



BRB No. 24-0006 BLA

EDDIE D. FULLER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
EXCEL MINING, LLC)	DATE ISSUED: 08/28/2024
)	
and)	
)	
Self-Insured Through ALLIANCE)	
RESOURCE PARTNERS,)	
)	
Employer/Carrier-)	
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 in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

C. Phillip Wheeler, Jr. (Wheeler & Baker, PLLC), Pikeville, Kentucky, for Claimant.

Sara May (Jones & Jones Law Office, PLLC), Pikeville, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits in an Initial Claim (2021-BLA-05359) rendered on a claim filed on April 9, 2019, 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 established twenty-nine years of coal mine employment, and he found that at least fifteen years were underground. The ALJ also determined Claimant established 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) (2018); 20 C.F.R. §718.304. Further, the ALJ found Claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203(b), and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis arising out of his coal mine employment. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response.¹

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'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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

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

¹ We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-nine years of coal mine employment with at least fifteen years underground. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

² The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his last coal mine employment Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 22; Director's Exhibits 4, 5.

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). 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. Consol. Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found the more recent x-ray interpretations in equipoise and therefore found the x-ray evidence does not support a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(a).³ Decision and Order at 9. In evaluating the evidence at 20 C.F.R. §718.304(c), he found the medical opinions and Claimant’s treatment records do not support a finding of complicated pneumoconiosis. *Id.* at 12-16. However, the ALJ found the computed tomography (CT) scan evidence, and the evidence as a whole, established

³ The ALJ considered ten interpretations of four x-rays, dated June 13, 2019, August 16, 2019, May 20, 2020, and July 21, 2022. Decision and Order at 5-9. All of the interpreting physicians are dually-qualified B readers and Board-certified radiologists, except Dr. Forehand who is only a B reader. *Id.* at 7. Drs Forehand and Crum interpreted the June 13, 2019 x-ray as positive for simple and complicated pneumoconiosis while Drs. Simone and Adcock interpreted it as positive for simple pneumoconiosis and negative for complicated pneumoconiosis. Director’s Exhibits 17, 21; Claimant’s Exhibit 3; Employer’s Exhibit 3. As one dually-qualified physician and one B reader identified complicated pneumoconiosis and two dually-qualified physicians found it was negative for the disease, the ALJ determined the June 13, 2019 x-ray is positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Decision and Order at 7-8. The ALJ found the interpretations of the August 16, 2019, May 20, 2020 and July 21, 2022 x-rays positive for simple pneumoconiosis but in equipoise concerning complicated pneumoconiosis, for while all of the physicians identified small opacities consistent with simple pneumoconiosis, the same number of equally qualified physicians provided positive and negative interpretations of each x-ray. *Id.* at 8-9; Claimant’s Exhibits 1, 2, 4; Employer’s Exhibits 4, 8, 9. Giving more weight to the interpretations of the more recent May 20, 2020 and July 21, 2022 x-rays, the ALJ found the x-ray evidence “inconclusive” as to the presence or absence of complicated pneumoconiosis. Decision and Order at 9.

complicated pneumoconiosis.⁴ *Id.* at 12, 16. Employer contends the ALJ erred in finding the CT scan evidence and a weighing of the evidence as a whole established complicated pneumoconiosis. Employer’s Brief at 4-5 (unpaginated). We affirm the ALJ’s findings.

CT Scan Evidence

The ALJ considered six interpretations of three CT scans dated October 26, 2018, September 24, 2019, and July 25, 2022.⁵ Decision and Order at 10-12. He found the most recent July 25, 2022 CT scan “more probative of the Claimant’s current physical condition” because there are “almost three years” between the September 24, 2019 CT scan and the July 2022 scan. *Id.* However, he found the October 26, 2018 and September 24, 2019 CT scans are still relevant to showing the progressive nature of Claimant’s pneumoconiosis. *Id.*

Dr. Sherman provided the only reading of the October 26, 2018 CT scan. Director’s Exhibit 20. He identified “predominantly subcentimeter pulmonary nodularity scattered throughout both lungs” and indicated the nodularity had “slightly progressed” compared to a “prior examination dated” August 10, 2015. *Id.* at 16.

Drs. Matharoo, Crum, and Simone interpreted the September 24, 2019 CT scan. Director’s Exhibit 20; Claimant’s Exhibit 7; Employer’s Exhibit 5. Dr. Matharoo identified “[m]ultifocal pulmonary nodularity” with several new nodules and several nodules that have increased in size since the October 26, 2018 CT scan. Director’s Exhibit 20 at 19. He concluded that his observations “may reflect complicated coal workers’ pneumoconiosis with interval progression” but “concomitant underlying metastatic or neoplastic change cannot be excluded.” *Id.* Dr. Crum interpreted the CT scan as positive for complicated pneumoconiosis category B with “multiple bilateral large opacit[ies] within both lungs” ranging from 1.1 centimeters (cm) to 1.7 cm. Claimant’s Exhibit 7 at 2-3. Finally, Dr. Simone indicated there were no “large opacities,” but observed “a partially calcified 11 [millimeter (mm)] nodule” and “a 17 mm by 8 mm nodule in the right

⁴ While the ALJ did not make a specific finding at 20 C.F.R. §718.304(b), neither party submitted biopsy evidence and a review of the record does not reveal any. Therefore, Claimant cannot establish complicated pneumoconiosis under this subsection.

⁵ The ALJ determined, based on Dr. Simone’s statement, that CT scans are medically acceptable to demonstrate the presence or absence of pneumoconiosis. 20 C.F.R. §718.304(c); *Skrack*, 6 BLR at 1-711; Decision and Order at 10; Employer’s Exhibit 5.

upper lobe suspicious for neoplasm.” Employer’s Exhibit 5 at 3. He concluded that there was no evidence of complicated pneumoconiosis or progressive massive fibrosis. *Id.*

Dr. Crum interpreted the July 25, 2022 CT scan as positive for complicated pneumoconiosis, identifying “innumerable pulmonary nodules round and irregular in shape . . . primarily distributed within the upper and middle lungs highly consistent with pneumoconiosis” q, r, t, and u nodules under the International Labour Organization (ILO) standard for x-rays. Claimant’s Exhibit 8 at 2-3. He also identified multiple bilateral large opacities in both lungs ranging from 1.2 cm up to 2.1 cm and observed that “[t]hese multiple large opacit[ies] total well greater than 5 cm and are consistent with category B complicated pneumoconiosis.” *Id.* at 2. Dr. Simone also interpreted the July 25, 2022 CT scan and stated “[t]here is a background of rounded [q and r] opacities” consistent with simple coal workers’ pneumoconiosis but found there were no large opacities. Employer’s Exhibit 10 at 3. He identified calcified granulomas in the right middle lobe and spleen and explained this “indicate[s] exposure to granulomatous disease, such as histoplasmosis.” *Id.*

The ALJ noted that all of the physicians who provided interpretations are Board-certified radiologists and that Drs. Crum and Simone are also B-readers. Decision and Order at 10. Concerning the September 24, 2019 CT scan, the ALJ determined that while all three physicians identified multiple nodules or opacities, including large nodules measuring between 1.2 cm and 1.7 cm, each “reached different conclusions as to what the nodules revealed.” *Id.* at 11. In considering the July 25, 2022 CT scan, the ALJ gave “full probative weight” to Dr. Crum’s diagnosis of complicated pneumoconiosis because it was well-reasoned, as the doctor explained how the nodules he observed were consistent with coal workers’ pneumoconiosis and how the large nodules’ sizes are comparable to category B large opacities. *Id.* at 12. The ALJ gave less weight to Dr. Simone’s interpretation because he did not explain the inconsistency in his diagnosis of large nodules seen in the September 24, 2019 CT scan but no large nodules in the most recent scan. *Id.* In addition, the ALJ found Dr. Simone’s conclusion, that the rounded opacities he observed were due to granulomatous disease like histoplasmosis, was unpersuasive because nothing in the record supports that the Claimant has been diagnosed with histoplasmosis. *Id.*

Employer argues that because the two physicians reached contrary conclusions on the most recent CT scan, which was taken in July 2022, the CT scan evidence is, at best, in equipoise. Employer’s Brief at 4-5 (unpaginated). However, it does not challenge the ALJ’s decision to give more weight to the most recent CT scan as more probative of Claimant’s current condition. Further, it does not challenge the specific reasons the ALJ gave for crediting Dr. Crum’s interpretation of the July 25, 2022 CT scan and his discrediting of Dr. Simone’s interpretation of the same scan. Thus, we affirm the ALJ’s determination that the July 25, 2022 CT scan is positive for complicated pneumoconiosis. *Skrack*, 6 BLR at 1-711; Decision and Order at 12. Consequently, we also affirm the ALJ’s

findings that the CT scan evidence as a whole supports a finding of complicated pneumoconiosis. Decision and Order at 12.

Evidence as a Whole

We also reject Employer's argument that the ALJ failed to consider all the relevant evidence in weighing the evidence as a whole at 20 C.F.R. §718.304 by relying upon Dr. Crum's interpretation of the July 25, 2022 CT scan to find Claimant established complicated pneumoconiosis. Employer's Brief 4-5 (unpaginated). Contrary to Employer's contention, when weighing all the evidence together, the ALJ found that although the x-ray evidence was inconclusive and the medical opinion and treatment record evidence do not support a finding of complicated pneumoconiosis, the CT scan evidence supports a finding of large opacities equivalent to Category A or B large opacities. Decision and Order at 16. Employer does not raise any specific challenges to this determination, aside from its assertions concerning the ALJ's weighing of the CT scan evidence, which we have rejected. *See* Employer's Brief 4-5 (unpaginated). Consequently, we affirm the ALJ's finding that Claimant established complicated pneumoconiosis at 20 C.F.R. §718.304. *Skrack*, 6 BLR at 1-711; Decision and Order at 16.

Section 718.203(b) – Disease Causation Presumption

As the ALJ found Claimant was employed as a coal miner for twenty-nine years, he found Claimant invoked the ten-year presumption at 20 C.F.R. §718.203(b) that the Claimant's complicated pneumoconiosis arose out of his coal mine employment and further found that Employer has not offered evidence sufficient to rebut the presumption. Decision and Order at 16-17. We reject Employer's argument that the ALJ erred in finding Claimant entitled to invoke the ten-year presumption that his complicated pneumoconiosis arose out of his coal mine employment because he did not establish a totally disabling respiratory impairment. Employer's Brief at 6 (unpaginated). The regulation at 20 C.F.R. §718.203(b) provides that "[i]f a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment." Thus, contrary to Employer's assertion, there is no requirement that Claimant establish total disability to invoke this presumption.⁶ As we have affirmed the ALJ's finding that

⁶ However, even if there were such a requirement, Claimant has satisfied it by virtue of qualifying for the irrebuttable presumption at 20 C.F.R. §718.304. To the extent Employer is arguing here that Claimant does not have pneumoconiosis and therefore cannot qualify for the irrebuttable presumption at 20 CFR. §718.304, that argument is moot

Claimant had twenty-nine years of coal mine employment, we affirm the ALJ's determination that Claimant's complicated pneumoconiosis arose out of his coal mine employment. Decision and Order at 16-17.

We therefore affirm the ALJ's finding that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis.

based on our affirmance of the ALJ's complicated pneumoconiosis determination. *See* Employer's Brief at 6 (unpaginated).

In addition, Employer contends that even if the ALJ found Claimant established total disability at 20 C.F.R. §718.204(b)(2), it successfully rebutted the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), by establishing that Claimant does not have legal pneumoconiosis and that his totally disabling respiratory impairment was due to smoking and unrelated to coal dust exposure. *Id.* As Employer does not explain its argument or cite to any findings or evidence to support its contention, we decline to address its argument as inadequately briefed. *See* 20 C.F.R. §802.211(b); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986).

Accordingly, the ALJ's Decision and Order Awarding Benefits in an Initial Claim is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge