



BRB No. 23-0071 BLA

HAROLD HARRIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 12/04/2023
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.

Harold Harris, Honaker, Virginia.

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

PER CURIAM:

Claimant appeals, without representation,<sup>1</sup> Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Denying Benefits (2021-BLA-05313) rendered on a

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<sup>1</sup> Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested that the Benefits Review Board review the ALJ's decision on Claimant's behalf, but Ms. Combs is not representing Claimant on appeal. *See Shelton v.*

miner's claim filed on August 12, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).<sup>2</sup>

The ALJ found Claimant did not establish that he suffers from complicated pneumoconiosis, and thus he was unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); *see* 20 C.F.R. §718.304. The ALJ accepted the parties' stipulation that Claimant has 31.22 years of qualifying coal mine employment; however, she found Claimant did not establish total disability. She, therefore, determined Claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),<sup>3</sup> or establish entitlement to benefits at 20 C.F.R. Part 718. Accordingly, the ALJ denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Neither Employer nor the Director, Office of Workers' Compensation Programs, filed a substantive response.

In an appeal filed without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (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.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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*Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

<sup>2</sup> Claimant filed two prior claims which he withdrew. Director's Exhibits 1, 2. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306.

<sup>3</sup> Under Section 411(c)(4) of the Act, a miner is presumed 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.

<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Hearing Transcript at 13, 17.

### **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 chest 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. 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. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. 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, 1-33-34 (1991) (en banc).

The ALJ found that the x-ray evidence supports a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(a). Decision and Order at 9. However, she found that the computed tomography (CT) scan evidence, Claimant's treatment records, and the medical opinions do not support a finding of the disease at 20 C.F.R. §718.304(c). *Id.* at 12, 14, 20. Weighing all the evidence together, she concluded Claimant did not establish complicated pneumoconiosis by a preponderance of the evidence. 20 C.F.R. §718.304; Decision and Order at 20.

#### **X-rays**

The ALJ considered nine interpretations of four x-rays dated October 22, 2019, July 28, 2020, June 17, 2021, and August 30, 2021. Decision and Order at 6-9. She noted all four interpreting physicians, Drs. DePonte, Adcock, Miller, and Alexander, are dually-qualified Board-certified radiologists and B readers, and found them to be equally qualified. *Id.* at 8.

Drs. DePonte and Miller each interpreted the October 22, 2019 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Adcock read it as negative for the disease.<sup>5</sup> Director's Exhibits 14, 17; Claimant's Exhibit 4. The ALJ found the October 22, 2019 x-ray positive for complicated pneumoconiosis as two of the three dually-qualified physicians read it as positive for the disease. Decision and Order at 8.

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<sup>5</sup> Dr. Gaziano reviewed the October 22, 2019 x-ray for quality purposes only. Director's Exhibit 15.

Dr. Alexander interpreted the July 28, 2020 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Adcock read it as negative for the disease. Director's Exhibit 18; Claimant's Exhibit 2. The ALJ found that this x-ray "neither supports nor refutes a finding of complicated pneumoconiosis." Decision and Order at 8.

Dr. Alexander also interpreted the June 17, 2021 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Adcock read it as negative for the disease. Claimant's Exhibit 3; Employer's Exhibit 8. The ALJ found that this x-ray "neither supports nor refutes a finding of complicated pneumoconiosis." Decision and Order at 9.

Finally, Dr. DePonte interpreted the August 30, 2021 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Adcock read it as negative for the disease. Claimant's Exhibit 1; Employer's Exhibit 9. Thus, the ALJ found that this x-ray "neither supports nor refutes a finding of complicated pneumoconiosis." Decision and Order at 9.

Finding that one x-ray supports a finding of complicated pneumoconiosis and three x-rays neither support nor refute such a finding, the ALJ determined that the overall x-ray evidence supports a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(a). Decision and Order at 9. However, the ALJ noted that the physicians who identified a large opacity indicated it could be a malignancy or due to something other than pneumoconiosis and suggested further tests to determine its etiology.<sup>6</sup> *Id.*

### **Biopsy or Autopsy**

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.

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<sup>6</sup> On the October 22, 2019 and August 30, 2021 x-rays she interpreted, Dr. DePonte identified an approximately twelve millimeter opacity near the right first rib and stated "malignancy should be excluded" and that the opacity she identified "may be related to the rib or represent a lung nodule," recommending a CT scan to further investigate. Director's Exhibit 14; Claimant's Exhibit 1. Similarly, on his interpretations of the July 28, 2020 and June 17, 2021 x-rays, Dr. Alexander indicated the large opacity he identified in the right upper lung zone could be lung cancer and recommended comparison with other x-rays or a CT scan. Claimant's Exhibits 2, 3. Dr. Miller also stated that malignancy could not be excluded as the cause of the two centimeter "right suprahilar opacity" he identified on his interpretation of the October 22, 2019 x-ray and suggested a CT scan be performed. Claimant's Exhibit 4.

## **CT scans**

The ALJ considered five interpretations by Dr. Adcock of CT scans dated May 21, 2019, October 8, 2019, May 6, 2020, October 9, 2020, and May 10, 2021. Decision and Order at 10-12. The ALJ noted Dr. Adcock's statement that CT scans are "superior to chest radiography for the evaluation of chronic silicosis/coal workers' pneumoconiosis" and relied on this statement to determine the scans are "medically acceptable" and relevant to determining benefits. Employer's Exhibits 3-7; Decision and Order at 10. Dr. Adcock interpreted each CT scan as negative for complicated pneumoconiosis. Employer's Exhibits 3-7.

The ALJ also considered Dr. DePonte's interpretations of CT scans dated October 9, 2020, and September 22, 2021, contained in Claimant's treatment records. Decision and Order at 12. Dr. DePonte interpreted both CT scans as negative for complicated pneumoconiosis. Employer's Exhibits 2, 10.

The ALJ found that although Dr. Adcock identified a non-calcified eight-millimeter opacity in the left upper lobe, he did not conclude it was consistent with pneumoconiosis or suggest it would appear as greater than one centimeter on x-ray. Decision and Order at 12. She also determined that neither Dr. Adcock nor Dr. DePonte identified any large opacity in the right upper lobe, which is where the three physicians, including Dr. Deponte, identified a possible Category A opacity on the chest x-rays. *Id.* The ALJ therefore concluded that the CT scan evidence does not support a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(c). *Id.* Furthermore, she found "the CT scan evidence affirmatively shows that the Category A opacity identified on chest x-ray is not present." *Id.* We affirm these findings as they are supported by substantial evidence. *See E. Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243-44 (4th Cir. 1999).

## **Claimant's Treatment Records**

The ALJ considered Claimant's treatment records from Dr. Jawad and Nurse Rasnick. Decision and Order at 13-14. Dr. Jawad noted Claimant's CT scan contained "multiple lung nodules compatible with complicated coal pneumoconiosis." Claimant's Exhibit 5. Nurse Rasnick diagnosed coal workers' pneumoconiosis and pulmonary fibrosis. Claimant's Exhibit 6. She noted Dr. Miller's positive reading of the October 22, 2019 x-ray and indicated Claimant underwent a May 10, 2021 CT scan with Dr. Jawad but did not comment on the results of the CT scan or independently diagnose complicated pneumoconiosis. *Id.*

The ALJ observed Dr. Jawad did not specify in his treatment notes the date of the CT scan he reviewed and she noted none of the CT scans of record diagnosed complicated

pneumoconiosis.<sup>7</sup> Decision and Order at 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 14.

### **Medical Opinions**

The ALJ considered the medical opinions of Drs. Harris, Fino, and Sargent. Decision and Order at 14-20. Dr. Harris conducted the Department of Labor (DOL)-sponsored examination of Claimant and diagnosed complicated pneumoconiosis, which the ALJ determined was based solely on Dr. DePonte’s positive interpretation of the October 22, 2019 x-ray.<sup>8</sup> Decision and Order at 15; Director’s Exhibit 14. Drs. Fino<sup>9</sup> and Sargent<sup>10</sup> examined Claimant and conducted a review of additional records in concluding

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<sup>7</sup> We note that Dr. Adcock interpreted the May 10, 2021 CT scan conducted at Clinch Valley Medical Center, comparing it to four prior scans, and did not observe complicated pneumoconiosis. Employer’s Exhibit 7.

<sup>8</sup> Dr. Harris indicated his diagnosis of coal workers’ pneumoconiosis and progressive massive fibrosis is supported by Claimant’s thirty-two years of coal mine employment, symptoms of dyspnea on exertion and cough, and x-ray findings of “small opacities in all lung zones with 1/1 profusion and type A large opacities.” Director’s Exhibit 14.

<sup>9</sup> Dr. Fino examined Claimant on July 28, 2020, and diagnosed simple, but not complicated, pneumoconiosis after reviewing two interpretations of the October 22, 2019 x-ray and Dr. Adcock’s interpretation of the July 28, 2020 x-ray. Director’s Exhibit 18. Prior to his October 4, 2021 deposition, Dr. Fino reviewed additional records, including interpretations of the October 22, 2019 and July 28, 2020 x-rays positive for complicated pneumoconiosis, Dr. Adcock’s interpretation of the June 17, 2021 x-ray, Dr. DePonte’s interpretation of the October 9, 2020 CT scan, and Dr. Adcock’s interpretations of CT scans dated October 8, 2019, May 21, 2019, May 6, 2020, and May 10, 2021. Employer’s Exhibit 11 at 8-13. Dr. Fino acknowledged he did not include or review Dr. DePonte’s finding of a Category A opacity on the October 22, 2019 x-ray in his initial report but concluded that the evidence as a whole did not support a finding of complicated pneumoconiosis. *Id.* at 15.

<sup>10</sup> Dr. Sargent examined Claimant on June 17, 2021, and diagnosed simple, but not complicated, pneumoconiosis based on Dr. Adcock’s interpretations of the July 28, 2020 and June 17, 2021 x-rays, Dr. Adcock’s interpretations of the CT scans, all of the

he did not have complicated pneumoconiosis. Director’s Exhibit 18; Employer’s Exhibits 8, 11, 12.

In considering the medical opinion evidence, the ALJ permissibly gave more weight to the opinions of Drs. Fino and Sargent because they reviewed several x-ray and CT scan interpretations, while Dr. Harris relied on a single x-ray interpretation, and sufficiently explained that “the absence of a right upper lobe opacity on CT scan disproved the existence of a Category A right upper lobe opacity.” Decision and Order at 19-20; *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 316-17 (4th Cir. 2012); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993) (ALJ has exclusive power to make credibility determinations and resolve inconsistencies in the evidence). 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 – Total Disability**

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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 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

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interpretations of the October 22, 2019 x-ray, and Dr. DePonte’s interpretation of the October 9, 2020 CT scan. Employer’s Exhibit 8. Prior to his October 6, 2021 deposition, Dr. Sargent reviewed additional records, including Dr. Alexander’s interpretation of the July 28, 2020 x-ray, Drs. DePonte’s and Adcock’s interpretations of the August 30, 2021 x-ray, treatment records from Dr. Jawad and Nurse Rasnick, and Dr. DePonte’s interpretation of the September 2021 CT scan. Employer’s Exhibit 12 at 5, 8-10, 30-35. Dr. Sargent concluded Claimant did not have complicated pneumoconiosis, explaining that “what the radiologists were seeing on a plain film turns out on CT scan not to be a large opacity.” *Id.* at 10-11, 19-20.

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 21-27.

### **Pulmonary Function Studies**

The ALJ considered three pulmonary function studies, dated October 22, 2019, July 28, 2020, and June 17, 2021. Decision and Order at 22. She correctly noted all three studies are non-qualifying<sup>11</sup> and, therefore, found Claimant did not establish total disability via the pulmonary function study evidence. *Id.*; Director's Exhibits 14, 18; 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)(i).

### **Arterial Blood Gas Studies**

The ALJ also considered three arterial blood gas studies, dated October 22, 2019, July 28, 2020, and June 17, 2021. Decision and Order at 23. She correctly noted all three studies yielded non-qualifying values<sup>12</sup> and thus found Claimant did not establish total disability via the arterial blood gas study evidence. *Id.*; Director's Exhibits 14, 18; Employer's Exhibit 8. 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 23. Thus, we affirm her determination that Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

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<sup>11</sup> 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).

<sup>12</sup> 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).

## Medical Opinions and Claimant's Treatment Records

The ALJ determined Claimant's usual job as an underground repairman "regularly required heavy exertion, including lifting and carrying more than 50 pounds." Decision and Order at 3-4. 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. Decision and Order at 3-4, 23-27.

Dr. Harris diagnosed total disability based on Claimant's symptoms of dyspnea on exertion and cough and his diagnosis of complicated pneumoconiosis. Director's Exhibit 14; *see* Decision and Order at 23-25. 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 18; Employer's Exhibits 8, 11, 12; *see* Decision and Order at 25-26. Claimant's treatment records describe that he has a history of significant shortness of breath and chronic obstructive pulmonary disease (COPD), document his own description of respiratory symptoms, and list medications he has been prescribed – all information that Drs. Harris, Fino, and Sargent reviewed and considered. Claimant's Exhibits 5, 6; *see* Decision and Order at 13, 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 24. She also permissibly found she was unable to discern from Dr. Harris's opinion whether he would have diagnosed total disability based on Claimant's symptoms alone. *Looney*, 678 F.3d at 316-17; Decision and Order at 24. Thus, we affirm her decision to give his opinion "little weight." *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); Decision and Order at 24.

The ALJ also permissibly gave "little weight" to Dr. Jawad's diagnosis of COPD in the treatment records because she found it was based on testing not contained in the record. *Looney*, 678 F.3d at 316-17; Decision and Order at 27. She further permissibly determined that while the treatment records describe "an indicia of a respiratory or pulmonary impairment," they do not independently establish Claimant is totally disabled from performing his usual coal mine employment. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); Decision and Order at 27.

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 v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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

SO ORDERED.

DANIEL T. GRESH, Chief  
Administrative Appeals Judge

JUDITH S. BOGGS  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge