



BRB No. 22-0460 BLA

RICKY A. GROSS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
JARISA, INCORPORATED)	
)	
and)	
)	
KENTUCKY EMPLOYERS' MUTUAL)	DATE ISSUED: 02/09/2024
INSURANCE)	
)	
Employer/Carrier-)	
Petitioners)	
)	
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 John P. Sellers, III,
Administrative Law Judge, United States Department of Labor.

Ricky A. Gross, Harlan, Kentucky.

Joseph D. Halbert, (Shelton, Branham & Halbert PLLC), Lexington,
Kentucky, for Employer and its Carrier.¹

¹ Employer was previously represented by Paul E. Jones and Denise Hall Scarberry of Jones & Jones Law Office, PLLC, who filed Employer's Response Brief. After briefing, but prior to the decision in this case, Jones & Jones moved to withdraw as Employer's counsel. Shelton, Branham & Halbert PLLC moved to be substituted as counsel of record.

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

PER CURIAM:

Claimant appeals, without representation,² Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Denying Benefits (2021-BLA-05236) rendered on a claim filed on July 18, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ determined Claimant did not establish complicated pneumoconiosis and therefore 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. He accepted the parties' stipulation to thirty-eight years of underground coal mine employment, but found Claimant failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). The ALJ therefore found Claimant did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,³ 30 U.S.C. §921(c)(4) (2018), or establish entitlement to benefits at 20 C.F.R. Part 718. Thus, the ALJ denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer and its Carrier (Employer) respond in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response.

In an appeal filed without representation, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported

The Benefits Review Board grants Jones & Jones's request to withdraw and the motion of Shelton, Branham & Halbert PLLC to be substituted as counsel.

² Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Board review the ALJ's decision on Claimant's behalf, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude v. Keene Trucking Co.*, 19 BLR 1-88 (1995).

³ Section 411(c)(4) provides a rebuttable presumption that a miner is total disabled 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. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

by substantial evidence, and in accordance with applicable law.⁴ 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).

Complicated Pneumoconiosis

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields 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 weigh all evidence relevant to the presence or absence of complicated pneumoconiosis before determining whether Claimant has invoked the presumption. *Gray v. SLC Corp.*, 176 F.3d 382, 389-90 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

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

The ALJ considered eight interpretations of three chest x-rays. Decision and Order at 5-8. All the interpreting physicians are dually-qualified B readers and Board-certified radiologists, thus the ALJ reasonably found them all equally qualified. *Id.* at 6; Director’s Exhibits 21, 28, 31, 33, 34; Claimant’s Exhibits 1-3; Employer’s Exhibit 4.

June 11, 2019 X-Ray

Dr. DePonte interpreted the June 11, 2019 x-ray as positive for simple pneumoconiosis and complicated pneumoconiosis, recording category A large opacities that are consistent with complicated pneumoconiosis but noting that malignancy should be excluded. Director’s Exhibit 28 at 1. Dr. Kendall read the x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis, and opined there were no large opacities. Director’s Exhibit 33 at 3-4.

The ALJ permissibly determined that Dr. DePonte’s notation that malignancy should be excluded does not detract from her interpretation. *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006) (physician’s “refusal to express a diagnosis in categorical

⁴ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 18.

terms is candor, not equivocation”); Decision and Order at 6-7. However, as the x-ray was read as positive and negative for complicated pneumoconiosis by equally qualified physicians, the ALJ permissibly found the readings of the June 11, 2019 x-ray inconclusive for complicated pneumoconiosis. See *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); Decision and Order at 6-7.

October 7, 2019 X-Ray

Dr. DePonte interpreted the October 7, 2019 x-ray as positive for simple pneumoconiosis and complicated pneumoconiosis, category A large opacities, but again noted that malignancy should be excluded. Director’s Exhibit 21 at 18. Dr. Adcock also read the x-ray as positive for simple pneumoconiosis and complicated pneumoconiosis, category A large opacities. Claimant’s Exhibit 1 at 1. Dr. Ramakrishnan interpreted the x-ray as positive for simple pneumoconiosis but negative for complicated pneumoconiosis and did not note any large masses or opacities. Claimant’s Exhibit 3 at 1. Dr. Simone read the October 7, 2019 x-ray as negative for simple and complicated pneumoconiosis and opined there were no large opacities.⁵ Employer’s Exhibit 4 at 3-4.

The ALJ again permissibly determined that Dr. DePonte’s notation that malignancy should be excluded does not detract from her interpretation. *Perry*, 469 F.3d at 366; Decision and Order at 7. Noting that two of the dually-qualified physicians identified large opacities in Claimant’s lungs on the October 7, 2019 x-ray while two did not, the ALJ permissibly found the weight of the readings of this x-ray also inconclusive for complicated pneumoconiosis. See *Woodward*, 991 F.2d at 321; Decision and Order at 7.

January 27, 2020 X-Ray

Dr. Miller read the January 27, 2020 x-ray as positive for simple pneumoconiosis and negative for complicated pneumoconiosis. Claimant’s Exhibit 2 at 1-2. Dr. Seaman interpreted the x-ray as negative for simple and complicated pneumoconiosis but identified “two possible right apical nodular opacities that should be followed up to evaluate for malignancy.” Director’s Exhibit 31 at 3.

As both of the physicians opined the film was negative for complicated pneumoconiosis, the ALJ appropriately found the January 27, 2020 x-ray negative for

⁵ Dr. Lundberg reviewed the October 7, 2019 x-ray for quality purposes only. Director’s Exhibit 24.

complicated pneumoconiosis. See *Ondecko*, 512 U.S. at 281; *Staton*, 65 F.3d at 59; Decision and Order at 7.

The ALJ also considered an additional August 11, 2019 chest x-ray from Claimant's treatment records, which simply noted small nodular interstitial changes, significant emphysema, and no acute cardiopulmonary abnormalities. Decision and Order at 7; Director's Exhibit 32 at 7. The ALJ permissibly gave this x-ray little weight as it was silent as to the presence or absence of simple or complicated pneumoconiosis. See *Ondecko*, 512 U.S. at 281; *Staton*, 65 F.3d at 59; Decision and Order at 7.

Because he found the readings of two of the films to be inconclusive for complicated pneumoconiosis and the remaining film to be negative for pneumoconiosis, the ALJ found that the x-ray evidence as a whole does not support a finding of complicated pneumoconiosis. Decision and Order at 8. As the ALJ performed the proper quantitative and qualitative evaluation of the conflicting readings, we affirm this finding.⁶ See *Staton*, 65 F.3d at 59; *Woodward*, 991 F.2d at 321; Decision and Order at 8.

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

Computed Tomography (CT) Scan Evidence

The ALJ next considered five readings of three CT scans dated December 19, 2016, July 23, 2019, and August 2, 2021.⁷ Decision and Order at 8-10.

⁶ The ALJ indicated “[t]he [x-ray] films do reveal large-size abnormalities in the Claimant’s lung; however, the various interpretations are insufficient to identify them as complicated pneumoconiosis.” Decision and Order at 8. Notwithstanding, the ALJ sufficiently considered the eight x-ray interpretations, where some of the readings do show large opacities, which the ALJ permissibly weighed against the negative findings to ultimately conclude that the overall weight of the readings of the June 11, 2019 and October 7, 2019 films are inconclusive and the January 27, 2020 x-ray is negative. See *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983); Decision and Order at 8.

⁷ There is no biopsy evidence in the record to assist Claimant in establishing complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).

December 19, 2016 CT Scan

Dr. Kendall opined the December 19, 2016 CT scan showed mild to moderate pleural parenchymal scarring with no evidence of pneumoconiosis. Employer's Exhibit 3 at 3. With no other interpretations in the record, the ALJ reasonably found this scan negative for complicated pneumoconiosis. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); Decision and Order at 9.

July 23, 2019 CT Scan

Dr. Jimenez interpreted the July 23, 2019 CT scan as showing changes of panacinar bullous emphysema and no "suspicious pulmonary nodules or pulmonary mass lesions." Claimant's Exhibit 5 at 1. Dr. Kendall indicated the scattered interstitial nodular densities "may represent" simple pneumoconiosis and identified parenchymal opacities within the lung apices that were "most probably related to scarring" but "could less likely represent large opacities associated with [c]oal workers' pneumoconiosis." Employer's Exhibit 1 at 3.

The ALJ reasonably found Dr. Jimenez's interpretation insufficient to establish complicated pneumoconiosis as it was silent on the presence or absence of pneumoconiosis. *See Banks*, 690 F.3d at 489; *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984); Decision and Order at 9. Further, the ALJ permissibly found Dr. Kendall's interpretation to be vague and uncertain because the physician identified complicated pneumoconiosis as a "less likely" alternative diagnosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 9. Consequently, the ALJ reasonably found the July 23, 2019 CT scan was insufficient to establish the presence of complicated pneumoconiosis. *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33; Decision and Order at 9.

August 2, 2021 CT Scan

Dr. DePonte read the August 2, 2021 CT scan as depicting an irregular elongated opacity of 20 x 4.5 millimeters and a bandlike opacity approximately 29 millimeters in length with scattered small nodular opacities that "may represent simple and complicated pneumoconiosis," but recommended follow-up testing. Claimant's Exhibit 4 at 1-2. Dr. Simone interpreted the scan as showing bilateral apical fibrosis and severe emphysema, and indicated there were no large opacities and no evidence of pneumoconiosis. Employer's Exhibit 5 at 1.

The ALJ permissibly found Dr. DePonte's opinion was not sufficient to establish complicated pneumoconiosis in light of her uncertainty in making a diagnosis of

complicated pneumoconiosis and Dr. Simone's failure to note any large masses or opacities. *See Banks*, 690 F.3d at 489; *Rowe*, 710 F.2d at 255; Decision and Order at 10.

Based on the interpretations of the December 19, 2016, July 23, 2019, and August 2, 2021 CT scans, the ALJ reasonably found the overall weight of the CT scan evidence is either negative or inconclusive and therefore insufficient to establish complicated pneumoconiosis. *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33; Decision and Order at 10, 13.

Medical Opinion Evidence

The ALJ next considered the medical opinions of Drs. Forehand, Westerfield, and Dahhan. Decision and Order at 11-13. Dr. Forehand initially diagnosed Claimant with complicated pneumoconiosis based on his occupational exposure and Dr. DePonte's reading of the October 7, 2019 x-ray. Director's Exhibit 21 at 4. However, Dr. Forehand changed his opinion in a supplemental report after reviewing numerous x-ray readings⁸ and Dr. Jimenez's CT scan interpretation, determining the majority of evidence shows simple but not complicated pneumoconiosis. Director's Exhibit 27 at 2. Dr. Westerfield's opinion and deposition do not discuss the presence or absence of complicated pneumoconiosis. Director's Exhibits 29 at 2-3; 63 at 13-14. Dr. Dahhan testified that the abnormalities in Claimant's lungs are not large opacities of complicated pneumoconiosis, based on the x-ray interpretations of record and the lack of a pulmonary impairment on the objective testing. Director's Exhibits 30; 66 at 14-15, 28.

The ALJ permissibly discredited Dr. Forehand's initial opinion as inconsistent with the weight of the x-ray evidence and accorded greater weight to the physician's supplemental report. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255; Decision and Order at 11. Further, the ALJ reasonably afforded no weight to Dr. Westerfield's opinion because it was silent on the issue of complicated pneumoconiosis. *See Banks*, 690 F.3d at 489; *Marra*, 7 BLR at 1-218-19; Decision and Order at 11. Finally, the ALJ permissibly credited Dr. Dahhan's opinion as consistent with the weight of the x-ray evidence. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070 (6th Cir. 2013); *Crisp*, 866 F.2d at 185; Decision and Order at 12-13. We therefore affirm, as supported by substantial evidence, the ALJ's determination that there is no well-reasoned or well-documented medical opinion diagnosing complicated

⁸ Dr. Forehand reviewed Dr. DePonte's readings of the June 11, 2019 and October 7, 2019 x-rays, Dr. Kendall's interpretation of the June 11, 2019 x-ray, Dr. Ramakrishnan's reading of the October 7, 2019 x-ray, and Dr. Seaman's interpretation of the January 27, 2020 x-ray. Director's Exhibit 27 at 2.

pneumoconiosis to support a finding of complicated pneumoconiosis. *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33; Decision and Order at 13.

Weighing all the evidence together, the ALJ acknowledged that there was some evidence that “notes the presence of abnormalities in the upper lungs,” but permissibly found the preponderance of the evidence does not support a finding of complicated pneumoconiosis at 20 C.F.R. §718.304.⁹ *See Gray*, 176 F.3d at 389-90; *Melnick*, 16 BLR at 1-33; Decision and Order at 13. Consequently, we affirm the ALJ’s finding that Claimant failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3).

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

To invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018), 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 and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). 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 consider all relevant evidence and weigh the evidence supporting total disability against the 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).

Pulmonary Function Studies

The ALJ assessed the two pulmonary function studies of record, dated October 7, 2019, and January 27, 2020. Decision and Order at 14. He accurately observed neither study produced qualifying values.¹⁰ *Id.*; Director’s Exhibits 21 at 6; 30 at 2, 4. Therefore,

⁹ The ALJ also permissibly found Claimant’s treatment records do not support a finding of complicated pneumoconiosis because, although they diagnose coal workers’ pneumoconiosis and pulmonary fibrosis, they are silent as to the existence of complicated pneumoconiosis or progressive massive fibrosis. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984); Decision and Order at 13; Director’s Exhibit 32; Claimant’s Exhibit 6.

¹⁰ A “qualifying” pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A “non-qualifying” study exceeds those values. 20 C.F.R. §718.204(b)(2)(i). Because the

we affirm his finding that the pulmonary function study evidence does not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 14.

Arterial Blood Gas Studies

The ALJ considered the results of two arterial blood gas tests dated October 7, 2019, and January 27, 2020. Decision and Order at 15. He correctly observed neither arterial blood gas test produced qualifying values.¹¹ *Id.*; Director’s Exhibits 21 at 13; 30 at 2, 5. Therefore, we affirm his finding that the arterial blood gas studies do not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 15.

Medical Opinions¹²

The ALJ considered the medical opinions of Drs. Forehand, Westerfield, and Dahhan. Decision and Order at 15-16. Dr. Forehand initially stated that Claimant was totally disabled based upon his diagnosis of complicated pneumoconiosis. Director’s Exhibit 21 at 4. However, after reconsidering his opinion, Dr. Forehand concluded that Claimant had the respiratory capacity to return to his last coal mine job. Director’s Exhibit 27 at 2-3. Drs. Westerfield and Dahhan similarly concluded that Claimant could return to his previous coal mine job. Director’s Exhibits 29 at 3; 30 at 3; 63 at 13-14; 66 at 10-12, 17, 28.

As Dr. Forehand, the only physician to diagnose a totally disabling impairment, changed his opinion, the ALJ reasonably found that the medical opinion evidence does not support a finding of total disability. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Crisp*, 866 F.2d at 185; *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507

administering physicians reported differing heights of 65.5 and 66.5 inches, the ALJ permissibly relied on an average height of 66.0 inches; he then properly used 66.1 inches, the closest greater table height set forth at Appendix B of 20 C.F.R. Part 718, to determine whether the studies were qualifying. *See Carpenter v. GMS Mine & Repair Maint. Inc.*, BLR , BRB No. 22-0100 BLA, slip op. at 4-5 (Sept. 6, 2023); Decision and Order at 14 n.10.

¹¹ A “qualifying” blood gas study yields results 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 exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

¹² The record contains no evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, and therefore Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

(6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989); Decision and Order at 16.

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if the evidence is found insufficient to establish a required element of entitlement. *See Ondecko*, 512 U.S. at 281; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv) or in consideration of the evidence as a whole. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; 20 C.F.R. §718.204(b)(2); Decision and Order at 16. As Claimant failed to establish that he has a totally disabling respiratory or pulmonary impairment, we affirm the ALJ's findings that he did not invoke the Section 411(c)(4) presumption and benefits are precluded under 20 C.F.R. Part 718. *See Anderson*, 12 BLR at 1-112; 20 C.F.R. §718.204(b)(2).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge