



BRB Nos. 21-0296 BLA  
and 21-0480 BLA

JUANITA G. KENNEDA )  
(o/b/o and Widow of GREGORY O. )  
KENNEDA) )

Claimant-Respondent )

v. )

ISLAND CREEK COAL COMPANY c/o )  
CONSOL ENERGY )

and )

DATE ISSUED: 7/26/2022

SMART CASUALTY CLAIMS )

Employer/Carrier- )  
Petitioners )

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

Party-in-Interest )

DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Theresa C. Timlin and the Decision and Order Awarding Benefits of Scott R. Morris, Administrative Law Judges, United States Department of Labor.

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

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits (2019-BLA-05117) on a miner's subsequent claim filed on April 4, 2017,<sup>1</sup> and ALJ Scott R. Morris's Decision and Order Awarding Benefits (2021-BLA-05308) on a survivor's claim filed on October 7, 2020,<sup>2</sup> rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). The Benefits Review Board consolidated Employer's appeals for purposes of a decision only.<sup>3</sup> *Kenneda v. Island Creek Coal Co.*, BRB Nos. 21-0296 BLA and 21-0480 BLA (Aug. 10, 2021) (Order) (unpub.).

ALJ Timlin credited the Miner with thirteen years of underground coal mine employment and thus found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.<sup>4</sup> 30 U.S.C. §921(c)(4) (2018), *see* 20 C.F.R. §718.305. However, she concluded Claimant established the Miner had complicated pneumoconiosis arising out of his coal mine employment, thereby establishing a change in an applicable condition of entitlement<sup>5</sup> and invoking the

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<sup>1</sup> The Miner filed a prior claim on May 12, 2014, which the district director denied for failure to establish any element of entitlement. Miner's Claim (MC) Director's Exhibit 1.

<sup>2</sup> Claimant is the widow of the Miner, who died on August 24, 2020, while his claim was pending before ALJ Timlin. Survivor's Claim (SC) Director's Exhibits 2, 5. Claimant is pursuing the miner's claim on his behalf as well as her survivor's claim.

<sup>3</sup> Employer's appeal in the miner's claim was assigned BRB No. 21-0296 BLA, and its appeal in the survivor's claim was assigned BRB No. 21-0480 BLA.

<sup>4</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had 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.

<sup>5</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 she

irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). 20 C.F.R. §§718.203, 718.304, 725.309(c). Thus, she awarded benefits in the miner's claim. In the survivor's claim, ALJ Morris found Claimant entitled to derivative benefits under Section 422(l) of the Act, 30 U.S.C. §932(l) (2018).<sup>6</sup>

On appeal, Employer argues ALJ Timlin erred in finding the Miner had complicated pneumoconiosis.<sup>7</sup> Employer also requests that the Board hold the award of survivor's benefits in abeyance pending a final adjudication of the miner's claim. Claimant responds in support of the award of benefits in the miner's claim. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response.

The Board's scope of review is defined by statute. We must affirm the ALJs' Decisions and Orders if they are rational, supported by substantial evidence, and in accordance with applicable law.<sup>8</sup> 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 (1965).

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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 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.

<sup>6</sup> Under Section 422(l) of the Act, a survivor of a miner who was determined to be 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).

<sup>7</sup> We affirm, as unchallenged on appeal, ALJ Timlin's finding that the Miner had thirteen years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); MC Decision and Order at 15.

<sup>8</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Decision and Order at 3 n.2; Hearing Tr. at 41.

## The Miner's Claim

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;<sup>9</sup> 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 consider all evidence relevant to the presence or absence of complicated pneumoconiosis. *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-Ray Evidence***

ALJ Timlin (the ALJ) considered ten interpretations of four x-rays taken on October 17, 2017, June 26, 2018, June 5, 2019, and June 26, 2019. MC Decision and Order at 19-21. The ALJ found all the interpreting physicians are dually-qualified Board-certified radiologists and B readers, except Dr. Fino, who is a B reader only. *Id.*

Dr. Willis read the October 17, 2017 x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. MC Director's Exhibit 15. Drs. Crum and Meyer read the same x-ray as positive for simple and complicated pneumoconiosis. MC Claimant's Exhibit 3; MC Employer's Exhibit 12. The ALJ found the October 17, 2017 x-ray supportive of a finding of complicated pneumoconiosis based on the weight of the positive readings. MC Decision and Order at 22.

Dr. Fino read the June 26, 2018 x-ray as negative for simple and complicated pneumoconiosis, while Dr. Meyer read the same x-ray as positive for simple and complicated pneumoconiosis. MC Director's Exhibit 22; MC Claimant's Exhibit 1; MC Employer's Exhibit 13. The ALJ credited Dr. Meyer's reading based on his "superior credentials," and found the June 26, 2018 x-ray positive for complicated pneumoconiosis. MC Decision and Order at 22.

Drs. DePonte and Meyer each read the June 5, 2019 x-ray as positive for simple and complicated pneumoconiosis. MC Claimant's Exhibit 2; MC Employer's Exhibit 10. As

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<sup>9</sup> There is no biopsy or autopsy evidence for consideration at 20 C.F.R. §718.304(b). MC Decision and Order at 24, 40 n.31.

there are no negative readings of this film, the ALJ found it positive for complicated pneumoconiosis. MC Decision and Order at 22.

Drs. DePonte and Crum each read the June 26, 2019 x-ray as positive for simple and complicated pneumoconiosis while Dr. Meyer read it as negative for both forms of the disease.<sup>10</sup> MC Employer's Exhibit 11; MC Claimant's Exhibits 4, 6. The ALJ found the two positive interpretations by Drs. DePonte and Crum outweighed Dr. Meyer's negative reading and thus determined the June 26, 2019 x-ray was positive for complicated pneumoconiosis. MC Decision and Order at 22.

Although the ALJ observed that "[e]ach of the X-rays of record establish[ed] the existence of complicated pneumoconiosis," she accurately noted that Dr. Meyer, in his August 2, 2019 deposition, "amended all of his [2017-2019] X-ray interpretations from positive to negative for complicated pneumoconiosis" after reviewing the February 23, 2015 CT scan and interpreting it as negative. MC Decision and Order at 22. The ALJ found Dr. Meyer's rationale for altering his opinion inadequately explained in light of the progressive nature of pneumoconiosis and thus concluded Claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(a). *Id.* at 23.

#### ***20 C.F.R. §718.304(c) - CT Scans and Medical Opinion Evidence***

The record contains three interpretations of the February 23, 2015 CT scan by Drs. Tallaksen, Crum, and Meyer.

Dr. Tallaksen, a Board-certified radiologist, reviewed the CT scan in the course of the Miner's treatment and did not address whether he had simple or complicated pneumoconiosis. MC Employer's Exhibit 2. He observed that it revealed the Miner had no masses on his spleen and liver.<sup>11</sup> *Id.*

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<sup>10</sup> Dr. Meyer explained he read the upper lobe findings as "other abnormalities" and not as "parenchymal abnormalities consistent with pneumoconiosis" based on his reading of the February 23, 2015 CT scan, which indicated they were "most consistent with healed granulomatous infection." MC Employer's Exhibit 11 at 3.

<sup>11</sup> Dr. Tallaksen reviewed the February 23, 2015 CT scan as part of Claimant's admission to West Virginia University Hospital for a second surgery on his right leg, after having a first surgery on the same leg for bone cancer. MC Employer's Exhibit 2 at 3, 7. Dr. Tallaksen recommended a follow up CT scan in four to six months due to the history of malignancy. *Id.* at 4.

Dr. Crum read the CT scan as “most consistent with complicated pneumoconiosis/progressive massive fibrosis . . . .” MC Claimant’s Exhibit 5. He observed “numerous bilateral pulmonary nodules” primarily in the upper and middle lung zones consistent with pneumoconiosis and Q, R, T, and U nodules under the International Labour Organization (ILO) standard for x-rays. *Id.* Dr. Meyer observed “findings that may be seen with healed granulomatous infection (‘histoplasmosis or tuberculosis’) or complicated coal workers’ pneumoconiosis.” MC Employer’s Exhibit 3. He noted the Miner’s presentation was more typical of healed granulomatous disease (histoplasmosis or tuberculosis) due to the lack of background small opacities and the presence of calcifications on the spleen and liver. *Id.* According to Dr. Meyer, complicated pneumoconiosis “typically” presents with a “background of small round[] opacities,” sizes “Q” and “R.” *Id.*; MC Employer’s Exhibit 6 at 46.

The ALJ found Dr. Tallaksen’s CT scan reading not probative of the presence or absence of complicated pneumoconiosis because he read the CT scan for treatment purposes only, did not opine as to the presence or absence of pneumoconiosis, and was not aware of the Miner’s history of coal mine dust exposure. MC Decision and Order at 37-38. In addition, the ALJ found Dr. Meyer’s negative CT scan reading undermined by the credited x-ray evidence demonstrating the presence of type Q or R opacities and Dr. Tallaksen’s observation that the CT scan revealed the Miner had no masses on his spleen or liver. *Id.* Further finding Dr. Crum’s reading corroborated by the x-ray evidence and that his report “reasonably establishes the equivalency between the opacities he observed on the February 23, 2015 CT scan and structures that would constitute complicated pneumoconiosis on X-ray,” the ALJ found the CT scan evidence demonstrates complicated pneumoconiosis. *Id.*

The ALJ also considered five medical opinions. She found the opinions of Drs. Green and Nader diagnosing complicated pneumoconiosis consistent with the weight of the x-rays and CT scan readings and therefore outweigh the contrary opinions of Drs. Porterfield, Fino, and Meyer, which are inconsistent with the ALJ’s findings. MC Decision and Order at 34-35; MC Director’s Exhibits 15, 21-23; MC Claimant’s Exhibits 2, 4; MC Employer’s Exhibit 9 at 25. Additionally, the ALJ found Dr. Meyer’s opinions that the Miner had, and then subsequently did not have, complicated pneumoconiosis internally inconsistent. MC Decision and Order at 35. She thus concluded the preponderance of the medical opinions establish complicated pneumoconiosis. *Id.*

Weighing the x-ray, CT scan, and medical opinion evidence as a whole, the ALJ found the Miner’s positive June 5, 2019 and June 26, 2019 x-rays most probative of his current condition. MC Decision and Order at 23, 40. Thus, regardless of whether the earlier February 23, 2015 CT scan is positive or negative for complicated pneumoconiosis,

the ALJ found Claimant established the disease by a preponderance of evidence at 20 C.F.R. §718.304 and therefore invoked the irrebuttable presumption.<sup>12</sup> *Id.* at 40.

### **Issues on Appeal/Employer's Contentions**

Employer argues the ALJ erred in rejecting Dr. Meyer's deposition testimony revising his 2017-2019 positive x-ray interpretations for complicated pneumoconiosis to negative interpretations based on his February 23, 2015 CT scan interpretation. Employer contends proper consideration of Dr. Meyer's revised x-ray readings renders the preponderance of 2017-2019 x-rays negative. Employer's Brief at 5-12. It also contends the ALJ erred in rejecting Dr. Meyer's CT scan reading and weighing the medical opinions. *Id.* at 12-23. Employer's arguments lack merit.

Even assuming the February 23, 2015 CT scan is, as Employer asserts, negative for complicated pneumoconiosis, the ALJ rationally discredited Dr. Meyer's reliance on it to revise his interpretation of the October 17, 2017, June 26, 2018 and June 5, 2019 x-rays that post-date the CT scan by two-to-four years in light of the progressive nature of pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992). She thus permissibly rejected Dr. Meyer's revised x-ray interpretations. MC Decision and Order at 23, 35.

Employer alleges the ALJ erred in considering Dr. Crum's reading of the June 26, 2019 x-ray as it exceeds the mandatory evidence limits. Employer's Brief at 5-6. Any error in the ALJ's consideration of Dr. Crum's re-reading of the June 26, 2019 x-ray is harmless, however, as excluding Dr. Crum's reading would render the readings of this x-ray in equipoise, while the October 17, 2017, June 26, 2018 and June 5, 2019 x-rays would remain positive for complicated pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984). As Employer raises no further challenge to the ALJ's weighing of the x-ray evidence, we affirm her finding that it establishes complicated pneumoconiosis at 20 C.F.R. §718.304(a).

Similarly, as the ALJ permissibly found the Miner's October 17, 2017, June 26, 2018 and June 5, 2019 x-rays more probative of his current condition than the February 23, 2015 CT scan, *see Adkins*, 958 F.2d at 52, any alleged error the ALJ may have made in

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<sup>12</sup> We reject Employer's assertion that the ALJ failed to properly consider the x-ray evidence and CT scan evidence together, Employer's Brief at 7-9, as she clearly weighed the x-ray evidence separately and in consideration of the evidence as a whole.

finding the February 23, 2015 CT scan positive is harmless. *See Larioni*, 6 BLR at 1-1278; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

In any event, we see no error in the ALJ's rejection of Dr. Meyer's opinion that the Miner suffered from histoplasmosis or tuberculosis, rather than pneumoconiosis, based on his observance of nodules in the Miner's spleen and liver since Dr. Tallaksen indicated the February 23, 2015 CT scan did not show those nodules.<sup>13</sup> *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 it); MC Decision and Order at 38; MC Employer's Exhibits 2; 6 at 37, 41.

Moreover, the ALJ permissibly rejected Dr. Meyer's CT scan reading because she found his rationale that there are no Q or R opacities at odds with the readings of Drs. Crum and DePonte, who saw Q and R opacities on the Miner's x-rays. *See Snorton v. Zeigler Coal Co.*, 9 BLR 1-106, 1-107 (1986) (ALJ may reasonably question the validity of a physician's opinion that varies significantly from the remaining medical opinions of record); *Hutchens*, 8 BLR at 1-19 ; MC Decision and Order at 37; MC Employer's Exhibits 3; 6 at 46; 10; 12; 13; MC Claimant's Exhibits 1-5. She also permissibly discredited Dr. Meyer's rationale that the nodules revealed on the February 23, 2015 CT scan are due to other diseases because he found a "lack of any small -- background small opacities" and, in particular, no Q or R opacities. MC Decision and Order at 38; MC Employer's Exhibit 6 at 36-37. As the ALJ noted, the CT scan predates the x-ray evidence read by Drs. Crum, Willis, and DePonte, who observed background opacities of simple pneumoconiosis, including those classified as Q and R. *See Snorton*, 9 BLR at 1-107; *Hutchens*, 8 BLR at 1-19; MC Decision and Order at 38; MC Director's Exhibit 15; MC Claimant's Exhibits 1-4; MC Employer's Exhibits 6 at 36-37; 10; 12; 13.

Employer further challenges the ALJ's weighing of the medical opinions. Employer's Brief at 19-23. However, the ALJ permissibly found the opinions of Drs. Green and Nader that the Miner had complicated pneumoconiosis supported by their reliance on the positive x-ray evidence for the disease. *See Adkins*, 958 F.2d at 52; *Hutchens*, 8 BLR at 1-19; MC Decision and Order at 34; MC Claimant's Exhibits 2 at 3; 4

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<sup>13</sup> Contrary to Employer's assertion, while Dr. Tallaksen did not address the existence of complicated pneumoconiosis, we see no error by the ALJ in considering his identification of no masses on the Miner's spleen or liver for the purpose of determining whether Dr. Meyer's diagnosis of other diseases was credible. *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); MC Decision and Order at 38; MC Employer's Exhibits 2, 3; Employer's Brief at 18-19.



at 3, 4; MC Employer's Exhibit 9 at 24-25, 29. Conversely, she permissibly found Dr. Porterfield's opinion that the Miner had only simple pneumoconiosis and Dr. Fino's opinion that the Miner did not have any form of pneumoconiosis unpersuasive as the x-ray evidence established both simple and complicated pneumoconiosis. *See Snorton*, 9 BLR at 1-107; *Hutchens*, 8 BLR at 1-19; MC Decision and Order at 34; MC Director's Exhibits 15 at 9, 11, 20; 21 at 24; 23. The ALJ also permissibly discounted Drs. Meyer's and Fino's diagnoses of histoplasmosis as unsupported by the record.<sup>14</sup> *See Cox*, 602 F.3d at 286-87 (affirming ALJ's rejection of Employer's experts' opinions attributing opacities seen to alternative diagnoses other than complicated pneumoconiosis); MC Decision and Order at 34-35; MC Director's Exhibit 22 at 4; MC Employer's Exhibit 7 at 11-12, 37-41. Having rejected Employer's challenges to the ALJ's findings at 20 C.F.R. §718.304(a)-(c), we affirm her finding that Claimant established complicated pneumoconiosis by a preponderance of evidence. *See Scarbro*, 220 F.3d at 255-56.

Employer's arguments on complicated pneumoconiosis 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). Because the ALJ weighed all of the relevant evidence and her credibility findings are supported by substantial evidence, we affirm her conclusion that the Miner had complicated pneumoconiosis and therefore Claimant invoked the irrebuttable presumption. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304.

We further affirm, as unchallenged, the ALJ's finding that the Miner's complicated pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203; *Daniels Co., Inc. v. Mitchell*, 479 F.3d 321, 337 (4th Cir. 2007); MC Decision and Order at 41. Thus, we affirm the ALJ's award of benefits in the miner's claim.

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<sup>14</sup> Employer alleges x-rays obtained in conjunction with the Miner's prior claim prove he has tuberculosis and granulomatous disease. Employer's Brief at 21. Contrary to Employer's characterization, Dr. Forehand did not explicitly diagnose tuberculosis when reviewing Claimant's 2014 x-ray; he observed "bilateral apical pleural thickening of *uncertain etiology*," followed by a notation, "?TB," questioning whether it may be tuberculosis. MC Director's Exhibit 1 at 90 (emphasis added). Moreover, this x-ray predates by four years the positive x-rays for complicated pneumoconiosis that the ALJ credited as most probative of the Miner's condition due to their recency. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992). Similarly, Dr. Gaziano's reading for quality purposes where he commented "fibronodular densities both upper zones rule out granulomatous disease" did not actually diagnose granulomatous disease. MC Director's Exhibit 1 at 78. Employer identifies no other evidence to contradict the ALJ's conclusion.

### **The Survivor's Claim**

ALJ Morris determined Claimant established all the necessary elements for automatic entitlement to survivor's benefits. 30 U.S.C. §932(l); SC Decision and Order Awarding Benefits at 2-3. 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.<sup>15</sup> 30 U.S.C. §932(l); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, we affirm ALJ Timlin's Decision and Order Awarding Benefits in the miner's claim and ALJ Morris's Decision and Order Awarding Benefits in the survivor's claim.

SO ORDERED.

GREG J. BUZZARD  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge

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<sup>15</sup> Consequently, Employer's request to hold the survivor's claim in abeyance is moot.