U.S. Department of Labor

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

BRB Nos. 21-0027 BLA
and 20-0551 BLA

ANITA D. DEEL (Widow and o/b/o of DONALD DEEL) Claimant-Respondent v. BULLION HOLLOW ENTERPRISES, INCORPORATED and TRAVELERS INDEMNITY COMPANY OF ILLINOIS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/12/2022 DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits in Miner's Subsequent Claim and Awarding Benefits in Survivor's Claim of Carrie Bland, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer and its Carrier.

Kathleen H. Kim (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Awarding Benefits in Miner's Subsequent Claim and Awarding Benefits in Survivor's Claim (2017-BLA-06117, 2017-BLA-05865) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1] This case involves a miner's subsequent claim filed on November 5, 2015, and a survivor's claim filed on April 28, 2017.

The ALJ found the Miner had 19.19 years of underground coal mine employment.[2] She also determined the Miner had complicated pneumoconiosis arising out of his coal mine employment and thus Claimant invoked the irrebuttable presumption that he was totally disabled due to pneumoconiosis at the time of his death pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). 20 C.F.R. §§718.203(b), 718.304. Therefore, the ALJ found Claimant established a change in an applicable condition of entitlement,[3] 20

[1] The district director denied the Miner's prior claim for failure to establish any element of entitlement. Director's Exhibit 1. The Miner died on April 3, 2017, while his current claim was pending. Employer's Exhibit 18. Claimant, the Miner's widow, is pursuing the miner's claim on his behalf and her own survivor's claim.

[2] Employer stipulated before the ALJ in its Closing Argument that the Miner was totally disabled at the time of his death. Employer's Closing Argument at 10.

[3] 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 she 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); *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 the Miner did not establish any element of entitlement in his prior claim, Claimant had to submit new evidence establishing at least one element of

C.F.R. §725.309(c), and awarded benefits in the miner's claim. Consequently, she found Claimant entitled to derivative benefits in the survivor's claim pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[4]

On appeal, Employer contends the ALJ erred in finding the Miner had 19.19 years of coal mine employment. Employer also argues that the ALJ erred in finding Claimant established complicated pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, agreeing with Employer that the ALJ erred in applying *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019), *reh'g denied*, No. 17-4313 (6th Cir. May 3, 2019) to determine the length of the Miner's coal mine employment. But the Director contends the ALJ's reliance on *Shepherd* is harmless if the Board affirms the ALJ's complicated pneumoconiosis finding as Employer concedes the Miner had at least ten years of coal mine employment, necessary to establish that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Miner's Claim

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

---

entitlement to obtain review of the miner's subsequent claim on the merits. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3.

[4] Section 422(*l*) of the Act provides the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[5] Claimant's most recent coal mine employment occurred in Virginia. Decision and Order at 7; Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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 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, 1-33-34 (1991) (en banc).

20 C.F.R. §718.304(a) - X-rays

The ALJ considered eight interpretations of three x-rays. Decision and Order at 11-13. All the readers are Board-certified radiologists and B readers. Decision and Order at 12-13; Director's Exhibit 10-12, Claimant's Exhibits 1, 2; Employer's Exhibit 24, 27, 47.

Dr. Adcock interpreted the May 7, 2013, x-ray as negative for both simple and complicated pneumoconiosis. Employer's Exhibit 24. There are no other readings of this x-ray.

Drs. Adcock, DePonte, Seaman, Crum, Tarver, and Miller interpreted the December 28, 2015 x-ray. Director's Exhibits 10-12; Claimant's Exhibits 1, 2; Employer's Exhibit 27. Dr. Adcock read it as negative for both simple and complicated pneumoconiosis. Director's Exhibit 11. Drs. DePonte and Crum read the x-ray as positive for both simple and complicated pneumoconiosis. Claimant's Exhibit 2; Director's Exhibit 10. Drs. Seaman, Tarver, and Miller read it as positive for simple pneumoconiosis with small opacities in all lung zones but negative for complicated pneumoconiosis.[6] Employer's Exhibit 27; Director's Exhibit 12; Claimant's Exhibit 1.

Dr. Adcock read the October 25, 2016 x-ray as negative for both simple and complicated pneumoconiosis. Director's Exhibit 12. However, he indicated the film quality was a "3" and noted the x-ray had "mottle" and was "suboptimal." *Id.*

In resolving the conflict in the x-ray evidence, the ALJ gave less weight to the May 7, 2013 x-ray because it was the oldest of record by two years. Decision and Order at 13. She also discredited the October 25, 2016 x-ray based on Dr. Adcock's description of the film's quality. *Id.* at 12.

[6] Dr. Miller noted coalescence of the small opacities. Claimant's Exhibit 1.

Regarding the December 28, 2015, x-ray, the ALJ stated: "[the] positive readings for simple [coal workers' pneumoconiosis] do not rule out Drs. DePonte['s] and Crum's finding of complicated pneumoconiosis as a negative reading would. In fact, the findings of multiple smaller opacities in the [radiologists' readings for simple pneumoconiosis only] support a finding of complicated pneumoconiosis." *Id*. at 13. Relying on the positive readings for complicated pneumoconiosis of the December 28, 2015 x-ray, the ALJ found Claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(a). *Id*.

Employer contends the ALJ erred in concluding an x-ray reading that is positive for simple pneumoconiosis only and is clearly marked as negative for large opacities on the ILO x-ray form can support of a finding of complicated pneumoconiosis. Employer's Brief at 10. Even if we agree with Employer that the ALJ erred in finding Claimant established complicated pneumoconiosis under the discrete subsection of 20 C.F.R §718.304(a), we see no reason to remand this case. In considering whether the evidence establishes the existence of complicated pneumoconiosis, an ALJ is required to examine all the evidence on the issue, namely, evidence of simple pneumoconiosis, complicated pneumoconiosis, and no pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Melnick*, 16 BLR at 1-37; *Truitt v. N. Am. Coal Corp*., 2 BLR 1-199 (1979), *aff'd sub nom*. *Director, OWCP v. N. Am. Coal Corp*., 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

As explained below, the ALJ found the CT scans confirmed large opacities in the miner's lungs which Employer's experts denied observing on x-rays. She permissibly concluded that although other evidence in the record indicated the Miner was diagnosed with lung cancer, it did not detract from the positive x-ray readings for complicated pneumoconiosis as supported, in part, by the CT scans. We conclude the ALJ's finding of complicated pneumoconiosis is supported by substantial evidence when viewed in the context of the record as a whole. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997).

20 C.F.R. §718.304(b) - Biopsy Evidence

Claimant underwent a biopsy on June 9, 2016, to determine the cause of his pain and weakness and spinal cord compression. Director's Exhibit 10 at 1. The surgeon diagnosed small cell carcinoma of the lung by fine needle biopsy and bronchial washings. *Id*. Dr. Green reviewed the biopsy slides and observed that "[t]hese techniques and samplings [i.e., the Miner's fine needle biopsy and bronchial washings] are inadequate to detect diffuse lung disease or interstitial lung disease of any degree." *Id*.at 2. Dr. Caffrey found the biopsy slides show small cell carcinoma of the lung and no coal workers' pneumoconiosis. Director's Exhibit 12 at 1, 2. Dr. Fino agreed with Dr. Green that coal workers' pneumoconiosis cannot be ruled out clinically based on the needle biopsy. Employer's Exhibit 20 at 9. He specifically noted that "[a]lthough Dr. Caffrey found no

pneumoconiosis on the pathology, this does not mean [the Miner] had no clinical pneumoconiosis." *Id*. In his deposition, Dr. Sargent testified that "[g]enerally a transbronchial biopsy is not considered adequate sampling to exclude any type of interstitial lung disease or give you a good idea of the lung structure." Employer's Exhibit 25 at 21. He further testified that although the biopsy results were interpreted as showing small cell carcinoma, those results do not rule out pneumoconiosis. *Id.*

Contrary to Employer's contention, because the pathologists and reviewing physicians specifically questioned the adequacy of the tissue sample, we affirm the ALJ 's finding that while the biopsy sample showed cancer, it was insufficient to exclude a diagnosis of complicated pneumoconiosis. *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).

20 C.F.R. §718.304(c) - Other Evidence

Although the ALJ found Claimant did not establish complicated pneumoconiosis at 20 C.F.R. §718.304(c), Employer asserts the ALJ shifted the burden of proof in weighing the CT scans and erred in finding the medical opinions inconclusive. Employer's Brief at 11. We disagree.

The ALJ correctly stated "[C]laimant has the burden of proof in establishing the existence of complicated pneumoconiosis and thereby invoking the irrebuttable presumption of total disability, under 20 C.F.R. §718.304." Decision and Order at 10, *citing Lester v. Director OWCP*, 993 F.2d 1143, 1146 (4th Cir. 1993).

CT scans

The ALJ accurately stated most of the CT scans attribute the masses, ranging from 5 mm to 5.2 cm, to lung cancer.[7] Decision and Order at 15. Moreover, she accurately

[7] The ALJ considered seven CT scans. Decision and Order at 14-15; Employer's Exhibit 4, 6-8, 11, 19, 34. Employer submitted a CT scan conducted at Johnston Memorial Hospital, which Dr. Adcock later interpreted. Employer's Exhibits 11, 19. Dr. Adcock observed that "chest CT has been demonstrated to be superior to chest radiography in the detection of small pulmonary opacities of pneumoconiosis, and is equivalent with respect to evaluation of large opacities," and further opined the Miner presented "no evidence of coal workers' pneumoconiosis." Employer's Exhibit 19 at 2. The ALJ noted that out of the remaining six CT scans of record, only the earliest May 27, 2016 CT scan mentioned pneumoconiosis. Employer's Exhibit 34. The doctor interpreting this CT scan reported that "[w]hile components of these findings could be explained by an underlying

noted that only two of the CT scans mention pneumoconiosis. *Id*. The ALJ found that the CT scans on their own do not support a finding of complicated pneumoconiosis as none of the physicians who reviewed them diagnosed a chronic dust disease of the lung. *Id*. However, the ALJ observed "it is clear that from the CT scans that there are certain large masses in the Miner's lungs." *Id*. The ALJ concluded that the "CT scan evidence, by itself, does not support a diagnosis of complicated pneumoconiosis," yet "does not rule out the presence of complicated pneumoconiosis" and "is inconclusive on the issue."[8] *Id*. Moreover, the ALJ permissibly found the CT scan evidence "supports the chest x-ray findings of large opacities in the Miner's lungs," thereby detracting from the negative x-ray readings for large opacities by Employer's experts. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 15, 22-23.

Medical Opinions

Dr. Green diagnosed Claimant with coal workers' pneumoconiosis, progressive massive fibrosis, and chronic obstructive pulmonary disease ("COPD") based on the positive x-ray findings for simple and complicated pneumoconiosis. Director's Exhibit 10 at 3. He also authored a supplemental report in which he reiterated his diagnosis of coal workers' pneumoconiosis and stated the large opacity seen on x-ray was later established as lung cancer by biopsy, while also observing the techniques and samplings by biopsy were "inadequate to detect diffuse lung disease or interstitial lung disease of any degree." Director's Exhibit 10 at 2.

Dr. Fino opined the totality of the medical evidence indicated the Miner suffered from lung cancer and not from any form of coal workers' pneumoconiosis. Employer's Exhibits 20 at 9-10; 26 at 7-17. He cited to the Miner's normal blood gas studies prior to the development of his lung cancer to support his opinion. *Id*.

Dr. Sargent opined that while the Miner had sufficient coal mine employment to place him at risk for the development of coal workers' pneumoconiosis, the Miner did not suffer from the disease. Employer's Exhibit 18 at 2. But he further noted he could exclude coal workers' pneumoconiosis from his diagnosis. *Id*. Specifically, he stated

---

pneumoconiosis or granulomatous disease process, the large soft tissue mass is felt to reflect a malignant neoplasm until pathologically [sic] determined otherwise." *Id.* at 2.

[8] Contrary to Employer's assertion, the ALJ's reference to "rule out" does not improperly shift the burden of proof. Employer's Brief at 15-16. The ALJ merely recognized that the CT scan evidence does not, as Employer asserts, prove the absence of complicated pneumoconiosis. *Id*.

"pathological examination of [the] lung tissue [which] is the gold standard for [a] determination of coal worker[s'] pneumoconiosis and therefore even though some interstitial changes may be present on [the] chest x-ray, they have been proven by biopsy to be inconsistent with coal worker[s'] pneumoconiosis." *Id.* Further, he testified that he agreed with Dr. Adcock's reading of the December 28, 2015 x-ray, which is negative for both simple and complicated pneumoconiosis. Employer's Exhibit 25 at 11. He reiterated his diagnosis of small cell carcinoma of the lung and stated with a reasonable degree of medical certainty that the Miner did not suffer from coal workers' pneumoconiosis. *Id.* at 12. Moreover, he testified "a transbronchial biopsy is not considered adequate sampling to exclude any type of interstitial lung disease or give you a good idea of the lung structure." *Id.* at 21.

Dr. Sargent also cited to the Miner's normal pulmonary function studies after the Miner ceased his coal mine employment to conclude the Miner's restrictive impairment was due to lung cancer. Employer's Exhibit 18 at 2.

Contrary to Employer's contention, the ALJ permissibly found Dr. Green did not adequately explain the change in his opinion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Hopton v. U.S. Steel Corp.*, 7 BLR 1-12, 1-14 (1984); Decision and Order at 22; Director's Exhibit 12. The ALJ also permissibly found neither Dr. Fino nor Dr. Sargent adequately addressed the progressive nature of the Miner's pneumoconiosis in discussing the timing of when the objective tests showed an impairment or the possibility that the Miner could have had coal workers' pneumoconiosis progressing at a rate similar to his lung cancer. 20 C.F.R. §718.201(c); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); Decision and Order at 20, 22; Employer's Exhibits 18 at 2; 25 at 22, 26-27; 26 at 14-17. These findings are within the ALJ's discretion and are supported by the record. We therefore affirm the ALJ's determination while the CT scans and medical opinions do not establish complicated pneumoconiosis at 20 C.F.R. §718.304(c) alone, they also do not detract from the positive x-ray readings for the disease. Decision and Order at 23-24.

Weighing the Evidence as a Whole

The ALJ found: the x-ray evidence is positive for complicated pneumoconiosis; the CT scan and biopsy evidence confirmed a large mass and the presence of lung cancer in the Miner's lungs but it was inconclusive regarding the presence of concurrent complicated pneumoconiosis and lung cancer; and the medical opinions are not well reasoned. Decision and Order at 13-24. Weighing all the evidence together, the ALJ found Claimant satisfied her burden of proving the Miner had complicated pneumoconiosis even if he also suffered from cancer, and thus invoked the irrebuttable presumption. Decision and Order at 24.

Although Employer identifies multiple alleged errors by the ALJ, it fails to persuasively show why the ALJ did not have discretion to find the totality of the evidence in this case, when considered as a whole, does not support her conclusion that Claimant has complicated pneumoconiosis. Claimant's burden is only to establish that the x-rays and other diagnostic methods when weighed together more likely than not establish the presence of the disease. *See e.g., Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 255-56 (in determining the presence of complicated pneumoconiosis, an ALJ must interrelate the evidence, considering whether it supports or undercuts evidence from the same and other categories).

Employer's arguments amount to 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). Because the ALJ summarized all the relevant evidence, weighed and interrelated the evidence from the different categories, and sufficiently explained her credibility determinations in accordance with the Administrative Procedure Act (APA),[9] we hold her findings are supported by substantial evidence, and we affirm her conclusions that Claimant established the Miner had complicated pneumoconiosis and is entitled to the irrebuttable presumption. 20 C.F.R. §718.304; *see Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (duty of explanation under the APA is satisfied if the reviewing court can discern what the ALJ did and why she did it); Decision and Order at 23-24. We therefore affirm her determination that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(3) presumption.[10] 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.304, 725.309; Decision and Order at 23-24.

[9] The Administrative Procedure Act, 5 U.S.C. §§500-591, requires that every adjudicatory decision include a statement of "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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[10] Employer argues the ALJ failed to consider evidence developed in the miner's prior claim on the issue of complicated pneumoconiosis, thereby violating the APA. Employer's Brief at 14-15. We reject this argument. The ALJ considered the prior claim evidence but permissibly found it outweighed by the more recent evidence because it is a more accurate reflection of the Miner's condition at the time of his current application given the progressive nature of pneumoconiosis. Decision and Order at 24. Even Employer concedes "older medical records may not be as probative as newer medical records." Employer's Brief at 15. *See Mullins Coal Co.*, 484 U.S. at 151; *Epling*, 783 F.3d at 506; *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc);

Disease Causation

Employer concedes the Miner had 12.07 years of coal mine employment. Employer's Brief at 8, 9. Having rejected Employer's assertion that the ALJ erred in finding that Miner had complicated pneumoconiosis - its only basis for challenging disease causation - we affirm the ALJ's conclusion that the Miner's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. 718.203(b) (requiring ten years of coal mine employment to afford a presumption that the Miner's disease arose from coal mine employment).[11] *See Daniels Co. v. Mitchell,* 479 F.3d 321, 337 (4th Cir. 2007); Decision and Order at 24-25; Employer's Brief at 16-17.

Consequently, we affirm the ALJ's finding that Claimant invoked the irrebuttable presumption that the Miner was totally disabled due to pneumoconiosis, and therefore we affirm the award of benefits in the miner's claim.

Survivor's Claim

The ALJ found Claimant automatically entitled to benefits in her survivor's claim after awarding benefits in the miner's Claim. Decision and Order at 26-27. Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the award of benefits in the survivor's claim, we affirm it. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.,* 25 BLR 1-121, 1-126 (2013).

Workman v. Eastern Associated Coal Corp., 23 BLR 1-22, 1-27 (2004) (en banc). Although Employer maintains the "older medical records can provide informative background in the interpretation of the existing records," Employer's Brief at 15, it does not explain how the old medical records would alter the ALJ's weighing of the newer medical evidence.

[11] Based on Employer's concession that the Miner had at least ten years of coal mine employment, we need not address it contentions regarding *Shepherd*. *See* Employer's Brief at 4-9.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits in Miner's Subsequent Claim and Awarding Benefits in Survivor's Claim.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge