

U.S. Department of Labor

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



BRB No. 23-0256 BLA

RUSSELL HIGGINS, JR. )

Claimant-Respondent )

v. )

THE HARRISON COUNTY COAL )  
COMPANY )

and )

MURRAY ENERGY CORPORATION )  
TRUST c/o SMART CASUALTY CLAIMS )

Employer/Carrier- )  
Petitioners )

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )

Party-in-Interest )

DATE ISSUED: 03/14/2024

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits 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.

Aimee M. Stern (Dinsmore & Shohl, LLP), Wheeling, West Virginia, for  
Employer and its Carrier.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2022-BLA-05926) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on January 21, 2020.<sup>1</sup>

The ALJ credited Claimant with thirty-one years of underground coal mine employment. He found Claimant established complicated pneumoconiosis and, therefore, invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act and established a change in an applicable condition of entitlement.<sup>2</sup> 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.304, 725.309(c). Further, he found Claimant's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203(b).

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<sup>1</sup> Claimant filed two prior claims. Director's Exhibits 1, 2. He withdrew his initial claim. Director's Exhibit 1. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b). The ALJ noted the district director denied Claimant's second claim on November 16, 2018, because he failed to establish any element of entitlement. Decision and Order at 3; Director's Exhibit 2.

<sup>2</sup> Where a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, 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); *see 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 failed to establish any element of entitlement in his prior claim, he had to submit new evidence establishing one element to obtain review of the merits of his current claim. *Id.*

On appeal, Employer asserts the ALJ erred in finding Claimant established complicated pneumoconiosis.<sup>3</sup> Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless requested.

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.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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 ALJ must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis. *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 readings neither support nor refute a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(a); Decision and Order at 8-12. He found the computed tomography (CT) scan readings and medical opinions support a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 11-16. Finally, he found the evidence when weighed together establishes Claimant has complicated pneumoconiosis.<sup>5</sup> 20 C.F.R. §718.304; Decision and Order at 16.

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<sup>3</sup> We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established thirty-one years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-5, 7.

<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 15-16; Director's Exhibits 5, 9.

<sup>5</sup> The ALJ found there is no biopsy evidence of record. 20 C.F.R. §718.304(b); Decision and Order at 13.

Employer argues the ALJ erred in weighing the x-ray and CT scan evidence. Employer's Brief at 8-9 (unpaginated). We disagree.

With respect to the x-ray evidence, the ALJ weighed two readings of a single x-ray dated February 19, 2020. 20 C.F.R. §718.304(a); Decision and Order at 11; Director's Exhibit 14; Employer's Exhibit 1. Dr. DePonte, dually-qualified as a Board-certified radiologist and B-reader, read this x-ray as positive for Category A "[c]omplicated coal workers' pneumoconiosis in the form of pseudoplaques as well as a [twelve millimeter] large opacity in the right lung apex." Director's Exhibit 14 at 13. Dr. Seaman, also a dually-qualified radiologist, read it as negative for the disease based on the absence of large opacities. Employer's Exhibit 1 at 2. She stated the x-ray revealed "[a]sbestos pleural disease," but no "findings consistent with asbestosis." *Id.*

The ALJ found the readings of the February 19, 2020 x-ray are in equipoise because an equal number of dually-qualified radiologists read it as positive compared to negative for complicated pneumoconiosis. Decision and Order at 10. Thus he concluded the x-ray evidence neither supports nor refutes a finding of complicated pneumoconiosis. *Id.*

Next, the ALJ considered five readings of three CT scans dated March 27, 2020, February 1, 2021, August 16, 2022. 20 C.F.R. §718.304(c); Decision and Order at 11; Director's Exhibit 14 at 29-30; Claimant's Exhibits 1, 3; Employer's Exhibits 3, 4. Dr. DePonte interpreted all three CT scans. She read the March 27, 2020 CT scan as revealing a four and one-half centimeter large opacity consistent with complicated pneumoconiosis in the form of a pseudoplaque and another 1.2 centimeter large opacity also consistent with complicated pneumoconiosis. Director's Exhibit 14 at 29. Similarly, she read the February 1, 2021 and August 16, 2022 CT scans as consistent with the same two masses of complicated pneumoconiosis, but she additionally identified a third 3.3 centimeter pseudoplaque mass consistent with complicated pneumoconiosis. Claimant's Exhibits 1, 3. She explained the "inner margin[s] of these opacities [have] a fine nodular contour supporting the diagnosis of the large opacity having formed from the coalescence of small nodular opacities." Claimant's Exhibit 3 at 2.

Dr. Seaman reviewed the March 27, 2020 and February 1, 2021 CT scans and excluded complicated pneumoconiosis based on the absence of large opacities. Employer's Exhibits 3, 4. She identified "asbestos pleural disease" on the test. *Id.* She did not review the August 16, 2022 CT scan.

The ALJ found the readings of the March 27, 2020 and February 1, 2021 CT scans are in equipoise because an equal number of dually-qualified radiologists read each test as

positive compared to negative for complicated pneumoconiosis.<sup>6</sup> Decision and Order at 11-12. Based on Dr. DePonte's uncontradicted positive reading of the August 16, 2022 CT scan, he found this test supports a finding of complicated pneumoconiosis. *Id.* Because one CT scan is positive for complicated pneumoconiosis and the readings of the remaining CT scans are in equipoise, the ALJ found the preponderance of the CT scan evidence supports a finding of complicated pneumoconiosis. *Id.*

Employer argues the ALJ should have assigned controlling weight to Dr. Seaman's x-ray and CT scan readings because her identification of "asbestos pleural disease" is supported by Dr. Abrahams's medical opinion diagnosing this condition and Claimant's treatment records reflecting treatment for asbestos exposure. Employer's Brief at 8-9 (unpaginated). It argues Dr. DePonte's concession in her deposition that she was not aware Claimant was exposed to asbestos undermines the credibility of her x-ray and CT scan readings. *Id.*

The ALJ addressed Claimant's asbestos exposure when resolving the conflict in the evidence. Although Dr. Abrahams excluded complicated pneumoconiosis and diagnosed asbestos-related disease, the ALJ discredited Dr. Abrahams's findings. Decision and Order at 15. The ALJ explained Dr. Abrahams's opinion was based, in part, on "his own readings of the radiographic evidence,"<sup>7</sup> but noted the doctor is not a Board-certified radiologist and thus has inferior qualifications compared to the dually-qualified Drs. DePonte and Seaman. Decision and Order at 15.

The ALJ also acknowledged Claimant's treatment records contain x-rays and CT scans referencing "asbestos-related pleural plaques" and no diagnosis of complicated pneumoconiosis, but he found the record does not include the qualifications of the doctors who read these objective tests. Decision and Order at 15. Further, he noted Dr. DePonte testified that "the knowledge of Claimant's possible asbestos exposure, or lack thereof, does not affect her radiographic diagnosis." *Id.* at 12, *citing* Claimant's Exhibit 4 at 26. Finally, the ALJ found that even if Claimant had been affected by his exposure to asbestos,

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<sup>6</sup> The ALJ also recognized Dr. Abrahams read the February 1, 2021 CT scan as negative for complicated pneumoconiosis, but he found Dr. Abrahams is less qualified than Drs. DePonte and Seaman because he is not a Board-certified radiologist. Decision and Order at 15.

<sup>7</sup> Dr. Abrahams specifically stated "there are no large opacities [of] complicated pneumoconiosis as [Dr.] DePonte suggests." Employer's Exhibit 2 at 5. He explained "[t]hose who read the CT scans and [c]hest x-rays as pleural plaques, not as large opacities of complicated pneumoconiosis, include . . . [Dr.] Abrahams . . . ." *Id.*

there is no basis to conclude “Claimant cannot suffer from both” complicated pneumoconiosis and the effects of asbestos exposure. Decision and Order at 16. Thus the ALJ permissibly found Claimant’s asbestos exposure does not bolster Dr. Seaman’s readings or undermine Dr. DePonte’s readings. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 10-15.

It is the ALJ’s responsibility to weigh the evidence, draw inferences and determine credibility. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 322 (4th Cir. 2013). The Board is not empowered to engage in a *de novo* review but rather is limited to reviewing the ALJ’s decision for errors of law and determining whether the factual findings are supported by substantial evidence. *Id.*

Employer’s argument 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). 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 Sea “B” Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); Decision and Order at 10-15. Because it is supported by substantial evidence, we affirm the ALJ’s finding the x-ray evidence does not undermine a finding of complicated pneumoconiosis and the CT scan evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(a), (c); Decision and Order at 10-12.

The ALJ next discussed Dr. Celko’s medical opinion diagnosing complicated pneumoconiosis and Dr. Abrahams’s opinion excluding the disease. 20 C.F.R. §718.304(c); Decision and Order at 13-15; Director’s Exhibit 14; Employer’s Exhibit 2. He found Dr. Celko’s opinion is reasoned and documented, but he further found Dr. Abrahams’s opinion undermined by the CT scan evidence that supports the existence of complicated pneumoconiosis. Decision and Order at 14-15.

Employer does not separately challenge the ALJ’s finding that the medical opinions support a finding of complicated pneumoconiosis other than reiterating its argument with respect to the x-ray and CT scan evidence. Employer’s Brief at 9 (unpaginated). Thus, we affirm the ALJ’s determination that the medical opinions support a finding of complicated pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.304(c); Decision and Order at 14-16.

As it is supported by substantial evidence, we affirm the ALJ’s finding that all the relevant evidence considered together establishes complicated pneumoconiosis. *See Melnick*, 16 BLR at 1-33; 20 C.F.R. §718.304; Decision and Order at 16. We further

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 Skrack*, 6 BLR at 1-711; Decision and Order at 16-17. Thus, we affirm the award of benefits.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief  
Administrative Appeals Judge

JUDITH S. BOGGS  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge