**U.S. Department of Labor**

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

BRB No. 21-0194 BLA

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| RONNIE VARNEY | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| CHEYENNE ENTERPRISE INCORPORATED | ) | |
| | ) | |
| and | ) | |
| | ) | |
| AMERICAN INTERNATIONAL SOUTH, c/o AIG[1] | ) | DATE ISSUED: 02/16/2022 |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| | ) | |
| 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 a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

[1] The administrative law judge (ALJ) identified Employer's carrier as American International South, c/o AIG, but in its brief to the Benefits Review Board, Employer identifies its carrier as the Kentucky Employers Mutual Insurance.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer.

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

Employer appeals Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits in a Subsequent Claim (2019-BLA-06356) filed on September 25, 2018, pursuant to the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2018) (Act).[2]

The ALJ credited Claimant with twenty-four 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.[3] 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 argues the ALJ erred in finding complicated pneumoconiosis.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

[2] Claimant filed one previous claim. Director's Exhibit 1. The district director denied it on July 24, 1997, because Claimant did not establish any element of entitlement. *Id*.

[3] Where 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); *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 did not establish any element of entitlement in his first claim, he had to submit new evidence establishing at least one element of entitlement in order to obtain review of his current claim on the merits. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3.

[4] We affirm, as unchallenged on appeal, the ALJ's finding of twenty-four years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

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.[5] 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 Assocs., 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 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 x-ray evidence, supported by the computed tomography (CT) scan and medical opinion evidence, establishes complicated pneumoconiosis.[6] 20 C.F.R. §718.304(a), (c); Decision and Order at 5-16. Weighing all of the evidence together, he concluded Claimant established complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 16.

Initially, we note Employer does not challenge the ALJ's finding that the CT scan and medical opinion evidence support finding complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 11-16. Thus, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer contends the ALJ erred in weighing the x-ray evidence. Employer's Brief at 4-7. The ALJ considered eleven interpretations of four x-rays dated November 14,

[5] The Board 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); Decision and Order at 3; Hearing Tr. at 36.

[6] The ALJ found the record contains no biopsy evidence. 20 C.F.R. §718.304(b); Decision and Order at 16.

2018, February 7, 2019, March 1, 2019, and March 28, 2019. 20 C.F.R. §718.304(a); Decision and Order at 5-6. He noted all of the interpreting physicians are dually-qualified as Board-certified radiologists and B readers. Decision and Order at 5-6.

Drs. DePonte and Crum each interpreted the November 14, 2018 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Adcock read it as negative for the disease. Director's Exhibits 17, 20, 25. Drs. DePonte and Crum each also interpreted the February 7, 2019 x-ray as positive for complicated pneumoconiosis, Category A, while Drs. Adcock and Siegler each read it as negative for the disease. Director's Exhibits 23, 31; Employer's Exhibit 5. Dr. Crum interpreted the March 1, 2019 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Adcock read it as negative for the disease. Director's Exhibit 24; Employer's Exhibit 2. Finally, Dr. Crum interpreted the March 28, 2019 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Kendell read it as negative for the disease. Director's Exhibit 24; Employer's Exhibit 2.

The ALJ found the interpretations of the February 7, 2019 and March 28, 2019 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 8-10. Employer does not challenge this finding. Thus, we affirm it. *Skrack*, 6 BLR at 1-711.

We reject Employer's argument the ALJ erred in finding the November 14, 2018 x-ray positive for complicated pneumoconiosis. Employer's Brief at 5-6. The ALJ properly performed both a qualitative and quantitative analysis of the conflicting x-ray readings, taking into consideration the qualifications of the physicians and stating he would assign greater weight to those physicians who are dually-qualified radiologists. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); 20 C.F.R. §718.202(a)(1); Decision and Order at 7 n.29, 8. As two of the three equally-credentialed radiologists read the November 14, 2018 x-ray as positive for complicated pneumoconiosis, the ALJ permissibly found it positive for the disease.[7] *Id*.

With respect to the March 1, 2019 x-ray, the ALJ found it positive for complicated pneumoconiosis. Decision and Order at 9-10. He specifically discredited Dr. Adcock's negative reading because he found the doctor contradicted himself by questioning the

[7] Because the ALJ provided a valid basis for resolving the conflict in the readings of the November 14, 2018 x-ray, we need not address Employer's argument that the ALJ erred in also discrediting Dr. Adcock's negative reading as "speculative." Decision and Order at 8; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 5-6.

film's quality,[8] but nonetheless excluding diagnoses of simple and complicated pneumoconiosis. Decision and Order at 9-10. We need not address Employer's argument that the ALJ erred in discrediting Dr. Adcock's negative x-ray reading on this basis. Employer's Brief at 6-7. As discussed above, the ALJ indicated he would assign greater weight to those physicians who are dually-qualified radiologists. *See Staton*, 65 F.3d at 59; *Woodward*, 991 F.2d at 321; Decision and Order at 7 n.29. Thus, even if the ALJ had not discredited Dr. Adcock's x-ray reading, his and Dr. Crum's readings of the March 1, 2019 x-ray would, at best, be in equipoise because an equal number of dually-qualified radiologists read it as positive and negative for complicated pneumoconiosis. Director's Exhibit 24; Employer's Exhibit 2. Because the ALJ found the November 14, 2018 x-ray positive for complicated pneumoconiosis, if the readings of the remaining x-rays were in equipoise, the result would remain that the x-ray evidence is positive under the permissible overall methodology the ALJ used in considering the x-rays in totality. Thus, any error in resolving the conflicting readings of March 1, 2019 x-ray is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Consequently, we affirm the ALJ's permissible finding that the x-ray evidence establishes complicated pneumoconiosis. *See Staton*, 65 F.3d at 59; *Woodward*, 991 F.2d at 321; 20 C.F.R. §718.304(a); Decision and Order at 7-10.

The ALJ further concluded the new claim evidence establishes a change in an applicable condition of entitlement. 20 C.F.R. §725.309; Decision and Order at 16. He also concluded the new evidence better reflects Claimant's current condition, and therefore did not further consider the past claim's evidence.[9] Decision and Order at 16-17. In conclusion, after considering all relevant evidence, he determined Claimant met his burden of establishing complicated pneumoconiosis and entitlement to the irrebutable presumption of total disability due to pneumoconiosis. *Id.*

As Employer raises no further challenge to the ALJ's finding of complicated pneumoconiosis, we affirm his determination that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. We further affirm, as unchallenged on appeal, the ALJ's finding that Claimant's

[8] The ALJ noted Dr. Adcock graded the x-ray film "quality as a '3,' with a notation that there was 'mottle' and 'scapular overlay' on the image," and commented that "'[a]ssessment for small opacities is compromised due to mottle.'" Decision and Order at 9, *quoting* Employer's Exhibit 2.

[9] These findings and conclusions are unchallenged by Employer. *Skrack*, 6 BLR at 1-711.

complicated pneumoconiosis arose out of his coal mine employment. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.203(b); Decision and Order at 16-17.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge