

CT Scans

The ALJ considered nine interpretations of six CT scans dated March 14, 2016, August 17, 2016, February 9, 2017, June 20, 2017, January 16, 2018, and March 18, 2019. Decision and Order at 17-26; Director's Exhibits 15, 32; Claimant's Exhibits 1-3; Employer's Exhibits 6-11. Dr. Adcock read the March 14, 2016 CT scan as showing nodules of four to ten millimeters, paraseptal emphysema, and "[o]ld granulomatous disease" but no evidence of pneumoconiosis. Employer's Exhibit 11. Dr. Adcock further read the August 17, 2016, February 9, 2017, June 20, 2017, January 16, 2018, and March 18, 2019 CT scans as showing diffuse paraseptal emphysema and old granulomatous disease but no evidence of pneumoconiosis. Employer's Exhibits 6-10.

Dr. Rao read the August 17, 2016 CT scan as "suggestive of complicated coal workers' pneumoconiosis." Director's Exhibit 15 at 2. Dr. DePonte read the February 9, 2017 CT scan as consistent with simple pneumoconiosis but did not specify whether it demonstrated complicated pneumoconiosis. Claimant's Exhibit 3. However, she interpreted the January 16, 2018 and March 18, 2019 CT scans as positive for both simple and complicated pneumoconiosis.⁴ Claimant's Exhibits 1, 2.

³ The ALJ found the record contains no biopsy evidence. 20 C.F.R. §718.304(b); Decision and Order at 8.

⁴ Dr. DePonte indicated the January 16, 2018 CT scan showed small opacities in the upper right lobe consistent with coal workers' pneumoconiosis as well as a 10.9 millimeter pseudoplaque in the right lung apex and an 11 millimeter pseudoplaque, partially calcified, in the right lower lobe consistent with complicated pneumoconiosis. Claimant's Exhibit 2 at 1-2. She read the March 18, 2019 CT scan as showing simple pneumoconiosis as well

The ALJ gave no weight Dr. Rao's interpretation of the August 17, 2016 CT scan because his qualifications are not in the record. Decision and Order at 9. He likewise gave no weight to Dr. Adcock's interpretations of the March 14, 2016, August 17, 2016, February 9, 2017, June 20, 2017, January 16, 2018, and March 18, 2019 CT scans because Dr. Adcock's diagnosis of old granulomatous disease is unsupported by any record evidence "showing that Claimant was diagnosed with, treated for, or otherwise suffered from granulomatous disease." *Id.* at 9-11. He discredited Dr. DePonte's reading of the February 9, 2017 CT scan because she did not specifically state whether she was diagnosing complicated pneumoconiosis, but he gave greater weight to her readings of the January 16, 2018 and March 18, 2019 CT scans, explaining that the 11 millimeter and 10.9 millimeter opacities she observed "meet criteria for" and are "consistent with" a diagnosis of large opacities of complicated pneumoconiosis. *Id.*

Because he had discredited each reading of the March 14, 2016, August 17, 2016, February 9, 2017, and June 20, 2017 CT scans, the ALJ found they were inconclusive for the presence of complicated pneumoconiosis. *Id.* at 10. Crediting Dr. DePonte's readings of the January 16, 2018 and March 18, 2019 CT scans over the contrary readings of Dr. Adcock, he found the January 16, 2018 and March 18, 2019 CT scans positive for complicated pneumoconiosis. *Id.* Therefore, having found the record contains four inconclusive CT scans and two positive CT scans, he found the CT scan evidence supports a finding of complicated pneumoconiosis. *Id.* at 11-12.

We reject Employer's assertion the ALJ erred in discrediting Dr. Adcock's CT scan readings and impermissibly shifted the burden to Employer to disprove complicated pneumoconiosis.⁵ Employer's Brief at 7-15. As the ALJ noted, Dr. Adcock opined the March 14, 2016, August 17, 2016, February 9, 2017, June 20, 2017, January 16, 2018, and March 18, 2019 CT scans each showed "[o]ld granulomatous disease" with no evidence of pneumoconiosis. Decision and Order at 9-11 (citing Employer's Exhibits 6-11). The ALJ correctly observed, however, that Dr. Adcock did not identify, and the record does not

as a 10.9 millimeter opacity in the right upper lung zone consistent with complicated pneumoconiosis. Claimant's Exhibit 1 at 1-2.

⁵ We affirm, as unchallenged, the ALJ's according "greater weight" to Dr. DePonte's readings of the January 16, 2018, and March 18, 2019 CT scans. *See Skrack*, 7 BLR at 1-711; Decision and Order at 10-11.

contain, any evidence showing Claimant has a history of granulomatous disease.⁶ *Id.* (citing Employer's Exhibits 6-11).

Contrary to Employer's contention, the ALJ's determination that the March 14, 2016, August 17, 2016, February 9, 2017, and June 20, 2017 CT scans are "inconclusive for the presence of or absence of complicated pneumoconiosis," did not create an impermissible "burden shifting" framework. Decision and Order at 9-10; Employer's Brief at 14. This determination did not require Employer to affirmatively disprove complicated pneumoconiosis but rather established only that March 14, 2016, August 17, 2016, February 9, 2017, and June 20, 2017 CT scans weigh neither in favor of nor against a finding of complicated pneumoconiosis. See *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 217-18 (1984); Decision and Order at 9-10. Likewise, the ALJ did not discredit Dr. Adcock's readings of the CT scans by impermissibly shifting the burden to Employer to produce evidence demonstrating the abnormalities Dr. Adcock observed were not opacities of complicated pneumoconiosis. Rather, he permissibly discredited Dr. Adcock's CT scan readings as speculative because he diagnosed conditions, namely "old granulomatous disease," documented nowhere else in the record. See *Westmoreland v. Cox*, 602 F.3d 276, 286-87 (4th Cir. 2010);⁷ *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); Decision and Order at 9-11; see also *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc) (ALJ may reject a medical opinion where he finds the doctor failed to adequately explain his diagnosis); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985) (ALJ must consider factors that tend to undermine the reliability of a physician's conclusions before accepting the medical opinion).

We further reject Employer's assertion that the ALJ erred in discrediting Dr. Adcock's opinion because he reviewed all of the CT scans in the record and is dually qualified as a B reader and Board-certified radiologist. Employer's Brief at 12-13. Employer's arguments are 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). Having

⁶ We also note that Dr. Adcock did not identify any features on the scans which caused him to find granulomatous disease.

⁷ Employer purports to distinguish *Cox* because the physicians in that case agreed the x-rays showed large opacities and disagreed solely as to their etiology. Employer's Brief at 10-12 (citing *Westmoreland v. Cox*, 602 F.3d 276 (4th Cir. 2010)). The court in *Cox* did not make this distinction, however, but rather affirmed the ALJ's discrediting of Westmoreland's experts' opinions because they "consisted of speculative alternative diagnoses that were not based on evidence that Cox suffered from any of the diseases suggested." *Cox*, 602 F.3d at 287.

affirmed the ALJ's crediting of Dr. DePonte's readings of the January 16, 2018, and March 18, 2019 CT scans, *see supra* note 5, we affirm his determination that the CT scan evidence supports a finding of complicated pneumoconiosis.

Medical Opinion Evidence

The ALJ next considered the medical opinions of Dr. Ajjarapu that Claimant has complicated pneumoconiosis and the opinions of Drs. Rosenberg and Fino that he does not. Director's Exhibit 12; Employer's Exhibits 4, 5. The ALJ discredited Drs. Ajjarapu's and Rosenberg's opinions because they are unreasoned. Decision and Order at 12-13. He further discredited Dr. Fino's opinion as conclusory and unsupported by the record. *Id.* at 13. He therefore found the medical opinion evidence is "not probative as to the presence or absence of complicated pneumoconiosis." *Id.*

Employer contends the ALJ erred in discrediting Drs. Rosenberg's and Fino's opinions. Employer's Brief at 13-14. We disagree.

The ALJ permissibly discredited their opinions because they were based in large part on Dr. Adcock's negative readings of the CT scans, contrary to the ALJ's determinations that Dr. Adcock's readings are not credible and the weight of the CT scan evidence is positive for the disease. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000) (medical opinion based on a discredited x-ray is not probative evidence that the miner has pneumoconiosis); Decision and Order at 12-13; Employer's Exhibits 4, 5. Employer's arguments regarding these opinions amount to a request to reweigh the evidence, which we are not empowered to do.⁸ *See Anderson*, 12 BLR at 1-113. Because it is supported by substantial evidence, we affirm the ALJ's finding that the medical opinion evidence neither supports nor weighs against a finding of complicated pneumoconiosis.

Employer raises no additional arguments regarding complicated pneumoconiosis. Therefore, because the ALJ considered all the relevant evidence and his determination that Claimant has complicated pneumoconiosis is supported by substantial evidence, we affirm

⁸ Because the ALJ discredited the complicated pneumoconiosis diagnoses of Cynthia Dean and Jody Willis as unpersuasive, we need not address Employer's contention that the ALJ erred in stating they are medical doctors rather than nurse practitioners. Employer's Brief at 16. Decision and Order 14; Claimant's Exhibits 5, 6. Error, if any, in overstating their qualifications is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference."); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

it.⁹ *See Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 255-56; *Melnick*, 16 BLR at 1-33-34. We thus affirm the ALJ's conclusion that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Further, we affirm, as unchallenged, the ALJ's finding that Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Daniels Co. v. Mitchell*, 479 F.3d 321 (4th Cir. 2007); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge

⁹ We thus reject Employer's assertion that the ALJ erred in finding Claimant totally disabled due to pneumoconiosis without making "other findings that would support a conclusion that the miner is totally disabled." 20 C.F.R. §718.304; Employer's Brief at 16. Because Claimant established complicated pneumoconiosis, the ALJ properly determined he is entitled to an irrebuttable presumption that he is totally disabled by the disease. 30 U.S.C. §921(c)(3).