**U.S. Department of Labor**

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

BRB No. 20-0185 BLA

| | | |
|---|---|---|
| HERBERT H. MOORE, JR.<br><br>Claimant-Respondent<br><br>v.<br><br>CONSOLIDATED ENERGY, INCORPORATED<br><br>and<br><br>KENTUCKY EMPLOYERS MUTUAL INSURANCE<br><br>Employer/Carrier-Petitioners<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 03/30/2021<br><br>DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits and the Order Denying Employer's Motion for Reconsideration of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

W. Barry Lewis (Lewis and Lewis Law Offices), Hazard, Kentucky, for Employer and its Carrier.

Ann Marie Scarpino (Elena S. Goldstein, Deputy Solicitor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Steven D. Bell's Decision and Order Awarding Benefits and the Order Denying Employer's Motion for Reconsideration (2018-BLA-05798) rendered on a claim filed on June 7, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

Employer did not contest its designation as the responsible operator at the hearing and the administrative law judge accepted the parties' stipulation to twenty-four years of coal mine employment. The administrative law judge found Claimant established complicated pneumoconiosis and was therefore entitled to 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).

Employer filed a motion for reconsideration asserting it should be permitted to withdraw its stipulation that it is the responsible operator and arguing the administrative law judge erred in finding Claimant established complicated pneumoconiosis. The administrative law judge summarily denied Employer's motion.

On appeal, Employer challenges the administrative law judge's finding of complicated pneumoconiosis and his summary denial of its reconsideration request. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), agrees the administrative law judge did not adequately explain his weighing of the x-ray evidence on complicated pneumoconiosis. The Director also contends the administrative law judge erred in not explaining his basis for denying Employer's reconsideration request, but maintains Employer is the responsible operator. The Director asks the Benefits Review Board to remand the case for the administrative law judge to reconsider whether Claimant established complicated pneumoconiosis and to address whether Employer forfeited its right to challenge its designation as the responsible operator.[1]

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding of twenty-four years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 13.

The Board's scope of review is defined by statute. We must affirm the administrative law judge'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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359, 361-62 (1965).

**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 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 administrative law judge must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. *Gray v. SLC Coal Co.*, 176 F.3d 382, 389-90 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc). The administrative law judge found Claimant established complicated pneumoconiosis based on the x-ray and medical opinion evidence.[3] Decision and Order at 11-13.

**X-ray Evidence**

The administrative law judge considered nine interpretations of five x-rays. Decision and Order at 9. Drs. Crum and DePonte, both dually qualified as Board-certified radiologists and B readers, interpreted the July 21, 2017 x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis, while Dr. Akers, also a dually-qualified radiologist, interpreted it as negative for both forms of the disease.[4] Director's Exhibits 14, 25; Claimant's Exhibit 1. Dr. Crum and Dr. Broudy, a B reader,

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Hearing Transcript at 10.

[3] There is no biopsy evidence for consideration. 20 C.F.R. §718.304(b).

[4] Dr. Lundberg, dually qualified as a Board-certified radiologist and B reader, reviewed the July 21, 2017 x-ray for quality only. Director's Exhibit 17.

interpreted the January 15, 2018 x-ray as positive for simple pneumoconiosis and negative for complicated pneumoconiosis. Director's Exhibit 24; Claimant's Exhibit 2. Dr. Jarboe, a B reader, read the July 19, 2018 x-ray as negative for simple and complicated pneumoconiosis. Employer's Exhibit 1. Dr. Crum and Dr. Siegler, also a dually-qualified radiologist, read the November 8, 2018 x-ray as positive for simple pneumoconiosis and negative for complicated pneumoconiosis. Claimant's Exhibit 3; Employer's Exhibit 4. Dr. DePonte read the November 20, 2018 x-ray as positive for simple and complicated pneumoconiosis. Claimant's Exhibit 4.

The administrative law judge noted that the most recent x-ray was read as positive for complicated pneumoconiosis by a dually-qualified physician, and "no evidence has been presented that this interpretation is inaccurate." Decision and Order at 12. Relying on "the fact that pneumoconiosis is a progressive and irreversible disease" and therefore "the more recent evidence is entitled to greater weight," the administrative law judge found Claimant established complicated pneumoconiosis based on Dr. DePonte's positive reading of the November 20, 2018 x-ray. *Id*. at 12; *see* 20 C.F.R. §718.304(a).

Employer and the Director assert the administrative law judge did not adequately explain his reliance on the most recent positive x-ray over the other negative x-rays for complicated pneumoconiosis. We agree. Because pneumoconiosis is a progressive and irreversible disease, the chronology of the evidence is a relevant factor and it is generally reasonable to credit more recent positive x-rays over earlier negative ones. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1983); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 n.6 (1985). However, a more recent x-ray may not always provide the most accurate information regarding a miner's current pulmonary condition if it is not separated by a significant amount of time. *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740-41 (6th Cir. 2014) (court approved the administrative law judge's determination that seven pulmonary function studies taken within a seven-month period were "sufficiently contemporaneous" and therefore equally probative); *see also Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991) (two months is insignificant when evaluating a miner's entitlement and thus court would not apply "later in time" rationale); *Conley v. Roberts and Shaefer Co.*, 7 BLR 1-309, 1-312 (1984); *Martin v. Director, OWCP*, 6 BLR 1-535, 1-537 (1983) (later evidence rule does not require adjudicator to credit positive x-ray over negative x-ray taken just two months earlier).

The administrative law judge did not provide any explanation why a difference of only twelve days was significant enough to credit the positive November 20, 2018 x-ray over the negative films. Moreover, the administrative law judge's rationale that Dr. DePonte's positive reading is credible because it is unrefuted is inadequately explained since two dually-qualified radiologists also provided unrefuted negative readings of the November 8, 2018 x-ray, taken just twelve days before the November 20, 2018 positive x-

ray. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because the administrative law judge failed to sufficiently explain his rationale for weighing the conflicting readings as the Administrative Procedure Act[5] requires, we vacate his determination that Claimant established complicated pneumoconiosis based on the x-ray evidence. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §718.304(a).

**Medical Opinions**

Drs. Green, Nader, and Broudy opined Claimant has simple pneumoconiosis but not complicated pneumoconiosis. Director's Exhibits 14, 23, 24; Claimant's Exhibit 3; Employer's Exhibit 3. Dr. Jarboe opined Claimant does not have simple or complicated pneumoconiosis. Employer's Exhibits 1, 2. Dr. Raj opined Claimant has both simple and complicated pneumoconiosis. Claimant's Exhibit 4.

The administrative law judge credited Dr. Raj's opinion because he was the only physician to consider the most recent positive x-ray for complicated pneumoconiosis. Decision and Order at 13. Because we have vacated the administrative law judge's finding that Claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(a), we also vacate his finding that Claimant established complicated pneumoconiosis based on Dr. Raj's opinion at 20 C.F.R. §718.304(c).[6] Thus, we vacate the administrative law judge's determination that Claimant invoked the irrebuttable presumption and vacate the award of benefits.

**Remand Instructions for Issues of Entitlement**

On remand, the administrative law judge must resolve the conflict in the x-rays, considering all of the x-rays, the qualifications of the physicians and the chronology of the evidence, including the duration elapsing between the x-rays on which the physicians' opinions are based. He must provide an appropriate explanation of his weighing of the evidence. *See* 5 U.S.C. §557(c)(3)(A); 30 U.S.C. §932(a); 20 C.F.R. §718.304(a); *Staton v.*

[5] 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).

[6] Further, we note that a physician's opinion which merely restates the results of an x-ray is not a reasoned medical opinion. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514 (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000).

*Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward*, 991 F.2d at 321. He also must reweigh the medical opinions on complicated pneumoconiosis and explain his rationale. *See* 20 C.F.R. §718.304(c); *Wojtowicz*, 12 BLR at 1-165. He must then weigh all of 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.

If the administrative law judge again finds Claimant has complicated pneumoconiosis, he also must determine whether it arose from coal mine employment. 20 C.F.R. §718.203. If Claimant invokes the irrebuttable presumption, the administrative law judge may reinstate the award of benefits. If Claimant does not establish complicated pneumoconiosis, the administrative law judge must consider whether Claimant can invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act[7] and, as necessary, whether Employer has rebutted it. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. If neither the irrevocable presumption nor the Section 411(c)(4) presumption applies, the administrative law judge must determine whether Claimant can establish entitlement to benefits under 20 C.F.R. Part 718 without the benefit of those presumptions. In reaching his credibility determinations on remand, the administrative law judge must set forth his findings in detail and explain his underlying rationale as the APA requires. *See* 5 U.S.C. §557(c)(3)(A); 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165.

**Employer's Motion for Reconsideration**

At the December 11, 2018 hearing, Employer advised the administrative law judge it was not contesting its designation as the responsible operator.[8] Decision and Order at 3; Hearing Transcript at 10. Following the administrative law judge's decision, which we have vacated, Employer argued it should be permitted to withdraw its responsible operator

[7] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[8] The responsible operator is the potentially liable operator that most recently employed Claimant for at least one year. 20 C.F.R. §§725.494, 725.495(a)(1). Once the district director designates a responsible operator, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or another operator financially capable of assuming liability more recently employed the miner for at least one year. *See* 20 C.F.R. §725.495(c).

stipulation based on the United States Court of Appeals for the Sixth Circuit's decision in *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401 (6th Cir. 2019), *reh'g denied*, No. 17-4313 (6th Cir. May 3, 2019).[9] Employer argued in its reconsideration request that *Shepherd* permits a less restrictive means of calculating the length of time in coal mine employment for which a miner is given credit than the one previously used by the Department of Labor when Employer was named the responsible operator. Thus, Employer asserted it should be allowed to withdraw its stipulation based on the change in law and be given the opportunity to litigate the responsible operator issue.[10] Employer's Motion for Reconsideration at 1-2.

We agree with Employer and the Director that the administrative law judge erred in summarily denying Employer's motion for reconsideration without providing any rationale. *See Wojtowicz*, 12 BLR at 1-165. We therefore instruct the administrative law judge on remand to address the merits of Employer's request to withdraw its responsible operator stipulation. The administrative law judge should also consider the Director's argument that Employer waived its rights to withdraw its stipulation and challenge its designation as the responsible operator.[11] *See Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 10 (2019).

[9] In *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401 (6th Cir. 2019), *reh'g denied*, No. 17-4313 (6th Cir. May 3, 2019), the Sixth Circuit held if the formula set out at 20 C.F.R. §725.101(a)(32)(iiii) yields at least 125 working days, a miner can be credited with a year of coal mine employment, regardless of the actual duration of employment for the year. If the results yield less than 125 days, the miner still can be credited with a fractional portion of a year based on the ratio of the days worked to 125. The definition of one year of coal mine employment is the same for the identification of the responsible operator and application of the presumptions under the Act. *See* 65 Fed. Reg. 79,951 (Dec. 20, 2000) (20 C.F.R. §725.101(a)(32) contains a "single definition with general applicability.").

[10] Employer identified Central Elkhorn, Incorporated, Jasper Coal LLC, Carbon Coal LLC, T&W Services LLC, Pilgrim Mining Company, Incorporated, Cliffs Logan County Coal LLC, Rockspring Development Incorporated, Double-Bonus Coal Company, and GR Mining, Incorporated as having employed Claimant after it, and requested that the administrative law judge determine whether Claimant had at least 125 days of coal mine employment with any of those companies. Employer's Motion for Reconsideration at 2.

[11] The Director notes that *Shepherd* was issued on February 6, 2019, yet Employer waited until after the administrative law judge issued his December 27, 2019 decision to request its responsible operator stipulation be withdrawn. Director's Brief at 2. The Director argues Employer did not explain in its reconsideration request or in this appeal

Accordingly, the administrative law judge's Order Denying Employer's Motion for Reconsideration is vacated, and his Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

why it failed to raise the issue for almost eleven months after *Shepherd* was issued, and it "does not explain why it could not and did not independently challenge the Department's length of employment calculations, as the petitioner did in *Shepherd*." *Id*. Thus, the Director contends the administrative law judge on remand "may find the Employer's request to withdraw its stipulation to liability based on *Shepherd* was untimely and therefore waived." *Id.*, *citing Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9 (2019).