**U.S. Department of Labor**

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

BRB Nos. 23-0228 BLA
and 23-0229 BLA

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| GLADYS HOWELL<br>(o/b/o and Widow of CORBETT HOWELL)<br><br>Claimant-Respondent<br><br>v.<br><br>CBL MINING, LLC<br><br>and<br><br>KENTUCKY EMPLOYERS' MUTUAL INSURANCE<br><br>Employer/Carrier-Petitioners<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 11/15/2023<br><br>DECISION and ORDER |

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

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

W. Barry Lewis (Lewis and Lewis Law Offices), Hazard, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2021-BLA-05469 and 2021-BLA-05471) rendered on claims filed pursuant the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on December 19, 2018,[1] and a survivor's claim filed on October 9, 2020.[2]

The ALJ found Claimant established the Miner had complicated pneumoconiosis and therefore 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 established the Miner's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits in the miner's claim. 20 C.F.R. §718.203. In addition, he determined that because the Miner was entitled to benefits at the time of his death, Claimant is automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[3]

On appeal, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis. Claimant responds in support of the award of benefits. The

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 A withdrawn claim is considered not to have been filed.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

[2] Claimant is the widow of the Miner, who died on September 19, 2020, while his claim was pending before the ALJ. Survivor's Claim (SC) Director's Exhibits 1, 2. She is pursuing the miner's claim on her husband's estate's behalf and her survivor's claim. *Howell v. CBL Mining LLC*, Case Nos. 2021-BLA-05469 and 2021-BLA-05471 (July 16, 2021) (Order) (unpub.); SC Director's Exhibit 1. Employer's appeal in the miner's claim was assigned BRB No. 23-0228 BLA, and its appeal in the survivor's claim was assigned BRB No. 23-0229 BLA. The Benefits Review Board has consolidated these appeals for purposes of decision only. *Howell v. CBL Mining LLC*, BRB Nos. 23-0229 BLA and 23-0229 BLA (Apr. 18, 2023) (Order) (unpub.).

[3] Section 422(*l*) of the Act provides that the 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 that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer filed a reply brief to Claimant's response, reiterating its contentions.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

**Invocation of the Section 411(c)(3) Presumption**

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner was totally disabled due to pneumoconiosis if he suffered 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). 30 U.S.C. §921(c)(3); *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. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found the autopsy, computed tomography (CT) scan, and medical opinion evidence supports a finding of complicated pneumoconiosis; the x-ray evidence does not support a finding of complicated pneumoconiosis; and the biopsy and the Miner's medical treatment record evidence neither proves nor disproves the existence of the disease. 20 C.F.R. §718.304(a)-(c); Decision and Order at 8, 11-13, 16, 20. Weighing all the evidence together, he concluded Claimant established complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 20-21.

[4] 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); MC Director's Exhibits 5, 7, 8; Hearing Tr. at 18, 26.

**20 C.F.R. §718.304(b) – Autopsy Reports**

The ALJ considered the autopsy reports of Drs. Schneider and Roggli. Decision and Order at 13-16. Dr. Schneider opined the Miner had progressive massive fibrosis,[5] while Dr. Roggli opined he did not. Miner's Claim (MC) Claimant's Exhibit 4 at 3; MC Employer's Exhibit 11 at 15, 17, 19. The ALJ found Dr. Schneider's opinion well-documented, well-reasoned and entitled to probative weight, and Dr. Roggli's contrary opinion not well-documented or well-reasoned. Decision and Order at 14, 16. He thus found the autopsy evidence supports a finding that the Miner had complicated pneumoconiosis based on Dr. Schneider's opinion. *Id*.

As Employer does not challenge the ALJ's finding that Dr. Schneider's opinion is well-documented, well-reasoned, and entitled to probative weight, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14, 16; MC Claimant's Exhibit 4.

We initially reject Employer's argument that the ALJ erred in considering Dr. Roggli's report only as a medical report at 20 C.F.R. §718.304(c) as opposed to considering it in conjunction with Dr. Schneider's autopsy report at 20 C.F.R. §718.304(b). Employer's Brief at 21-22. In its Black Lung Benefits Act (BLBA) Evidence Summary form, Employer designated Dr. Roggli's report and deposition testimony as autopsy evidence, and not as medical opinion evidence. MC Employer's BLBA Evidence Summary Form at 5-6; MC Employer's Exhibits 5, 11; *see* 20 C.F.R. §725.414(a). Contrary to Employer's argument, the ALJ did not consider Dr. Roggli's report as part of the medical opinion evidence under 20 C.F.R. §718.304(c). Rather, he rationally considered, discussed, and rendered credibility determinations for Dr. Roggli's opinion only as part of the autopsy evidence under 20 C.F.R. §718.304(b). Decision and Order at 13-16.

We also reject Employer's argument that the ALJ provided invalid reasons for finding Dr. Roggli's opinion not credible. Employer's Brief at 18-19; Decision and Order at 16.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held autopsy evidence can establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(b) if it shows massive lesions or, alternatively, if a physician opines there are lesions on autopsy that, if seen on an x-ray, would appear as greater than one centimeter in diameter. *Gray*, 176 F.3d at 390. A diagnosis of progressive

[5] Dr. Schneider noted "several black nodules along the periphery (up to 1.7 [centimeters] in greatest dimension)" and that "[t]he largest is located in the mid lobe." MC Claimant's Exhibit 4 at 3.

massive fibrosis is equivalent to a diagnosis of "massive lesions" resulting from pneumoconiosis under 20 C.F.R. §718.304(b). *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976) ("Complicated pneumoconiosis . . . involves progressive massive fibrosis as a complex reaction to dust and other factors . . . ."); *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365 n.4 (4th Cir. 2006) (autopsy report diagnosing "[c]oal worker type pneumoconiosis, complicated type, with progressive massive fibrosis" is sufficient to invoke the presumption pursuant to 20 C.F.R. §718.304(b)).

Dr. Roggli stated he observed histologic findings typical for simple coal workers' pneumoconiosis, including "coal dust macules, micronodules, and macronodules up to 1.5 [centimeters] in maximum dimension." MC Employer's Exhibit 5 at 3. He testified a "massive fibrosis is a more irregularly shaped area of scarring" that usually occurs bilaterally "in the upper to mid lung zones" and "is at least two centimeters in size pathologically" based on the medical literature he co-authored. MC Employer's Exhibit 11 at 12. In addition, he testified he did not know "for sure" whether the macronodule that measured up to 1.5 centimeters on pathology would be equivalent to a one centimeter in diameter opacity on x-ray, "but it could be." *Id*. at 17, 20. He thus opined the Miner did not have complicated coal workers' pneumoconiosis, a massive lesion, or progressive massive fibrosis. MC Employer's Exhibit 11 at 11, 13-15, 17.

The ALJ noted the Department of Labor (DOL) "declined to adopt the view that a [two-centimeter] lesion on autopsy or biopsy is a prerequisite for a diagnosis of complicated pneumoconiosis." Decision and Order at 16. He permissibly found Dr. Roggli's opinion unpersuasive because he relied on the masses or nodules to measure at least two centimeters[6] in diameter – a standard that is not set forth in the regulations. *See*

[6] Employer argues the ALJ erred in relying on "inches" as opposed to "centimeters" in weighing the autopsy opinions. Employer's Brief at 19. The ALJ stated "Dr. Roggli based his opinion on a standard that has been rejected by the Department of Labor – that a massive lesion of pneumoconiosis must be at least two inches to be classified as such, a requirement that is not supported by the case law or the regulations." Decision and Order at 16. As Employer notes, Dr. Roggli found macronodules measuring up to 1.5 centimeters in maximum dimension. Employer's Brief at 18. Immediately before and after the sentence in which the ALJ referred to inches, he referred to centimeters regarding the measurement of nodules and lesions that Dr. Roggli identified on pathology. Decision and Order at 16. He also noted in the prior paragraphs of his decision that Dr. Roggli measured nodules and lesions that he identified on pathology in centimeters. *Id*. at 14-16. Therefore, the context of the ALJ's analysis makes clear that his misstatement of "inches" instead of "centimeters" was a "scrivener's error." *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

*Pittsburg & Midway Coal Mining Co. v. Director, OWCP* [*Cornelius*], 508 F.3d 975, 986 (11th Cir. 2007); *see also* 65 Fed. Reg. 79,920, 79,936 (Dec. 20, 2000) (declining to adopt diagnostic criteria requiring a lesion of 2.0 [centimeters] for a diagnosis of complicated pneumoconiosis because "the record does not substantiate the existence of a consensus among physicians for making diagnoses using these criteria"). Further, he permissibly found that Dr. Roggli did not adequately explain why he could not determine whether the 1.5-centimeter nodule he identified on pathology would appear as one centimeter or more on an x-ray. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 16.

We further reject Employer's argument that the ALJ erred in finding Dr. Roggli failed to explain the inconsistency between his autopsy report and Dr. Schneider's autopsy report. Employer's Brief at 20. The ALJ specifically stated the "two independent reasons" he provided for finding Dr. Roggli's opinion "unpersuasive and not well-documented or well-reasoned" are: 1) the doctor based his opinion on a standard the DOL has rejected; and 2) the doctor did not adequately explain why he could not determine whether the 1.5-centimeter nodule he identified on the autopsy slides would appear as an opacity measuring greater than one centimeter in diameter on an x-ray. Decision and Order at 16; *see Napier*, 301 F.3d at 712-14; *Crisp*, 866 F.2d at 185. Contrary to Employer's argument, he did not provide any other reason to discredit Dr. Roggli's opinion. As substantial evidence supports the ALJ's credibility determinations, we affirm his finding that the autopsy evidence supports a finding that the Miner had complicated pneumoconiosis. 20 C.F.R. §718.305(b); Decision and Order at 16.

**20 C.F.R. §718.304(c) – CT Scans**

The ALJ considered nine interpretations of three treatment record CT scans dated March 27, 2017, February 26, 2019, and May 10, 2019. Decision and Order at 8-11; MC Claimant's Exhibit 5; MC Employer's Exhibits 4, 7, 8. Dr. Buck read the March 27, 2017 CT scan as revealing a "stellate nodule" in the periphery of the "right lower lung field" that "measures 1.8 x 1 [centimeter]" and "[three] additional smaller ones[,] two [of] which are pleural based," which can be seen in the right lower lung field" and are "suspicious for neoplastic process." MC Claimant's Exhibits 6 at 6-7; 7 at 6. He also read the February 26, 2019 CT scan as showing "[m]ultiple small noncalcified bilateral pleural-based nodules" and a "large" pleural-based nodule "[m]easuring [two centimeters]" in the "right mid lung." MC Claimant's Exhibits 6 at 4; 7 at 4. Dr. Harper read the May 10, 2019 CT scan as revealing multiple "predominantly" pleural-based pulmonary nodules in both lungs, with the largest being at the periphery of the right upper lobe, and "[s]table underlying interstitial disease/fibrosis." MC Claimant's Exhibit 8 at 5.

In addition, Dr. Crum read the March 27, 2017 and February 26, 2019 CT scans as positive for complicated pneumoconiosis,[7] while Dr. Simone read them as negative for the disease. MC Claimant's Exhibit 5 at 2; MC Employer's Exhibits 4 at 3-4; 7 at 3. Further, Dr. Crum read the May 10, 2019 CT scan as positive for complicated pneumoconiosis, while Dr. Kendall read it as negative for the disease. MC Claimant's Exhibit 5 at 2; MC Employer's Exhibit 8 at 3. The ALJ found Dr. Crum's interpretations persuasive and entitled to probative weight and Drs. Kendall's and Simone's interpretations unpersuasive and entitled to "little" weight. Decision and Order at 11. Further, he found that Drs. Buck's and Harper's interpretations do not establish either the presence or absence of complicated pneumoconiosis. *Id*. He thus concluded the CT scan evidence supports a finding of complicated pneumoconiosis based on Dr. Crum's interpretations. *Id*.

Employer does not challenge the ALJ's finding that Dr. Crum's interpretations of the March 27, 2017, February 26, 2019, and May 10, 2019 CT scans are persuasive and entitled to probative weight. Decision and Order at 10; MC Claimant's Exhibit 5 at 1-2. Thus, we affirm this finding. *Skrack*, 6 BLR at 1-711.

We initially reject Employer's assertion that the ALJ erred in failing to consider the physicians' radiological credentials in rendering his findings. Employer's Brief at 26. Contrary to Employer's argument, the ALJ correctly noted that Drs. Crum, Kendall, and Simone are "[B]oard-certified radiologist[s]." Decision and Order at 10-11. He also noted Dr. Buck is a "treating radiologist" and Dr. Harper is a "treating physician." *Id.* at 9. Although he did not state that Drs. Crum, Kendall, and Simone are also B readers during his weighing of the CT scan evidence, he did note that they are dually qualified as B readers and Board-certified radiologists during his weighing of the x-ray evidence. *Id*. at 6-7, 9-11. Because they are equally qualified radiologists, any error the ALJ made in failing to specifically note that they are B readers during his weighing of the CT scan evidence is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

We also reject Employer's argument that the ALJ erred in discrediting Dr. Kendall's "negative CT scan interpretation for complicated pneumoconiosis" because the doctor "identified simple pneumoconiosis on Claimant's x-rays, which is fully supported by the ALJ's own finding that the x-ray evidence showed only at best simple pneumoconiosis." Employer's Brief at 25. Contrary to Employer's

[7] Dr. Crum noted findings "consistent with Category B complicated pneumoconiosis or progressive massive fibrosis." MC Claimant's Exhibit 5 at 2.

argument, the ALJ properly considered the x-ray interpretations under 20 C.F.R. §718.304(a) and the CT scan interpretations under 20 C.F.R. §718.304(c). The issues of simple pneumoconiosis and complicated pneumoconiosis must be considered separately, and a finding that medical evidence is credible on one issue does not necessarily indicate that the evidence is credible on a separate issue. *See Luketich v. Director, OWCP*, 8 BLR 1-477, 1-480 n.3 (1986).

Employer's general argument that the ALJ erred in discrediting the CT scan interpretations of Drs. Kendall and Simone amounts 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); Employer's Brief at 23-24. As Employer raises no further arguments, we affirm the ALJ's finding that the CT scan evidence supports a finding that the Miner had complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 11.

**20 C.F.R. §718.304(c) – Medical Opinions**

The ALJ next considered the medical opinions of Drs. Dahhan, Green, Jarboe, Raj, and Sood. Decision and Order at 16-20. Drs. Raj and Sood opined the Miner had complicated pneumoconiosis, while Drs. Dahhan, Green, and Jarboe opined he did not. MC Director's Exhibit 20 at 2-5; MC Claimant's Exhibits 2 at 7; 3 at 14-16; MC Employer's Exhibits 2 at 7; 6 at 6; 12 at 33, 42; 13 at 11-12. The ALJ found the opinions of Drs. Dahhan, Green, Jarboe, and Raj entitled to "little" weight. Decision and Order at 17-20. Further, he found Dr. Sood's opinion well-reasoned, well-documented, and entitled to probative weight. *Id.* at 18-20. He thus concluded the medical opinion evidence supports a finding that the Miner had complicated pneumoconiosis based on Dr. Sood's opinion. *Id.* at 20.

As Employer does not challenge the ALJ's finding that Dr. Sood's opinion is well-reasoned, well-documented, and entitled to probative weight, we affirm it. *Skrack*, 6 BLR at 1-711; Decision and Order at 18, 20.

We reject Employer's argument that the ALJ provided invalid reasons for finding Drs. Dahhan's and Jarboe's opinions not credible. Employer's Brief at 22; Decision and Order at 18-20. The ALJ noted Drs. Dahhan and Jarboe reviewed the pathology findings of Drs. Schneider and Roggli and they opined the Miner did not have complicated pneumoconiosis. Decision and Order at 18-20; MC Employer's Exhibits 2 at 7; 12 at 33, 42; 13 at 11-12. He permissibly found Drs. Dahhan's and Jarboe's opinions not well-reasoned because they relied on "the mistaken belief" that a massive lesion identified on pathology must be at least two centimeters in dimension for a diagnosis of complicated

pneumoconiosis. Decision and Order at 19-20; *see Napier*, 301 F.3d at 712-14; *Crisp*, 866 F.2d at 185.

Employer's general argument that the opinions of Drs. Dahhan and Jarboe are credible amounts to a request to reweigh the evidence, which again we are not empowered to do. *Anderson*, 12 BLR at 1-113; Employer's Brief at 20-22. Because Employer raises no further challenges, we affirm the ALJ's finding that the medical opinion evidence supports a finding that the Miner had complicated pneumoconiosis based on Dr. Sood's opinion. 20 C.F.R. §718.304(c).

As it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established that the Miner had complicated pneumoconiosis based on the evidence as a whole. Decision and Order at 20-21; *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005). We also affirm, as unchallenged, the ALJ's finding that the Miner'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 21. Consequently, we affirm the ALJ's finding that Claimant invoked the irrebuttable presumption of totaldisability due to pneumoconiosis. 20 C.F.R. §718.304. We therefore affirm the award of benefits in the miner's claim.

**Survivor's Claim**

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 the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 22.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge