U.S. Department of Labor

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

BRB No. 23-0072 BLA

KERMIT PHILLIPS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 04/22/2024
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

Kermit Phillips, Bristol, Virginia.

Timothy W. Gresham (Penn, Stuart, & Eskridge), Abingdon, Virginia, for Employer.

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

BOGGS and JONES, Administrative Appeals Judges:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Denying Benefits (2021-BLA-05144) rendered on a claim filed on July 29, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant did not establish complicated pneumoconiosis and thus could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. She credited Claimant with 13.79 years of underground coal mine employment and thus found he also could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant failed to establish total disability, a necessary element of entitlement. 20 C.F.R. §718.204(b)(2). Therefore, she denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.

In an appeal a claimant files without representation, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

[1] On Claimant's behalf, Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the ALJ's decision, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled 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); 20 C.F.R. §718.305.

[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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 25.

Invocation of the 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 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 an opacity 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. The ALJ must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether Claimant has invoked the irrebuttable presumption. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *Eastern Associated 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).

X-Ray Evidence

The ALJ considered seven interpretations of three chest x-rays dated October 21, 2019, July 27, 2020, and July 13, 2021. Decision and Order at 7-9. She noted all of the interpreting physicians are dually-qualified B readers and Board-certified radiologists and found them equally qualified. *Id.* at 9; Director's Exhibits 17 at 21; 21 at 36, 40; 23 at 5; Claimant's Exhibits 1 at 4; 3 at 3.

Dr. DePonte interpreted the October 21, 2019 x-ray as positive for complicated pneumoconiosis, Category A, in the form of small pseudoplaques in the lung apices, while Drs. Tarver and Ramakrishnan read it as negative for the disease. Director's Exhibits 17 at 21; 23 at 3; Claimant's Exhibit 3 at 1. The ALJ found this x-ray weighed against a finding of complicated pneumoconiosis because two of the three dually-qualified physicians read it as negative for the disease. Decision and Order at 9.

Dr. Crum read the July 27, 2020 x-ray as "likely" positive for complicated pneumoconiosis, Category A, whereas Dr. Seaman read it as negative for the disease. Director's Exhibit 21 at 24; Claimant's Exhibit 1 at 1. The ALJ found that this x-ray "neither supports nor refutes a finding of complicated pneumoconiosis." Decision and Order at 9.

Drs. DePonte and Tarver interpreted the July 13, 2021 x-ray as negative for complicated pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 4 at 26. The ALJ found this x-ray weighs against a finding of complicated pneumoconiosis. Decision and Order at 9.

Because she found two x-rays weigh against a finding of complicated pneumoconiosis and the remaining x-ray neither supports nor refutes such a finding, the ALJ determined that the overall x-ray evidence does not establish complicated pneumoconiosis at 20 C.F.R. §718.304(a). Decision and Order at 9. As the ALJ performed the proper quantitative and qualitative evaluations of the conflicting readings, we affirm this finding as supported by substantial evidence. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-54 (4th Cir. 2016).

Biopsy Evidence

The ALJ correctly observed the record contains no biopsy evidence to be considered at 20 C.F.R. §718.304(b). Decision and Order at 10.

Computed Tomography (CT) Scans

The ALJ considered three CT scans, dated June 26, 2019, October 4, 2019, and June 14, 2021. Decision and Order at 10-11. She noted Dr. Seaman indicated on all three of her readings that CT scans "are more sensitive" than x-rays and "may be useful in . . . documenting the presence of complicated coal workers' pneumoconiosis when not well demonstrated on routine chest x[-]rays." Decision and Order at 10 (quoting Employer's Exhibits 2 at 1; 3 at 1; 7 at 1). She further noted Dr. DePonte indicated that the October 4, 2019 and June 14, 2021 CT scans that she read were taken to "assess Claimant for pulmonary fibrosis." *Id.* at 11 (referencing Director's Exhibit 10 at 1; Claimant's Exhibit 4 at 1). Relying on these statements, the ALJ concluded the CT scans are "medically acceptable and relevant to establishing or refuting Claimant's entitlement to benefits." *Id.*

Dr. Seaman read the June 26, 2019 CT scan as positive for simple pneumoconiosis but negative for complicated pneumoconiosis, indicating the largest nodule measured up to seven millimeters in size. Employer's Exhibit 2. As the only interpretation of this CT scan is negative, the ALJ found it does not support a finding of complicated pneumoconiosis. Decision and Order at 11.

Dr. DePonte diagnosed simple and complicated pneumoconiosis based on her reading of the October 4, 2019 CT scan, which she opined revealed an 11.5-millimeter pseudoplaque in the right lung apex, a 10.9-millimeter pseudoplaque in the upper left lung, and a 12.0-millimeter irregular opacity along the lateral chest wall of the upper right lobe, which she indicated "may be related to pneumoconiosis or other etiology." Director's Exhibit 20 at 1-2. Dr. Seaman interpreted the same CT scan as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Employer's Exhibit 3. The ALJ found these interpretations equally balanced and thus concluded they neither support nor refute a finding of complicated pneumoconiosis. Decision and Order at 11.

Dr. DePonte read the July 14, 2021 CT scan as positive for simple and complicated pneumoconiosis, indicating the scan documented a twelve-millimeter irregular peripheral opacity in the right upper lobe and pseudoplaques in the lung apices, "some of which exceed [one millimeter]." Claimant's Exhibit 4 at 1. Dr. Seaman interpreted the same CT scan as positive for simple pneumoconiosis but negative for complicated pneumoconiosis. Employer's Exhibit 7. The ALJ found these interpretations equally balanced and thus neither support nor refute a finding of complicated pneumoconiosis. Decision and Order at 12.

The ALJ determined Drs. DePonte and Seaman are equally qualified to render opinions on the CT scan evidence. *Id.* Thus, having determined "one CT scan is negative for complicated pneumoconiosis and the other two CT scans are in equipoise," she found the preponderance of the CT scan evidence does not support Claimant's burden to establish complicated pneumoconiosis. *Id.* As the ALJ performed the proper quantitative and qualitative evaluations of the conflicting readings, we affirm this finding as supported by substantial evidence. *See Addison*, 831 F.3d at 252-54.[4]

Treatment Records

The ALJ noted the Claimant's treatment records document diagnoses of complicated pneumoconiosis. Decision and Order at 12-13. Treatment notes dated July 23, 2019 from Stone Mountain Health document a diagnosis of complicated pneumoconiosis based on readings of a May 15, 2019 chest x-ray and June 26, 2019 CT scan, but the identity of the physician interpreting this imaging is not documented in the record. Claimant's Exhibit 5 at 4. A May 20, 2021 treatment note from Dr. Harris likewise diagnosed complicated pneumoconiosis based on Dr. DePonte's interpretation of the October 21, 2019 chest x-ray and the June 26, 2019 and October 4, 2019 CT scans, as well

[4] Contrary to the contention of our dissenting colleague, the ALJ determined the CT evidence did not support finding complicated pneumoconiosis by considering the differing readings of Drs. DePonte and Seaman, not the medical opinion evidence. Decision and Order at 12. Her specific determination was the following:

> Dr. Seaman and Dr. DePonte are equally qualified to render opinions on these CT scans, and I do not prefer either radiologist over the other based on qualifications. At most, one CT scan is negative for complicated pneumoconiosis and the other two CT scans are in equipoise. The preponderance of the CT evidence, therefore, does not independently support Claimant's burden to establish complicated pneumoconiosis.

Id.

as an unknown physician's reading of a May 2019 chest x-ray.[5] Claimant's Exhibit 5 at 7-8. The ALJ noted the May 2019 x-ray and Dr. DePonte's reading of the June 26, 2019 CT scan are not in the record, and the remaining imaging described in the treatment notes is the same as the imaging the ALJ considered when reviewing the x-ray and CT scan evidence, discussed above. Decision and Order at 11 n.8, 12-13. Finding the treatment records "do not provide specific new information relevant to the presence or absence of pneumoconiosis," she permissibly determined that they do not support a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(c). *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993); Decision and Order at 13.

Medical Opinion Evidence

The ALJ considered the medical opinions of Drs. Harris, Fino, and Sargent. Decision and Order at 14-17. Dr. Harris conducted the Department of Labor-sponsored complete pulmonary examination of Claimant and diagnosed complicated pneumoconiosis, which the ALJ determined was based solely on Dr. DePonte's positive interpretation of the October 21, 2019 x-ray.[6] Decision and Order at 14; Director's Exhibit 17 at 8. Drs. Fino[7] and Sargent[8] examined Claimant and reviewed additional medical

[5] Dr. Harris noted he was relying only on the imaging reports, as the x-rays and CT scans themselves were not available for him to review. Claimant's Exhibit 5 at 7.

[6] Dr. Harris indicated his diagnosis of coal workers' pneumoconiosis and progressive massive fibrosis is supported by Claimant's twenty-three years of coal mine employment and x-ray findings of "small opacities in all lung zones with 1/1 profusion and small pseudoplaques forming category A large opacities in the lung apices." Director's Exhibit 17 at 8.

[7] Dr. Fino examined Claimant on July 27, 2020, and diagnosed simple, but not complicated, pneumoconiosis after reviewing Drs. DePonte's and Tarver's readings of the October 21, 2019 x-ray and Dr. Seaman's reading of the July 27, 2020 x-ray. Director's Exhibit 21 at 5, 8, 10. Prior to his October 4, 2021 deposition, Dr. Fino reviewed additional records, including Drs. Ramakrishnan's and DePonte's readings of the October 21, 2019 x-ray, Dr. Crum's reading of the July 20, 2020 x-ray, Dr. Seaman's reading of the June 26, 2019 CT scan, and Drs. DePonte's and Seaman's readings of the October 4, 2019 and July 14, 2021 CT scans. Employer's Exhibit 5 at 9, 13-17. Although he noted Dr. DePonte diagnosed complicated pneumoconiosis in the form of pseudoplaques, Dr. Fino opined pseudoplaques are not consistent with complicated pneumoconiosis and concluded none of the imaging supported a diagnosis of complicated pneumoconiosis. *Id.* At 9-17.

[8] Dr. Sargent examined Claimant on July 13, 2021, and diagnosed simple, but not complicated, pneumoconiosis after reviewing Drs. DePonte's and Tarver's readings of the

records in concluding he did not have complicated pneumoconiosis. Director's Exhibit 21 at 10; Employer's Exhibits 4 at 2; 5 at 17-18; 6 at 15.

In considering the medical opinion evidence, the ALJ gave no weight to the opinion of Dr. Harris because it was based solely on Dr. DePonte's x-ray reading and therefore did not merit independent weight. The Board has held a medical opinion that is merely a restatement of an x-ray is not entitled to separate weight as a medical opinion. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The ALJ thus permissibly discounted the only medical opinion diagnosing complicated pneumoconiosis. Decision and Order at 14, 17. The medical opinions of Drs. Fino and Sargent, which did not find complicated pneumoconiosis, do not aid Claimant in this regard; thus, any error the ALJ made in considering their opinions is harmless. We therefore affirm her determination that the medical opinions do not support a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(c).

We further affirm, as supported by substantial evidence, the ALJ's finding that Claimant did not establish complicated pneumoconiosis based on the record as a whole. 20 C.F.R. §718.304; *see Scarbro*, 220 F.3d at 255. Consequently, we affirm the ALJ's conclusion that Claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304.

Invocation of the Section 411(c)(4) Presumption: Length of Coal Mine Employment

Because the ALJ's length of coal mine employment finding is relevant to the Section 411(c)(4) presumption, we will review her determination that Claimant worked 13.48 years in coal mine employment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mine employment or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The

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October 21, 2019 x-ray, Dr. Seaman's reading of the July 27, 2020 x-ray, Dr. Seaman's reading of the June 26, 2019 CT scan, and Drs. DePonte's and Seaman's readings of the October 4, 2019 CT scan. Employer's Exhibit 6 at 1-2, 7, 10. Prior to his October 7, 2021 deposition, Dr. Sargent reviewed additional records, including Dr. DePonte's reading of the July 27, 2020 x-ray and Drs. DePonte's and Seaman's readings of the July 14, 2021 CT scan. Employer's Exhibit 5 at 5, 32, 35-36. Although he noted Dr. DePonte diagnosed complicated pneumoconiosis in the form of pseudoplaques, Dr. Sargent opined pseudoplaques are not consistent with complicated pneumoconiosis and concluded none of the imaging supported a diagnosis of complicated pneumoconiosis. *Id.* at 10-11, 15.

Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

The ALJ considered Claimant's testimony, Social Security Administration (SSA) earnings records, and employment history form; an employment record summary form; and a separation notice and related forms from Employer. Decision and Order at 4-5; Hearing Transcript at 16-17, 23-24; Director's Exhibits 2, 3, 6-10; Employer's Exhibit 1. For Claimant's work with Employer, the ALJ relied on the beginning and end dates of employment listed in the employment record summary form,[9] as supported by the separation notice and related forms, and concluded Claimant established 8.67 years of coal mine employment between August 1978 and 1990. Decision and Order at 5 (citing Director's Exhibits 6-8; Employer's Exhibit 1).

The ALJ determined the actual dates of employment were not ascertainable for Claimant's work prior to 1978, and she thus relied solely on Claimant's SSA earnings records for that time period. Decision and Order at 5. She divided Claimant's yearly earnings from coal mine employers set forth in the SSA records by the coal mine industry's average daily earnings as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*[10] to determine the number of days Claimant worked. Decision and Order at 5. For years when Claimant worked 125 days or more, she credited him with a full year of coal mine employment. *Id.* For years where he worked less than 125 days, she divided his working days by 125 to credit him with a portion of a year. *Id.* Using this method, she found Claimant worked in coal mine employment for a total of 5.12 years. *Id.*

Because this case arises within the Fourth Circuit, the ALJ erred in failing to consider whether Claimant established a calendar year of coal mine employment prior to applying the regulatory formula, as the Board has long interpreted Fourth Circuit caselaw as supporting the position that the ALJ must first determine whether the miner was engaged

[9] The employment record summary form documents that Claimant began work for Employer on August 14, 1978, and ended on August 25, 1979, began again on July 17, 1980, and ended on May 22, 1982, began again on February 17, 1984, and ended on March 29, 1987, and began for the last time on April 13, 1988, and finally ended on December 21, 1990. Employer's Exhibit 1.

[10] Exhibit 610 to the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*, entitled "Average Wage Base," contains the average daily earnings of employees in coal mining and the earnings for those who worked 125 days during a year, and is referenced in 20 C.F.R. §725.101(a)(32)(iii).

in an employment relationship for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-35 (4th Cir. 2007) (a one-year employment relationship must be established, during which the miner had 125 working days); *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) (recognizing the 2001 amendments to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). If the threshold one-year period is met, the ALJ must then determine whether the miner worked for at least 125 working days within that one-year period.[11] 20 C.F.R. §725.101(a)(32). Proof that a miner worked at least 125 days or that a miner's earnings exceeded the industry average for 125 days of work in a given year, however, does not satisfy the requirement that such employment occurred during a 365-day period and therefore, in itself, does not establish one full year of coal mine employment as defined in the regulations. *See Clark*, 22 BLR at 1-281.

Nonetheless, the ALJ's errors are harmless and remand is not required on this basis because the ALJ's method necessarily credited Claimant with more years of coal mine employment than would have been calculated under the proper analysis. Consequently, we affirm the ALJ's finding that Claimant established fewer than fifteen years of coal mine employment and therefore is unable to invoke the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4) (2018); *Muncy*, 25 BLR at 1-27; 20 C.F.R. §718.305(b)(1)(i).

20 C.F.R. Part 718: Total Disability

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist a claimant in establishing these elements when certain conditions are met, but failure to establish any element precludes an award of benefits. *Anderson*, 12 BLR at 1-112; *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary

[11] If the threshold one-year period is met, "it must be presumed, in the absence of evidence to the contrary, that the miner spent 125 working days in such employment[,]" in which case the miner would be entitled to credit for one full year of employment. 20 C.F.R. §725.101(a)(32)(ii).

function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The ALJ found Claimant did not establish total disability by any method. 20 C.F.R. §718.204(b)(2); Decision and Order at 19-27.

Pulmonary Function Studies

The ALJ considered three pulmonary function studies, dated October 21, 2019, July 27, 2020, and June 13, 2021. Decision and Order at 19-20. She permissibly averaged the heights recorded during the administration of the pulmonary function studies to find Claimant is 71 inches tall and used the next highest height in the tables at 20 C.F.R. Part 718 Appendix B (71.3 inches), to assess whether or not a study qualifies for disability.[12] *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 114 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). She correctly noted all three studies are non-qualifying and, therefore, found Claimant did not establish total disability based on the pulmonary function study evidence. Decision and Order at 20; Director's Exhibits 17 at 9, 21 at 11; Employer's Exhibit 4 at 12.

The ALJ also considered two pulmonary function studies, dated May 15, 2018 and May 15, 2019, included in Claimant's treatment records and correctly noted neither study is qualifying. Decision and Order at 26; Director's Exhibit 23 at 33, 36. Thus, we affirm her finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i).

Arterial Blood Gas Studies

The ALJ also considered three arterial blood gas studies, dated October 21, 2019, July 27, 2020, and June 13, 2021. Decision and Order at 23. She correctly noted all three studies yielded non-qualifying values[13] and thus found Claimant did not establish total disability based on the arterial blood gas study evidence. *Id.*; Director's Exhibits 14, 18;

[12] A "qualifying" pulmonary function study yields results equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[13] A "qualifying" blood gas study yields results that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

Employer's Exhibit 8. Thus, we affirm her finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii).

Cor Pulmonale

The ALJ correctly found that there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 21. Thus, we affirm her determination that Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

Medical Opinions

The ALJ determined Claimant's usual job as a roof bolter "required him to regularly engage in heavy manual labor." Decision and Order at 6. She then considered the medical opinions of Drs. Harris, Fino, and Sargent and Claimant's treatment records as to whether Claimant is totally disabled from performing his usual coal mine work.[14] Decision and Order at 21-27.

Dr. Harris diagnosed total disability based on Claimant's symptoms of dyspnea on exertion, reduced MVV on the October 21, 2019 pulmonary function study, and his diagnosis of complicated pneumoconiosis. Director's Exhibit 17 at 8. Drs. Fino and Sargent opined Claimant's pulmonary function studies showed a mild pulmonary impairment but indicated he is not totally disabled. Director's Exhibit 21 at 7; Employer's Exhibits 4 at 1-2; 5 at 19-21; 6 at 16-21. The ALJ found Dr. Harris's opinion inadequately reasoned whereas she found Drs. Fino's and Sargent's opinions well-documented and reasoned. Decision and Order at 22-24. Thus, crediting the opinions of Drs. Fino and Sargent over the opinion of Dr. Harris, the ALJ found the preponderance of medical opinion evidence does not support a finding of total disability. *Id.* at 24.

[14] Claimant's treatment records document a history of stroke, coronary artery disease, and diagnoses of pneumoconiosis, but they do not contain any description of exertional limitations related to any pulmonary or respiratory impairment. Decision and Order at 24-27; Director's Exhibits 22, 23; Claimant's Exhibit 5. As these notes do not document exertional limitations or statements suggesting Claimant is unable to perform his usual coal mine work, the ALJ permissibly found they do not aid Claimant in satisfying his burden of proof on total disability. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); Decision and Order at 26-27.

The ALJ noted Dr. Harris's diagnosis of complicated pneumoconiosis is contrary to her finding that the evidence as a whole does not support such a diagnosis. Decision and Order at 22. She also permissibly discredited Dr. Harris's opinion because he "relied in large part on a self-reported symptom of dyspnea." Decision and Order at 24; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); Decision and Order at 24. Thus, we affirm her decision to give his opinion "reduced probative weight." Decision and Order at 24; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986).

Claimant has the burden of establishing entitlement to benefits and bears the risk of non-persuasion if the evidence is found insufficient to establish a required element of entitlement. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because we have affirmed the ALJ's discrediting of Dr. Harris's opinion and the treatment records, the only evidence supportive of Claimant's burden of proof, we affirm the ALJ's determination that Claimant is unable to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Weighing the Evidence as a Whole

Having affirmed the ALJ's findings that Claimant did not establish total disability under any of the subsections at 20 C.F.R. §718.204(b)(2)(iv), we further affirm her overall conclusion that Claimant is not totally disabled and is unable to invoke the Section 411(c)(4) presumption. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order at 30. Claimant's failure to establish total disability, an essential element of entitlement pursuant to 20 C.F.R. Part 718, also precludes an award of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GRESH, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the ALJ's Decision and Order Denying Benefits.

In considering whether the relevant medical opinion evidence established complicated pneumoconiosis, the ALJ credited the opinions of Drs. Fino and Sargent, who noted that while simple coal workers' pneumoconiosis may cause pseudoplaques, the pseudoplaques found on the x-ray and CT scan interpretations they reviewed are not equivalent to complicated pneumoconiosis, as pseudoplaques by definition in medical literature are not complicated pneumoconiosis, even though the length of pseudoplaques can be longer than one centimeter. Decision and Order at 14-18; Employer's Exhibits 5 at 17; 4 at 2, 10-11.

On the other hand, while Dr. Harris diagnosed complicated pneumoconiosis based on Dr. DePonte's interpretations of the October 21, 2019 chest x-ray *and* the June 26, 2019 and October 4, 2019 CT scans, the ALJ found the treatment records and the medical opinion of Dr. Harris, Director's Exhibit 17; Claimant's Exhibit 5 at 7-8, did not provide independent support for his finding of complicated pneumoconiosis. Decision and Order at 13-14, 17-18. Specifically, Dr. DePonte found that the CT scans and the October 2019 x-ray she read showed pseudoplaques forming an opacity exceeding one centimeter consistent with complicated pneumoconiosis. Director's Exhibits 10 at 1, 17 at 21; Claimant's Exhibit 4 at 1.

When considering the treatment records and medical opinions, the ALJ discredited Dr. DePonte's opinion, on which Dr. Harris relied, that the CT scans she interpreted showed pseudoplaques forming an opacity exceeding one centimeter consistent with complicated pneumoconiosis because she found Dr. DePonte did not explain this position in contrast to the explanation that Drs. Fino and Sargent provided (that pseudoplaques by definition in medical literature are not complicated pneumoconiosis, even though the length of pseudoplaques can be longer than one centimeter). Decision and Order at 18.[15] Specifically, despite noting that Drs. Fino and Sargent did not cite or summarize the medical literature they relied on, the ALJ declined to give their opinions reduced weight on this basis because "no contrary explanation or literature was offered in this record." *Id.* at 17, 18 ("The record

[15] The ALJ found that the CT scan evidence is in equipoise and thus neither supports nor refutes a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(b). Decision and Order at 12.

contains no contrary explanation."). Thus, the ALJ found their opinions on complicated pneumoconiosis "well-documented and well-reasoned" and gave them probative weight over the contrary opinions of Dr. DePonte and, therefore, Dr. Harris. *Id.* at 15, 17-18.

But the ALJ failed to recognize that Drs. Fino and Sargent applied a medical definition of complicated pneumoconiosis, whereas that medical definition of complicated pneumoconiosis differs from what the Act requires in order to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. As the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held, the statutory definition of the chronic dust disease of the lung for invoking the Section 411(c)(3) presumption -- commonly referred to as complicated pneumoconiosis -- "betrays no intent to incorporate a purely medical definition." *E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 257 (4th Cir. 2000). The Fourth Circuit noted in *Scarbro* that Section 411(c)(3) of the Act "does not refer to the triggering condition as 'complicated pneumoconiosis,' nor does it refer to a medical condition that doctors independently have called complicated pneumoconiosis. Rather, the presumption . . . is triggered by a congressionally defined condition, for which the statute gives no name but which, if found to be present, creates an irrebuttable presumption that disability or death was caused by pneumoconiosis." *Id.*

Thus, the relevant issue is does Claimant suffer from a chronic dust disease of the lung which when diagnosed by x-ray or "other means" would yield an opacity greater than one centimeter in diameter that would be classified as Category A, B, or C on x-ray. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Whether Claimant has a condition that satisfies a medical definition of complicated pneumoconiosis, which Drs. Fino and Sargent found he does not, is not the relevant issue and, therefore, whether the record contains any contrary explanation or medical literature regarding what satisfies a medical definition of complicated pneumoconiosis is also not relevant. Consequently, the ALJ erred in discrediting Dr. DePonte's opinion, on which Dr. Harris relied, because Dr. DePonte did not provide an explanation in contrast to the opinions of Drs. Fino and Sargent that Claimant does not have a condition that satisfies a medical definition of complicated pneumoconiosis. The issue is whether the relevant evidence, including Dr. DePonte's finding that the CT scans and x-ray she read showed pseudoplaques forming an opacity exceeding one centimeter on which Dr. Harris relied, establishes Claimant has a condition that satisfies the statutory definition of the chronic dust disease of the lung necessary for invoking the Section 411(c)(3) presumption.

Because the ALJ did not adequately explain why the opinions of Drs. Fino and Sargent, that Claimant does not have a condition that meets a medical definition of complicated pneumoconiosis, are entitled to greater weight than Dr. DePonte's opinion, on which Dr. Harris relied, as to whether Claimant has a condition that satisfies the statutory definition of the chronic dust disease of the lung necessary for invoking the Section 411(c)(3)

presumption, her determination that Claimant did not establish complicated pneumoconiosis as defined under the Act based on the medical opinion evidence does not satisfy the explanatory requirements of the Administrative Procedure Act (APA).[16] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Thus, contrary to the majority decision, the ALJ's discrediting of Dr. Harris's opinion merely because it was based on Dr. DePonte's interpretations is also not rational or adequately explained.

Consequently, I would remand the case for a proper consideration of the pertinent issue: whether the relevant medical opinion evidence establishes Claimant has a condition that satisfies the statutory definition of the chronic dust disease of the lung necessary for invoking the Section 411(c)(3) presumption. I would therefore vacate the ALJ's determinations that the medical opinions do not support a finding that Claimant has a chronic dust disease of the lung necessary for invoking the Section 411(c)(3) presumption, that Claimant did not establish the disease based on the record as a whole and therefore that he did not invoke the irrebuttable presumption of total disability due to pneumoconiosis, and remand the case for reconsideration. 20 C.F.R. §718.304; *see Scarbro*, 220 F.3d at 257. Moreover, as I would vacate the ALJ's weighing of the medical opinion evidence under 20 C.F.R. §718.304, I would also vacate the ALJ's finding that the medical opinion evidence from the same physicians does not support a finding of total disability and remand for reconsideration of that issue as well in light of his reconsideration of the medical opinion evidence under 20 C.F.R. §718.304.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

[16] 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).