**U.S. Department of Labor**

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

BRB No. 23-0290 BLA

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| IRVIN NEACE | ) | |
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| v. | ) | |
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| ENTERPRISE MINING COMPANY LLC | ) | |
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| and | ) | |
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| ANR INCORPORATED, c/o CONTURA ENERGY | ) | DATE ISSUED: 08/29/2024 |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
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| 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 Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for Claimant.

Joseph D. Halbert and Jarrod R. Portwood (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2021-BLA-05498) rendered on a claim filed on December 29, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted Employer's stipulation that Claimant has forty-one years of coal mine employment. On the merits, he found Claimant 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). The ALJ further found Claimant's complicated pneumoconiosis arose out of his coal mine employment and thus awarded benefits. 20 C.F.R. §718.203(b).

On appeal, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis.[1] Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, has not filed a response.

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.[2] 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).

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

Section 411(c)(3) of the Act 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). 30 U.S.C. §921(c)(3); 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 (1991) (en banc). The ALJ found the computed tomography (CT) scan evidence supports a finding of complicated

[1] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant has forty-one years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 710, 1-711 (1983); Decision and Order at 11.

[2] We will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 14.

pneumoconiosis. 20 C.F.R. §718.304(c). Weighing the evidence together, the ALJ found Claimant established he has the disease.[3] Decision and Order at 8, 10.

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

The ALJ considered two readings of a CT scan taken on February 25, 2021.[4] Decision and Order at 6-8. Dr. Crum read the CT scan as positive for complicated pneumoconiosis, noting a 1.2-centimeter, Category A large opacity in Claimant's right lower lobe. Claimant's Exhibit 3. Dr. Tarver read the February 25, 2021 CT scan[5] as negative for clinical pneumoconiosis but noted the presence of a one-centimeter nodule, also in the right lower lobe.[6] Employer's Exhibit 6. The ALJ credited Dr. Crum's reading

[3] The ALJ found the x-ray evidence does not support a finding of simple clinical or complicated pneumoconiosis and Claimant's treatment records and the medical opinion evidence weigh neither for nor against a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(a), (c); Decision and Order at 5, 8-10. There is no pathology evidence of record. 20 C.F.R. §718.304(b).

[4] We affirm as unchallenged on appeal the ALJ's finding that CT scans are medically acceptable and relevant to establishing the presence of complicated pneumoconiosis. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.107(b); Decision and Order at 7.

[5] The ALJ references Dr. Tarver's reading of an August 4, 2021 CT scan. Decision and Order at 7. This reference appears to be a scrivener's error, as no readings of an August 4, 2021 CT scan are in the record and Dr. Tarver's interpretation of the February 25, 2021 CT scan is *dated* August 4, 2021. Employer's Exhibit 6.

[6] Employer contends the ALJ erred in not considering Dr. Adcock's interpretation of the February 25, 2021 CT scan. Employer's Brief at 9-10. The regulations at 20 C.F.R. §725.414, in conjunction with 20 C.F.R. §725.456(b)(1), set limits on the amount of specific types of medical evidence the parties can submit into the record. Medical evidence that exceeds those limitations "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1). CT scan interpretations constitute "other medical evidence" under 20 C.F.R. §718.107 and, therefore, each party is limited to one affirmative reading of each test or procedure. *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-135 (2006) (en banc); 20 C.F.R. §718.107. Employer designated both Dr. Tarver's and Dr. Adcock's readings of the February 25, 2021 CT scan as affirmative evidence. *See* Employer's Evidence Summary Form at 8. Because Employer submitted two affirmative interpretations of the February 25, 2021 CT scan, in excess of the evidentiary limitations, and it has not attempted to argue good cause for doing so, Employer's Brief at 9-10, the ALJ was within his discretion to exclude Dr. Adcock's reading of that CT scan. *See Smith*

over Dr. Tarver's reading, finding Dr. Crum's interpretation better explained given that Dr. Tarver did not provide an opinion on the etiology of the one-centimeter nodule he identified and stated that there was no mass, without explaining how the one-centimeter nodule was not a mass. Decision and Order at 7-8.

Employer contends the ALJ erred by applying a "double standard" in weighing the experts' CT scan readings and improperly shifted the burden of proof to require its expert to prove that Claimant does not have complicated pneumoconiosis. Employer's Brief at 6. It further contends that Dr. Crum's interpretation cannot be credited as it is inconsistent with the ALJ's finding that the x-ray evidence is negative for even simple clinical pneumoconiosis. *Id.* at 9. We disagree.

The record contains conflicting interpretations regarding the size and nature of the nodule seen on Claimant's February 25, 2021 CT scan. As it is within the ALJ's discretion to determine the credibility of the evidence, he permissibly reconciled the readings and accorded more weight to Dr. Crum's opinion as better explained and supported. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). As the ALJ found, Dr. Crum explained the large opacity exceeded one centimeter and was seen with a background of small nodules and other changes[7] consistent with coal mine dust exposure, thus explaining that the large opacity is consistent with complicated pneumoconiosis. Decision and Order at 7-8; Claimant's Exhibit 3. Further, the ALJ permissibly found Dr. Tarver's reading less persuasive as he identified a one centimeter nodule, yet stated there was no large mass, without explaining the distinction between the two, if any, and the etiology of the nodule.[8] *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012) (ALJ's function is to weigh the evidence, draw appropriate inferences, and determine credibility); Decision and Order at 8; Employer's Exhibit 6.

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*v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004) (evidentiary limitations set forth in the regulations are mandatory and, as such, are not subject to waiver); Decision and Order at 7, 8 n.21; Employer's Brief at 9-10.

[7] Dr. Crum stated there are "bilateral subcentimeter pulmonary nodules," primarily in the upper lobes, which is a "classic pattern" for pneumoconiosis. Claimant's Exhibit 3. He further identified "prominent mediastinal and hilar adenopathy with small punctate calcification," which he stated is a finding associated with coal mine dust exposure. *Id.*

[8] Dr. Tarver stated that there were no CT scan findings consistent with coal workers' pneumoconiosis while also identifying a one-centimeter right lower lobe nodule, which he recommended be further evaluated to assess its stability. Employer's Exhibit 6.

Employer also argues Dr. Crum's positive CT scan reading is inconsistent with the weight of the chest x-ray evidence, which the ALJ found did not establish even the presence of simple clinical pneumoconiosis. Employer's Brief at 7-9. However, the ALJ accorded greater weight to the more recent February 25, 2021 CT scan, crediting Dr. Vuskovich's opinion that the nodule seen on the CT scan reasonably could have developed after the last chest x-ray imaging taken on September 26, 2018, a finding Employer does not contest. *See Skrack v. Island Creek Coal Co.*, 6 BLR 710, 1-711 (1983); *see also Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); Decision and Order at 10; Employer's Exhibit 11 at 7. Moreover, the ALJ credited Dr. Tarver's explanation that CT scans are more sensitive than chest x-rays for "detection and characterization for pulmonary parenchymal abnormalities," and can document simple clinical and complicated pneumoconiosis not shown on x-rays. Decision and Order at 10; Employer's Exhibit 6. Thus, the ALJ permissibly found the negative x-ray evidence outweighed by the more recent and more sensitive CT scan evidence. *See Banks*, 690 F.3d at 489; *Martin*, 400 F.3d at 305; *Woodward*, 991 F.2d at 319-20; Decision and Order at 10-11.

Finally, contrary to Employer's characterization, the ALJ did not find the medical opinion evidence weighed against a finding of complicated pneumoconiosis. Rather, he accorded little weight to both medical opinions. *See* Employer's Brief at 7, 9; Decision and Order at 9-10. The ALJ accorded little weight to Dr. Vuskovich's opinion because the doctor found the CT scans were in equipoise as to the presence of complicated pneumoconiosis, contrary to the ALJ's determination that the CT scan evidence supports a finding of complicated pneumoconiosis. *Id.* He accorded little weight to Dr. Alam's opinion because the doctor did not review either CT scan interpretation. *Id.* Similarly, the ALJ did not find the radiographic evidence in Claimant's treatment records weighs against a finding of pneumoconiosis, but rather found the evidence does not specifically address pneumoconiosis and thus weighs neither for nor against it.[9] Decision and Order at 4, 6. Employer's arguments amount 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).

Thus, as it is supported by substantial evidence, we affirm the ALJ's determination that the CT scan evidence supports a finding of complicated pneumoconiosis and the evidence, when weighed together, establishes Claimant has the disease. *See Banks*, 690

[9] Employer contends in its "Statement of the Case" that the ALJ erred in finding Claimant's June 10, 2022 treatment record CT scan does not weigh against a finding of pneumoconiosis. Employer's Brief at 2-3 n.1. Even assuming Employer adequately raised this issue, we reject its argument as an ALJ is not required to find testing that is silent on the issue of pneumoconiosis to be negative for the disease. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984) (ALJ has discretion to determine the weight to accord diagnostic testing that is silent on the existence of pneumoconiosis).

F.3d at 489; *Martin*, 400 F.3d at 305; *Gray*, 176 F.3d at 388-89; Decision and Order at 10-11. Thus, we affirm the ALJ's finding that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 11. Finally, we affirm, as unchallenged on appeal, the ALJ's finding 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 11.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge