U.S. Department of Labor

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

BRB Nos. 21-0459 BLA
and 21-0459 BLA-A

JAMES R. CUMBOW	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
FRASURE CREEK MINING, LLC	)	
	)	DATE ISSUED: 04/27/2023
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Denying Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Cameron Blair (Wolfe Williams & Reynolds), Norton Virginia, for Claimant.

Joseph D. Halbert (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Claimant appeals, and Employer cross-appeals, Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Denying Benefits (2019-BLA-06199), rendered on a claim filed on May 17, 2018, pursuant the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ accepted the parties' stipulation of twenty-nine years of coal mine employment. She then found the evidence did not establish complicated pneumoconiosis and thus Claimant 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); 20 C.F.R. §718.304. She next determined Claimant failed to establish a totally disabling respiratory or pulmonary impairment and therefore could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.204(b)(2). Because Claimant failed to establish total disability, an essential element of entitlement, the ALJ denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not prove complicated pneumoconiosis.[3] Employer responds, urging the Benefits Review Board to affirm the denial of benefits. On cross-appeal, Employer contests the ALJ's weighing of the medical opinion evidence and treatment records regarding complicated pneumoconiosis. Claimant responds to Employer's cross-appeal. The Director, Office of Workers' Compensation Programs, has not filed a brief in response to either appeal.

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.[4] 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 Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

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[1] Claimant filed a prior claim but withdrew it. Director's Exhibit 1. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306(b).

[2] 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.

[3] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant failed to establish a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 30.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in West Virginia.

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 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 reveal a result equivalent to (a) or (b). *See* 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. Associated 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 Claimant established complicated pneumoconiosis by the computed tomography (CT) scan and medical opinion evidence but failed to establish the disease by the x-ray evidence and when weighing the evidence together as a whole.[5]

X-ray Evidence

The ALJ considered eight interpretations of four x-rays dated July 3, 2018, October 25, 2018, February 4, 2019, and January 24, 2020. 20 C.F.R. §718.304(a); Decision and Order at 10-12; Director's Exhibits 23-25, 27; Claimant's Exhibits 1, 3; Employer's Exhibits 4, 5. All the interpreting physicians are dually-qualified B readers and Board-certified radiologists. Decision and Order at 6-7.

Drs. DePonte and Crum interpreted the July 3, 2018 x-ray as positive for both simple and complicated pneumoconiosis, with Category A opacities, while Dr. Adcock found simple pneumoconiosis only and noted "mild" pseudoplaques. Director's Exhibits 19, 24; Claimant's Exhibit 3. The ALJ accorded Dr. DePonte's interpretation "lesser weight" because she classified the x-ray's film quality as grade 2. Decision and Order at 12. The two remaining, equally-qualified physicians offered conflicting interpretations; therefore,

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See Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5; Hearing Transcript at 12.

[5] There is no biopsy or autopsy evidence of record. 20 C.F.R. §718.304(b); Decision and Order at 13.

the ALJ concluded the July 3, 2018 x-ray was "equivocal" on the issue of complicated pneumoconiosis. Decision and Order at 12.

The ALJ next considered the sole reading of the October 25, 2018 x-ray. Decision and Order at 12; Director's Exhibit 27. Dr. Tarver read the x-ray as positive for simple clinical pneumoconiosis only. Because his reading was uncontradicted, the ALJ found the October 25, 2018 x-ray negative for complicated pneumoconiosis. Decision and Order at 12.

The ALJ found the two remaining x-rays, dated February 4, 2019 and January 24, 2020, in equipoise on the issue of complicated pneumoconiosis, as the readings by equally-qualified physicians conflicted.[6] Decision and Order at 12; Director's Exhibit 23; Claimant's Exhibit 1; Employer's Exhibits 4, 5.

Weighing the x-ray evidence together, the ALJ found it does not support a finding of complicated pneumoconiosis. Decision and Order at 12. Claimant asserts the ALJ's finding that the x-ray interpretations do not establish complicated pneumoconiosis is undermined by the ALJ's errors in considering the July 3, 2018 and October 25, 2018 x-rays. Claimant's Brief at 6-11. We agree, in part.

Claimant first argues the ALJ erred in discounting Dr. DePonte's positive interpretation of the July 3, 2018 x-ray based solely on her classification of the film quality as grade 2, particularly given her testimony that the film quality did not prevent her from evaluating the x-ray.[7] Claimant's Brief at 8-9. We agree.

[6] Dr. Crum interpreted the February 4, 2019 x-ray as positive for both simple pneumoconiosis and Category A large opacities; Dr. Adcock read the x-ray as positive for simple pneumoconiosis but negative for large opacities. Director's Exhibit 23; Employer's Exhibit 4. Dr. DePonte interpreted the January 24, 2020 x-ray as positive for simple pneumoconiosis and Category A large opacities, while Dr. Tarver read the x-ray as positive for simple pneumoconiosis but negative for large opacities. Claimant's Exhibit 1; Employer's Exhibit 5.

[7] Dr. DePonte classified the film quality of the July 3, 2018 x-ray as grade 2 because of scapular overlay. Director's Exhibit 19; Claimant's Exhibit 4 at 15. She explained that meant a shoulder blade covered a portion of the lung field but testified it did not limit her ability to render an opinion regarding the presence of pneumoconiosis on the x-ray. Claimant's Exhibit 4 at 15. As Claimant argues, the ALJ did not consider this testimony. Claimant's Brief at 8-9.

The regulations do not require x-ray readings to be of optimal quality; they only need to "be of suitable quality for proper classification of pneumoconiosis." 20 C.F.R. §718.102(a); *Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214, 1-1215-16 (1984). As Claimant argues, Dr. DePonte did not indicate the July 3, 2018 x-ray film was unreadable or unsuitable for classification and specifically testified she was able to interpret the x-ray for pneumoconiosis notwithstanding any quality deficiencies. Claimant's Exhibits 2; 4 at 15. The ALJ provided no other basis for according Dr. DePonte's reading lesser weight; thus, we vacate the ALJ's finding that the July 3, 2018 x-ray is "equivocal" regarding complicated pneumoconiosis.[8] Decision and Order at 12.

Claimant also asserts the ALJ erred in not considering Dr. DePonte's positive reading of the October 25, 2018 x-ray, which conflicted with Dr. Tarver's negative reading. Claimant's Brief at 9-11. Claimant acknowledges he did not designate Dr. DePonte's reading of the October 25, 2018 x-ray on his evidence summary form, but argues it was admitted into the record and thus the ALJ must consider it. *Id*. Contrary to Claimant's argument on appeal, he specifically informed the ALJ that he did not offer Dr. DePonte's reading of the October 25, 2018 x-ray as part of his affirmative case. Claimant's Closing Brief at 7. Instead, he argued that because Dr. DePonte's reading was *not submitted* as affirmative evidence, Employer's submission of Dr. Tarver's "rebuttal" reading of that same x-ray should also be excluded from the record. *Id*. As Claimant did not allege to the ALJ that Dr. DePonte's x-ray reading should be admitted as part of his affirmative case or supports his burden of proof, we decline to address these arguments for the first time on appeal.[9] *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 587 (6th Cir. 2021) ("Black lung benefits adjudication regulations require that litigants raise issues before the ALJ as a prerequisite to review by the Benefits Review Board."); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-4-7 (1995).

[8] Claimant also initially argued that the ALJ selectively analyzed the evidence based on the different experts' film quality ratings. Claimant's Brief at 6-8. However, he later appears to concede his assertion of the facts supporting this argument was incorrect. Claimant's Response to Employer's Cross-Appeal at 2. Therefore, we need not address this portion of Claimant's argument.

[9] The ALJ rejected Claimant's argument that Dr. Tarver's reading of the October 25, 2018 x-ray should be excluded as inadmissible rebuttal evidence, noting that Employer designated it as one of its affirmative x-ray readings. Decision and Order at 12 n.13; *see* 20 C.F.R §725.414(a)(3)(i). Claimant does not challenge that ruling on appeal. We therefore affirm it. *See Skrack*, 6 BLR at 1-711.

Because the ALJ erred in her consideration of the July 3, 2018 x-ray, remand is required for her to reconsider whether it supports a finding of complicated pneumoconiosis. As this determination may change the ALJ's weighing of the overall x-ray evidence, the ALJ must also reconsider whether the x-ray evidence supports a finding of complicated pneumoconiosis. *See Scarbro*, 220 F.3d at 255-56.

CT Scan and Medical Opinion Evidence

On cross-appeal, Employer challenges the ALJ's finding that the medical opinion evidence supports complicated pneumoconiosis. Because the ALJ's conclusion that the medical opinion evidence weighs in favor of complicated pneumoconiosis is linked to her evaluation of the CT scan evidence, we address the ALJ's analysis of the CT scan evidence and medical opinion evidence together.

The ALJ considered the medical opinions of Drs. Habre, Nader, DePonte, Vuskovich, and Adcock. Decision and Order at 14-20. Drs. Habre and Nader diagnosed complicated pneumoconiosis based on the x-ray interpretations obtained in their respective examinations. Director's Exhibit 19; Claimant's Exhibit 1. Dr. DePonte diagnosed complicated pneumoconiosis based on her interpretations of multiple x-rays and the January 23, 2018 CT scan,[10] which she opined documented a sixteen-millimeter pseudoplaque in the right upper lobe consistent with complicated pneumoconiosis. Claimant's Exhibits 2, 4. Dr. DePonte explained that pseudoplaques are peripheral large opacities "resting . . . on the pleura" and they form in the same way more central large opacities do: small nodules coalesce until they "form[] a large opacity consistent with . . . complicated pneumoconiosis." *Id.* at 33-34. Dr. DePonte added that the large opacity seen on Claimant's CT scan "would measure similar in size and greater than one centimeter on a standard radiograph (x-ray)." Claimant's Exhibit 2 at 2.

In contrast, Dr. Adcock opined that complicated pneumoconiosis was not present based on his interpretations of multiple x-rays and the January 23, 2018 CT scan.[11] Dr. Adcock agreed that a pseudoplaque was present on the January 23, 2018 CT scan; however,

[10] Dr. DePonte provided a medical opinion, in the form of deposition testimony, in which she discussed her interpretations of the July 3, 2018, October 25, 2018, February 4, 2019, and January 24, 2020 x-rays, and the January 23, 2018 CT scan. Claimant's Exhibit 4; Decision and Order at 15-16.

[11] While considering his interpretation of the July 3, 2018 x-ray as well as the January 23, 2018 CT scan, Dr. Adcock primarily based his medical opinion upon his review of the CT scan. Employer's Exhibit 10; Decision and Order at 18 n.18.

citing medical literature, he explained that pseudoplaques are not complicated pneumoconiosis but rather constitute simple pneumoconiosis regardless of their size. Employer's Exhibit 10 at 5-6.

Finally, Dr. Vuskovich reviewed the medical evidence of record and opined that complicated pneumoconiosis was not present based on the x-ray and CT scan interpretations. Employer's Exhibits 6, 8.

Because Drs. Habre and Nader were unaware of the radiographic evidence beyond the x-rays obtained in their examinations, the ALJ accorded their opinions little probative weight. Decision and Order at 20. The ALJ found that while Dr. Vuskovich reviewed a significant amount of evidence, his opinion merited less probative weight because he is not Board-certified in pulmonary medicine or radiology. *Id.*

Comparing Drs. DePonte's and Adcock's explanations regarding the large opacities, she gave Dr. Adcock's opinion less weight because he applied a medical definition of complicated pneumoconiosis that differed from the definition applicable under the Act. Decision and Order at 20, 22-23. The ALJ found Dr. DePonte's description of the CT scan findings met the definition of a large opacity because Dr. DePonte identified a homogenous pseudoplaque exceeding one centimeter and explained it would appear as a greater than one centimeter opacity on a conventional x-ray. *Id.* at 22. In contrast, the ALJ found Dr. Adcock's discussion "reflects his focus on the medical definition of complicated pneumoconiosis" because he concluded, based on medical literature, that pseudoplaques are a form of simple pneumoconiosis "even when extending over several centimeters." *Id.* at 22-23 (quoting Employer's Exhibit 10 at 6). Finding that Dr. Adcock relied on standards different from those in the Act and regulations, i.e., whether Claimant has a chronic dust disease of the lung that yields a large opacity that would be classified as Category A, B, or C, she found Dr. DePonte's interpretation of the January 23, 2018 CT scan more persuasive. *Id.* at 23. She therefore found the preponderance of the CT scan and medical opinion evidence weighs in favor of complicated pneumoconiosis. *Id.* at 20, 23.

Employer asserts the ALJ should not have considered Dr. DePonte's medical opinion because Dr. DePonte relied in part on her interpretation of the February 4, 2019 x-ray, which Claimant did not designate as evidence. Employer's Brief at 5-6. Employer maintains Claimant thus exceeded the evidentiary limitations, as he instead designated Dr. Crum's reading of the February 4, 2019 x-ray as one of his two affirmative x-ray readings. *Id.* at 6 (citing 20 C.F.R. §725.414). Claimant responds, asserting Dr. DePonte did not review evidence beyond the record or evidentiary limitations, but merely considered and commented on the admitted evidence. Claimant's Brief at 4. We agree with Employer, in part.

The regulations provide that any study or test that appears in a medical report must each be admissible under the evidentiary limitation provisions. 20 C.F.R. §§725.414(a)(2), 725.457(d). Although Claimant submitted Dr. DePonte's interpretation of the February 4, 2019 x-ray as Director's Exhibit 23, he did not designate it as evidence before the ALJ. *See* Claimant's Evidence Summary Form. Rather, as Employer argues, Claimant designated two other x-ray readings, including Dr. Crum's interpretation of the February 4, 2019 x-ray.[12] Employer's Brief at 5-6; Claimant's Evidence Summary Form. Nonetheless, Dr. DePonte discussed her own interpretation of the February 4, 2019 x-ray in her testimony. Claimant's Exhibit 4 at 13, 21-22; *see* Decision and Order at 15. As Claimant already had two affirmative x-ray readings, Dr. DePonte's reading of the February 4, 2019 x-ray exceeds the evidentiary limitations and thus cannot be considered as part of her medical opinion. 20 C.F.R. §§725.414(a)(2), 725.457(d).

When considering how to assess medical opinions that have considered inadmissible evidence, an ALJ must determine if the opinion was affected by the physician's consideration of the inadmissible evidence. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-65 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989). Despite Employer's argument that Dr. DePonte's opinion is undermined given her reliance on this evidence, the ALJ did not address this issue. Employer's Post-Hearing Brief at 11-12. Thus, we vacate the ALJ's determinations regarding Dr. DePonte's medical opinion. On remand, the ALJ must determine what effect, if any, Dr. DePonte's consideration of the undesignated evidence had on her medical opinion.[13]

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[12] Claimant's second affirmative x-ray reading was Dr. DePonte's reading of the January 24, 2020 x-ray. Claimant's Exhibit 1; Claimant's Evidence Summary Form.

[13] Contrary to Employer's argument, Dr. DePonte's consideration of her undesignated x-ray reading does not require her entire opinion to be stricken. Employer's Brief at 6. The disposition of this issue is committed to the ALJ's discretion. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004) (en banc). An ALJ, however, must first ascertain what portions of the opinion, if any, are tainted by reliance on inadmissible evidence. *Harris*, 23 BLR at 1-108. Even if the ALJ finds the medical opinion is tainted, she is not required to exclude the testimony in its entirety. *Id*. Rather, she may redact the objectionable content, ask the physician to submit a new report, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which the physician's opinion is entitled. *Harris*, 23 BLR at 1-108; *Dempsey*, 23 BLR at 1-67. We note, moreover, that Employer does not allege any impropriety in Dr. DePonte's reliance on her interpretations of the July 3, 2018, October 25, 2018, and January 24, 2020 x-rays, or the January 23, 2018 CT scan.

Next, Employer argues the ALJ erred in according less weight to Dr. Adcock's opinion.[14] Employer's Brief at 6. We disagree.

While Employer argues it is irrational for the ALJ to discredit Dr. Adcock's opinion based on his application of the medical definition of complicated pneumoconiosis, Employer's Brief at 6-7, as the ALJ explained, complicated pneumoconiosis is a legally defined disease, and "to the extent there is a divergence between medical and legal standards" for assessing the disease, the standard established by Congress must apply. *Scarbro*, 220 F.3d at 257; Decision and Order at 23. Thus, the ALJ permissibly found Dr. Adcock's opinion to be unpersuasive as inadequately explained given the statutory and regulatory definition of the disease.[15] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Based on the foregoing, we vacate the ALJ's finding that the medical opinion evidence supports a finding of complicated pneumoconiosis and remand for further consideration.

Treatment Records

Finally, Employer generally argues the ALJ did not adequately weigh the radiographic evidence within Claimant's hospitalization and treatment notes. Employer's Brief at 7-8. The ALJ considered the x-ray and CT scan readings contained in Claimant's treatment records, finding that while some diagnose pneumoconiosis, none note a large

[14] Employer also argues the ALJ erred in giving Dr. DePonte's opinion "enhanced weight." Employer's Brief at 6. However, the ALJ did not accord Dr. DePonte's opinion "enhanced" weight; rather, she accorded Dr. DePonte's opinion "normal probative weight." Decision and Order at 20. In either event, we decline to address as premature the ALJ's credibility determinations regarding Dr. DePonte's opinion.

[15] Employer does not otherwise challenge the ALJ's conclusion that the January 23, 2018 CT scan weighs in favor of complicated pneumoconiosis because Dr. DePonte's positive reading was more persuasive. We note, in particular, that Employer does not argue that the medical definition Dr. Adcock applied was consistent with the applicable legal definition. We therefore affirm the ALJ's determination. *Skrack*, 6 BLR at 1-711; Decision and Order at 23. Additionally, the parties do not challenge the ALJ's credibility findings regarding the medical opinions of Drs. Habre, Nader, and Vuskovich; thus, they are affirmed. *Skrack*, 6 BLR at 1-711; Decision and Order at 20.

opacity. Decision and Order at 24. Thus, the ALJ found these records do not support a finding of complicated pneumoconiosis. Decision and Order at 24.

Employer has not explained how the ALJ erred in her consideration of this evidence. Employer's argument is a request that the Board reweigh the evidence, which we are not permitted to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Weighing the Evidence Together

While the ALJ's weighing of the categories of evidence together will depend on her findings on remand regarding the x-ray evidence and medical opinion evidence, for judicial efficiency we address Claimant's arguments on this issue.

Weighing the "other medical evidence" together, the ALJ found it supported a finding of complicated pneumoconiosis. Decision and Order at 24; *see* 20 C.F.R. §718.304(c). When weighing the "other medical evidence" together with the x-ray evidence, she found "a single CT scan" was insufficient to outweigh the more recent x-ray evidence. Decision and Order at 24. Thus, she found Claimant failed to establish complicated pneumoconiosis by a preponderance of the evidence. *Id.* at 25.

Claimant asserts the ALJ erred in finding the x-ray evidence more probative than the CT scan and medical opinion evidence based solely on the recency of the x-ray evidence. Claimant's Brief at 11-13. He further argues that while the ALJ found the medical opinion evidence also supported complicated pneumoconiosis, the ALJ did not explain how she weighed it with the other evidence. *Id.* at 12. Employer responds that while the ALJ noted the CT scan was the oldest radiographic evidence in the record, she emphasized the numerical superiority of the x-ray evidence over the single CT scan in reaching her conclusion. Employer's Brief at 4-5.

In weighing the conflicting evidence, the ALJ accorded the most weight to the more recent x-ray evidence over the earlier CT scan, indicating it is more reflective of Claimant's current condition. Decision and Order at 25. However, the United States Court of Appeals for the Fourth Circuit, under whose law this case arises, has held such logic does not apply when the more recent testing demonstrates improvement in the miner's condition. *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992).[16]

[16] In *Adkins*, the court, considering x-ray tests, recognized that, given pneumoconiosis is a progressive disease, a later test may be more reliable than an earlier one when assessing the miner's condition; however, this logic only holds when the evidence shows the miner's condition worsened. *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992). If the evidence shows the miner's condition *improved*, the reasoning

While, as Employer argues, the ALJ noted there are multiple x-rays as opposed to a single CT scan, she also emphasized that more weight should be afforded to the most recent evidence. Employer's Brief at 5; Decision and Order at 25 ("[F]or the same reason that older x-rays can be given less weight because they do not reflect the present condition of the claimant, the 1/23/18 CT scan is given less weight."). On remand, the ALJ should explain her weighing of the evidence without reference to its chronological relationship if she determines the later x-ray evidence shows improvement in Claimant's condition. *See Adkins*, 958 F.2d at 51-52; *see also Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993).

Moreover, we agree the ALJ failed to explain how the medical opinion evidence, which she found supported a finding of complicated pneumoconiosis, was weighed with the other categories of evidence. Claimant's Brief at 13. While generally noting the "other medical evidence," the ALJ weighed only the x-ray and CT scan evidence together, without discussing how the medical opinion and treatment record evidence factored into her finding. Decision and Order at 25. The ALJ is required to determine whether complicated pneumoconiosis has been established by weighing together all categories of the evidence presented. 20 C.F.R. §718.304; *see Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 255-56; *Melnick*, 16 BLR at 1-33.

Based on the foregoing, we vacate the ALJ's finding that a preponderance of the evidence fails to establish complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 25.

Remand Instructions

On remand, the ALJ must reconsider the July 3, 2018 x-ray and the x-ray evidence as a whole to determine if it supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(a). The ALJ must conduct a quantitative and qualitative analysis of the x-ray readings and adequately explain how she resolves the conflict in the evidence in compliance with the Administrative Procedure Act.[17] *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *see Cox*, 602 F.3d at 283.

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does not apply: "either the earlier or the later result must be wrong, and it is just as likely that the later evidence is faulty as the earlier. The reliability of irreconcilable items of evidence must therefore be evaluated without reference to their chronological relationship." *Id.*

[17] The Administrative Procedure Act requires that every adjudicatory decision include "findings and conclusions, and the reasons or basis therefor, on all the material

The ALJ must then reconsider Dr. DePonte's medical opinion in light of her consideration of her interpretation of the February 4, 2019 x-ray, which was not designated as evidence, 20 C.F.R. §718.304(c), addressing her credentials, the explanations for her conclusions, the documentation underlying her medical judgments, and the sophistication of, and bases for, her diagnosis. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Finally, the ALJ must weigh all the categories of evidence together to determine if complicated pneumoconiosis is established, keeping in mind the principle that relying on the recency of the evidence alone when it demonstrates improvement in Claimant's condition is not permitted. 20 C.F.R. §718.304; *Adkins*, 958 F.2d at 51-52.

If the ALJ again finds Claimant failed to establish complicated pneumoconiosis, she may reinstate her denial of benefits given Claimant's failure to establish total disability, a requisite element of entitlement under 20 C.F.R. Part 718. *See Anderson*, 12 BLR at 1-112. If the ALJ finds complicated pneumoconiosis established, she must determine if Claimant's pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203.

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).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge