U.S. Department of Labor

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

BRB Nos. 22-0433 BLA
and 22-0433 BLA-A

DEBORAH HALSTEAD (Executrix of the Estate of MAXINE HUDSON, Widow of CHARLES HUDSON)	)	
Claimant-Petitioner Cross-Respondent	)	
v.	)	
PEABODY COAL COMPANY, LLC	)	DATE ISSUED: 04/29/2024
and	)	
PEABODY INVESTMENTS, INCORPORATED	)	
Employer/Carrier- Respondents Cross-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Modification of Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

H. Brett Stonecipher (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

Kathleen H. Kim (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

GRESH, Chief Administrative Appeals Judge, and BOGGS, Administrative Appeals Judge:

Claimant[1] appeals, and Employer and its Carrier (Employer) cross-appeal, Administrative Law Judge (ALJ) Patricia J. Daum's Decision and Order Denying Modification (2018-BLA-05008) rendered on a survivor's claim[2] filed on July 10, 2008, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for a third time.[3]

In the second appeal, the Board affirmed ALJ Richard A. Morgan's Decision and Order Denying Benefits on Remand.[4] Claimant thereafter twice sought modification of

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[1] Following the miner's death on June 2, 2008, his widow Maxine Hudson filed the instant survivor's claim. Director's Exhibit 2. Mrs. Hudson died on March 17, 2014, and Deborah Halstead, executrix of her estate, was substituted as Claimant. Director's Exhibits 83, 98.

[2] 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 the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018). Claimant is not entitled to this presumption, as there was no miner's claim award. *See Hudson v. Peabody Coal Co.*, BRB No. 11-0177 BLA, slip op. at 2 n.1 (Oct. 11, 2011) (unpub.), *citing Hudson v. Peabody Coal Co*., BRB No. 05-0988 BLA (Aug. 30, 2006) (unpub.) (affirming denial of benefits in miner's claim).

[3] We incorporate by reference the procedural history as set forth in the Board's second decision in this matter. *Hudson v. Peabody Coal Co.*, BRB No. 13-0062 BLA, slip op. at 2-3 (Nov. 14, 2013) (unpub.).

[4] The Board affirmed ALJ Morgan's findings that the evidence was insufficient to establish total respiratory disability and thus that the Section 411(c)(4) presumption could not be invoked. 20 C.F.R. §§718.204(b), 718.305; *Hudson*, BRB No. 13-0062 BLA, slip

that denial. Director's Exhibits 85, 91. The district director denied Claimant's first request but granted the second request, finding a mistake in fact in ALJ Morgan's assessment of the evidence regarding complicated pneumoconiosis. Director's Exhibits 89, 106. In response, Employer requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 107. The case was assigned to ALJ Daum (the ALJ) who thereafter issued her Decision and Order Denying Modification, the subject of this appeal.

Initially, the ALJ found Employer was properly designated as the responsible operator and declined to address its arguments regarding insurer liability. As to the elements of entitlement, the ALJ indicated the only issue to be considered is whether there was a mistake in determination of fact in ALJ Morgan's finding that the Miner did not have complicated pneumoconiosis. 20 C.F.R. §725.310. She found Claimant failed to demonstrate such a mistake, and thus could not invoke the irrebuttable presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.304, 718.203(b). As the Board previously affirmed ALJ Morgan's determinations that Claimant did not invoke the Section 411(c)(4) presumption and failed to establish that the Miner's simple clinical or legal pneumoconiosis[5] substantially contributed to his death, the ALJ denied benefits.

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op. at 5-6. Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. The Board also affirmed the ALJ's finding that the weight of the evidence was insufficient to establish that the Miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Hudson*, BRB No. 13-0062 BLA, slip op. at 6.

[5] "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 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). "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 significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The parties do not contest the presence of simple clinical pneumoconiosis.

On appeal, Claimant contends the ALJ erred in finding the Miner did not have complicated pneumoconiosis and thus erred in denying modification.[6] Employer responds in support of the denial of benefits. On cross-appeal, Employer raises constitutional and due process arguments related to the appointment of district directors and the Department of Labor's regulatory process in determining the responsible operator.[7] The Director, Office of Workers' Compensation, responds to Employer's cross-appeal, urging the Board to reject its arguments.

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.[8] 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).

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial. 20 C.F.R. §725.310(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). In reviewing the record on modification, an ALJ is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see also Jessee v. Director, OWCP*, 5 F.3d 723, 724-25 (4th Cir. 1993).

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[6] Claimant does not contend the ALJ erred in declining to address the ALJ's remaining findings that the Board previously affirmed.

[7] It its brief filed May 16, 2023, Employer also raised arguments related to insurer liability. Thereafter, the Director, Office of Workers' Compensation (the Director) requested multiple extensions of time to respond, with the Board providing a final extension by order dated December 19, 2023. On December 21, 2023, Employer filed a Notice of Withdrawal of Liability Issues on Cross-Appeal, advising that it was withdrawing its liability arguments given an omnibus settlement related to these arguments. It requested that the Board address its remaining constitutional and due process arguments, with the exception of its arguments related to the ALJ's application of 20 C.F.R. §725.465 and the Director's issuance of Black Lung Benefits Act (BLBA) Bulletin 16-01.

[8] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

Section 411(c)(3) Presumption - Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner's death was 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). *See* 20 C.F.R. §718.304. In determining whether a claimant has invoked the irrebuttable presumption, the ALJ must weigh 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 Claimant failed to establish complicated pneumoconiosis by any method. 20 C.F.R. §718.304(a)-(c); Decision and Order at 41.

X-Ray Evidence - Section 718.304(a)

The ALJ considered the seven readings of four analog chest x-rays dated March 27, 2001, May 16, 2001, February 7, 2003, and July 14, 2004. Decision and Order at 11-13; Director's Exhibit 35 (Employer's Exhibits 1, 2);[9] Employer's Exhibit 1; Claimant's Exhibits 4-6, 12. The ALJ found the March 27, 2001 x-ray was negative for the presence of complicated pneumoconiosis, the May 16, 2001 x-ray was positive for complicated pneumoconiosis, and the readings of the February 7, 2003 and July 14, 2004 x-rays were in equipoise. Decision and Order at 35-36. According less weight to the May 16, 2001 x-ray and finding the readers all dually qualified as B readers and Board-certified radiologists,[10] the ALJ found the x-ray evidence insufficient to support a finding of complicated pneumoconiosis. *Id.*

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[9] Director's Exhibit 35 was apparently not included in the record when the case was returned to the Office of Administrative Law Judges. Decision and Order at 4. While Employer submitted certain portions of the exhibit, including evidence it previously submitted to ALJ Morgan, it is unclear if the entire exhibit was included. *Id.* Thus, we use a similar citation as the ALJ did to identify the exhibits contained within Director's Exhibit 35. Decision and Order at 10 n.15

[10] The parties do not contest the ALJ's findings that Drs. Adcock, Alexander, and Wheeler were equally qualified at the time of their readings based on their qualifications as B readers and Board-certified radiologists. Decision and Order at 35. Thus, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Claimant first asserts the ALJ erred in giving Dr. Wheeler's negative readings of the February 7, 2003 and July 14, 2004 x-rays equal probative weight to the readings of those x-rays by Dr. Alexander, and thus erred in finding them in equipoise. Claimant's Brief at 13. She argues the ALJ failed to recognize that Dr. Wheeler's readings, which are negative for even simple clinical pneumoconiosis, are inconsistent with the remainder of the evidence of record. *Id.* at 13-15. Claimant acknowledges that the ALJ found Dr. Wheeler's opinion that the fibrosis on the x-ray was likely due to another condition, such as histoplasmosis or tuberculosis, was not entirely unsupported given notations of treatment for tuberculosis in the Miner's treatment records. *Id.* at 13. However, she contends this finding ignores the fact that the autopsy evidence did not demonstrate such diseases. *Id.* at 13-15. We disagree.

As the ALJ indicated, Dr. Wheeler noted fibrosis on the x-rays he interpreted, but opined it was not due to pneumoconiosis, but likely due to tuberculosis or histoplasmosis. Decision and Order at 36; Director's Exhibit 35 (Employer's Exhibits 1, 2). She further noted that while the Miner's autopsy report did not mention tuberculosis or similar disease cited by Dr. Wheeler, there was at least some form of treatment for tuberculosis noted in the Miner's treatment records; thus, his opinion was not entirely unsupported, particularly given that autopsies can reveal disease not seen on x-ray and certain diseases may also mask the presence of pneumoconiosis on x-ray.[11] Decision and Order at 36, *citing Usery v. Turner Elkhorn Mining Co*, 428 U.S. 1, 32 (1976). As it is within the ALJ's discretion to determine an expert's credibility, we affirm the ALJ's findings giving Dr. Wheeler's x-ray readings equal weight to Dr. Alexander's readings on the issue of large opacities. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993) (ALJ has the exclusive power to make credibility determination and resolve inconsistencies in the evidence). We therefore affirm the ALJ's finding that the February 7, 2003 and July 14, 2004 x-ray readings are in equipoise regarding complicated pneumoconiosis. Decision and Order at 35-36.

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[11] Claimant argues Dr. Wheeler's opinion is speculative given that it was not corroborated by the record, citing to the Fourth Circuit's decision in *Westmoreland Coal Co. v. Cox*, 602 F.3d 276 (4th Cir. 2010). Claimant's Brief at 14. In *Cox*, it was undisputed that a large mass exceeding one centimeter was present in the miner's lungs, but the experts disagreed as to its etiology. 602 F.3d at 285. The court concluded it was permissible for the ALJ to find the physicians' opinions that found the mass was due to various diseases rather than coal mine dust to be speculative given that there was no support in the record for any such diseases. *Id.* at 286-87. Thus, *Cox* simply affirmed the ALJ's weighing of the evidence as within his discretion. Moreover, unlike in *Cox*, here there is a dispute as to the presence of large opacities and at least some evidence of the disease cited by Dr. Wheeler. Thus, we do not find that *Cox* requires holding that the ALJ erred in declining to find Dr. Wheeler's readings speculative.

Claimant also argues the ALJ erred in giving less weight to the May 16, 2001 x-ray, read solely by Dr. Alexander as positive for complicated pneumoconiosis. Claimant's Brief at 15; Claimant's Exhibit 5. The ALJ gave this x-ray less weight than the March 27, 2001 x-ray due to the lesser quality of the film,[12] her finding that the doctor's opinion was equivocal, and that it is unlikely that a large opacity would develop in such a short time frame. Decision and Order at 35. Claimant argues that the ALJ erred in giving the May 16, 2001 x-ray less weight because Dr. Alexander still found the film to be of sufficient quality to make a reading. Claimant's Brief at 15-16. She also contends the ALJ failed to consider that Dr. Alexander noted coalescence in the March 27, 2001 x-ray when the ALJ found the time period insufficient to progress to complicated pneumoconiosis. Claimant's Brief at 16-17; Claimant's Exhibit 12. Finally, she argues that while Dr. Alexander suggested a computed tomography (CT) scan to confirm his diagnosis of a large opacity, Dr. Alexander did so and explained it confirmed his finding of complicated pneumoconiosis in his x-ray reading. Claimant's Brief at 17.

While we agree that the ALJ erred in part[13] in giving the May 16, 2001 x-ray less weight, we find any errors harmless as Claimant has not demonstrated how according the x-ray full probative weight would change the outcome in light of our findings regarding the remaining x-rays. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Even assuming, at best, the May 16, 2001 x-ray is worthy of the same weight as the March 27, 2001 x-ray reading,[14] the two readings

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[12] Dr. Alexander classified the May 16, 2001 x-ray film as quality "2" due to too much contrast while he classified the March 27, 2001 x-ray film as quality "1." Claimant's Exhibits 5, 12; Employer's Exhibit 1. However, Dr. Adcock classified the March 27, 2001 x-ray as quality "2." Employer's Exhibit 1.

[13] We agree with Claimant that the ALJ erred in discounting Dr. Alexander's interpretation of the May 16, 2001 x-ray in part because the film quality was classified as "2." Claimant's Brief at 16. The regulations do not require that the x-ray readings be of optimal quality in order to establish the existence of pneumoconiosis, only that they be "of suitable quality for proper classification of pneumoconiosis." 20 C.F.R. §§718.102(a); *Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214, 1-1215-16 (1984). Further, while the ALJ found Dr. Alexander's statements that an "apparent 10.0 cm large opacity" was present and recommendation for a CT scan were equivocal, the ALJ did not explain this determination. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763 (4th Cir. 1999) (opinion that pneumoconiosis "could be" a complicating factor in miner's death was not equivocal); *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006) ("refusal to express a diagnosis in categorical terms is candor, not equivocation").

[14] Claimant does not argue that the May 16, 2001 x-ray should have been given greater weight than the March 27, 2001 x-ray. Nor does she challenge the ALJ's finding

would still be in equipoise. As the remaining two x-rays' readings have also been affirmed as being in equipoise, the x-ray evidence remains insufficient for Claimant to meet her burden at Section 718.304(a).[15] *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994).

Thus, we affirm the ALJ's finding that the preponderance of the x-ray evidence fails to support a finding of complicated pneumoconiosis under Section 718.304(a). Decision and Order at 36.

Autopsy Evidence - Section 718.304(b)

Dr. Cinco conducted the Miner's autopsy on June 4, 2008. Claimant's Exhibit 1. He described the Miner's lungs as having "numerous lesions of varied size oftentimes occurring in nodules and occasionally in confluent mass. The nodules (0.8 [centimeter] maximum diameter) are situated in the interstitium . . . ." *Id.* at 2. Thus, Dr. Cinco diagnosed pneumoconiosis, in the form of "macular, micro and macronodular lesions." *Id.* at 1. In his supplemental report dated April 22, 2014, Dr. Cinco reexamined the autopsy slides and concluded they showed "confluent and conglomerate micronodular fibrosis averaging 1 [centimeter] and up to 1.5 [centimeter] in width." Director's Exhibit 84 at 3. Dr. Cinco then provided an addendum, stating the lesions measured "evidently greater than 1 [centimeter]" as he had noted in his supplemental report, which may appear larger on x-ray and are thus consistent with complicated pneumoconiosis. *Id.* at 4. Dr. Oesterling also reviewed the autopsy slides, agreeing with Dr. Cinco's initial observation, finding nodules and "aggregate of macronodular change" measuring 0.8 centimeters in "greatest

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that the March 27, 2001 x-ray is positive for simple pneumoconiosis but negative for complicated pneumoconiosis and that it is worthy of "significant weight" as two dually-qualified readers agreed on the interpretation. Decision and Order at 35; Employer's Exhibit 1; Claimant's Exhibit 12. Thus, we affirm the ALJ's findings. *Skrack*, 6 BLR at 1-711.

[15] Our dissenting colleague asserts that the ALJ erred in finding the recency of the readings of two x-rays that she found neither positive nor negative for complicated pneumoconiosis undermines the probative value of an earlier x-ray she found affirmatively positive for the disease. But the ALJ did not provide the readings of the most recent x-rays more weight based on their recency, but merely noted the readings of the most recent x-rays were in equipoise, that neither support the presence or absence of complicated pneumoconiosis, regardless of the recency of the x-rays. Rather, she found the single positive x-ray was insufficient to establish complicated pneumoconiosis. Decision and Order at 36. As we note, even if the positive x-ray was given equal probative weight to the negative x-ray, the x-ray evidence would still be in equipoise as a whole. Thus, in essence, the ALJ found the readings of all the x-rays are in equipoise.

dimension." Director's Exhibit 35 (Employer's Exhibit 9) at 2. Thus, he opined that simple coal workers' pneumoconiosis was present. *Id.* at 4.

The ALJ found Dr. Cinco's opinions in his initial autopsy report and his supplemental reports to be inconsistent and his change of opinion regarding the size of the lesions he identified inadequately explained. Decision and Order at 38. Further noting his initial report was consistent with Dr. Oesterling's report, the ALJ accorded Dr. Cinco's supplemental opinions no weight. *Id*. at 38-39. She found Dr. Oesterling's opinion to be better detailed and reasoned and, finding his qualifications superior to those of Dr. Cinco, she gave Dr. Oesterling's opinion greater weight. *Id*. Thus, she found the autopsy evidence insufficient to support a finding of complicated pneumoconiosis. *Id.* at 39.

Claimant argues that the ALJ erred in discrediting Dr. Cinco's supplemental opinions. She contends the ALJ failed to consider that in Dr. Cinco's autopsy report, he addressed the maximum measurement of nodules, while in his supplemental report he identified the size of the "conglomerate" fibrosis, where the individual nodules merged together. Claimant's Brief at 20. In addition, she argues the ALJ erred in not providing Dr. Cinco's opinion greater weight given that he was the autopsy prosector. *Id.* at 23-24. We find Claimant's arguments unpersuasive.

As the ALJ found, Dr. Cinco failed to explain why he did not identify large masses exceeding one centimeter during his autopsy examination yet did so six years later based solely on a reexamination of the autopsy slides. Decision and Order at 38. Indeed, in his supplemental reports, Dr. Cinco makes no reference to his autopsy report or prior findings. Claimant's Exhibit 1. Claimant argues that in his supplemental report, Dr. Cinco was simply addressing the size of the confluent fibrosis where the nodules joined together, as opposed to only the size of the individual nodules addressed in his initial report, and the ALJ confused the issues. Claimant's Brief at 20, 23. However, Dr. Cinco does not provide such an explanation and it is not evident when comparing his opinions that he is making such a distinction, particularly given that he notes conglomerate masses in his initial autopsy report yet only provides the 0.8-centimeter measurement. Claimant's Exhibit 1.

In addition, as the ALJ found, while Dr. Cinco provided a copy of an academic discussion by another physician regarding how lesions on autopsy appear larger on x-ray, neither physician addressed whether 0.8-centimeter opacities would appear as one centimeter or larger on x-ray.[16] Decision and Order at 38; Director's Exhibit 84. Thus, we affirm the ALJ's finding that Dr. Cinco's opinions are inadequately explained and

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[16] Fourth Circuit law requires that lesions identified in an autopsy, biopsy, or by other means such as a CT scan must include a determination that such lesions would appear equivalent to or larger than one centimeter on x-ray. *See Scarbro*, 220 F.3d at 255-56.

insufficient to support a finding of complicated pneumoconiosis. Decision and Order at 38-39.

We also disagree with Claimant that the ALJ erred in finding Dr. Cinco was not entitled to additional weight given his role as the autopsy prosector. As the ALJ noted, mechanical crediting of the autopsy prosector's opinion is improper; rather, for such an opinion to be worthy of greater weight, the physician must have gained an advantage over the other physicians from the first-hand examination of the lungs and body based on the specific facts. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 191-92 (4th Cir. 2000); *Urgolites v. BethEnergy Mines, Inc.,* 17 BLR 1-20, 1-23 (1992); Decision and Order at 37. Here, the ALJ permissibly found Dr. Cinco gained no advantage from grossly examining the lungs, as his diagnosis of complicated pneumoconiosis was based on his reexamination of the autopsy slides, the same evidence Dr. Oesterling reviewed. Decision and Order at 37-38. Thus, we reject Claimant's argument that the ALJ erred in finding Dr. Cinco's supplemental opinions are insufficient to support a finding of complicated pneumoconiosis. Claimant's Brief at 23.

Finally, while Claimant alleges that Dr. Oesterling did not opine as to what size the 0.8-centimeter nodules he identified would appear as on x-ray, Claimant's Brief at 22, he did not diagnose complicated pneumoconiosis; thus, his opinion does not support Claimant's burden. *Ondecko*, 512 U.S. at 281; Director's Exhibit 35 (Employer's Exhibit 9).

As the ALJ properly evaluated the evidence and explained her findings, we affirm her determination that the autopsy evidence does not support a finding of complicated pneumoconiosis. *See Wojtowicz*, 12 BLR at 1-164.

Other Medical Evidence - Section 718.304(c)

CT Scans and Digital X-rays

The ALJ next considered the multiple interpretations of CT scans and the digital x-ray[17] as "other medical evidence." Decision and Order at 14-16, 39-40. These readings were provided by Drs. Alexander, Wheeler, Scott, and Scatarige, all of whom the ALJ noted were dually qualified as B readers and Board-certified radiologists at the time of their readings. Decision and Order at 14-16; Director's Exhibit 35 (Employer's Exhibits 3, 10, 11, 13-16); Claimant's Exhibits 2, 3. There were also readings from treating physicians,

[17] As the claim was filed prior to May 19, 2014, the revised regulations governing digital x-rays do not apply; thus, the ALJ properly admitted the digital x-ray as "other medical evidence" at 20 C.F.R. §718.107 and considered it under 20 C.F.R. §718.304(c). 79 Fed. Reg. 21,606 (Apr. 17, 2014); Decision and Order at 8.

all of whom were Board-certified radiologists. Decision and Order at 16; Director's Exhibit 10. All of the readings noted opacities; however, only some noted large masses consistent with complicated pneumoconiosis. Decision and Order at 14-16. The ALJ found that while this evidence supported a finding of simple clinical pneumoconiosis, it was insufficient to support a finding of complicated pneumoconiosis. *Id.* at 40.

Claimant raises similar arguments regarding Drs. Wheeler's, Scott's, and Scatarige's readings of the CT scans and digital x-ray as she did regarding Dr. Wheeler's x-ray readings, addressed above. She contends their opinions that the fibrosis present radiographically was likely due to diseases other than coal workers' pneumoconiosis were not supported by the record and thus should have been given no weight. Claimant's Brief at 26-29; 20 C.F.R. §718.304(c). However, the ALJ found that of the numerous interpretations spanning nearly eight years, only Dr. Alexander specifically opined there were large opacities consistent with complicated pneumoconiosis, while five other doctors – including three dually-qualified B readers and Board-certified radiologists and two Board-certified radiologists – did not.[18] Decision and Order at 39-40.

As the ALJ considered the experts' qualifications, and therefore weighed the evidence both quantitatively and qualitatively, we affirm her findings that the CT scan and digital x-ray evidence is insufficient to support a finding of complicated pneumoconiosis as supported by substantial evidence. 20 C.F.R. §718.304(c); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016) (ALJ must consider the quantity and quality of the experts' opinions); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Grizzle*, 994 F.2d at 1096; Decision and Order at 40. Claimant's arguments are 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).

Medical Opinions

The ALJ next considered medical opinions by Drs. Cohen, Zaldivar, and Rosenberg.[19] Decision and Order at 20-25, 40-41. Dr. Cohen diagnosed complicated pneumoconiosis, while Drs. Zaldivar and Rosenberg found simple clinical pneumoconiosis, but not complicated pneumoconiosis. Director's Exhibit 35 (Employer's

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[18] While Claimant argues that Dr. Cordell noted "conglomerate fibrosis," which she contends is a term used by treating radiologists to describe complicated pneumoconiosis, Claimant's Brief at 31, Dr. Cordell did not, as the ALJ found, opine as to the size of any large masses. Decision and Order at 40; Director's Exhibit 10.

[19] The ALJ also considered Dr. Pfister's treatment records. Decision and Order at 22. She noted that while Dr. Pfister diagnosed pneumoconiosis, he did not discuss whether it constituted complicated pneumoconiosis. *Id.* at 40.

Exhibits 7, 8, 17, 18); Employer's Exhibits 2, 3, 15; Claimant's Exhibits 8, 11. The ALJ credited Drs. Zaldivar's and Rosenberg's opinions as consistent with the medical evidence of record. Decision and Order at 40. Further, the ALJ found Dr. Cohen's opinion based on certain of Dr. Alexander's CT scan readings to be "problematic," as he did not address how they would be viewed on x-ray. *Id.* Consequently, the ALJ found Dr. Cohen's opinion insufficient to outweigh Drs. Zaldivar's and Rosenberg's opinions. *Id.* at 41. The ALJ thus concluded that the medical opinion evidence fails to establish the presence of complicated pneumoconiosis. *Id.*

Claimant argues the ALJ should not have given weight to Drs. Rosenberg's and Zaldivar's opinions; however, her arguments are primarily based on her contention that the ALJ erred in assessing Dr. Cinco's supplemental pathology opinion, arguments that we have rejected. Claimant's Brief at 34-35. Moreover, she appears to concede that Dr. Cohen's opinion does not weigh in favor of a finding of complicated pneumoconiosis, arguing that Dr. Cohen's opinion should not be found to establish the *absence* of complicated pneumoconiosis. *Id.* at 35.

As Claimant does not argue that Dr. Cohen's opinion is sufficient to support a finding of complicated pneumoconiosis, we affirm the ALJ's finding that the medical opinion evidence does not support a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 41.

Based on the foregoing, we affirm the ALJ's finding that Claimant failed to establish complicated pneumoconiosis and thus that Claimant has failed to establish a mistake in fact. 20 C.F.R. §§718.304, 725.310. Because we affirm the denial of benefits, we need not address the remaining issues raised in Employer's cross-appeal.

Accordingly, the ALJ's Decision and Order Denying Modification is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the denial of benefits. Because the ALJ committed several errors in finding Claimant does not have complicated pneumoconiosis, I would remand the claim for a new determination on the issue.

First, in weighing the x-ray evidence, the ALJ failed to explain why Dr. Wheeler's completely negative readings of the February 7, 2003 and July 14, 2004 x-rays are entitled to equal weight as Dr. Alexander's positive readings for both simple and complicated pneumoconiosis. As the ALJ found, the evidence overwhelmingly reveals that the Miner had at least simple clinical pneumoconiosis. The disease was present on autopsy according to Drs. Cinco and Oesterling, Dr. Adcock diagnosed the disease on x-ray, Drs. Zaldivar and Rosenberg diagnosed the disease by medical opinion, and several physicians diagnosed the disease by CT scan.

Dr. Wheeler, on the other hand, failed to accurately diagnose the disease. Yet, as Claimant alleges, the ALJ did not address whether his inability to properly identify even simple pneumoconiosis on x-ray undermined his opinion that the x-ray also does not reveal the complicated form of the disease. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016) (ALJ must consider the quantity and quality of the experts' opinions); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46 (4th Cir. 1993) (ALJ must consider all evidence relevant to the presence or absence of complicated pneumoconiosis); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

While the ALJ purported to find Dr. Wheeler's alternative diagnosis of tuberculosis "not entirely unsubstantiated" in light of past medical records showing testing and treatment for the disease, she failed to reconcile that finding with the conflicting evidence of record. Drs. Cohen and Pfister provided specific explanations as to why the Miner's treatment records do not support a diagnosis of tuberculosis; Dr. Alexander concluded, based on his review of CT scans, there is no radiographic evidence of tuberculosis; and the *ALJ herself found* that the opacities Dr. Wheeler diagnosed as tuberculosis are actually clinical pneumoconiosis. Given this evidence, and the ALJ's own acknowledgement that the Miner's treatment for tuberculosis may have been a "prophylaxis," the ALJ did not provide a rational basis to credit Dr. Wheeler's alternative diagnosis.[20] *Westmoreland Coal*

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[20] The ALJ attempts to bolster the credibility of Dr. Wheeler's misdiagnosis by citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 32 (1976) for the proposition that autopsies can reveal pneumoconiosis even if it is not visible on x-ray, and sometimes other diseases may mask pneumoconiosis from x-ray detection. Decision and Order at 36; *see supra* at 6. But the exact opposite happened in this case. The autopsy revealed that nothing was masking the pneumoconiosis Dr. Alexander observed – it was in fact pneumoconiosis, not tuberculosis as diagnosed by Dr. Wheeler.

Co. v. Cox, 602 F.3d 276, 286 (4th Cir. 2010) (ALJ rationally discredited physicians' diagnoses that were not supported by "evidence that [the miner] was suffering from any of the alternative diseases mentioned or discussed whether the tests showed any signs inconsistent with those diseases").[21]

Second, even assuming the ALJ could rationally find the February 7, 2003 and July 14, 2004 x-rays in equipoise based on Drs. Alexander's and Wheeler's conflicting interpretations, the ALJ's conclusion that those two x-rays are entitled to greater weight than the demonstrably positive May 16, 2001 x-ray is contrary to law. It is erroneous to credit equivocal/equipoise radiographic evidence over a definitively positive x-ray given the ALJ's own conclusion – and well-established case law – that such evidence neither supports nor refutes a finding of complicated pneumoconiosis. *See Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256 (4th Cir. 2000) ("inconclusive" evidence does not reduce the probative force of "x-ray evidence vividly displaying opacities exceeding one centimeter").

Stated another way, the February 7, 2003 and July 14, 2004 x-rays the ALJ found to be neither positive nor negative for complicated pneumoconiosis do not contradict the May 16, 2001 x-ray she affirmatively found positive for the disease.[22] *Ondecko*, 512 U.S.

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[21] While the majority believes *Cox* simply stands for the proposition that an ALJ has discretion to weigh the evidence as she sees fit, my colleagues ignore that Dr. Wheeler's alternative diagnosis of tuberculosis is undermined by other evidence explaining why the Miner did not have that disease, as well as the ALJ's own finding that the Miner had at least simple clinical pneumoconiosis. The ALJ's crediting of Dr. Wheeler's x-ray readings in this case is, therefore, unsupported and inconsistent with *Cox*.

[22] The Board has consistently held that x-rays found to be in equipoise neither support nor undermine a finding of simple clinical or complicated pneumoconiosis, and thus do not weigh against x-rays found to be affirmatively positive for the disease. *See, e.g.*, *Back v. Sapphire Coal Co.*, BRB No. 22-0092 BLA, 2023 WL 4683363, at *2 (June 27, 2023) (affirming finding that one positive x-ray and one in equipoise establishes complicated pneumoconiosis); *Simpson v. Unicorn Mining, Inc.*, BRB No. 22-0002 BLA, 2023 WL 4683345, at *5 (June 23, 2023) (affirming finding that one positive x-ray and three in equipoise establishes complicated pneumoconiosis); *Yates v. Paramont Contura, LLC*, BRB No. 21-0477 BLA, 2022 WL 3551989, at *3 (July 29, 2022) (holding that one positive x-ray and two in equipoise establishes complicated pneumoconiosis); *Smith v. Stillhouse Mining, LLC*, BRB No. 20-0401 BLA, 2021 WL 5769287, at *4–5 (Oct. 26, 2021) (reversing ALJ's finding of no clinical pneumoconiosis because the three x-rays in equipoise are "not contrary to the [one] positive reading of record"); *Houchins v. Clinchfield Coal Co.*, BRB No. 20-0292 BLA, 2021 WL 2036330, at *2 (Apr. 30, 2021)

at 272-73 ("equally probative" or "evenly balanced" evidence cannot preponderantly establish the fact for which it is proffered); *U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 390–91 (4th Cir. 1999) (evidence that two opposite propositions are equally possible is insufficient to establish that either proposition "more likely than not" exists); *see also Dixie Fuel Co., LLC v. Director* [*Hensley*], *OWCP*, 820 F.3d 833, 843 (6th Cir. 2016) (a finding that one x-ray is positive and four are in equipoise satisfies the claimant's burden of proving pneumoconiosis by a preponderance of the evidence).[23]

The ALJ's additional finding that the positive May 16, 2001 x-ray "is entitled to little weight" because the two equipoise x-rays are "more recent" is similarly flawed. It is irrational to credit evidence solely on the basis of recency where it shows the miner's condition may have improved. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); *Smith v. Kelly's Creek Res.*, BLR , BRB No. 21-0329 BLA, slip op. at 14 (June 23, 2023); *see also Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993). The ALJ has offered no explanation why the recency of two x-rays she found neither positive nor negative for complicated pneumoconiosis undermines the probative value of an earlier x-ray she found affirmatively positive for the disease.

The ALJ's errors in weighing the x-ray evidence necessitate that the Board remand this claim for her to reconsider all of the evidence relevant to whether the Miner had complicated pneumoconiosis. *Scarbro*, 220 F.3d at 256 (because x-rays provide the "most objective measure" of the presence of complicated pneumoconiosis, "the x-ray evidence can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be").

Finally, the Board should instruct the ALJ upon reweighing the evidence to correct additional errors in her finding that the CT scan interpretations do not support complicated pneumoconiosis. The record contains twenty readings of eleven CT scans between November 2000 to May 2008. The ALJ summarized the evidence but failed to conduct the requisite quantitative and qualitative review or resolve the conflicting interpretations of the individual CT scans. *See Addison*, 831 F.3d 244, 256-57; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012). Instead, she impermissibly counted heads by giving less weight to Dr. Alexander's various positive interpretations

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(affirming finding that one positive x-ray and four in equipoise establishes complicated pneumoconiosis).

[23] The evidence in *Hensley* also included an x-ray found to be negative, but the ALJ determined it did not undermine the finding of complicated pneumoconiosis because it was less recent than the remaining positive and equipoise evidence.

simply because, overall, five other doctors "did not find" complicated pneumoconiosis.[24] *Addison*, 831 F.3d at 256 ("When engaged in fact finding, administrative agencies may not base a decision on the numerical superiority of the same items of evidence."); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438 at 441 (4th Cir. 1997) (ALJ erred by "resolving the conflict of medical opinion solely on the basis of the number of physicians supporting the respective parties").

For these reasons, I would vacate the ALJ's denial of benefits and remand the claim for her to reweigh the evidence consistent with the law.[25]

GREG J. BUZZARD
Administrative Appeals Judge

[24] Notably, Dr. Wheeler is one of the five doctors whose CT scan readings the ALJ credited, despite having failed to accurately diagnose even simple clinical pneumoconiosis.

[25] I would reject Employer's cross-appeal arguments that the district director is an inferior officer and the regulatory structure for designating responsible operators deprived it of due process. As the Director argues, Employer frames both arguments as relating to the district director's and ALJ's adverse determinations that Employer is the responsible operator. Given that Employer has since withdrawn its challenge to the district director's and ALJ's underlying responsible operator determinations, its arguments are moot. Moreover, as the Director asserts, Peabody also forfeited its challenge to the district director's appointment by failing to raise the issue before the district director. *See Bailey v. E. Assoc. Coal Co.,* 25 BLR 1-323, 1-327-32 (2022) (en banc).