

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



BRB No. 21-0357 BLA

BILLY D. STIDHAM

## Claimant-Respondent

V.

ABUNDANCE COAL,  
INCORPORATED #3

and

# CHARTIS CASUALTY COMPANY

Employer/Carrier-  
Petitioners

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

## Party-in-Interest

DATE ISSUED: 03/16/2023

## DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III,  
Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for Claimant.

Timothy J. Walker (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer and its Carrier.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits (2019-BLA-05728) rendered on a subsequent claim filed on September 6, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).<sup>1</sup>

The ALJ accepted the parties' stipulation that Claimant has twenty-seven years of underground coal mine employment and found he established complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2018), and establishing a change in an applicable condition of entitlement. 20 C.F.R. §725.309.<sup>2</sup> He further found Claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203, and therefore awarded benefits.

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<sup>1</sup> This is Claimant's second claim for benefits. On June 19, 2014, the district director denied his prior claim, filed on March 26, 2013, because Claimant failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1.

<sup>2</sup> When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant's prior claim was denied for failure to establish total disability, he had to establish this element in order to obtain review of the merits of his current claim. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309; Director's Exhibit 1.

On appeal, Employer asserts the ALJ erred in finding Claimant established complicated pneumoconiosis.<sup>3</sup> Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (Director) declined to file a substantive response in this appeal. In a footnote in his letter to the Benefits Review Board, however, the Director asserts Employer "makes no clear argument" as to why the ALJ erred in his credibility determinations regarding complicated pneumoconiosis.

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.<sup>4</sup> 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).

### **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 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). *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 Corp.*, 176 F.3d 382, 389-90 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

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

<sup>4</sup> 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 5.

The ALJ found the medical opinion and computed tomography (CT) scan<sup>5</sup> evidence establish complicated pneumoconiosis while the x-ray<sup>6</sup> evidence does not. 20 C.F.R. §718.304(a), (c); Decision and Order at 7-16. Weighing all the evidence together,<sup>7</sup> he concluded Claimant established the existence of complicated pneumoconiosis and therefore invoked the irrebuttable presumption. 30 U.S.C. §921(c)(3); Decision and Order at 16-17.

The ALJ considered the medical opinions of Drs. DePonte, Green, Adcock, and Rosenberg. Decision and Order at 8-17. Dr. Green initially diagnosed complicated

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<sup>5</sup> Dr. Adcock testified that the October 16, 2017 CT scan documented a pseudoplaque measuring 2.3 centimeters as well as others that might measure as large as 1.1 centimeters. Employer's Exhibit 5 at 19, 21. Dr. DePonte identified "several" pseudoplaques consistent with Category A opacities on the October 31, 2018 CT scan, specifically noting the presence of a 2.0 centimeter pseudoplaque in the upper left lung and 1.08 centimeter, 1.14 centimeter, and 1.7 centimeter pseudoplaques in the upper right lung. Claimant's Exhibits 2 at 10-11, 13-14; 3. Dr. Adcock indicated he agreed with Dr. DePonte's findings "as morphologically described." Employer's Exhibit 5 at 17. They disagreed, however, as to whether pseudoplaques constitute complicated pneumoconiosis. Claimant's Exhibit 3; Employer's Exhibit 5 at 36. Because the ALJ's conclusion that the CT scan evidence establishes complicated pneumoconiosis is inherently linked to his evaluation of the medical opinion evidence, we will address the medical opinion and CT scan evidence together.

<sup>6</sup> The ALJ considered six readings of three x-rays dated April 7, 2017, March 21, 2018, and August 19, 2019. Decision and Order at 5-7. Because each x-ray was read as positive and negative for complicated pneumoconiosis by equally qualified physicians, he found each to be inconclusive for the presence of the disease. *Id.* at 7; Director's Exhibits 10-11, 65; Claimant's Exhibit 1; Employer's Exhibits 1-2. He also considered Dr. Pampati's July 29, 2019 x-ray included in Claimant's treatment records. Decision and Order at 6; Employer's Exhibit 9. Noting Dr. Pampati documented abnormalities but did not specifically address the presence of complicated pneumoconiosis, the ALJ gave the July 29, 2019 x-ray no weight. Decision and Order at 6. Weighing the evidence together, the ALJ found the x-ray evidence inconclusive for providing evidence of complicated pneumoconiosis. *Id.* at 7; *see* 20 C.F.R. §718.304(a). We affirm this finding as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

<sup>7</sup> The record contains no biopsy evidence. 20 C.F.R. §718.304(b).

pneumoconiosis but later revised his opinion to conclude Claimant does not have the disease. Director's Exhibits 11 at 3; 16.

Dr. DePonte diagnosed complicated pneumoconiosis based on the March 21, 2018 x-ray<sup>8</sup> and October 31, 2018 CT scan, both of which she opined documented multiple pseudoplaques consistent with complicated pneumoconiosis. Claimant's Exhibits 2 at 10-11, 13-14; 3. She explained pseudoplaques are pulmonary opacities "contiguous with the visceral pleura formed by coalescent small nodules," Claimant's Exhibit 2 at 9, that are "formed by the same coalescence [and] caused by the same inhalation of coal mine dust . . . as the more central large opacities." Claimant's Exhibit 3 at 1. Further, she explained the ILO Guidelines define a large opacity as having a longest dimension exceeding ten millimeters without regard to its location, Claimant's Exhibit 3 at 1 (quoting *ILO Guidelines for the use of the ILO International Classification of Radiographs of Pneumoconiosis*). While Dr. DePonte acknowledged pseudoplaques may be associated with conditions other than pneumoconiosis, she opined there is no evidence of another condition such as sarcoidosis in Claimant's case. Claimant's Exhibit 2 at 16. Thus, she concluded the March 21, 2018 x-ray and October 31, 2018 CT scan demonstrate the presence of complicated pneumoconiosis. *Id.* at 12.

Drs. Adcock and Rosenberg both acknowledged the March 21, 2018 x-ray and the CT scans demonstrate the presence of pseudoplaques that exceeded one centimeter.<sup>9</sup> Employer's Exhibits 5 at 14, 17-19, 21; 6; 10 at 1. However, as the ALJ observed, although neither physician disputed that pseudoplaques may be caused by coal mine dust exposure,<sup>10</sup>

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<sup>8</sup> Dr. DePonte initially checked the box indicating there are no large opacities on Section 2C of the International Labour Organization (ILO) form for the March 21, 2018 x-ray but noted in Section 4C the presence of "bilateral pseudoplaques forming Category A opacities." Director's Exhibit 11 at 20. She later explained her checkmark in Section 2C was a clerical error and the x-ray was consistent with Category A opacities. Claimant's Exhibit 2 at 7, 16-17.

<sup>9</sup> Dr. Adcock indicated the October 31, 2018 CT scan demonstrates the presence of a pseudoplaque which would measure 2.3 centimeters as well as "at least" two other areas of pseudoplaque formation that "might measure" more than one centimeter. Employer's Exhibit 5 at 19, 21. Dr. Rosenberg likewise noted the x-ray and CT scan evidence demonstrated pseudoplaque formation. Employer's Exhibit 6.

<sup>10</sup> Dr. Adcock specifically opined pseudoplaques may be caused by coal mine dust exposure and are a form of simple pneumoconiosis, Employer's Exhibit at 35-36, whereas

both opined they do not constitute large opacities consistent with complicated pneumoconiosis. Decision and Order at 14-16; Employer's Exhibits 5 at 36; 6; 10 at 3. Dr. Adcock explained pseudoplaques do not constitute complicated pneumoconiosis because they are not "masses" that progress into the parenchyma of the lung but are rather "sheaths" of coalescent small opacities consistent with simple pneumoconiosis. Dr. Rosenberg likewise agreed pseudoplaques constitute a "coalescence of nodules along the pleural surface," but opined pseudoplaques are not consistent with complicated pneumoconiosis, explaining "[c]lassically, large opacities have been described as nodular densities that are surrounded by lung tissue." Employer's Exhibit 6 at 3. He thus diagnosed "advanced" simple pneumoconiosis. *Id.*

The ALJ afforded Dr. DePonte's opinion "substantial weight," concluding she convincingly explained that the pseudoplaques identified on the x-ray and CT scan evidence constitute complicated pneumoconiosis. Decision and Order at 12-13. In contrast, he found Drs. Adcock's and Rosenberg's opinions that pseudoplaques do not constitute complicated pneumoconiosis to be unpersuasive, as the regulations do not place limits on the shape or location of the large opacity associated with a chronic dust disease. Decision and Order at 14-16. Thus, because Drs. DePonte, Adcock, and Rosenberg agree that the CT scan evidence documents the presence of pseudoplaques measuring at least one centimeter, the ALJ found the CT scan and medical opinion evidence supports a finding of complicated pneumoconiosis. *Id.* at 10, 16.

Employer generally argues the ALJ's analysis of Dr. DePonte's, Adcock's, and Rosenberg's opinions is not supported by the overall record and is inconsistent with applicable law. Employer's Brief at 10-13. Although Employer recounts Drs. Adcock's and Rosenberg's explanations for their opinions that pseudoplaques do not constitute large opacities consistent with complicated pneumoconiosis, *id.* at 11-13, it has not set forth any specific allegation of error in the ALJ's credibility determinations.<sup>11</sup> See *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 109 (1983); 20 C.F.R. §802.211(b). At best, Employer's arguments amount to a request to reweigh the evidence, which the Board may not do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Therefore, we affirm the ALJ's findings that the CT scan and medical opinion

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Dr. Rosenberg did not address whether there may be a relationship between pseudoplaques and coal mine dust exposure. Employer's Exhibit 6.

<sup>11</sup> We affirm, as unchallenged, the ALJ's finding that Dr. Green's opinion does not weigh against a finding of complicated pneumoconiosis. See *Skrack*, 7 BLR at 1-711; Decision and Order at 11.

evidence support a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 10, 16.

As Employer raises no further challenge to the ALJ's determination that Claimant established complicated pneumoconiosis, we affirm it, and therefore affirm his conclusions that Claimant established a change in an applicable condition of entitlement and invoked the irrebuttable presumption at Section 411(c)(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.304, 725.309; Decision and Order at 16-17. We further affirm, as unchallenged on appeal, the ALJ's determination that Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack*, 6 BLR at 1-711; Decision and Order at 17.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge