



BRB No. 25-0133 BLA

CHARLES E. MCDANIEL )  
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 Claimant-Respondent )  
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 v. )  
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 MINGO LOGAN COAL COMPANY )  
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 Employer-Petitioner )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest )

**NOT-PUBLISHED**

DATE ISSUED: 03/23/2026

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Modification of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Austin), Norton, Virginia, for Claimant.

Scott A. White (White & Risse, L.L.C), Arnold, Missouri, for Employer.

David Casserly (Jonathan Berry, Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: ROLFE, JONES, and ULMER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits on Modification (2021-BLA-06008) rendered on a second request for modification of a claim filed on March 25, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Act).

In a May 15, 2019 Decision and Order Denying Benefits, the ALJ credited Claimant with 32.14 years of qualifying coal mine employment per the parties' stipulation. She found Claimant did not establish he has complicated pneumoconiosis and thus could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. She further found he did not establish he has a totally disabling pulmonary or respiratory impairment and thus denied benefits. 20 C.F.R. §718.204(b)(2).

Claimant timely requested modification of the denial and submitted additional evidence. Director's Exhibit 163. After the district director denied modification in a November 18, 2019 Proposed Decision and Order, Director's Exhibit 166, Claimant again requested modification and submitted additional evidence. Director's Exhibit 174. The district director denied Claimant's second request for modification in a November 9, 2020 Proposed Decision and Order. Director's Exhibit 214. Claimant subsequently requested a hearing and the claim was again referred to the Office of Administrative Law Judges. Director's Exhibits 223, 226.

In her Decision and Order Awarding Benefits on Modification, the subject of this appeal, the ALJ adopted her prior finding that Claimant established 32.14 years of qualifying coal mine employment. She again determined Claimant failed to establish a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). But she also found Claimant established the presence of complicated pneumoconiosis and therefore invoked the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304. She further found Claimant's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203(b). The ALJ thus determined Claimant established a change in conditions and further found granting modification would render justice under the Act. 20 C.F.R. §725.310.

On appeal,<sup>1</sup> Employer contends the ALJ lacked the authority to hear and decide the case because she was not appointed in a manner consistent with the Appointments Clause

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<sup>1</sup> Employer acknowledges its Petition for Review and Brief and Reply were untimely filed and requests that the Benefits Review Board accept the pleadings as a part of the record. *See* Employer's Motion to File Petition for Review and Supporting Brief For Good Cause Shown, *Instanter*; Employer's Motion to File Combined Reply Brief,

of the Constitution.<sup>2</sup> It further asserts the removal provisions applicable to the ALJ render her appointment unconstitutional. On the merits, it contends the ALJ erred in finding Claimant established complicated pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging rejection of Employer's constitutional arguments. Employer filed a reply, addressing Claimant's and the Director's arguments.<sup>3</sup>

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

### **Appointments Clause and Removal Protections**

Employer urges the Board to vacate the ALJ's Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*,

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*Instantly*. No party has objected to the late filings. The pleadings are accepted as part of the record.

<sup>2</sup> Article II, Section 2, Clause 2, sets forth the appointing powers:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

<sup>3</sup> We affirm, as unchallenged on appeal, the ALJ's finding of 32.14 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

<sup>4</sup> We will apply the law of the United State Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 24-25.

585 U.S. 237 (2018).<sup>5</sup> Employer’s Brief at 53-59; Employer’s Reply at 4-5. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,<sup>6</sup> but maintains the ratification was insufficient to cure the constitutional defect in the ALJ’s appointment.<sup>7</sup> Employer’s Brief at 54-59. For the reasons set forth in *Johnson v. Apogee Coal Co.*, 26 BLR 1-1, 1-5-7 (2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023), we reject Employer’s Appointments Clause arguments.

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer’s Brief at 53-54; Employer’s Reply at 7-8. It generally argues the

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<sup>5</sup> *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are “inferior officers” subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. 237, 251 (2018) (citing *Freytag v. Comm’r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has conceded that the Supreme Court’s holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

<sup>6</sup> The Secretary of Labor (Secretary) issued a letter to the ALJ on December 21, 2017, stating:

In my capacity as head of the [DOL], and after due consideration, I hereby ratify the [DOL’s] prior appointment of you as an [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] of the [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary’s December 21, 2017 Letter to ALJ Timlin.

<sup>7</sup> Employer argues the ALJ adjudicated the case before she was properly appointed. Employer’s Brief at 54. However, as the Director argues, the ALJ took no action in this modification until issuing her Notice of Hearing on August 24, 2022, well after the ALJ’s appointment was ratified. Director’s Brief at 2. Further, in the initial proceedings of the claim, after the issuance of *Lucia*, the ALJ issued a Notice and Order regarding the parties’ potential entitlement to relief. Director’s Exhibit 157. In response, the Employer asked the ALJ to proceed with the adjudication of the claim rather than seek reassignment or rehearing. Director’s Exhibit 158. Thus, as the Director argues, Employer waived its objection to the ALJ’s appointment. *See Lucia*, 585 U.S. at 239 (requiring “a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party’s] case”); Director’s Response.

removal provisions for ALJs contained in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia* and the United States Supreme Court's holding in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Employer's Brief at 53-54, 56; Employer's Reply at 7-8. In *Howard v. Apogee Coal Co.*, 25 BLR 1-301 (2022), the Board rejected similar arguments, in part, because the employer did not sufficiently allege "it suffered any harm due to the ALJ's removal protections." 25 BLR at 1-307 (applying *Calcutt v. FDIC*, 37 F.4th 293, 319 (6th Cir. 2022)). Subsequently, in *K&R Contractors, LLC v. Keene*, 86 F.4th 135, 145 (4th Cir. 2023), the Fourth Circuit, whose law applies to this claim, held that "the Board has no authority to remedy the alleged separation-of-powers violation." The court nevertheless denied the employer's request for a new hearing because it did not show that the alleged "constitutional violation caused [it] harm." *Keene*, 86 F.4th at 149. So too here. Thus, even if the Board had authority to remedy the violation presented by Employer's removal protections arguments, we would decline to do so because Employer has failed to identify a harm.

### **Invocation of the Section 411(c)(3) Presumption - Complicated Pneumoconiosis**

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields 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, yields 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 v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The ALJ found the x-ray and computed tomography (CT) scan evidence support a finding of complicated pneumoconiosis, and found while the biopsy evidence, medical opinion evidence, and treatment records do not support the finding of complicated pneumoconiosis, they do support a finding of simple clinical pneumoconiosis. 20 C.F.R. §718.304(a)-(c); Decision and Order at 33, 40-41, 46, 53, 55. Weighing the evidence together, she concluded Claimant established complicated pneumoconiosis and thus invoked the irrebuttable presumption at Section 411(c)(3) of the Act. Decision and Order at 56.

Employer contends the ALJ erred in finding Claimant established complicated pneumoconiosis based on the x-ray and CT scan evidence, and in consideration of the evidence as a whole.<sup>8</sup> Employer's Brief at 61, 66-67; Employer's Reply at 10-26. We are not persuaded by Employer's arguments.

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

The ALJ considered eighteen interpretations of eight x-rays. Decision and Order at 22-33. All the physicians who interpreted the x-rays are Board-certified radiologists and B readers. *Id.* at 32. Drs. DePonte and Crum read the May 11, 2015 x-ray as positive for complicated pneumoconiosis, Category A, while Drs. Tarver<sup>9</sup> and Meyer<sup>10</sup> read the x-ray as negative for pneumoconiosis. Director's Exhibits 32 at 3, 28; 147 at 34-35; Claimant's Exhibit 1. Dr. Ramakrishnan read the February 7, 2017 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Meyer read the x-ray as negative for pneumoconiosis.<sup>11</sup> Claimant's Exhibit 4; Employer's Exhibit 8. Dr. Crum read the April 14, 2017 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Meyer

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<sup>8</sup> Employer also raises multiple arguments regarding the ALJ's weighing of the medical opinion and biopsy evidence, including contending the ALJ did not establish "clear bases" for crediting Drs. Gaziano, Green, and Cool. Employer's Brief at 59-63, 65. However, the ALJ did not rely on these opinions in reaching her conclusions. Decision and Order at 41, 46. Further, as Employer acknowledges, the ALJ found the biopsy evidence does not support a finding of complicated pneumoconiosis. *Id.*; Employer's Brief at 2 n.1. Thus, Employer has failed to explain how any alleged errors in the ALJ's consideration of this evidence made a difference in the outcome of this case. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

<sup>9</sup> Dr. Tarver noted a two-centimeter right upper lobe "nodule vs. scar" and left base scarring or atelectasis. Director's Exhibit 32 at 28.

<sup>10</sup> Dr. Meyer noted a nodule in the right upper zone, measuring 1.2 by 2.4 centimeters, which he indicated may be inflammatory or cancerous. Director's Exhibit 32 at 3. He also noted changes in the left lung base, which might be "a mass, aspiration/pneumonia, or post-surgical scarring." *Id.*

<sup>11</sup> Dr. Meyer noted an "indeterminate" nodule in the right upper zone, measuring two centimeters in greatest dimension and post-surgical changes in left lung base. Employer's Exhibit 8.

read the x-ray as negative for pneumoconiosis.<sup>12</sup> Director's Exhibit 147 at 24; Employer's Exhibit 7. Dr. Crum interpreted the February 5, 2018 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Meyer read it as negative for pneumoconiosis.<sup>13</sup> Director's Exhibit 147 at 51; Employer's Exhibit 10. Dr. DePonte read the June 10, 2019 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Tarver read the x-ray as negative for pneumoconiosis.<sup>14</sup> Director's Exhibits 63, 163. Dr. DePonte interpreted the December 9, 2019 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Meyer provided a negative reading.<sup>15</sup> Director's Exhibits 178, 186. Dr. Crum interpreted the October 15, 2020 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Kendall interpreted the x-ray as negative for pneumoconiosis.<sup>16</sup> Claimant's Exhibit 11; Employer's Exhibit 3. Finally, Dr. DePonte interpreted the November 28, 2020 x-ray as positive for complicated pneumoconiosis, Category A, and Dr. Meyer interpreted the x-ray as negative for pneumoconiosis.<sup>17</sup> Claimant's Exhibit 10; Employer's Exhibit 1.

The ALJ found there is an equal number of positive and negative readings for complicated pneumoconiosis by dually-qualified readers for each x-ray. Decision and Order at 32. But she further noted that "virtually all the interpreting physicians noted an

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<sup>12</sup> Dr. Meyer noted an "indeterminate" right upper zone nodule, measuring 1.5 by two centimeters, which he indicated is likely granulomatous or cancerous, in addition to surgical changes in the left lung. Employer's Exhibit 7.

<sup>13</sup> Dr. Meyer noted a nodule measuring 1.4 by 2.1 centimeters in the right upper zone, which he indicated may be prior granulomatous, focal fibrosis, or cancerous. Employer's Exhibit 10. He also noted post-surgical changes on the left and recommended correlation with pathology. *Id.*

<sup>14</sup> Dr. Tarver noted "upper lobe disease" bilaterally, "right greater than left," which he found likely secondary to old tuberculosis or histoplasmosis. Director's Exhibit 63.

<sup>15</sup> Dr. Meyer noted granuloma in the right upper lobe, and surgical changes. Director's Exhibit 186. He also noted pleural plaques "consistent with pneumoconiosis" on the ILO form. *Id.* However, he also noted "en face pleural plaques," with the impression "no radiographic findings of coal workers' pneumoconiosis." *Id.*

<sup>16</sup> Dr. Kendall noted calcified granuloma in the right upper lobe and pleural parenchymal scarring. Employer's Exhibit 3.

<sup>17</sup> Dr. Meyer again noted a large "ill-defined" opacity in the right upper lobe, noting it is "enlarging," and found it suspicious for lung cancer. Employer's Exhibit 1.

abnormality in the right upper lung,” and in every instance, those physicians who concluded Claimant does not have complicated pneumoconiosis also interpreted the x-ray as negative for simple pneumoconiosis and provided other explanations for the large opacity, including granulomatous disease or cancer. *Id.* at 32-33. The ALJ found the negative readings providing these alternate etiologies to be speculative and unsupported, as there is no evidence of lung cancer or diseases which would result in granuloma in the record; however, there is pathological evidence of simple pneumoconiosis.<sup>18</sup> *Id.* at 33. Thus, the ALJ accorded the negative readings for pneumoconiosis less weight and found the x-ray evidence positive for complicated pneumoconiosis. *Id.*

Employer argues the ALJ erred in her consideration of the x-ray evidence, alleging her findings are inconsistent by first finding the x-rays in equipoise, but then giving the negative readings less weight. Employer’s Reply at 15. It also contends that the positive x-ray readings are equivocal, given they indicate the large opacity identified “may” constitute complicated pneumoconiosis. *Id.* at 21. Finally, it contends the ALJ substituted her opinion for that of the experts, noting that although the ALJ found no evidence of granulomatous disease of record, such disease is “endemic to people in the Midwest.” *Id.* at 15.

Initially, the ALJ appropriately found that although the positive and negative x-ray readings by equally-qualified physicians are equally balanced for each x-ray (i.e., the readings are in equipoise), when considering all the relevant evidence, including the readers’ comments regarding the identified large opacity in the right upper lung and evidence in Claimant’s treatment records, the negative readings were nevertheless speculative and unsupported.<sup>19</sup> *See Cox*, 602 F.3d at 286-87 (ALJ permissibly rejected, as

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<sup>18</sup> A wedge biopsy of Claimant’s left lower lobe was obtained on February 5, 2015. Director’s Exhibit 30. The treating pathologist found evidence of silicosis but did not indicate it was consistent with complicated pneumoconiosis. *Id.* The record also contains pathology opinions by Drs. Oesterling, Cool, and Roggli. Director’s Exhibit 31; Claimant’s Exhibit 12; Employer’s Exhibits 5, 18, 21. The ALJ found while the evidence was insufficient to establish complicated pneumoconiosis at 20 C.F.R. §718.304(b), it supported a finding of simple clinical pneumoconiosis as the treating pathologist, Dr. Cool, and Dr. Roggli agreed it was present on pathology and Dr. Oesterling’s opinion to the contrary was undermined. Decision and Order at 40-41. Employer has not specifically challenged these findings. *See Skrack*, 6 BLR at 1-711.

<sup>19</sup> Employer argues granuloma is “endemic” to people in the Midwest (presumably including Claimant); however, it points to no evidence of record supporting this statement.

speculative and equivocal, expert opinions that large opacities seen on the miner's x-ray were not due to coal dust and were likely due to other conditions when there was no evidence of record that the miner was suffering from any of the alternative diagnoses); *see also Melnick*, 16 BLR at 1-33-34 (ALJ must consider the entirety of an x-ray report including additional comments); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 316-17 (4th Cir. 2012) (if a reviewing court can discern what the ALJ did and why she did it, the duty of explanation is satisfied); Decision and Order at 32-33.

Employer also contends the ALJ's findings are contradictory, as Claimant's treatment records likewise lack a diagnosis of pneumoconiosis. But as discussed more below, that statement is inaccurate.<sup>20</sup> Employer's Brief at 62.

Finally, a physician's use of words such as "may" or "likely" do not necessarily render the opinion equivocal. *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006) (in certain situations, "refusal to express a diagnosis in categorical terms is candor, not equivocation."). Although Employer points to Dr. DePonte's use of qualifying language,<sup>21</sup> she clearly checked the box identifying a Category A large opacity. Employer's Reply at 21; *see* Claimant's Exhibit 1. Based on the design of the ILO form and the Act's statutory and regulatory requirements, such an indication on the ILO form permits an ALJ to conclude a physician read the x-ray as positive for complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.102(d), 718.304. Thus, we reject Employer's argument.

As the ALJ performed both a qualitative and quantitative analysis of the x-ray evidence and permissibly discounted the negative x-ray interpretations as inconsistent with the evidence of record, we affirm her finding that the x-ray evidence supports a finding of complicated pneumoconiosis.<sup>22</sup> *See "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57

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Employer's Reply at 15. Employer also appears to acknowledge that Claimant has not been diagnosed with lung cancer. *Id.*

<sup>20</sup> Moreover, Employer does not address the ALJ's finding that Drs. Zaldivar and Rosenberg ultimately acknowledged the presence of simple clinical pneumoconiosis based on Dr. Roggli's biopsy report finding the disease. Decision and Order at 45-46 (citing Employer's Exhibits 22 at 7; 23 at 45-47).

<sup>21</sup> Employer lists interpretations by Drs. Ramakrishnan and Crum and contends their opinions are also equivocal; however, it points to no similar qualifying language. Employer's Reply at 21; Claimant's Exhibits 4, 11.

<sup>22</sup> Employer also generally argues that Drs. Meyer and Tarver are better-qualified than Drs. Crum and DePonte. Employer's Brief at 66; Employer's Reply at 13. Employer

(4th Cir. 2016); *Cox*, 602 F.3d at 286-87; *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order at 33.

### **Other Medical Evidence - 20 C.F.R. §718.304(c)**

Relevant to “other medical evidence” under 20 C.F.R. §718.304(c), the ALJ considered CT scans, Claimant’s treatment records, and medical opinion evidence.<sup>23</sup>

#### CT Scans/Treatment Records

The ALJ considered two CT scans taken January 5, 2015, and July 1, 2015, read by Drs. Crum and Meyer. Decision and Order at 48-50. She also considered the treatment readings of these CT scans by Drs. Maxwell and Bueno. *Id.* at 51-53.

The ALJ initially noted the readings provided by Dr. Meyer of the two CT scans submitted in the prior adjudication, which Employer again designated for consideration on modification. Decision and Order at 48. Dr. Meyer noted a left lower lobe opacity, which he found suspicious for cancer, and a right upper lobe opacity, which he stated must be classified as possible complicated pneumoconiosis, although the lack of extensive background opacities made it an atypical presentation for complicated pneumoconiosis, thus making it suspicious for granulomatous disease. *Id.*; Director’s Exhibits 31; 148 at 1724.

In the January 5, 2015 CT scan, Dr. Crum noted a large opacity in the right upper lobe, 4.5 centimeters, which he found to be consistent with complicated pneumoconiosis. Director’s Exhibit 185. He also noted another large opacity, 3.2 centimeters, in the left lung, which he indicated may also be consistent with complicated pneumoconiosis. *Id.* Dr. Meyer’s rehabilitative reading also noted a large opacity in the right upper lobe, which he indicated was more likely due to a granulomatous infection as there is “no diffuse interstitial process to suggest pneumoconiosis.” Employer’s Exhibit 25. He also noted a

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does not support its contention with evidence of record; moreover, while an ALJ may give greater weight to an expert with “superior” qualifications, she is not required to do so. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc), *aff’d on recon.*, 24 BLR 1-13 (2007) (en banc); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Thus, we reject Employer’s argument.

<sup>23</sup> While the ALJ found the medical opinion evidence and treatment records do not support a finding of complicated pneumoconiosis, we address her consideration of this evidence as it pertains to Employer’s arguments that the ALJ did not adequately weigh the evidence as a whole.

mass in the left lower lobe, 1.8 by three centimeters which he indicated is “non-specific” and could be cancerous or a result of aspiration, but it is “not typical of a pneumoconiotic large opacity.” *Id.* Dr. Maxwell noted a large right upper lobe opacity measuring “4.3 x 1.0 x 1.6” centimeters as well as a left lower lobe opacity measuring 3.1 centimeters in diameter, changed from 1.4 centimeters in August 2014. Director’s Exhibit 148 at 1766. He did not provide an etiology for the right upper lobe opacity but indicated the left lower lobe opacity is likely inconsistent with pneumoconiosis, given the significant change in size, and noted it as suspicious for cancer. *Id.*

Dr. Crum interpreted the July 1, 2015 CT scan as consistent with complicated pneumoconiosis, Category B. Director’s Exhibit 190. He noted right upper lung and left upper lung opacities. *Id.* Dr. Meyer again noted the right upper lung opacity, measuring 1.5 by 2.4 centimeters, which he indicated is consistent with granulomatous disease or an infectious process. Employer’s Exhibit 24. He indicated new additional nodules, measuring less than one centimeter, suggesting an “active process” inconsistent with pneumoconiosis. *Id.* He also noted post-surgical change in the left lower lobe. *Id.* Dr. Bueno likewise noted the large opacity in the right upper lobe, measuring twenty-nine millimeters in its largest dimension and the lower lobe resection. Director’s Exhibit 187. He indicated the findings were concerning for a process other than silicosis and recommended another biopsy to rule out cancer. *Id.*

Weighing the CT scan evidence together, the ALJ found it does not establish complicated pneumoconiosis as to the left lower lobe abnormality present in the January 5, 2015 CT scan because there is no interpretation that specifically identified it as complicated pneumoconiosis. Decision and Order at 53. As for the right upper lobe abnormality, the ALJ found it “notable” that Dr. Meyer conceded it could constitute complicated pneumoconiosis. *Id.* She dismissed the treatment record interpretations, as their focus was on whether Claimant’s abnormalities were cancerous and there is nothing in the record diagnosing Claimant with lung cancer. *Id.* Thus, she found the CT scan evidence supports a finding that the right upper lobe large opacity is pneumoconiotic and sufficiently large to constitute complicated pneumoconiosis as defined in 20 C.F.R. §718.304(a). *Id.*

Employer argues the ALJ erred in her consideration of the CT scan evidence. Employer’s Brief at 61-62, 66; Employer’s Reply at 20-25. Specifically, it again contends Dr. Meyer’s credentials are “superior” to those of Dr. Crum and generally argues the ALJ should have accorded Dr. Meyer more weight as his opinion is based on the entirety of the record. Employer’s Brief at 61, 66; Employer’s Reply at 21-25. It further contends the ALJ gave “short shrift” to the CT scans included in the treatment records. Employer’s Reply at 20. Finally, it contends the ALJ failed to properly weigh the CT scans with the

other medical evidence, particularly its experts' medical opinions. Employer's Brief at 59-63. We disagree.

Employer's general argument that the ALJ should have given Dr. Meyer's readings more weight than Dr. Crum's readings because Dr. Meyer allegedly reviewed more evidence and is better qualified is a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Contrary to Employer's argument, an ALJ is not required to credit one physician's opinion over another because they have additional qualifications or considered more evidence. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993).

Employer next generally argues the ALJ did not adequately address the CT scan readings contained in the treatment records. Employer's Reply at 20. As noted above, the ALJ considered the treatment readings of the January 2015 and July 2015 CT scans and found no reason to weigh them for or against a finding of pneumoconiosis given their focus on determining whether the abnormalities were cancerous. Decision and Order at 53. As it is within the ALJ's discretion to weigh the credibility of the evidence, we affirm her determination. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ evaluates the credibility of the evidence of record); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216 (1984) (ALJ has the discretion to determine whether the lack of discussion of pneumoconiosis supports a finding that it is not present).

Further, while Employer argues the ALJ did not adequately consider other CT scan readings contained in the treatment records, it does not indicate what evidence the ALJ allegedly failed to address or how it weighs against the ALJ's findings. Employer's Reply at 20. The ALJ noted there are "thousands of pages" of treatment records, which she summarized, including notations of multiple CT scan interpretations. Decision and Order at 54-55. Thus, we reject Employer's contention. *See Vandenboom v. Barnhart*, 421 F.3d 745, 750 (8th Cir. 2005) (rejecting out of hand conclusory assertion that ALJ erred in failing to consider an argument where litigant provided no analysis of relevant law or facts).

Moreover, contrary to Employer's argument that Claimant's treatment records fail to diagnose pneumoconiosis, the records note multiple bilateral pulmonary nodules consistent with silicosis or pneumoconiosis. Decision and Order at 54-55; *see, e.g.*, Director's Exhibit 187; Claimant's Exhibits 7, 9. Thus, we reject Employer's argument that the ALJ failed to consider all the relevant evidence and its contention that her findings are undermined by the lack of a pneumoconiosis diagnosis in Claimant's treatment records. Employer's Brief at 59-60, 62.

### Medical Opinion Evidence

Employer next alleges the ALJ did not adequately weigh its experts' explanations as to etiology of the large opacities identified on CT scan. Employer's Brief at 61, 64-66; Employer's Reply at 15-20.

The ALJ considered the medical opinions of Drs. Green, Zaldivar, Rosenberg, and Tuteur. Decision and Order at 41-47. As the ALJ noted, only Dr. Green diagnosed complicated pneumoconiosis; however, she found his opinion of limited value because it appears he did not consider any of the negative radiographic evidence. *Id.* at 46. The ALJ found those doctors not diagnosing complicated pneumoconiosis relied on the pathologists and radiologist they believed had the best credentials to determine the etiology of the lower lobe opacity and upper lobe opacity, respectively, in determining if complicated pneumoconiosis was present,<sup>24</sup> which she found made their opinions worthy of "extremely limited value." *Id.* She further found Drs. Rosenberg's and Tuteur's opinions that complicated pneumoconiosis was not present given Claimant's lack of disabling impairment to be unpersuasive. *Id.* at 46-47. Finally, she also found Dr. Tuteur's opinion that the large opacities were the result of pulmonary emboli speculative and inconsistent with the treatment record evidence. *Id.* at 46, 55-56. Thus, the ALJ found all the medical opinion evidence is unreliable and so does not support a finding of complicated pneumoconiosis. *Id.* at 46.

Employer generally argues Drs. Zaldivar's and Rosenberg's opinions should have been given more weight based on their credentials and because their opinions were better reasoned and documented. Employer's Brief at 64-65. It further contends the ALJ simply "counted heads" because more physicians found the large opacity to be coal dust-related and substituted her opinion for those of the experts. *Id.* at 64. More specifically, it argues the ALJ found that Claimant did not establish a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2), a finding it contends supports Dr. Meyer's conclusion that the large opacity is not complicated pneumoconiosis and Dr. Tuteur's explanation that the opacities are the result of Claimant's pulmonary embolism documented in his treatment records. Employer's Brief at 61, 66; Employer's Reply at 16-19.

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<sup>24</sup> Of note, Dr. Zaldivar indicated that if complicated pneumoconiosis is present, it is usually located in the upper lobes, and the radiographic evidence showed such opacities; however, he deferred to Dr. Meyer's negative readings. Decision and Order at 46; Employer's Exhibit 23.

Again, Employer's general arguments that Drs. Zaldivar's and Rosenberg's opinions should have been given greater weight based on their credentials<sup>25</sup> and their consideration of more evidence of record is a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. Further, contrary to Employer's argument, the ALJ did not "count heads" in weighing the evidence. Indeed, she did not credit Dr. Green's opinion regarding the presence of complicated pneumoconiosis but also found those opinions that did not find complicated pneumoconiosis to be unreasoned. Decision and Order at 46-47.

Moreover, we reject Employer's arguments that the ALJ did not consider evidence regarding Claimant's lack of impairment or evidence contending his large opacities were the result of his pulmonary emboli.<sup>26</sup> As analyzed above, the ALJ specifically addressed the opinions relying on this evidence to exclude complicated pneumoconiosis and permissibly found them unpersuasive. Decision and Order at 46, 55-56; *see* 20 C.F.R. §718.304 (Claimant is not required to show evidence of disability to invoke the presumption of total disability due to complicated pneumoconiosis); *Scarbro*, 220 F.3d at 257 (Act does not "incorporate a purely medical definition" of complicated pneumoconiosis); *Stallard*, 876 F.3d at 670 (ALJ evaluates the credibility of the evidence of record); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000) (it is the province of the ALJ to evaluate the physicians' opinions and the ALJ is not required to accept the opinion or theory of any medical expert).

Finally, Employer does not challenge the ALJ's findings that Drs. Zaldivar's, Rosenberg's, and Tuteur's opinions that complicated pneumoconiosis is not present are of limited value as they relied primarily on their assessments regarding which of the pathologists and radiologists were the most qualified. Decision and Order at 46. Thus, these credibility findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Therefore, we reject Employer's arguments that the ALJ did not adequately consider the relevant evidence when evaluating the CT scan and "other medical evidence." Employer's Brief at 61. We further affirm, as supported by substantial evidence, the ALJ's findings that while the treatment records and medical opinion evidence do not support a

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<sup>25</sup> The ALJ noted that all the physicians providing opinions are Board-certified pulmonologists. Decision and Order at 41.

<sup>26</sup> The ALJ pointed to evidence of opacities in the upper lobes bilaterally as early as 2008, "well before" the complications with Claimant's surgery resulting in pulmonary emboli in 2014. Decision and Order at 55.

finding of complicated pneumoconiosis, the CT scan evidence supports such a finding. 20 C.F.R. §718.304(c); *Compton*, 211 F.3d at 207-08; Decision and Order at 33, 40-41, 46, 53, 55.

### **Weighing the Evidence as a Whole**

We also reject Employer's assertion that the ALJ did not adequately explain her conclusion that Claimant established complicated pneumoconiosis on the record as a whole to find the irrebuttable presumption invoked. Employer's Brief at 66-67; Employer's Reply at 25.

Contrary to Employer's contention, the ALJ did not rely solely on the x-ray evidence, to the exclusion of all the other evidence. Employer's Reply at 25-26. Rather, she adequately explained why she found the x-ray and CT scan evidence supported a finding of complicated pneumoconiosis, specifically as to the large right upper lobe opacity identified radiographically and acknowledged by all the experts of record. Decision and Order at 56. In addition, while the treatment records and the weight of the medical opinion and biopsy evidence did not directly support a finding of complicated pneumoconiosis, she explained the evidence supports a finding of simple pneumoconiosis. *Id.* Thus, the ALJ adequately explained her finding that Claimant established complicated pneumoconiosis on the record as a whole. *Id.* at 18; see *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Employer's arguments amount to a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. As the ALJ considered all the relevant evidence and substantial evidence supports her determinations, we affirm her conclusion that Claimant established complicated pneumoconiosis on the record as a whole. See *Cox*, 602 F.3d at 283; *Melnick*, 16 BLR at 1-33-34; Decision and Order at 56. We thus affirm the ALJ's conclusion that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis and established a basis for modification.<sup>27</sup> 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.304; 725.310.

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<sup>27</sup> Employer argues "there is no more convincing evidence this time – in connection with the modification, than presented before," i.e., when the ALJ initially found Claimant failed to establish complicated pneumoconiosis. Employer's Reply at 26. Again, the weighing of credibility of the evidence is within the purview of the ALJ. See *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017). Further, even if additional evidence were not submitted in connection with Claimant's modification, ALJs are authorized to consider wholly new evidence or cumulative evidence, or merely further reflect on the evidence initially submitted, in determining whether a mistake of fact was

We further affirm, as unchallenged, the ALJ's determination that Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack*, 6 BLR at 1-711; Decision and Order at 57.

Accordingly, we affirm the ALJ's Decision and Order on Modification Awarding Benefits.

SO ORDERED.

JONATHAN ROLFE  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge

GLENN E. ULMER  
Administrative Appeals Judge

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made. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). The ALJ acted within her discretion in granting modification.