U.S. Department of Labor

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

BRB No. 20-0380 BLA

JULIUS L. MILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEA "B" MINING COMPANY	)	DATE ISSUED: 09/15/2021
	)	
Employer-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul R. Almanza, Associate Chief Administrative Law Judge, United States Department of Labor.

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

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer and its Carrier.

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

BOGGS, Chief Administrative Appeals Judge:

Employer appeals Associate Chief Administrative Law Judge (ALJ) Paul R. Almanza's Decision and Order Awarding Benefits (2016-BLA-05792) rendered on a subsequent claim filed on June 19, 2015, pursuant to the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2018) (Act).[1] The ALJ credited Claimant with thirty-one years of underground coal mine employment and found he has complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and establishing a change in an applicable condition of entitlement. 20 C.F.R. §§718.304, 725.309(c). He further found Claimant's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203(b).

On appeal, Employer contends the ALJ erred in finding the evidence establishes complicated pneumoconiosis.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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 Associates, Inc*., 380 U.S. 359, 361-62 (1965).

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

[1] Claimant filed three previous claims. Director's Exhibits 1-3. The district director denied his most recent claim on July 18, 2000, because he did not establish any of the elements of entitlement. Director's Exhibit 3.

[2] We affirm as unchallenged on appeal the ALJ's finding of thirty-one years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 6; Hearing Transcript at 32, 48.

whether Claimant has invoked the irrebuttable presumption, the ALJ must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The ALJ found the x-rays and medical opinions establish complicated pneumoconiosis, but the treatment records and computed tomography (CT) scans do not.[4] 20 C.F.R. §718.304(a), (c); Decision and Order at 21. Weighing all the evidence together, he concluded the evidence establishes complicated pneumoconiosis. Decision and Order at 24.

Employer argues the ALJ erred in weighing the x-ray evidence. 20 C.F.R. §718.304(a); Employer's Brief at 4-7. The ALJ weighed twelve interpretations of five x-rays dated July 11, 2015, February 4, 2016, May 19, 2017, May 31, 2017, and June 17, 2017. Decision and Order at 5-9, 19-21. He noted all the physicians who read these x-rays are dually qualified as B readers and Board-certified radiologists. *Id*. at 21. He found Drs. Crum and Alexander read the July 11, 2015 x-ray as positive for complicated pneumoconiosis, Category A, whereas Dr. Wolfe read it as negative for the disease.[5] Director's Exhibits 15, 19, 25. Because a greater number of dually-qualified radiologists read the July 11, 2015 x-ray as positive for complicated pneumoconiosis than read it as negative, the ALJ found this x-ray establishes complicated pneumoconiosis.[6] *Id*. at 19-21.

We agree with Employer's argument that the ALJ erred in resolving a conflict regarding the July 11, 2015 x-ray. Employer's Brief at 4-7. Before the ALJ, Employer

[4] The record contains no biopsy evidence to satisfy the requirements at 20 C.F.R. §718.304(b).

[5] Dr. Gaziano reviewed the July 11, 2015 x-ray only to assess its quality. Director's Exhibit 16.

[6] Dr. Crum also identified a Category A opacity of complicated pneumoconiosis on each of the x-rays taken on February 4, 2016, May 19, 2017, May 31, 2017, and June 17, 2017. Claimant's Exhibit 2-5. Dr. Wolfe, however, read the February 4, 2016 x-ray as negative for complicated pneumoconiosis, and Dr. Adcock read each of the x-rays taken on May 19, 2017, May 31, 2017, and June 17, 2017, as negative for the disease. Director's Exhibit 26 at 35; Employer's Exhibits 8-1. The ALJ found the readings of the February 4, 2016, May 19, 2017, May 31, 2017, and June 17, 2017 x-rays in equipoise because an equal number of dually-qualified radiologists read each x-ray as positive and negative for complicated pneumoconiosis. Decision and Order at 19-21.

argued that the positive readings by Drs. Crum and Alexander are equivocal in light of the additional comments they provided in the narrative portions of their ILO-forms. Decision and Order at 19-20, *citing* Employer's Brief at 5.

Specifically, Dr. Crum checked the box for Category A complicated pneumoconiosis on the ILO-form and stated there is a "coalescence with likely [right-upper lung] 'A' opacity." Director's Exhibit 15 at 24. He remarked, however, that a chest CT scan should be "performed for confirmation/comparison." *Id*. He indicated the results should be compared to prior scans "to exclude neoplasm." *Id*. He also noted the x-ray revealed an atherosclerotic aorta, coalescence of small opacities, calcification in small pneumoconiotic opacities, enlargement of non-calcified hilar or mediastinal lymph nodes, and pleural thickening in the interlobar fissure. *Id*. Dr. Alexander also checked the box for Category A complicated pneumoconiosis on the ILO-form, but then stated "there is an [eleven millimeter] nodular density which may represent Category A complicated coal workers pneumoconiosis, lung cancer, or other disease. Further evaluation recommended." Director's Exhibit 19. He also noted this x-ray revealed atherosclerotic aorta and the presence of non-pneumoconiotic nodules. *Id*.

The ALJ found the x-ray readings by Drs. Crum and Alexander are not equivocal. Decision and Order at 19-20[7] because "both checked the box indicating that they observed a large Category A opacity consistent with complicated pneumoconiosis." Decision and Order at 19-20.

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[7] The ALJ cited the Board's unpublished decision in *J.P.L.* [*Looney*] *v. Shady Lane Coal Corp.*, BRB No. 07-0941 BLA, slip. op. at 6 (Aug. 28, 2008) to support his conclusion. In that case, the Board held that a doctor's identification of alternative diseases on an x-ray does not render his diagnosis of complicated pneumoconiosis on the same x-ray equivocal. *Id*. The doctor's "comments about ruling out associated granulomatous disease [does] not indicate that he was questioning the existence of large opacities consistent with pneumoconiosis, any more than his checking the box for cancer did." *Id.* In addition to not being precedential, the holding in *Looney* applied to comments which were construed as relating to additional conditions not whether complicated pneumoconiosis existed. *See id.* Patently, that is not the situation here. *See Melnick*, 16 BLR at 1-3 (holding an ALJ must determine and address if a physician's additional notations constitute an alternative diagnosis which undermines the credibility of the positive ILO classification or merely represent an additional diagnosis).

This was error. The narrative comments from Drs. Crum and Alexander directly relate to whether the July 11, 2015 x-ray evidences complicated pneumoconiosis. Director's Exhibits 15, 19. Dr. Crum indicated follow-up CT scan testing should be performed to verify the large opacity is related to complicated pneumoconiosis and to exclude neoplasm, Director's Exhibit 15 at 24, and Dr. Alexander stated the eleven millimeter nodule "may represent Category A complicated coal workers[']pneumoconiosis, lung cancer, or other disease. Further evaluation recommended." Director's Exhibit 19. The ALJ thus failed to consider the x-ray readings of Drs. Crum and Alexander in their entirety when crediting them. *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016); *Melnick*, 16 BLR at 1-37; *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985) (if the ALJ misconstrues relevant evidence, the case must be remanded for reevaluation of the issue to which the evidence is relevant). We therefore vacate the ALJ's finding that the x-rays establish complicated pneumoconiosis.[8] 20 C.F.R. §718.304(a); Decision and Order at 21.

In addition, the ALJ credited the medical opinions of Drs. Nader and Green because they were in accord with the preponderance of the x-ray evidence. Decision and Order at 21. He discredited the opinions of Drs. McSharry and Sargent because their findings that Claimant did not have complicated pneumoconiosis were predicated on requirements not contained in the Act. *Id.* at 22-24. Although the ALJ did not find any of the medical opinions to be particularly well-reasoned or dispositive, he gave more weight to the opinions of Drs. Nader and Green because they analyzed the issue in accordance with the definition contained in the Act and the regulations. *Id.* at 24. Because the ALJ's weighing of the x-ray evidence affected the weight he assigned the medical opinions of Drs. Nader and Green,[9] we also vacate his finding that the medical opinions establish complicated pneumoconiosis and his finding all the relevant evidence establishes complicated pneumoconiosis. 20 C.F.R. §718.304(a), (c). We further vacate his finding that Claimant

[8] The ALJ also noted "[t]he record contains several x-ray readings submitted as treatment records spanning from November 14, 2012 to October 21, 2016." Decision and Order at 6-9, 21. He found the x-rays "of limited use" as they were not interpreted in accordance with the ILO system, none of them were read for size and type of opacities found, and the qualifications of the readers were unknown. *Id.* at 21. This finding is unchallenged on appeal. *See Skrack*, 6 BLR 1-711.

[9] As noted above, the ALJ found the medical opinions of Drs. McSharry and Sargent excluding complicated pneumoconiosis unpersuasive and entitled to little weight for reasons unrelated to his weighing of the x-ray evidence. Decision and Order at 22-24. Thus, as these findings are unchallenged, we affirm them. *See Skrack*, 6 BLR at 1-711.

invoked the Section 411(c)(3) presumption, and the award of benefits. We remand for reconsideration of the issue of complicated pneumoconiosis.

The ALJ must reconsider whether the x-ray evidence establishes complicated pneumoconiosis. 20 C.F.R. §718.304(a). He should specifically consider the conflicting readings of the July 11, 2015 x-ray, including the physicians' comments, and address whether the additional comments by the physicians undermine the reliability of their interpretations. *See 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. *Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 255-56; 20 C.F.R. §718.304. He should adequately explain his credibility determinations in accordance with the Administrative Procedure Act (APA),[10] 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).

Notwithstanding whether the ALJ finds complicated pneumoconiosis established, he should address whether Claimant, alternatively, has established a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and therefore invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[11] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b)(1)(iii). If he finds Claimant has invoked the presumption, he should address whether Employer has rebutted it by establishing Claimant has neither legal nor clinical pneumoconiosis,[12] or that "no part of [his]

[10] The Administrative Procedure Act 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).

[11] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has 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.

[12] "Legal pneumoconiosis" includes any "chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate

respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur.

MELISSA LIN JONES
Administrative Appeals Judge

ROLFE, Administrative Appeals Judges, dissenting:

I respectfully dissent from my colleagues' decision to remand this case and would affirm the award of benefits for two reasons.

First, the ALJ acted in his discretion in crediting Drs. Crum's and Alexander's readings of the July 11, 2015 x-ray. The ALJ considered their qualifications, did not find any fault in their interpretations, and rejected Employer's argument that their readings were impermissibly equivocal. Decision and Order at 19-20. The ALJ thus did an appropriate qualitative and quantitative review of the relevant x-ray evidence. *See, e.g, Adkins v. Director, OWCP*, 958 F.2d 49, 52, (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22

matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

BLR 1-294, 1-300 (2003). Employer's argument that the ALJ conducted an illegitimate "head count" thus is demonstrably wrong. *Id.*

Second, contrary to the majority's holding, the ALJ satisfied the statutory requirement that all relevant evidence must be considered. 30 U.S.C. § 923(b); *Melnick Consolidation Coal Co.*, 16 BLR 1-31 (1991) (en banc). Unlike *Melnick*, the ALJ here explicitly acknowledged the additional comments, discussed them, and rationally concluded they do not alter the physicians' interpretations given the ILO form's basic, straightforward design. Decision and Order at 19-20. No more is required. *Melnick*, 16 BLR at 1-34 (remanding where doctor recommended ruling out cancer because "the record contain[ed] no evidence the [doctor's] comment *was considered* by the administrative law judge.") (emphasis added). The majority's suggestion the ALJ failed to consider the x-ray readings "in their entirety" thus is similarly simply incorrect. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc) (it is the ALJ's job to weigh evidence, draw inferences, and determine credibility; Board must not substitute its inferences).

As a threshold matter, the ALJ accurately concluded both physicians diagnosed complicated pneumoconiosis on the ILO x-ray forms. Both checked the box indicating Category A, complicated pneumoconiosis. Director's Exhibit 15 at 24; Director's Exhibit 19 at 3. That simple, direct check -- barring some sort of clear indication it was made in error -- permits an ALJ to conclude a physician read the x-ray as positive for complicated pneumoconiosis, given the design of the ILO form and the Act's statutory and regulatory requirements. 30 U.S.C. §921(c)(3); 20 C.F.R. § 718.102(d); 20 C.F.R. §718.304.[13]

After noting their diagnoses of complicated pneumoconiosis pursuant to the ILO criteria, the ALJ further stated why the physicians' additional comments recommending follow-up care and other possible diseases did not render them equivocal: in his view, they did not alter their conclusion that more likely than not the large opacity they identified was

[13] For more than fifty years, the ILO has published guidelines for the classification of chest x-rays of pneumoconiosis. The classification system seeks to codify x-ray abnormalities of pneumoconioses in a simple, reproducible manner. *See* INTERNATIONAL LABOR OFFICE, GUIDELINES FOR THE USE OF THE ILO INTERNATIONAL CLASSIFICATION OF RADIOGRAPHS OF PNEUMOCONIOSES, at 1 (2000). In claims for black lung benefits, pneumoconiosis may be established with a chest x-ray "classified as Category 1, 2, 3, A, B, or C, according to the ILO classification system[.]" 20 C.F.R. §718.102(d). Categories 1, 2, and 3 indicate simple pneumoconiosis; categories A, B, and C indicate complicated pneumoconiosis. 20 C.F.R. §718.304.

consistent with pneumoconiosis. Decision and Order at 19 ("the readings by Dr. Crum and Dr. Alexander are not equivocal by virtue of their comments that other causes of the large opacity need to be ruled out"), 20 ("all an x-ray reading can do is determine whether the opacities are consistent with pneumoconiosis or complicated pneumoconiosis and a reading finding such opacities is positive") (citation omitted).

He did not ignore the comments -- as the ALJ did in *Melnick* -- and his evaluation is precisely the type of factual judgment call ALJs are intended to make. *Clark*, 12 BLR at 1-155. Having done a qualitative review of all relevant evidence and determined the majority of the equally-qualified readers diagnosed complicated pneumoconiosis, Employer's argument that the ALJ merely counted heads fails. *Adkins*, 958 F.2d at 52.

Moreover, that my colleagues would have evaluated the comments differently (or even just more extensively) does not permit us to remand this case for him to address the same issue a second time. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n10 (4th Cir. 1999) (the duty of explanation under the APA "is not intended to be a mandate for administrative verbosity or pedantry."); *Elkins v. Sec'y of HHS*, 658 F.2d 437, 439 (6th Cir. 1981) ("If the [ALJ's] findings are supported by substantial evidence we must affirm the [ALJ's] decision, even though as triers of fact we might have arrived at a different result.").

Nor does the majority's suggestion the ALJ misapplied an unpublished case change this analysis. The majority is correct that it is only relevant to the extent it can persuade. But the majority's assertion it is patently distinguishable is inaccurate: the ALJ's reasoning is entirely consistent with it and the rationale persuasively supports the outcome here.

In *J.P.L.* [*Looney*] v. *Shady Lane Coal Corp.*, BRB No. 07-0941 BLA, (February 28, 2007), a doctor checked the box for complicated pneumoconiosis on the ILO form and then noted that he nevertheless recommended "rul[ing] out associated granulomatous disease in the upper lobes." Slip op. at 7. In the first appeal, the Board remanded because the ALJ did not discuss the comment. *Id.* In the second, it affirmed the ALJ's credibility finding the x-ray was not equivocal because the comment did not take away from the ILO diagnosis. *J.P.L.* [*Looney*] *v. Shady Lane Coal Corp.*, BRB No. 07-0941 BLA, (August 28, 2008) ("The administrative law judge considered Dr. Sargent's additional comments, as instructed by the Board, and she determined that they did not call into question Dr. Sargent's diagnosis of complicated pneumoconiosis.").

So too here. There is no meaningful distinction between the recommendation in *Looney* to rule out granulomatous disease, the recommendation to rule out cancer in *Melnick*, and Dr. Crum's recommendation to exclude neoplasm. And given Claimant's burden of proof, Dr. Alexander's statement that the opacity may represent Category A

complicated coal workers pneumoconiosis, lung cancer, or other disease is similarly indistinguishable. Claimant must establish it is more likely than not that he suffers from complicated pneumoconiosis; he does not have to establish it as a certainty. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 18 BLR 2A-1 (1994), aff'g sub nom. *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Dr. Alexander's indication that the x-ray met the ILO standards to diagnose complicated pneumoconiosis permitted the ALJ to consider the x-ray reading positive. 30 U.S.C. §921(c)(3); 20 C.F.R. § 718.102(d); 20 C.F.R. §718.304; *Clark*, 12 BLR at 1-155. That Dr. Alexander indicated it might be another disease does not necessarily alter that fact, and, having permissibly so found, it leaves nothing more for the ALJ to clarify on remand. *Id*; *Melnick*, 16 BLR at 1-34.

JONATHAN ROLFE
Administrative Appeals Judge