U.S. Department of Labor

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

BRB No. 21-0080 BLA

ELBERT WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	
	)	DATE ISSUED: 3/24/2022
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Asher, Kentucky, for Claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for Employer.

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

BUZZARD and ROLFE, Administrative Appeals Judges:

Claimant appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Denying Benefits on Remand (2012-BLA-05762) 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[1] filed on March 28, 2011, and is before the Benefits Review Board for a second time.

In a January 10, 2017 Decision and Order Awarding Benefits, ALJ Christopher Larsen credited Claimant with at least thirty-two years of underground coal mine employment, but found he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He thus found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He found, however, Claimant established complicated pneumoconiosis and thus invoked 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. He further found Claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203(b), and awarded benefits.

In consideration of Employer's appeal, the Board held ALJ Larsen erred in weighing the x-ray and computed tomography (CT) scan evidence on the issue of complicated pneumoconiosis.[3] *Williams v. Whitaker Coal Corp.*, BRB No. 17-0228 BLA, slip op. at 3-11 (Feb. 28, 2018) (unpub.); 20 C.F.R. §718.304(a), (c). Because his findings with respect to the x-rays and CT scans affected the weight he assigned the medical opinions, the Board also vacated his finding that the medical opinions establish complicated pneumoconiosis. *Williams*, BRB No. 17-0228 BLA, slip op. at 11; 20 C.F.R. §718.304(c). The Board thus remanded the case for ALJ Larsen to reconsider all the relevant evidence on the issue of complicated pneumoconiosis and explain the bases for his findings of fact and credibility

[1] This is Claimant's second claim for benefits. The district director denied his initial claim on August 27, 1980 because he did not establish the existence of pneumoconiosis. Director's Exhibit 1.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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 at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] Nine months after Employer filed its opening brief in support of the petition for review, and six months after the briefing schedule closed, Employer argued for the first time that the manner in which Department of Labor (DOL) ALJs are appointed may violate the Appointments Clause of the Constitution, Art. II § 2, cl. 2. *Williams v. Whitaker Coal Corp.*, BRB No. 17-0228 BLA, slip op. at 3 n.5 (Feb. 28, 2018) (unpub.). The Board held Employer waived this argument by failing to raise it in its opening brief and thus denied its request to hold the case in abeyance. *Id.*

determinations in accordance with the Administrative Procedure Act (APA).[4] *Williams*, BRB No. 17-0228 BLA, slip op. at 11.

On remand, this case was reassigned to ALJ Golden (the ALJ).[5] In his Decision and Order Denying Benefits on Remand that is the subject of this appeal, ALJ Golden did not disturb ALJ Larsen's finding that Claimant failed to establish total disability and thus could not invoke the Section 411(c)(4) presumption or establish entitlement under 20 C.F.R Part 718. 20 C.F.R. §718.204(b)(2). ALJ Golden further found the x-ray, CT scan, and medical opinion evidence insufficient to establish complicated pneumoconiosis; therefore, he found 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. He thus denied benefits.

On appeal, Claimant argues the ALJ erred in weighing the evidence on the issue of complicated pneumoconiosis. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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[4] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must include "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[5] After the Board remanded this case to ALJ Larsen, the Supreme Court issued its decision in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). In light of that decision, Employer again argued ALJ Larsen was not properly appointed and moved for reassignment of the case to a new ALJ for a new hearing; ALJ Larsen granted Employer's motion. September 5, 2018 Order for New Hearing. The case was reassigned to ALJ Golden. On August 13, 2020, however, ALJ Golden noted that Employer had waived its *Lucia* argument by failing to raise it in a timely manner. August 13, 2020 Order on Telephone Conference. Thus he requested the parties address, among other things, whether he had the authority to hear and decide the claim in light of that waiver and, if he had the authority, whether he was limited to deciding only the issues that the Board previously vacated. *Id.* Employer, Claimant, and the Director all agreed that ALJ Golden had authority to hear and decide the case and that he could limit his consideration to only the issues that the Board previously instructed ALJ Larsen to address – specifically whether Claimant established complicated pneumoconiosis. *See* Parties' Responses to August 13, 2020 Order. Based on the parties' positions and the applicable law, ALJ Golden determined he would "limit [his] decision of the claim to the issues the Board instructed [ALJ] Larsen to address in its remand order." September 23, 2020 Order Clarifying the Evidentiary Record. No party challenges that finding.

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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any element precludes an award of benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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 consider all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consol. Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found the x-ray readings, biopsy evidence, CT scan readings, treatment records, and medical opinions of record, considered independently, are insufficient to establish complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c); Decision and Order on Remand at 4-14. He further found all the relevant evidence weighed together is insufficient to establish complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order on Remand at 14.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

We agree with Claimant that the ALJ erred in weighing the x-ray evidence.[7] 20 C.F.R. §718.304(a); Claimant's Brief at 3-4. The ALJ weighed four readings of three x-rays dated November 10, 2010, June 8, 2011, and June 28, 2012. Decision and Order on Remand at 6-9; Director's Exhibits 13, 14; Claimant's Exhibit 2; Employer's Exhibit 1. He accurately noted Dr. Miller's positive reading of the November 10, 2010 x-ray and Dr. West's negative reading of the June 28, 2012 x-ray are the only interpretations of these films.[8] Decision and Order at 4-9. Based on the unrebutted readings, the ALJ found the November 10, 2010 x-ray is positive for complicated pneumoconiosis, while the June 28, 2012 x-ray is negative for the disease.[9] *Id.*

The ALJ then weighed the two conflicting interpretations of the June 8, 2011 x-ray.[10] Dr. Westerfield, a B reader, interpreted it as positive for complicated pneumoconiosis, whereas Dr. Wheeler, a dually-qualified Board-certified radiologist and B reader, interpreted it as negative for the disease. Director's Exhibits 13, 14. The ALJ accorded greater weight to Dr. Wheeler's negative reading based on his superior

[7] Because it is unchallenged on appeal, we affirm the ALJ's finding that the biopsy and treatment record evidence does not establish complicated pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.304(b), (c); Decision and Order on Remand at 14. Although Claimant generally asserts the ALJ erred in finding the CT scan evidence insufficient to establish complicated pneumoconiosis, he nonetheless argues the ALJ "should not have given any consideration to the CT scan evidence" in this case. Claimant's Brief at 2, 5. As Claimant has failed to explain his argument or identify any error in the ALJ's weighing of the CT scan evidence, we affirm the ALJ's finding that this evidence does not establish complicated pneumoconiosis. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120 (1987).

[8] Dr. Miller, a dually-qualified Board-certified radiologist and B reader, read the November 10, 2010 x-ray and identified Category B large opacities consistent with complicated pneumoconiosis. Claimant's Exhibit 2. Dr. West, also a dually-qualified radiologist, interpreted the June 28, 2012 x-ray as negative for complicated pneumoconiosis. Employer's Exhibit 2.

[9] As it is unchallenged on appeal, we affirm the ALJ's finding that the November 10, 2010 x-ray is positive for complicated pneumoconiosis, while the June 28, 2012 x-ray is negative for the disease. *See Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 9.

[10] Dr. Gaziano read this x-ray for quality purposes only. Director's Exhibit 13. The ALJ assigned his reading no weight. Decision and Order on Remand at 8.

radiological qualifications and thus found the June 8, 2011 x-ray negative for complicated pneumoconiosis. Decision and Order on Remand at 8.

The ALJ erred in resolving the conflicting readings of the June 8, 2011 x-ray. Consistent with the requirement to consider all relevant evidence, the Board previously held that, in evaluating the June 8, 2011 x-ray readings, the ALJ "must consider a physician's entire x-ray report at 20 C.F.R. §718.304(a), including any additional notations by the physician." *Williams*, BRB No. 17-0228 BLA, slip op. at 6, *citing Melnick*, 16 BLR at 1-33. The Board reasoned that such comments, including alternative diagnoses, "could call into question" the doctor's opinions on the issue of complicated pneumoconiosis. *Id.* Thus in resolving the conflicting readings of this x-ray, the Board instructed the ALJ to weigh "the number of x-ray interpretations, along with the readers' qualifications, dates of film, quality of film, and *the actual reading*." *Id.* at 8 (emphasis added). Claimant argues the ALJ erred on remand by selectively analyzing the x-ray evidence.[11] Claimant's Br. at 4. We agree. The ALJ followed the Board's instructions with respect to Dr. Westerfield but failed to do so with Dr. Wheeler. He found Dr. Westerfield diagnosed complicated pneumoconiosis on the June 8, 2011 x-ray and identified "granulomas" along with a "right upper lobe large opacity [that] could be neoplasm." Decision and Order on Remand at 7-8, *citing* Director's Exhibit 13. The ALJ permissibly found Dr. Westerfield's additional comments regarding granulomas and neoplasm do not undermine the credibility of his diagnosis of complicated pneumoconiosis because the doctor "affirmed that he found the x-ray [supports] a diagnosis of complicated pneumoconiosis in his accompanying report." Decision and Order on Remand at 7-8; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703,

[11] Our dissenting colleague contends we have deviated from the "fundamental concept of our 'adversarial system'" that a court "must 'rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.'" *See infra*, *quoting Greenlaw v. United States*, 554 U.S. 237, 243 (2008). But a preceding "fundamental" duty arose here prior to the parties' framing of the issues for this appeal: a lower tribunal must act in strict compliance with remand instructions from a higher tribunal without altering, amending, or examining them. *See Sullivan v. Hudson*, 490 U.S. 877, 886 (1989); *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414-15 (4th Cir. 2005); *Piambino v. Bailey*, 757 F.2d 1112, 1119-20 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). The "mandate rule," as it is known, is nothing more than a specific application of the "law of the case" doctrine. *Piambino*, 757 F.2d at 1120. And thus "[d]eviation from the [tribunal's] remand order in the subsequent administrative procedures is itself legal error, subject to reversal on further judicial review." *Hudson*, 490 U.S. at 866, citations omitted. We are therefore well within our inherent authority in ensuring our previous instructions are followed, *id.*, notwithstanding Claimant's further specific challenges in this appeal that the ALJ counted heads and "selectively analyzed" the x-rays. Claimant's Br. at 3-4.

713-14 (6th Cir. 2002); *Wolf Creek Collieries v. Robinson*, 872 F.2d 1264 (6th Cir. 1989); *Melnick*, 16 BLR at 1-33; Director's Exhibit 13. Thus we affirm the ALJ's finding that Dr. Westerfield's June 8, 2011 positive x-ray reading is credible.[12]

The ALJ, however, failed to similarly critically analyze the narrative comments accompanying Dr. Wheeler's June 8, 2011 x-ray reading. Dr. Wheeler identified a six-centimeter mass in the right upper lung "compatible with conglomerate granulomatous disease: histoplasmosis, or mycobacterium avium complex (MAC) more likely than [tuberculosis]." Director's Exhibit 14. He further stated the "[m]ass in [the right upper lung] is not [a] large opacity of [coal workers' pneumoconiosis] because [the] background nodules are very low profusion." *Id*. Thus he reiterated that the mass is "most likely" histoplasmosis "judging from calcified granulomata because histoplasmosis is [the] most common cause of calcified granulomata in America." *Id*. He concluded that a "diagnosis should have been made with biopsy or microbiology when lung symptoms first developed or first abnormal x-ray was reported. If untreated, histoplasmosis is the granulomatous disease most likely to self-cure." *Id*.

Rather than evaluating Dr. Wheeler's narrative comments that set forth his rationale for excluding a diagnosis of complicated pneumoconiosis, including whether there was a basis for his alternative diagnoses in the record, as required by the Board's prior remand instructions, the ALJ solely deferred to the doctor's contrary reading based exclusively on his radiological qualifications.[13] Decision and Order on Remand at 8. This was error.

While the qualifications of the respective medical experts are relevant to resolving the conflict in the evidence, the ALJ must still consider the entirety of the doctors' opinions,

[12] We reject Claimant's argument that Dr. Westerfield's positive x-ray interpretation is entitled to controlling weight because he conducted an "independent" pulmonary evaluation of Claimant on behalf of the DOL. Claimant's Brief at 4. Physicians performing DOL examinations are not automatically entitled to greater weight due to their impartiality. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-36 (1991) (en banc).

[13] The ALJ also found "[n]o expert in this case has explained why Dr. Wheeler's interpretation [of the June 8, 2011 x-ray] is inaccurate." Decision and Order on Remand at 8. Contrary to the ALJ's finding, Dr. Westerfield read the same June 8, 2011 x-ray, identified granuloma in the right upper lung, but reiterated that Claimant has complicated pneumoconiosis. Director's Exhibit 13. As discussed above, the ALJ found this positive x-ray reading credible. Decision and Order on Remand at 7-8. The ALJ cannot simply assume Dr. Wheeler's reading is credible; as discussed, he must critically analyze the doctor's opinion and, given Dr. Westerfield's contrary reading, resolve the conflict in the evidence.

including the underlying rationales for reaching their conclusions. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712 (6th Cir. 2002); *Balsavage v. Director, OWCP*, 295 F.3d 390, 397 (3d Cir. 2002) (error for an ALJ to defer to a medical opinion based on superior credentials without considering whether doctor's underlying rationale was persuasive); *Gross v. Dominion Coal Corp*., 23 BLR 1-8, 1-18-19 (2003) (qualifications alone do not provide a basis for giving greater weight to a particular physician's opinion; that opinion must also be adequately reasoned and documented); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993) (ALJ is not required to defer to the physicians with superior qualifications). Further, the narrative portion of an x-ray reading has a direct bearing on the credibility of a doctor's opinion that an x-ray is negative for complicated pneumoconiosis. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 286-87 (4th Cir. 2010); *Melnick*, 16 BLR at 1-37. Thus when an ALJ fails to evaluate a doctor's underlying rationale for excluding complicated pneumoconiosis, remand is required. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Because an ALJ must consider all of the relevant evidence in determining the credibility of the x-ray readings, and the ALJ failed to critically analyze Dr. Wheeler's rationale for excluding complicated pneumoconiosis, we must vacate his finding that the x-ray evidence is insufficient to establish complicated pneumoconiosis.[14] 30 U.S.C.

[14] Our dissenting colleague has pointed to evidence she believes supports Dr. Wheeler's interpretation that the mass on the June 8, 2011 x-ray is more consistent with granulomatous disease than complicated pneumoconiosis. *See* below n.17. She specifically notes Dr. West interpreted a June 28, 2012 CT scan of the lung and identified multiple scattered calcified granulomas and calcified hilar and mediastinal lymph nodes, and he concluded the scan is "not typical for coal worker's [sic] pneumoconiosis." *Id*., *quoting* Employer's Exhibit 7. In weighing this CT scan, however, the ALJ specifically found CT scan testing by itself is not "sufficiently reliable that a negative result effectively rules out the existence of pneumoconiosis." Decision and Order on Remand at 10. Moreover, Dr. Westerfield also identified "granulomas" on the June 8, 2011 x-ray and the ALJ found Dr. Westerfield's additional comments regarding granulomas do not undermine the credibility of his diagnosis of complicated pneumoconiosis because the doctor "affirmed that he found the x-ray [supports] a diagnosis of complicated pneumoconiosis in his accompanying report." *Id*. at 7-8. Further, Dr. West's June 28, 2012 CT scan is not the only relevant evidence. Dr. Trent read a July 22, 2011 CT scan and did not identify any granulomatous disease. Director's Exhibit 11. The record also includes numerous treatment record x-rays that do not diagnose granulomatous disease. Director's Exhibits 11, 12. It is not our job to weigh the evidence in the first instance, *Director, OWCP, v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984), and it does not remedy the ALJ's failure to follow our remand instructions. See above at 8-9.

§923(b); *see Rowe*, 710 F.2d at 255; *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999) (en banc); *Melnick*, 16 BLR at 1-33; *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984); 20 C.F.R. §718.304(a).

Because the ALJ's weighing of the x-ray evidence affected the weight he assigned the medical opinion evidence, we also vacate his finding that the medical opinions do not establish complicated pneumoconiosis, 20 C.F.R. §718.304(c); Decision and Order on Remand at 14, and his finding all the relevant evidence does not establish complicated pneumoconiosis. 20 C.F.R. §718.304. We therefore vacate his finding that Claimant failed to invoke the Section 411(c)(3) presumption and the denial of benefits.

We remand for reconsideration of whether Claimant has complicated pneumoconiosis.[15] The ALJ must first reconsider whether the x-ray evidence establishes the disease. 20 C.F.R. §718.304(a). He should specifically weigh Dr. Wheeler's negative reading of the June 8, 2011 x-ray and address whether the additional narrative comments by Dr. Wheeler, including whether there is a basis for his alternative diagnoses, undermine the reliability of his interpretation. *See Napier*, 301 F.3d at 712; *Melnick*, 16 BLR at 1-37. He must then reconsider whether the medical opinion evidence establishes complicated pneumoconiosis. 20 C.F.R. §718.304(c). Finally, he must weigh all the relevant evidence together to determine if the evidence as whole establishes complicated pneumoconiosis. *Gray*, 176 F.3d at 388-89; 20 C.F.R. §718.304. He must adequately explain his credibility determinations in accordance with the APA, 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).

[15] Because Claimant does not separately challenge the ALJ's finding that he failed to establish total disability, 20 C.F.R. §718.204(b)(2), we affirm this finding. *See Skrack*, 6 BLR at 1-711.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the decision of my colleagues to vacate the ALJ's denial of benefits.

A fundamental concept of our "adversarial system" is that a court must "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (where "courts have approved departures from the party presentation principle, the justification has usually been to protect a pro se litigant's rights."). Pursuant to this principle, "courts generally do not craft new arguments for a party, especially in civil cases and especially when the party is represented by counsel." *Horne v. Elec. Eel Mfg. Co., Inc.*, 987 F.3d 704, 727 (7th Cir. 2021). "Courts are entitled to expect represented parties to incorporate all relevant arguments" in the pleadings that directly address a motion or appeal. *Dahua Tech. USA Inc.* v. *Feng Zhang*, 988 F.3d 531, 538 (1st Cir. 2021). Thus the Board should not consider an argument that has not been raised by Claimant. *Greenlaw*, 554 U.S. at 243; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Feng Zhang*, 988 F.3d at 538; *Horne*, 87 F.3d at 727; *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b). Claimant must demonstrate with some degree of specificity the

manner in which the ALJ's decision is unsupported by the facts or contrary to law. *Cox*, 791 F.2d at 446.

A review of Claimant's Petition for Review and Brief in Support of Petition for Review reflect that he never argued that the ALJ failed to comply with the Board's prior remand instructions. Nor did he argue that the ALJ erred by failing to critically analyze the narrative comments accompanying Dr. Wheeler's June 8, 2011 negative x-ray reading. Although Claimant generally argues that the ALJ "selectively analyzed" the evidence, Claimant's Brief at 5, as discussed in greater detail below, his only specific arguments in this regard are that the ALJ engaged in a head count of positive and negative x-ray readings and failed to give additional credit to Dr. Westerfield because he provided an "independent" opinion.[16] Claimant's Brief at 3-5. As Claimant's specific arguments have no merit, I would affirm the denial of benefits.

I do not disagree with the majority that a lower tribunal must act in strict compliance with remand instructions from a higher tribunal without altering, amending, or examining them. *See Sullivan v. Hudson*, 490 U.S. 877, 886 (1989). The ALJ in this case, however, has complied with our remand instructions. The Board instructed the ALJ that, when weighing the June 8, 2011 x-ray readings, he "must consider a physician's entire x-ray report at 20 C.F.R. §718.304(a), including any additional notations by the physician." *Williams*, BRB No. 17-0228 BLA, slip op. at 6, *citing Melnick*, 16 BLR at 1-33. It clarified the ALJ should weigh "the number of x-ray interpretations, along with the readers' qualifications, dates of film, quality of film, and the actual reading." *Id*. at 8.

The ALJ followed these instructions. He noted Dr. Wheeler, "a dually qualified physician, interpreted the June 8, 2011 x-ray as negative for pneumoconiosis" and identified "that the mass in the right upper lung was not coal workers' pneumoconiosis because the pattern was asymmetrical and mainly in the right upper lung." Decision and Order at 8, *quoting* Director's Exhibit 14. Finding no "expert in this case has explained why Dr. Wheeler's interpretation is inaccurate," the ALJ found the June 8, 2011 x-ray negative for pneumoconiosis "based on Dr. Wheeler's superior qualifications." *Id*. The ALJ thus considered Dr. Wheeler's "entire x-ray report at 20 C.F.R. §718.304(a), including any additional notations by the physician," and he was not persuaded there is a basis in the

[16] Claimant generally contends the ALJ erred in finding the CT scan evidence insufficient to establish complicated pneumoconiosis. Claimant's Brief at 2. As Claimant has failed to explain his argument or identify any error by the ALJ in weighing the CT scan evidence, the Board should affirm the ALJ's finding that this evidence does not establish complicated pneumoconiosis. *See Cox v. Director, OWCP*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120 (1987); 20 C.F.R. §§802.211(b), 802.301(a).

record to discredit the reading; therefore he has followed the Board's remand instructions. *Williams*, BRB No. 17-0228 BLA, slip op. at 6.

To the extent the majority holds the ALJ's credibility finding is erroneous and would like the ALJ to further evaluate Dr. Wheeler's reading, I believe they have raised arguments related to Dr. Wheeler's credibility that Claimant has not raised.[17] Claimant has raised specific arguments in this case, none of which have merit. In challenging the ALJ's finding that the x-ray evidence does not establish complicated pneumoconiosis, Claimant argues the ALJ improperly "relied almost solely upon the numerical superiority of the x-ray interpretations." Claimant's Brief at 3. To the contrary, the ALJ resolved the conflict in the x-ray evidence based on a comparison of the radiological qualifications of the doctors who conducted x-ray readings rather than a mere head count of positive and negative x-ray readings. Decision and Order on Remand at 6-9.

The ALJ recognized that Drs. Miller, West, and Wheeler are dually-qualified Board-certified radiologists and B readers, but Dr. Westerfield is only a B reader. Decision and Order on Remand at 6-9; Director's Exhibits 13, 14; Claimant's Exhibit 2; Employer's Exhibit 1. Because Dr. Miller's positive reading of the November 10, 2010 x-ray and Dr.

[17] Even if Claimant had raised this argument, I would hold substantial evidence supports the ALJ's decision to credit Dr. Wheeler's opinion that the June 8, 2011 x-ray is more consistent with granulomatous disease. *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion.). Subsequent to Dr. Wheeler reading this x-ray, Dr. West interpreted a June 28, 2012 CT scan of the lung and identified multiple scattered calcified granulomas and calcified hilar and mediastinal lymph nodes. Employer's Exhibit 7. He further identified a few noncalcified small opacities in the perihilar lungs and some larger nodules and masses that contained scattered coarse calcifications and pleural plaques. *Id*. He opined the CT scan is "most consistent with granulomatous scarring, such as residue of previous tuberculosis or fungal pneumonitis." *Id*. He concluded the scan is "not typical for coal worker's [sic] pneumoconiosis." *Id*. Thus the evidence of record supports Dr. Wheeler's x-ray reading. As the majority notes, Dr. Trent's reading of a July 22, 2011 CT scan and other treatment record x-ray readings do not identify any granulomatous disease. Director's Exhibits 11, 12. The ALJ, however, found the treatment record x-ray readings entitled to "little weight" because they "do not make any express references to pneumoconiosis." Decision and Order on Remand at 6. He also found Dr. Trent's "silence with regard to clinical pneumoconiosis [in the July 22, 2011 CT scan] . . . neither supports nor refutes such a finding." *Id*. at 9. Consequently, Dr. Trent's July 22, 2011 CT scan reading and the treatment record x-ray readings do not detract from Dr. West's June 28, 2012 CT scan reading and Dr. Wheeler's x-ray interpretation. Employer's Exhibit 7.

West's negative reading of the June 28, 2012 x-ray are the only interpretations of these films, the ALJ found the November 10, 2010 x-ray is positive for complicated pneumoconiosis, while the June 28, 2012 x-ray is negative for the disease. *Id*.

The ALJ then weighed the two conflicting readings of the June 8, 2011 x-ray. Dr. Westerfield read the June 8, 2011 x-ray as positive for complicated pneumoconiosis, whereas Dr. Wheeler read it as negative for the disease. Director's Exhibits 13, 14. The ALJ permissibly accorded greater weight to Dr. Wheeler's negative reading based on his superior radiological qualifications and thus found the June 8, 2011 x-ray negative for complicated pneumoconiosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 513-14 (6th Cir. 2002) (ALJ permissibly considered the readers' respective qualifications and appropriately discounted the opinions of those not fully qualified); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); Decision and Order on Remand at 7-8. Claimant next specifically argues the ALJ should have assigned Dr. Westerfield's positive x-ray reading greater weight than the negative readings of Drs. West and Wheeler because Dr. Westerfield conducted an "independent" pulmonary evaluation of Claimant on behalf of the Department of Labor (DOL). Claimant's Brief at 4. This argument also lacks merit. Unless the opinions of the physicians retained by the parties are properly held to be biased, and a foundation exists for finding the DOL expert independent, the opinions of DOL physicians should not be accorded greater weight due to their impartiality. *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 637 n.6 (6th Cir. 2009) (bias cannot be presumed merely because an expert is compensated for his opinion); *Melnick v. Consol. Coal Co*., 16 BLR 1-31, 1-36 (1991) (en banc).

Because the ALJ found two x-rays are negative for complicated pneumoconiosis and one x-ray is positive for the disease, he found the preponderance of the x-ray evidence insufficient to establish complicated pneumoconiosis. Decision and Order on Remand at 9. As the ALJ properly conducted both a qualitative and quantitative assessment of the x-ray interpretations, and his credibility determinations are supported by substantial evidence, I would affirm his finding that the x-ray evidence of record is insufficient to support a finding of complicated pneumoconiosis. *Williams*, 338 F.3d at 513-14; *Staton*, 65 F.3d at 59; *Woodward*, 991 F.2d at 321; 20 C.F.R. §718.304(a); Decision and Order on Remand at 9.

With respect to the medical opinion evidence, the ALJ noted the only physician to diagnose complicated pneumoconiosis is Dr. Westerfield. Decision and Order on Remand at 12-14; Director's Exhibit 13. Once again Claimant has raised a specific argument in this context, asserting the ALJ improperly discredited Dr. Westerfield's opinion because the x-ray evidence is negative for complicated pneumoconiosis. Claimant's Brief at 5-6. Contrary to Claimant's argument, the ALJ permissibly discredited Dr. Westerfield's opinion that Claimant has complicated pneumoconiosis because it was based on his

positive reading of the June 8, 2011 x-ray, which the ALJ found to be outweighed by the negative reading from Dr. Wheeler in light of the latter doctor's superior qualifications. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order at 12-13. Because it is supported by substantial evidence, I would affirm the ALJ's finding Claimant failed to support a finding of complicated pneumoconiosis based on the medical opinion evidence. 20 C.F.R. §718.304(c); Decision and Order at 14.

As all of the arguments actually raised by Claimant are meritless, I would affirm the ALJ's finding that Claimant failed to establish complicated pneumoconiosis based on a consideration of all the evidence weighed together and thus is unable to invoke the irrebuttable presumption at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge