U.S. Department of Labor

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

BRB No. 21-0124 BLA

BARRY L. OWENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WELLMORE ENERGY COMPANY, LLC	)	DATE ISSUED: 8/31/2022
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	
	)	
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 Denying Benefits of Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

Barry L. Owens, Vansant, Virginia.

Jason D. Gallagher (Street Law Firm, LLP), Grundy, Virginia, for Employer and its Carrier.

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

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

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Denying Benefits (2017-BLA-05870) rendered on a claim filed on October 16, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 29.41 years of coal mine employment, with at least fifteen years working in an underground coal mine. He found the evidence insufficient to establish complicated pneumoconiosis and thus Claimant 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) (2018); 20 C.F.R. §718.304. Because the ALJ also determined the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018), or affirmatively establish entitlement under 20 C.F.R. Part 718. Accordingly, the ALJ 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, declined to file a response.

When an unrepresented claimant files an appeal the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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

[2] Because Claimant performed his most recent coal mine employment in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Director's Exhibit 3; Hearing Transcript at 35.

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

Section 411(c)(3) of the Act provides an irrebuttable presumption a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. 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)*; E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found all the x-rays and CT scans inconclusive and none of the other evidence supports a finding of complicated pneumoconiosis. We vacate the ALJ's conclusion that Claimant did not invoke the irrebuttable presumption because he applied an incorrect burden of proof, failed to resolve conflicts in the evidence, and did not consider applicable law. *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Cox*, 602 F.3d at 283; *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992).

X-Ray Evidence – 20 C.F.R. §718.304(a)

The ALJ considered eleven interpretations of five x-rays. Decision and Order at 10-11. With the exception of Dr. Forehand, who is a B reader, all of the interpreting physicians are dually qualified as Board-certified radiologists and B readers. *Id*.

Dr. DePonte read the July 28, 2014 x-ray as positive for both simple pneumoconiosis (1/0) in the upper left and right lung zones and complicated pneumoconiosis, Category A large opacities. Director's Exhibit 24. She wrote in the narrative portion of the ILO form that there was "[a]t least [a] 15 mm large opacity [in the] upper lung zone and [a] 10 mm opacity [in the] upper lung zone consistent with complicated pneumoconiosis." *Id*. Dr. Wolfe interpreted the film as negative for both simple pneumoconiosis (0/1 small opacities in the upper lung zones) and complicated pneumoconiosis. Director's Exhibit 25.

Dr. DePonte read the January 15, 2015 x-ray as positive for both simple pneumoconiosis (1/1 in the upper left and right lung zones) and complicated

pneumoconiosis, Category A large opacities. Director's Exhibit 24. Dr. Adcock read the same x-ray as negative for both simple pneumoconiosis (0/1 small opacities in the upper lung zones) and complicated pneumoconiosis.[3] Director's Exhibit 18. Dr. Forehand initially interpreted this x-ray as positive for simple pneumoconiosis (1/1 in upper lung zones) and positive for Category A complicated pneumoconiosis. Director's Exhibit 15. However, after reviewing Dr. Adcock's negative interpretation, Dr. Forehand retracted his reading and opined the x-ray was negative for complicated pneumoconiosis. Director's Exhibits 20, 22.

Dr. DePonte interpreted the February 23, 2017 x-ray as positive for both simple pneumoconiosis (1/1 in the middle and upper zones of both lungs) and complicated pneumoconiosis, Category A large opacities, while Dr. Adcock read it as positive for simple pneumoconiosis (1/1 in the middle and upper lung zones of both) but negative for complicated pneumoconiosis. Claimant's Exhibit 3; Employer's Exhibit 2.

Dr. Crum read the June 29, 2017 x-ray as positive for both simple pneumoconiosis (1/1 in all lung zones of both lungs) and complicated pneumoconiosis, Category A large opacities. Claimant's Exhibit 2. He wrote on the ILO form that the findings were consistent with "progressive massive fibrosis" and recommended follow-up to "document stability." *Id.* Dr. Kendall read the same x-ray but did not complete an ILO form. In a narrative report, he described nodular densities (1/1) in the upper lung zones and a "right spiculated nodular density measuring 2 cm x 1.2 cm." Employer's Exhibit 1. Dr. Kendall further described: "Finding consistent with coal workers' pneumoconiosis. There is a nodule seen within the right upper lobe. This might represent a large A type opacity. This could alternatively represent a developing neoplasm or inflammatory process. Suggest correlation with CT scan for further evaluation." *Id.*

Dr. Alexander interpreted the August 30, 2017 x-ray as positive for Category A large opacities, "which could be due to category A complicated Coal Workers Pneumoconiosis" while Dr. Adcock read it as negative. Claimant's Exhibit 1; *see* Employer's Exhibit 3. Dr. Adcock wrote on the ILO form that there is a "[s]mall area of superolateral right lung fibrosis; minimal left upper changes of a similar nature partially obscured. Absent small opacities, favor old granulomatous disease over complicated coal worker[s'] pneumoconiosis." Employer's Exhibit 3.

[3] Dr. Adcock wrote on the ILO form that there was "bilateral upper lobe fibrosis consistent with old [tuberculosis] or pneumonia and not consistent with [coal workers' pneumoconiosis]." Director's Exhibit 18.

Because he determined each film had one positive and one negative reading by a dually-qualified radiologist,[4] the ALJ found each of the five x-rays inconclusive and that Claimant was unable to prove complicated pneumoconiosis at 20 C.F.R. §718.304(a). Decision and Order at 22.

We vacate the ALJ's finding at 20 C.F.R. §718.304(a) because it is inadequately explained. While the ALJ permissibly characterized the other x-ray readings as inconclusive given an equal number of positive and negative readings by equally qualified readers, the June 29, 2017 x-ray is different. As the ALJ recognized, Dr. Crum unequivocally read the x-ray as positive for large Category A opacities. But in contrast to the other four x-rays that had unambiguously negative readings, Dr. Kendall did not interpret this x-ray as negative, outright. Instead, he described a "spiculated nodular density" that met the size requirements for complicated pneumoconiosis, termed the x-ray "consistent with coal worker's pneumoconiosis," stated the density was either a large Category A opacity, or, alternatively, a developing neoplasm or inflammatory process, and concluded a CT scan should be conducted for further evaluation. The ALJ merely listed aspects of both readings and found the x-ray overall to be inconclusive without any discussion at all. Decision and Order at 21; *see* Claimant's Exhibit 2; Employer's Exhibit 1. The ALJ's finding thus does not comport with the Administrative Procedure Act. 5 U.S.C. §557 (C)(3)(A), incorporated into the Act by 30 U.S.C. §932(a), as it is not self-evident how he made his determination.[5]

[4] The ALJ permissibly gave Dr. Forehand's interpretation no weight because he is not a dually-qualified radiologist. *Addison*, 831 F.3d at 256-57; *Adkins*, 958 F.2d at 52; Decision and Order at 20. The ALJ also considered x-rays contained in Claimant's treatment records but permissibly found them inconclusive because none note the presence of complicated pneumoconiosis "or any other analogous terms." Decision and Order at 22; *see Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984) (ALJ may find an x-ray that is silent on the existence of pneumoconiosis inconclusive on the presence or absence of the disease); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 536 (4th Cir. 1998); Claimant's Exhibit 8.

[5] We disagree with our concurring colleague's suggestion that Dr. Kendall's interpretation supports, or at the very least does not detract from, Dr. Crum's positive interpretation, and therefore makes it "more likely than not" that the June 29, 2017 is positive for complicated pneumoconiosis. *See infra* at 11-12. Rather, this is a matter consigned to the judgment of the ALJ in his role as trier of fact. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012). Dr. Crum's reading is not entitled to any presumption of correctness. Moreover, the ALJ can credit a doctor's opinion that the evidence can be interpreted in more than one way. The ALJ, exercising reasonable discretion, determines the inferences to be drawn and the weight to be assigned,

Other Means – 20 C.F.R. §718.304(c)[6]

The ALJ also considered readings of two CT scans dated December 10, 2013 and March 31, 2014, which pre-date the x-ray evidence in this case. Drs. Dilip R. Patel, DePonte, and Adcock interpreted the December 10, 2013 CT scan. Because Dr. Dilip R. Patel's qualifications are not in the record, the ALJ permissibly gave his interpretation little weight. *See Adkins*, 958 F.2d at 52; Decision and Order at 23.

Dr. DePonte read the December 10, 2013 CT scan as showing "[l]arge opacities in the upper lobes bilaterally consistent with complicated coal workers' pneumoconiosis." Claimant's Exhibit 4. Dr. Adcock interpreted the CT scan as showing "bilateral upper lobe fibrotic changes without small opacities and few scattered granuloma, changes more like old granulomatous disease than atypical complicated coal workers' pneumoconiosis." Employer's Exhibit 4. Noting that Drs. DePonte and Adcock are both dually qualified radiologists, the ALJ found the December 10, 2013 CT scan to be inconclusive. Decision and Order at 23.

Drs. Ramakrishnan and Adcock interpreted the March 31, 2014 CT scan. Dr. Ramakrishnan observed "at the upper lobes bilaterally, stellate distorted appearing lesions…measuring up to 15 mm in diameter . . . ." Claimant's Exhibit 5. He opined that "the overall appearance is suggestive of coal worker's pneumoconiosis." *Id*. Dr. Adcock noted "[s]table, bilateral upper lobe fibrotic changes without small opacities and a few scattered granulomata, changes more like old granulomatous disease than atypical coal worker's pneumoconiosis." Employer's Exhibit 4. Finding the physicians equally qualified, the ALJ concluded the March 31, 2014 CT scan was also inconclusive. Decision and Order at 24.

The ALJ next considered four medical opinions. Decision and Order at 24. Dr. Forehand initially diagnosed Claimant with complicated pneumoconiosis but changed his opinion after reviewing Dr. Adcock's negative x-ray reading of the June 15, 2015 x-ray. Director's Exhibit 22. Dr. Jashubhai G. Patel, Claimant's treating pulmonologist, noted in treatment records that Claimant has "[l]ung densities most likely from CWP." Director's Exhibit 23. He also noted the March 3, 2013 CT/PET scan showed "findings suggestive

---

with regard to the evidence presented. However, he must provide an adequate explanation for his findings.

[6] As there is no biopsy evidence in the record, the ALJ accurately found that Claimant did not establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).

of CWP." *Id*. Drs. Fino and Jarboe opined that Claimant does not suffer from simple or complicated pneumoconiosis. Employer's Exhibits 1, 2.

The ALJ found Dr. Jashubhai Patel's opinion "equivocal" and concluded the medical opinions did not establish complicated pneumoconiosis. Decision and Order at 24. Weighing evidence as a whole the ALJ stated:

> Neither the x-rays, CT scans nor the medical reports, weighed separately or together, show the presence of complicated pneumoconiosis. The designated x-rays and CT scans are inconclusive, the treatment record x-rays do not reveal complicated pneumoconiosis, and none of the medical experts diagnosed complicated pneumoconiosis. *I recognize that Claimant has submitted the results of various blood and other tests in what appears to be an attempt to "rule out other possibilities of lung densities."[] However, there is no nexus between the tests and the lung densities observed on imaging. That is, there is no medical determination in the record explaining how those tests rule out all other possibilities except for complicated pneumoconiosis, and I simply cannot make that "rule out" finding without a medical nexus.[]* Therefore, I find that Claimant has not established by a preponderance of the evidence the presence of complicated pneumoconiosis.

Decision and Order at 25 (emphasis added).[7]

Having vacated the ALJ's weighing of the x-ray evidence, we also vacate his determination that the evidence as a whole does not establish complicated pneumoconiosis. Moreover, in considering all the evidence together, it appears that the ALJ applied an incorrect burden of proof. Contrary to the ALJ's statements on "ruling out" the existence of conditions other than complicated pneumoconiosis, Claimant need only establish that it is more likely than not that he has a chronic lung disease that appears as a Category A, B or C opacity on x-ray. *See* 20 C.F.R. §718.304; *Cox*, 602 F.3d at 283*; Scarbro*, 220 F.3d at 255-56. He is not required to "rule out" all other possibilities. Decision and Order at 25; *see Cox*, 602 F.3d at 283.

Further, simply acknowledging that certain types of evidence are positive while others are negative, does not satisfy the explanatory requirements of the Administrative

[7] Among the blood test results Claimant submitted is a 2016 negative test for histioplasmosis and a treatment record indicating he tested negative for tuberculosis in 2013. Claimant's Exhibits 6-7.

Procedure Act (APA).[8] *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); U.S.C. §557(c)(3)(A); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803 (4th Cir. 1998); *Gunderson v. United States Department of Labor*, 601 F.3d 1013, 1024 (10th Cir. 2010) (citing *Stalcup v. Peabody Coal Co.*, 477 F.3d 482 (7th Cir. 2007)) (administrative law judge's mere statement that the evidence was "evenly balanced and should receive equal weight" failed to discharge his duty under the APA to explain, on scientific grounds, why a conclusion could not be reached as to the existence of pneumoconiosis); *Wojtowicz*, 12 BLR at 1-165.

In light of these errors, we vacate the ALJ's conclusion that Claimant failed to establish complicated pneumoconiosis and cannot invoke the irrebuttable presumption. *See Addison*, 831 F.3d at 252-54; *Adkins*, 958 F.2d at 52; *see also Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 149 n.23 (1987) (ALJ must "weigh the quality, and not just the quantity, of the evidence"); Decision and Order at 24.

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure,[9] 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 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 correctly found that the three pulmonary function studies and three blood gas studies contained in the record are non-qualifying.[10] *See* 20 C.F.R. §718.204(b)(2)(i);

[8] The Administrative Procedure Act provides 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).

[9] The ALJ found no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 26; *see* 20 C.F.R. §718.204(b)(2)(iii).

[10] The ALJ noted the pulmonary function studies reported varying heights for Claimant and averaged them to find Claimant's height is 69 inches. Decision and Order at 12. He then used the closest greater table height for purposes of applying Appendix B of

Decision and Order at 25; Director's Exhibit 15, Employer's Exhibits 1, 2. We therefore affirm the ALJ's conclusion that Claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii).

The ALJ next considered whether the medical opinions support establishment of Claimant's total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 26. Drs. Fino and Jarboe concluded Claimant does not have a respiratory impairment that would prevent him from performing his last coal mine job or a job requiring similar effort. Employer's Exhibits 1, 2. Dr. Forehand conducted the Department of Labor (DOL) sponsored exam and initially stated that "[a]lthough Claimant's [pulmonary function study] and [blood gas study] results exceed DOL disability standards, a totally and permanently disabling lung condition is present (20 C.F.R. §718.304)." Director's Exhibit 15 at 5. At the request of the Director, Dr. Forehand wrote a letter, dated August 5, 2016, clarifying and updating his opinion in light of Dr. Adcock's interpretation of the January 15, 2015 x-ray which he determined was negative for complicated pneumoconiosis. Director's Exhibits 18, 19, 20. Dr. Forehand stated that in light of Dr. Adcock's interpretation and Claimant's non-qualifying pulmonary function and blood gas study values, "I no longer find that [Claimant] is totally and permanently disabled as a result of his coal mine employment." Director's Exhibit 20. Dr. Forehand reiterated his opinion at the behest of the district director in an additional letter dated October 24, 2016. Director's Exhibit 22.

Dr. Jashubhai G. Patel reviewed radiological evidence and advised Clamant "to not work in mines anymore to avoid any further exposure to coal dust." Director's Exhibit 27. The ALJ permissibly found that Dr. Jashubhai G. Patel did not specifically address whether Claimant has a totally disabling respiratory or pulmonary impairment and that his opinion did not satisfy Claimant's burden of proof because "a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment." Decision and Order at 26, *quoting Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989).

Because it is supported by substantial evidence, we affirm the ALJ's finding that the medical opinions do not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). We also affirm, as supported by substantial evidence, the ALJ's conclusion that the evidence as a whole does not establish total disability at 20 C.F.R. §718.204(b)(2). *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 26-27.

---

the regulations to determine if they are qualifying for total disability. *See Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116 n.6 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 12.

As Claimant failed to establish he has a totally disabling respiratory or pulmonary impairment, we affirm the ALJ's conclusion that he did not invoke the Section 411(c)(4) presumption or establish entitlement at 20 C.F.R. Part 718. *See* Decision and Order at 17-18, 27.

Remand Instructions

On remand, the ALJ must initially reconsider whether the x-ray evidence is sufficient to support a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(a). He must conduct a qualitative analysis of the x-ray readings and adequately explain how he resolves the conflict in the evidence in compliance with the APA. *Wojtowicz,* 12 BLR at 1-165.

The ALJ must also reconsider whether the CT scans and medical opinions are sufficient to establish complicated pneumoconiosis at 20 C.F.R. §718.304(c). The ALJ must reconsider Drs. DePonte's, Adcock's, and Ramakrishnan's CT scan reports. 20 C.F.R. §718.304(c). He must address the bases for their opinions and the validity of the reasons they provided for determining whether Claimant has complicated pneumoconiosis. The ALJ must also reconsider the medical opinions of Drs. Forehand, Jarboe, Fino, and Jashubhai G. Patel in light of his x-ray and CT scan findings. 20 C.F.R. §718.304(c), addressing the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). The ALJ must then weigh all relevant evidence on the issue of complicated pneumoconiosis together, interrelating the evidence from each category, and apply the correct standard for the burden of proof (i.e. whether the evidence establishes it is more likely than not Claimant has a chronic dust disease of the lung meeting the diagnostic requirements of 20 C.F.R. §718.304).

If Claimant establishes he has complicated pneumoconiosis, the ALJ must then determine whether it arose out of his coal mine employment. 20 C.F.R. §718.203. If Claimant invokes the irrebuttable presumption, he is entitled to benefits. 20 C.F.R. §718.304. If the ALJ finds Claimant is unable to invoke the irrebuttable presumption, he may reinstate the denial of benefits in light of Claimant's failure to establish total disability, a requisite element of entitlement under 20 C.F.R. Part 718. *Trent v. Director, OWCP,* 11 BLR 1-26, 1-27 (1987).

Accordingly, the ALJ's Decision and Order Denying is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge:

I concur with my colleagues' decision to remand this case because the ALJ applied an incorrect burden of proof, failed to resolve conflicts in the evidence, and did not consider applicable law. I write separately, however, to clarify what I view as the ALJ's additional misconception in finding Dr. Kendall's equivocal interpretation of the June 29, 2017 x-ray could not support Dr. Crum's positive reading of the same x-ray.

In considering Dr. Kendall's reading, the ALJ mistakenly stated that a "physician must specifically conclude the chest x-ray study demonstrates a Category A, B, or C opacity in order to support a finding of complicated pneumoconiosis." Decision and Order at 21, n.112 (citing two unpublished Board cases). He then found the June 2017 x-ray as a whole inconclusive, presumably because he determined the two readings effectively canceled each other out -- without first considering whether Dr. Kendall's equivocal interpretation added to or subtracted from Dr. Crum's positive reading, or, conversely, if it was simply too ambiguous to be credited.

Claimant's burden is only to establish that the x-rays and other diagnostic methods when weighed together more likely than not establish the presence of the disease. *See e.g.*, *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010). And while Dr. Kendall might not have "conclusively" identified the presence of a Class A opacity in his reading, there is nothing that legally precludes finding his interpretation, which identified a large Class A opacity as one of two likely diagnoses for a mass in Claimant's lung, supported

Dr. Crum's unequivocal identification of large Class A opacities on the same x-ray -- making it more likely than not that the June 2017 x-ray establishes complicated pneumoconiosis. *E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56 (4th Cir. 2000) (in determining the presence of complicated pneumoconiosis, an ALJ must interrelate the evidence considering whether it supports or undercuts evidence from the same and other categories).

Notably, the ALJ's failure to explain why he found the x-ray inconclusive when weighing these two not necessarily conflicting readings was not harmless error; given the ALJ found the other four x-rays to be in equipoise, finding the June 29, 2017 x-ray positive would tip the scales. 20 C.F.R. §718.304(a); *Wojtowicz*, 12 BLR at 1-165.[11]

JONATHAN ROLFE

Administrative Appeals Judge

[11] I agree with my colleagues that the weight to assign each interpretation when considering all of the evidence in this case is a matter of reasonable discretion, which is why I concur the decision should be remanded rather than outright reversed. But the ALJ's statement that a physician "must specifically conclude an x-ray demonstrates a Category A, B, or C opacity to support a finding of complicated pneumoconiosis" when interrelating that evidence is wrong as a matter of law. *Scarbro*, 220 F.3d at 255-56. And any assertion that a reasonable mind could not determine that an x-ray reading that identifies an opacity that meets the size requirements for complicated pneumoconiosis, notes it "is consistent with coal workers' pneumoconiosis," and concludes complicated pneumoconiosis is one of two likely alternatives cannot support a second x-ray reading that unambiguously concludes the same opacity is complicated pneumoconiosis is patently wrong as a simple matter of fact.