U.S. Department of Labor Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 20-0571 BLA
and 20-0572 BLA

FREDA F. REED (o/b/o and Widow of CECIL LUKE REED)	)	
Claimant-Petitioner	)	
v.	)	
L & M COAL COMPANY	)	
and	)	DATE ISSUED: 02/16/2022
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Denying Modification and Survivor's Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Freda F. Reed, Princeton, West Virginia.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Denying Modification and Survivor's Benefits (2015-BLA-05259, 2017-BLA-05735) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[2] This case involves Claimant's request for modification of the denial of a miner's subsequent claim filed on June 29, 2010,[3] and a survivor's claim filed on August 11, 2014. For the following reasons, we vacate the denial of benefits in both claims, and remand them to the ALJ for further consideration.

In an August 6, 2015 Decision and Order Denying Benefits in the miner's claim, ALJ Theresa C. Timlin found the new evidence did not establish the Miner had complicated pneumoconiosis and therefore found 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); 20 C.F.R. §718.304. She further found the Miner was totally disabled but Claimant could not invoke the rebuttable presumption of total disability due to

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[1] Vickie Combs, a lay representative with Stone Mountain Health Services of Vansant, Virginia, filed a letter on Claimant's behalf requesting that the Benefits Review Board review the Decision and Order, but she is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co*., 19 BLR 1-88 (1995) (Order).

[2] Claimant is the widow of the Miner, who died on November 7, 2014. Miner's Claim Director's Exhibit 59. Claimant is pursuing the miner's claim on her husband's behalf. *Id.*

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, an ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). The Miner filed three prior claims for benefits, all of which were denied. Miner's Claim Director's Exhibits 1-3. ALJ William S. Colwell denied the Miner's most recent prior claim on May 29, 2007, for failure to establish the existence of pneumoconiosis or that his totally disabling respiratory impairment was due to pneumoconiosis. Miner's Claim Director's Exhibit 3. Therefore, the Miner had to submit new evidence establishing at least one of these elements of entitlement in order to obtain review of the merits of his claim. 20 C.F.R. §725.309(c).

pneumoconiosis at Section 411(c)(4) of the Act because the Miner had only twelve and one-half years of coal mine employment.[4] 30 U.S.C. §921(c)(4) (2018). She additionally found the new evidence did not establish the Miner had pneumoconiosis or that his total disability was due to pneumoconiosis under 20 C.F.R. Part 718. Finding Claimant failed to establish a change in an applicable condition of entitlement, ALJ Timlin denied benefits. 20 C.F.R. §725.309(c).

Claimant timely requested modification of the decision denying the miner's claim. 20 C.F.R. §725.310; Miner's Claim Director's Exhibit 62. Meanwhile, the district director denied Claimant's survivor's claim and forwarded both claims to the Office of Administrative Law Judges. Survivor's Claim Director's Exhibits 29, 36. ALJ William T. Barto held a consolidated hearing on both claims on June 26, 2018. On January 17, 2019, ALJ Francine L. Applewhite (the ALJ) issued a Notice of Reassignment, notifying the parties that the cases were reassigned to her and she would issue a Decision and Order based on the existing record.

In the miner's claim, the ALJ found that because Claimant did not challenge ALJ Timlin's finding of less than fifteen years of coal mine employment, she could not invoke the Section 411(c)(4) presumption that the Miner was totally disabled due to pneumoconiosis. The ALJ also found no mistake of fact in ALJ Timlin's determination that the evidence developed since the denial of the Miner's prior claim did not establish he had complicated pneumoconiosis. She further found the additional evidence submitted on modification also did not establish he had the disease and, therefore, Claimant could not invoke the Section 411(c)(3) irrebuttable presumption of total disability due to pneumoconiosis. Additionally, the ALJ found no mistake of fact in ALJ Timlin's determination that the evidence did not establish the Miner had pneumoconiosis under 20 C.F.R. Part 718, and the additional evidence submitted on modification also did not establish pneumoconiosis. Finding no change in an applicable condition of entitlement, the ALJ denied benefits.

In the survivor's claim, the ALJ found that because she denied the miner's claim, Claimant was not automatically entitled to survivor's benefits under Section 422(*l*) of the

[4] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability or 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.

Act.[5] 30 U.S.C. §932(*l*) (2018). The ALJ again determined Claimant did not challenge ALJ Timlin's finding the Miner had less than fifteen years of coal mine employment, did not establish the Miner had complicated pneumoconiosis, and therefore was not entitled to the Section 411(c)(4) or Section 411(c)(3) presumptions that the Miner's death was due to pneumoconiosis. Moreover, as the record contained no evidence that the Miner's death was due to pneumoconiosis, she found Claimant could not establish entitlement to survivor's benefits at 20 C.F.R. Part 718. The ALJ therefore denied benefits in the survivor's claim.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal a claimant files without the assistance of counsel, the considers whether substantial evidence supports the Decision and Order below. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 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).

Length of Coal Mine Employment—Both Claims

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines, or in "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 the Miner worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

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[5] Section 422(*l*) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of the miner's 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).

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Miner's Claim Director's Exhibit 60.

Contrary to the ALJ's finding, Claimant was not required to specifically allege that ALJ Timlin erred in calculating the Miner's length of coal mine employment to obtain review of that issue on modification. The ALJ may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake of fact may be corrected, including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); *see Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 954 (6th Cir. 1999) ("If a claimant merely alleges that the ultimate fact (disability due to pneumoconiosis) was wrongly decided, the [ALJ] may, if [s]he chooses, accept this contention and modify the final order accordingly."); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). Claimant's general allegation of a mistake in fact sufficed to invoke the ALJ's "broad discretion to correct mistakes of fact," including on the issue of the Miner's coal mine employment, "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence originally submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993) ("There is no need for a smoking-gun factual error . . . .").

Further, the ALJ was incorrect as a factual matter in stating that Claimant did not challenge ALJ Timlin's finding of less than fifteen years of coal mine employment. At the hearing on modification, Claimant alleged the Miner had at least eighteen years of underground coal mine employment. Hearing Transcript at 23-24; Claimant's Closing Arguments at 2.[7] Because the ALJ did not determine the length of the Miner's coal mine employment, the Board has no relevant findings to review. *Muncy*, 25 BLR at 1-27. Therefore, we vacate her determination that the Miner had less than fifteen years of coal mine employment and that Claimant did not invoke the Section 411(c)(4) presumption in either the miner's or the survivor's claims. We therefore vacate the denial of benefits in both claims. Because we vacate the denial of benefits in the miner's claim, we vacate the ALJ's finding that Claimant is not derivatively entitled to survivor's benefits under Section 422(*l*) of the Act. 30 U.S.C. §932(*l*) (2018); Decision and Order Denying Modification at 24.

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[7] Further, ALJ Timlin found the Miner had less than fifteen years of coal mine employment in the miner's claim. Decision and Order at 6. In the survivor's claim, which is a separate case, no ALJ has rendered a finding as to the length of the Miner's coal mine employment. In that claim, the ALJ was required to determine whether Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, which requires addressing whether the Miner worked for at least fifteen years in qualifying coal mine employment. *See* 20 C.F.R. §718.205(a)(4).

On remand, the ALJ must determine whether ALJ Timlin made a mistake of fact in determining the Miner had less than fifteen years of coal mine employment in his claim, and must determine the length of his coal mine employment in the survivor's claim. In doing so, the ALJ must employ a reasonable method of calculation. She must specifically address whether Claimant can establish fifteen years of qualifying coal mine employment, which is necessary to invoke the Section 411(c)(4) presumption that the Miner was totally disabled due to pneumoconiosis or, if reached in the survivor's claim, that he died due to pneumoconiosis. If Claimant establishes the Miner had at least fifteen years of qualifying coal mine employment, Claimant has invoked the Section 411(c)(4) presumption in the miner's claim.[8] 20 C.F.R. §718.305. If Claimant invokes the presumption in the miner's claim, the burden shifts to Employer to establish the Miner had neither legal nor clinical pneumoconiosis, or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii).

If benefits are awarded in the miner's claim, the ALJ must determine whether Claimant is automatically entitled to survivor's benefits under Section 422(*l*). If benefits are denied in the miner's claim, the ALJ must consider Claimant's entitlement in the survivor's claim. If she establishes fifteen years of coal mine employment and total disability, based on the evidence in her claim, then she will invoke the Section 411(c)(4) presumption in the survivor's claim. Employer must then establish the Miner had neither legal nor clinical pneumoconiosis, or "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i),(ii).

If the ALJ finds Claimant is not entitled to benefits under the Section 411(c)(4) presumption, in the interest of judicial efficiency, we address the ALJ's findings regarding the other methods of establishing entitlement.

The Miner's Claim

Section 411(c)(3) – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner was totally disabled due to pneumoconiosis if he suffered from a

[8] ALJ Timlin found the Miner was totally disabled because all of the pulmonary function studies were qualifying for total disability and all of the medical experts agreed the Miner was totally disabled. Decision and Order at 28, 32. On modification, there is no new evidence that suggests the Miner was not totally disabled. Employer's Exhibits 4-6. Consequently, if the Miner had more than fifteen years of qualifying coal mine employment, then Claimant will have invoked the Section 411(c)(4) presumption in the miner's claim. 20 C.F.R. §718.305

chronic dust disease of the lung which: (a) when diagnosed by x-ray, yielded one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yielded massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. In determining whether Claimant has invoked the irrebuttable presumption, the ALJ must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. *See 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*, 16 BLR 1-31, 1-33 (1991) (en banc).

The Miner's Treatment Records

Because the ALJ's weighing of the Miner's treatment records may have an effect on the way she weighs the x-ray evidence, we consider the treatment records first. The parties submitted the Miner's treatment records from Princeton Community Hospital, dating from February 17, 2006 to November 4, 2014. Miner's Claim Director's Exhibit 62; Employer's Exhibits 1-2. The ALJ found these records include several non-ILO x-ray readings that do not support a finding of complicated pneumoconiosis, as well as a diagnosis on a discharge summary of coal workers' pneumoconiosis which she found not adequately explained. Decision and Order Denying Modification at 24. Therefore, she found these treatment records do not support a finding of complicated pneumoconiosis. *Id*.

The Miner's treatment records, however, also include x-rays the ALJ did not consider: a January 20, 2014 x-ray that Dr. Belcher interpreted as presenting a stable appearance since November 9, 2011, "suggestive of complicated coal workers pneumoconiosis" and a November 4, 2014 x-ray that he interpreted as showing "probable complicated pneumoconiosis." Miner's Claim Director's Exhibit 62; Employer's Miner's Claim Exhibit 2. As the ALJ failed to consider Dr. Belcher's diagnoses of complicated pneumoconiosis on these x-rays, the ALJ's summary determination that the Miner's treatment records do not support a finding of complicated pneumoconiosis is unsupported by the evidence and not sufficiently explained in accordance with the Administrative Procedure Act (APA).[9] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[9] 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).

Moreover, we cannot affirm the ALJ's adoption of ALJ Timlin's determination that the Miner's previously submitted treatment records do not support a finding of complicated pneumoconiosis. Decision and Order Denying Modification at 9. ALJ Timlin did not consider the Miner's hospitalization from February 16, 2011 to February 20, 2011, at which point he was discharged with a diagnosis of "coal workers' pneumoconiosis, complicated." Director's Exhibit 52. In addition, ALJ Timlin discredited Dr. Ahmed's interpretation of a March 29, 2011 treatment x-ray as positive for complicated pneumoconiosis because he was the only physician to diagnose the disease. Decision and Order at 16; Miner's Claim Director's Exhibit 52. However, as discussed above, the Miner's treatment records and other evidence submitted on modification contain additional diagnoses of complicated pneumoconiosis. Because a mistake of fact may be determined based upon all of the evidence, old and new, the ALJ must reconsider her finding in light of the new evidence of complicated pneumoconiosis. *Stanley*, 194 F.3d at 497; *Milliken*, 200 F.3d at 954.

Because the ALJ failed to consider all relevant evidence and adequately explain her findings, we must vacate her determination that the Miner's treatment records do not support a finding of complicated pneumoconiosis. *See Wojtowicz*, 12 BLR at 1-165; Decision and Order Denying Modification at 24. We must therefore vacate her determination that Claimant did not establish complicated pneumoconiosis at 20 C.F.R. §718.304(c), and the evidence as a whole does not establish complicated pneumoconiosis. 20 C.F.R §718.304; Decision and Order Denying Modification at 24.

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

Initially, the ALJ accurately determined there was no mistake of fact in ALJ Timlin's determination that the x-ray evidence previously submitted in this miner's claim did not establish complicated pneumoconiosis, as none of the x-rays were read as positive for the disease. 20 C.F.R. §718.304(a); Decision and Order Denying Modification at 7; Decision and Order at 26.

Turning to the evidence submitted on modification, the ALJ considered four new interpretations of two x-rays dated March 14, 2013, and February 25, 2014, which were both interpreted by physicians dually qualified as Board-certified radiologists and B readers.[10] Decision and Order Denying Modification at 22-23.

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[10] The parties designated separate sets of evidence in the miner's and survivor's claims for purposes of the evidence limitations at 20 C.F.R. §725.414. The evidence in the claims overlapped but was not identical. The ALJ, however, summarized all the new evidence together and, at places in her decision, weighed both sets of evidence together without regard to the parties' designations. In this decision, we designate the evidence

Dr. Crum interpreted the March 14, 2013 x-ray as showing Category "B" large opacities of complicated pneumoconiosis in the upper lungs and left lower lung, but opined "cancer cannot entirely be excluded." Claimant's Survivor's Claim Exhibit 6. Conversely, Dr. Meyer opined the x-ray was negative for complicated pneumoconiosis, but noted biapical pleural parenchymal scarring with a possible cavity in the left apex and a density in the left lung base that "favors granulomatous infection such as typical or atypical mycobacterium."[11] Employer's Miner's Claim Exhibit 8.

Dr. Alexander interpreted the February 25, 2014 x-ray as showing a 20 x 15mm large opacity in the left upper lung consistent with Category "A" complicated pneumoconiosis. Claimant's Miner's Claim Exhibit 1. Conversely, Dr. Meyer interpreted this film as negative for complicated pneumoconiosis, and again noted biapical parenchymal scarring with a possible cavity in the left apex and a bronchovascular density in the left lower lung "favoring granulomatous infection such as typical or atypical mycobacterium." Employer's Miner's Claim Exhibit 11.

The ALJ found the interpretations of the March 14, 2013 and February 25, 2014 x-rays to be in equipoise, based on the equal number of positive and negative readings from dually-qualified readers for each film. Decision and Order Denying Modification at 22-23. As discussed above, however, the Miner also had treatment records containing x-rays

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submitted in the miner's claim as Claimant/Employer's Miner's Claim Exhibit and Miner's Claim Director's Exhibit and the survivor's claim as Claimant/Employer's Survivor's Claim Exhibit and Survivor's Claim Director's Exhibit, and, where necessary, address the ALJ's failure to consider the evidence separately. *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-221, 1-241-42 (2007) (en banc) (parties may submit separate sets of evidence in consolidated hearings, but must designate the claim each piece of evidence supports; ALJ must consider the specific issues of entitlement in accordance with the evidentiary rules applicable to each claim).

[11] It appears Claimant designated Dr. Crum's interpretation of the March 14, 2013 x-ray as affirmative evidence in the survivor's claim but did not submit the x-ray in the miner's claim. Claimant's Evidence Summary Form in the Miner's Claim; Claimant's Evidence Summary Form in the Miner's Claim; Claimant's Survivor's Claim Exhibit 6. If so, Employer was not entitled to submit Dr. Meyer's reading of the x-ray as a rebuttal reading in the miner's claim. *See* 20 C.F.R. §§725.414(a)(3)(ii), 725.310(b); Employer's Evidence Summary in the Miner's Claim at 4, 11. On remand, the ALJ should address whether these interpretations were properly admitted in the miner's claim.

that the ALJ failed to consider that may affect the way she weighed these readings. We therefore vacate the ALJ's determination that the x-ray evidence does not establish complicated pneumoconiosis. 20 C.F.R. §718.304(a); Decision and Order Denying Modification at 23. On remand, the ALJ should consider all of the x-ray evidence to determine whether the Miner had complicated pneumoconiosis, including evaluating the diagnoses the readers provided for the scarring they found in the Miner's lungs. *See Cox*, 602 F.3d at 283 (4th Cir. 2010) (an ALJ must consider all relevant evidence and may discount x-ray readings where there is no evidence of the alternative diagnoses for large masses present on the x-rays); *Melnick*, 16 BLR at 1-33 (1991); 20 C.F.R. §718.304(a); Decision and Order Denying Modification at 23.

20 C.F.R. §718.304(c) – Other Medical Evidence

In addition to the Miner's treatment records, addressed above, the record contains medical opinions, computed tomography (CT) scan evidence, and a digital x-ray relevant to the existence of complicated pneumoconiosis.[12] The ALJ reviewed ALJ Timlin's findings and accurately found no mistake in fact in her determination that the affirmative medical opinion evidence previously submitted in the miner's claim does not support a finding of complicated pneumoconiosis, as no physician diagnosed the disease. 20 C.F.R. §718.304(c); 20 C.F.R. §718.107(a); Decision and Order Denying Modification at 7; Decision and Order at 26. Similarly, the ALJ found no mistake of fact in ALJ Timlin's determination that the digital x-ray and CT scan evidence previously submitted in the miner's claim does not support a finding of complicated pneumoconiosis, as no physician diagnosed the disease. 20 C.F.R. §718.304(c); 20 C.F.R. §718.107(a); Decision and Order Denying Modification at 6; Decision and Order at 26.

On modification, the parties submitted new medical opinions from Drs. Owens and Farney and new supplemental medical opinions from Drs. Zaldivar and Fino. Claimant's Exhibit 3; Employer's Exhibits 4-6, 13-15. The ALJ found Dr. Owens's opinion that the Miner had "coal workers' pneumoconiosis" outweighed by the contrary medical opinions.[13] Decision and Order Denying Modification at 23. Therefore, she found the medical opinion evidence does not support a finding of complicated pneumoconiosis. *Id.*

[12] Because there is no biopsy or autopsy evidence, Claimant cannot establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(b).

[13] The ALJ considered not only the opinions of Drs. Owens, Farney, Zaldivar, and Fino, which were designated in the miner's claim, but also the opinions of Drs. Castle and Spagnolo that Employer designated for consideration in the survivor's claim. She found Dr. Owens's opinion "not . . . significant enough to overcome the combined weight of the

ALJs may not rely solely on a head count of the physicians providing assessments; she must also conduct a qualitative analysis of their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998): *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Adkins v. Dir., OWCP*, 958 F.2d 49, 52 (4th Cir. 1992). Dr. Owens diagnosed the Miner with pneumoconiosis based upon a March 14, 2013 x-ray that he reported was positive for the disease with a 1/1 profusion.[14] Claimant's Miner's Claim Exhibit 3. As Dr. Owens diagnosed the Miner with simple but not complicated pneumoconiosis, there is no affirmative medical opinion diagnosing the Miner with complicated pneumoconiosis. *Id.* Consequently, any error in the ALJ's weighing of his opinion is harmless, and we affirm her determination that Dr. Owens's opinion does not establish complicated pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Claimant's Exhibit 3.

The ALJ considered four new interpretations of two CT scans conducted on May 31, 2013, and October 23, 2013. Decision and Order Denying Modification at 23-24. Dr. Belcher interpreted the May 31, 2013 CT scan as showing bilateral apical pleural and parenchymal scarring not significantly changed since 2011, an air cyst that had decompressed in the left upper lobe, a 16mm air cyst in the right middle lobe, and a small residual 13mm lesion in the left lower lung. Claimant's Miner's Claim Exhibit 4. Dr. Meyer noted biapical pleural parenchymal scarring, scattered calcified nodules, "tree-in-bud opacities," and a peribronchovascular airspace opacity in the left lower lobe. Employer's Miner's Claim Exhibit 9. He opined the changes are not a manifestation of coal dust exposure and favor "the 'classic form' of atypical mycobacterial infection." *Id.*

Dr. Belcher opined the October 23, 2013 CT scan shows biapical parenchymal scarring with noncavitary conglomerate mass formation, a small cavitary lesion in the left lower lobe, and scattered reticular nodular opacities and calcified granulomas. Claimant's Miner's Claim Exhibit 5. Dr. Meyer interpreted the scan as showing biapical parenchymal

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opinions rendered by Drs. Farney, Zaldivar, Fino, Castle, and Spagnolo." Decision and Order Denying Modification at 23. The ALJ erred in considering all of these medical opinions in the miner's claim without regard to the parties' designations or the evidentiary limitations at 20 C.F.R. §725.414. *See Keener*, 23 BLR at 1-241-42. But the error here was again harmless, as Dr. Owens did not diagnose the Miner with complicated pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[14] It appears Dr. Owens was relying upon Dr. Alexander's interpretation of the March 14, 2013 x-ray as showing simple pneumoconiosis with a 1/1 profusion, which Dr. Alexander read as negative for complicated pneumoconiosis. Miner's Claim Director's Exhibit 52.

scarring, "tree-in-bud" opacities, a thin-walled decreasing cavity, and new areas of ground-glass opacities and ill-defined nodules. Employer's Miner's Claim Exhibit 10. Dr. Meyer opined the findings are "likely" due to an atypical mycobacterial infection, and are not a manifestation of coal dust exposure. *Id.*

The ALJ accurately noted Dr. Belcher did not make a diagnosis of pneumoconiosis and his credentials are not of record. Decision and Order Denying Modification at 12, 24. We therefore affirm the ALJ's determination that the CT scan evidence does not establish complicated pneumoconiosis. Decision and Order Denying Modification at 24.S

However, as discussed above, the ALJ erred in her analysis of the Miner's treatment records and x-rays. As such, to summarize, we vacated her determination that the "other medical evidence" does not establish complicated pneumoconiosis at 20 C.F.R. §718.304(c), vacated her finding that the x-rays do not establish the disease at 20 C.F.R. §718.304(c), and vacated her finding that the evidence as a whole does not establish complicated pneumoconiosis. 20 C.F.R §718.304; Decision and Order Denying Modification at 24.

Part 718 Entitlement – Pneumoconiosis

Without the assistance of any statutory presumptions, 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. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). The ALJ found Claimant failed to establish the existence of clinical or legal pneumoconiosis,[15] and therefore did not establish a change in an applicable condition of entitlement.

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[15] 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). This definition encompasses 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). 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).

Clinical Pneumoconiosis

The ALJ initially found no mistake of fact in ALJ Timlin's determination that the x-ray evidence did not establish simple pneumoconiosis. Decision and Order Denying Modification at 7. She rationally found the July 21, 2010 x-ray negative for pneumoconiosis, as each of the three physicians who interpreted the film found no evidence of the disease. *Id.* at 7. She further rationally found the interpretations of the November 11, 2010, October 12, 2011, and March 14, 2012 x-rays to be in equipoise as each was read as positive and negative by the same number of equally-qualified radiologists. *Id.* Because these findings are supported by substantial evidence, we affirm them. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 272-76 (1994); *Adkins,* 958 F.2d at 52; 20 C.F.R. §718.202(a)(1).

The ALJ also considered four new interpretations by dually-qualified physicians of two x-rays dated March 14, 2013 and February 25, 2014. Decision and Order Denying Modification at 22-23.

Dr. Crum interpreted the March 14, 2013 x-ray as positive for simple pneumoconiosis. Claimant's Survivor's Claim Exhibit 6.[16] Conversely, Dr. Meyer opined the x-ray was negative for the disease. Employer's Miner's Claim Exhibit 8. Dr. Alexander interpreted the February 25, 2014 x-ray as positive for simple pneumoconiosis. Claimant's Miner's Claim Exhibit 1. Conversely, Dr. Meyer interpreted this film as negative for pneumoconiosis. Employer's Miner's Claim Exhibit 11.

The ALJ permissibly found the interpretations of the March 14, 2013 and February 25, 2014 x-rays to be in equipoise, based on the equal number of positive and negative readings from dually-qualified readers for each film. *Ondecko*, 512 U.S. at 272-76; *Adkins,* 958 F.2d at 52; Decision and Order Denying Modification at 22-23. We therefore affirm the ALJ's determination that the x-ray evidence does not establish simple pneumoconiosis.[17] 20 C.F.R. §718.202(a)(1); Decision and Order Denying Modification at 23.

The ALJ further found no mistake of fact in ALJ Timlin's determination that the digital x-ray and CT scan evidence does not establish pneumoconiosis. Decision and Order

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[16] As noted above, Claimant designated Dr. Crum's x-ray interpretation in the survivor's claim and not in the miner's claim. Claimant's Evidence Summary Forms; Claimant's Survivor's Claim Exhibit 6.

[17] Because there is no biopsy or autopsy evidence, Claimant cannot establish the existence of simple clinical pneumoconiosis at 20 C.F.R. §718.202(a)(2).

Denying Modification at 7; Decision and Order at 12, 14. The February 24, 2011 digital x-ray was read as positive for simple clinical pneumoconiosis by Dr. Miller, a dually-qualified radiologist, and as negative for the disease by Dr. Meyer, also a dually-qualified radiologist, and Dr. Fino, a B reader. Director's Exhibits 17, 51, 52. The ALJ permissibly found the digital x-ray did not establish pneumoconiosis, based upon the conflicting interpretations from equally-qualified readers and the additional negative reading by Dr. Fino. *Ondecko*, 512 U.S. at 272-76; *Adkins,* 958 F.2d at 52; 20 C.F.R. §§718.107(a), 718.202(a)(4); Decision and Order Denying Modification at 7. The ALJ further rationally found the CT scans previously submitted in the miner's claim do not establish simple pneumoconiosis as no physician diagnosed the disease. 20 C.F.R. §§718.107(a), 718.202(a)(4); Decision and Order Denying Modification at 7; Decision and Order at 14.

The ALJ considered four new interpretations of two CT scans conducted on May 31, 2013 and October 23, 2013. Decision and Order Denying Modification at 23-24; Claimant's Miner's Claim Exhibit 5; Employer's Miner's Claim Exhibit 10. The ALJ permissibly found the new CT scan evidence does not establish simple clinical pneumoconiosis for the same reasons they did not establish complicated pneumoconiosis, i.e., neither Dr Belcher nor Dr. Meyer diagnosed the disease. Decision and Order Denying Modification at 23-24. We therefore affirm the ALJ's determination that the CT scan evidence does not establish simple clinical pneumoconiosis. 20 C.F.R. §§718.107(a), 718.202(a)(4); Decision and Order Denying Modification at 24. We therefore affirm the ALJ's determination that the other medical evidence does not establish simple pneumoconiosis. 20 C.F.R. §§718.107(a), 718.202(a)(4).

In the miner's claim on modification, the parties submitted the new medical opinions of Drs. Owens and Farney and the new supplemental medical opinions of Drs. Zaldivar and Fino. 20 C.F.R. §718.202(a)(4); Claimant's Exhibit 3; Employer's Exhibits 4-6, 13-15. The ALJ found Dr. Owens's opinion that the Miner had clinical pneumoconiosis outweighed by the contrary medical opinions. Decision and Order Denying Modification at 23.

In finding that the opinions of Drs. Farney, Fino, Zaldivar, Castle, and Spagnolo outweighed Dr. Owens's opinion, she considered medical opinions not in the record. Decision and Order Denying Modification at 23. Employer submitted the opinions of Drs. Castle and Spagnolo as evidence in the survivor's claim, while it designated the reports of Drs. Fino, Zaldivar, and Dr. Farney as its medical opinions in the miner's claim. 20 C.F.R. §§725.414(a)(3)(i), 725.310(b); Employer's Evidence Summary in the Miner's Claim; Employer's Evidence Summary in the Survivor's Claim. The ALJ's consideration of Drs. Castle's and Spagnolo's opinions in the miner's claim violates the evidentiary limitations. 20 C.F.R. §§725.414(a)(3)(i), 725.310(b). Moreover, the ALJ erred in relying on a head count of the physicians who assessed the Miner's condition, rather than conducting a

qualitative analysis of their opinions. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. We must therefore vacate the ALJ's determination that the medical opinion evidence does not establish clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4).

In addition, the ALJ made the same error that she made in determining Claimant did not establish complicated pneumoconiosis: she failed to adequately explain her determination that the Miner did not suffer from clinical pneumoconiosis in light of the Miner's unaddressed treatment records. Decision and Order Denying Modification at 23-24; *see Wojtowicz*, 12 BLR at 1-165; Decision and Order Denying Modification at 20; Miner's Claim Director's Exhibit 62; Claimant's Survivor's Claim Exhibits 14, 15; Employer's Miner's Claim Exhibits 1, 2; Employer's Survivor's Claim Exhibits 2. The treatment records contain numerous diagnoses of pneumoconiosis and coal workers' pneumoconiosis which the ALJ did not discuss. Employer's Miner's Claim Exhibit 1. Therefore, we vacate the ALJ's determination that they do not support a finding of simple clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order Denying Modification at 24.

On remand, the ALJ must reconsider whether the medical opinion evidence and the Miner's treatment records support a finding of simple clinical pneumoconiosis, considering only the evidence submitted in the miner's claim and setting forth her findings in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165. She must then determine if the evidence as a whole establishes clinical pneumoconiosis. 20 C.F.R. §718.202(a); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08 (4th Cir. 2000).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove the Miner had a "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).

On modification, the parties submitted the new medical opinions of Drs. Owens and Farney and the new supplemental medical opinions of Drs. Zaldivar and Fino. Dr. Owens opined the Miner suffered from chronic obstructive pulmonary disease (COPD) without addressing its cause.[18] Claimant's Miner's Claim Exhibit 3. Drs. Farney, Zaldivar, and

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[18] ALJ Timlin determined Dr. Ammissetty's opinion that the Miner's impairment was due in part to coal mine dust exposure because his impairment was too severe to be due to smoking was unpersuasive because the physician did not explain the basis for his opinion or provide citation to medical literature in support of his position. Decision and Order at 24. The ALJ permissibly adopted ALJ Timlin's determination. *See Milburn*

Fino each attributed the Miner's obstructive lung disease solely to his cigarette smoking. Employer's Miner's Claim Exhibits 4-6, 13-15.

The ALJ accurately noted Dr. Owens did not address the etiology of the Miner's COPD. Decision and Order Denying Modification at 23: Claimant's Survivor's Claim Exhibit 3. Because she did not link the Miner's obstructive lung disease to coal mine dust exposure, we affirm the ALJ's determination that her opinion does not support Claimant's burden of proof. 20 C.F.R. §718.202(a)(4); Decision and Order Denying Modification at 23; Claimant's Miner's Claim Exhibit 3. The ALJ further accurately found the remaining opinions do not support Claimant's burden to establish the existence of legal pneumoconiosis. Decision and Order Denying Modification at 23. Because it is supported by substantial evidence, we affirm the ALJ's determination that Claimant did not establish the Miner had legal pneumoconiosis. 20 C.F.R. §718.201(a)(4).

Survivor's Claim

Because we vacate the denial of benefits in the miner's claim and the ALJ's finding the Miner had less than fifteen years of coal mine employment, we must also vacate the denial of benefits in the survivor's claim. However, in the interest of judicial economy, we will review the ALJ's determination that Claimant did not otherwise establish entitlement to benefits in her survivor's claim in the event Claimant does not establish entitlement to the Section 411(c)(4) presumptions on remand.

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

The ALJ found that because Claimant did not establish complicated pneumoconiosis in the miner's claim, she could not do so in her survivor's claim. Decision and Order Denying Modification at 25. However, the miner's and survivor's claims are separate cases with different elements of entitlement and procedural postures, and therefore different evidentiary limitations. *See* 20 C.F.R. §§718.205(a), 725.414, 725.310(b). Moreover, the parties designated different evidence in the miner's and survivor's claims. Claimant's Evidence Summary in the Miner's Claim; Claimant's Evidence Summary in the Survivor's Claim; Employer's Evidence Summary in the Miner's Claim; Employer's Evidence Summary in the Survivor's Claim. The ALJ erred in failing to determine whether the evidence submitted in the survivor's claim establishes the existence of complicated pneumoconiosis, regardless of whether Claimant established the disease in the miner's claim. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-221, 1-241-42 (2007) (en banc);

Colliery Co. v. Hicks, 138 F.3d 524, 533 (4th Cir. 1998): *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989); Decision and Order Denying Modification at 10.

Decision and Order Denying Modification at 25. Consequently, we vacate the ALJ's determination that Claimant did not establish complicated pneumoconiosis in her survivor's claim. 20 C.F.R. §718.304.

Part 718 Entitlement

Without the Section 411(c)(3) or Section 411(c)(4) statutory presumptions, Claimant must establish the Miner had pneumoconiosis arising out of coal mine employment, and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Death is considered due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis cause a miner's death, or if pneumoconiosis was a substantially contributing cause of his death. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *see Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 184 (4th Cir 2014). Failure to establish any one of the required elements precludes entitlement. *See Trumbo*, 17 BLR at 1-87-88.

The ALJ accurately found no evidence the Miner's death was due to pneumoconiosis. Decision and Order Denying Modification at 25. Thus, we affirm the ALJ's determination that Claimant cannot affirmatively establish entitlement to benefits without the Section 411(c)(3) and Section 411(c)(4) presumptions or automatic derivative entitlement under Section 422(*l*) based on an award in the miner's claim. 20 C.F.R. §718.205(b); *Collins*, 751 F.3d at 185; *Trumbo*, 17 BLR at 1-87; Decision and Order Denying Modification at 25.

Summary of Remand Instructions

On remand in the miner's claim, the ALJ must first determine whether Claimant established complicated pneumoconiosis, based on the evidence properly designated and admitted in that claim. 20 C.F.R. §718.304. If she determines Claimant has established complicated pneumoconiosis, she must also determine whether it arose from his coal mine employment.[19] 20 C.F.R. §718.203.

If Claimant does not establish complicated pneumoconiosis in the miner's claim, the ALJ must then determine if Claimant can invoke the Section 411(c)(4) presumption by establishing the Miner had at least fifteen years of qualifying coal mine employment. 20

[19] If a miner has at least ten years of coal mine employment, his pneumoconiosis is presumed to have arisen out of his coal mine employment, in which case the employer has the burden to disprove that presumed fact. 20 C.F.R. §718.203.

C.F.R. §718.305. If Claimant invokes the presumption, the burden shifts to Employer to establish the Miner had neither legal nor clinical pneumoconiosis, or "no part of the [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii).

If Claimant cannot invoke the Section 411(c)(4) presumption, the ALJ must reconsider whether Claimant can establish entitlement to benefits in the miner's claim at 20 C.F.R. Part 718. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

If the ALJ awards benefits in the miner's claim on remand, she must then determine if Claimant is entitled to automatic survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018). If she does not award benefits in the miner's claim, the ALJ must reconsider whether Claimant can invoke the Section 411(c)(3) or 411(c)(4) presumption in the survivor's claim, based only on the evidence properly designated and admitted in the survivor's claim. If Claimant invokes the Section 411(c)(3) presumption, the Miner is irrebuttably presumed to have died due to pneumoconiosis; if Claimant invokes the Section 411(c)(4) presumption, Employer must establish the Miner had neither legal nor clinical pneumoconiosis, or "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge