U.S. Department of Labor

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

BRB No. 24-0050 BLA

FERRELL McGLOTHLIN Claimant-Petitioner v. ISLAND CREEK COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 05/29/2025 DECISION and ORDER

Appeal of Decision and Order Denying Benefits of Heather C. Leslie, Administrative Law Judge, United States Department of Labor.

Ferell McGlothlin, Swords Creek, Virginia.

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

GRESH, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Heather C. Leslie's Decision and Order Denying Benefits (2021-BLA-05463) rendered on

[1] On Claimant's behalf, Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board review the

a claim filed on July 22, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 22.5 years of underground coal mine employment but found he did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2), a necessary element of entitlement under 20 C.F.R. Part 718. Thus, Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018). She further found Claimant did not establish 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. Consequently, she denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits.[3] Neither Employer nor the Acting Director, Office of Workers' Compensation Programs, has filed a response brief.

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[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).

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administrative law judge's (ALJ's) decision, but she is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 22.5 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10-11.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia and West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Tr. at 17.

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

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray, yields one or more 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* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In determining whether a claimant has invoked the irrebuttable presumption, the ALJ must weigh 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-rays, biopsies, computed tomography (CT) scans, medical opinions, and Claimant's treatment records do not support a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c); Decision and Order at 13-25. She further found all the relevant evidence weighed together does not establish the existence of complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 25.

Chest X-Rays

The ALJ considered seven interpretations of four x-rays dated August 12, 2019, October 17, 2019,[5] August 6, 2020, and April 28, 2021. Decision and Order at 14-16; Director's Exhibits 17 at 7; 20 at 2; Claimant's Exhibits 1, 2; Employer's Exhibits 2-4. She found all of the physicians who interpreted the x-ray evidence are dually-qualified as Board-certified radiologists and B readers.[6] *Id*. Dr. Ramakrishnan read the August 12,

[5] Dr. Gaziano read the October 17, 2019 x-ray for quality only. Director's Exhibit 18.

[6] As part of the Department of Labor's sponsored complete pulmonary evaluation of Claimant, Dr. Forehand read the October 17, 2019 x-ray as positive for both simple and complicated pneumoconiosis; however, contrary to the ALJ's characterization of his credentials, while he is a B reader, he is not a Board-certified radiologist. Director's Exhibit 17; Decision and Order at 14. Nevertheless, the ALJ failed to note that Dr. Crum also read the October 17, 2019 x-ray as positive for both simple and complicated pneumoconiosis. Dr. Crum is dually-qualified. Director's Exhibit 20. It is the ALJ's responsibility to consider "all relevant evidence." 30 U.S.C. §923(b); *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949 (4th Cir. 1997).

2019 x-ray as positive for simple and complicated pneumoconiosis, Category A. Director's Exhibit 20 at 2. Drs. Forehand and Crum read the October 17, 2019 x-ray as positive for simple and complicated pneumoconiosis, Category A, while Drs. Meyer and Tarver read the x-ray as negative for the disease. Director's Exhibit 17 at 7; Employer's Exhibits 2, 3.[7] Dr. DePonte read the August 6, 2020 x-ray as positive for complicated pneumoconiosis, Category A, while Dr. Meyer read the x-ray as negative for the disease. Claimant's Exhibit 2; Employer's Exhibit 4. Finally, Dr. DePonte read the April 28, 2021 x-ray as positive for complicated pneumoconiosis, Category A. Claimant's Exhibit 1.

The ALJ also considered Dr. Meyer's deposition and Dr. Forehand's subsequent supplemental report from 2020, after he reviewed additional medical records. Decision and Order at 15-16; Director's Exhibit 25; Employer's Exhibit 9. Dr. Meyer discussed his review of the October 17, 2019 and August 6, 2020 x-rays and reiterated his interpretation that there is no evidence of pneumoconiosis in either x-ray. Employer's Exhibit 9. He stated the nodule in the right mid-zone of the lung seen on the October 17, 2019 x-ray is either a granuloma or cancer because of the "lack of surrounding small opacities" and that the "lack of parenchymal distortion" indicates it is unlikely due to complicated pneumoconiosis. *Id.* at 15-16. Further, he noted the August 6, 2020 x-ray does not support a diagnosis of complicated pneumoconiosis because he "didn't see any small opacities" and "it was less whether the nodule was actually just related to a healing rib fracture or whether it was in fact a parenchymal nodule." *Id.* at 24. Similarly, despite Dr. Forehand's positive reading of the October 17, 2019 x-ray for complicated pneumoconiosis, he subsequently changed his opinion after reviewing additional medical records, opining Claimant's medical record no longer supports a diagnosis of "clinical/radiographic" pneumoconiosis. Director's Exhibit 25 at 2.

Based on her determination that the opinions of Drs. Meyer and Forehand are persuasive and entitled to dispositive weight, the ALJ found "the chest x-ray evidence does not support a conclusion that [Claimant] suffers from complicated pneumoconiosis." Decision and Order at 16.

However, the ALJ failed to resolve the conflicts in the x-ray evidence as a whole. Specifically, although our dissenting colleague asserts the ALJ permissibly found Dr. Meyer's deposition and Dr. Forehand's 2020 supplemental report persuasive and entitled to dispositive weight in resolving the conflicting x-ray evidence, the ALJ failed to explain, nor can we discern, why Dr. Meyer's negative readings of the October 17, 2019 and August

[7] Again, the ALJ failed to note or consider that Dr. Crum also read the October 17, 2019 x-ray as positive for both simple and complicated pneumoconiosis. Director's Exhibit 20; *see* 30 U.S.C. §923(b); *Underwood*, 105 F.3d at 949.

6, 2020 x-rays, along with Dr. Forehand's supplemental report, outweigh the positive x-ray readings. Moreover, the ALJ failed to note or consider Dr. Crum's reading of the October 17, 2019 x-ray as positive for both simple and complicated pneumoconiosis. Thus, the ALJ failed to consider "all relevant evidence," 30 U.S.C. §923(b); *Underwood*, 105 F.3d at 949, and failed to provide an adequate rationale for resolving the conflicts in the x-ray evidence as a whole as the Administrative Procedure Act (APA) requires.[8] *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore vacate the ALJ's finding that the x-ray evidence does not support a finding of complicated pneumoconiosis and remand the case for further consideration. 20 C.F.R. §718.304(a); *see McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (Board lacks the authority to render factual findings to fill in gaps in the ALJ's decision); Decision and Order at 16.[9]

[8] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must include "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[9] Notably, both the ALJ and our dissenting colleague have misapplied the holding of *Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992), to these facts to credit Drs. Meyer and Forehand over the rest of the equally qualified x-ray readers. While the Fourth Circuit made clear that merely counting heads is "disfavored" as our colleague notes, it distinguished the practice from "looking to qualifications" of the readers -- which it specifically directed is "prescribed by the regulations" -- and in doing so it concluded that one physician's opinion was "at least as probative as two opinions from physicians of lesser rank." *Adkins*, 958 F.2d at 52. Here, the ALJ noted all of the readers were "dually qualified," and thus "entitled to equal weight." Decision and Order at 14. But in weighing their respective readings, she did not acknowledge that the majority of the overall readings, the majority of the specific x-ray readings, and the most recent reading were all positive for complicated pneumoconiosis -- and she failed to acknowledge Dr. Crum's readings at all. Instead, in her analysis she summarized only Dr. Meyer's opinion and, to a lesser extent, Dr. Forehand's. And that is only half of the equation. Because while it is true that the ALJ has the discretion to reasonably explain why a minority of equally qualified readers are entitled to more weight than a majority, she is not free to avoid obvious conflicts, *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989), or omit relevant evidence, *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949 (4th Cir. 1997), in doing it. The ALJ did both here, and remand thus is required.

Biopsies

The ALJ considered the results of a February 22, 2022 core needle biopsy and a January 13, 2020 treatment record CT-guided needle biopsy. Decision and Order at 18-19, 24-25; Claimant's Exhibit 4 at 21-25; Employer's Exhibits 8, 11. Dr. Turjman, Claimant's treating physician, stated the February 22, 2022 biopsy demonstrates "normal alveolar tissue" with areas of interstitial fibrosis with "heavy carbon pigment deposition." Employer's Exhibit 11 at 2. He noted the presence of anthracosis with associated chronic inflammatory cell infiltration that is consistent with coal macules. *Id.* at 3. In addition, he noted there is a "focus of squamous metaplasia" with a dimension of less than one millimeter, which "may represent the edge of a more significant lesion." *Id.* The ALJ stated the February 22, 2022 biopsy "shows a reactive lymph node with 'anthracosilicotic dust/nodule'" and thus found it supports a finding of clinical, but not complicated, pneumoconiosis. Decision and Order at 19. Further, she noted that while Dr. Meyer indicated the February 22, 2022 biopsy shows "markers of coal dust exposure," the doctor also opined the biopsy confirms that Claimant does not have complicated pneumoconiosis. *Id.*; Employer's Exhibit 9 at 26-27. She thus rationally found the February 22, 2022 biopsy does not support a finding of complicated pneumoconiosis. Decision and Order at 19.

Further, Dr. Jawad noted Claimant underwent a January 13, 2020 treatment record CT-guided needle biopsy, Claimant's Exhibit 4 at 20, opining that it shows pigmented carbon and coal macules associated with complicated pneumoconiosis because the lesion was over ten millimeters in size. Employer's Exhibit 8 at 12-13. Although Dr. Jawad also noted the biopsy revealed a "squamous metaplasia" malignancy, he ultimately opined Claimant has complicated pneumoconiosis based on the biopsy conducted earlier in 2019. *Id.* at 18-19.

The ALJ found Dr. Jawad's interpretation of the January 13, 2020 biopsy unpersuasive because the doctor acknowledged "some confusion with [Claimant's] presentation and diagnosis" and "described his opinion as not [one hundred percent]." Decision and Order at 25; Employer's Exhibit 8 at 12-13.

An ALJ is not required to credit an opinion simply because it is uncontradicted by probative evidence; rather she has "broad discretion to determine the weight accorded to each doctor's opinion." *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Further, an ALJ may accord less weight to a medical opinion that is equivocal. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999) (weight to give the testimony of an uncertain witness is a question for the trier of fact); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988) (ALJ permissibly considered the equivocal nature of a physician's opinion). However, the United State Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that refusal to express a

diagnosis in categorical terms in some circumstances can be "candor, not equivocation." *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006).

Thus, while it is within the ALJ's purview to evaluate the credibility of each physician's opinion, the ALJ has not adequately explained why she found Dr. Jawad's opinion concerning the January 13, 2020 biopsy equivocal. The ALJ did not address the underlying reasoning or explanations provided in support of Dr. Jawad's opinion; rather, her analysis is based on the doctor's use of qualifying language. Decision and Order at 25. As the ALJ failed to adequately explain her findings in rejecting Dr. Jawad's opinion in light of the applicable law, her finding does not comply with the APA and remand is required. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165. Therefore, we vacate the ALJ's finding that the biopsy evidence does not support a finding of complicated pneumoconiosis and remand the case for further consideration. 20 C.F.R. §718.304(b); Decision and Order at 18, 25.

CT Scans

The ALJ considered Dr. Meyer's interpretations of three affirmative evidence CT scans dated November 5, 2019, November 25, 2019, and June 1, 2020, and Dr. Jawad's interpretations of six treatment record CT scans dated October 16, 2019, November 25, 2019, January 20, 2020, June 1, 2020, July 7, 2021, and October 14, 2021. Employer's Exhibits 5-8. Dr. Meyer noted there are "rare apical nodules" in the November 5, 2019, November 25, 2019, and June 1, 2020 CT scans that indicate simple pneumoconiosis and severe emphysema but do not exceed a profusion of 0/1. Employer's Exhibits 5 at 3; 6 at 4; 7 at 4; 9 at 20-23. He opined the "growing right lower lobe nodule" in these CT scans are consistent with primary lung cancer. *Id*. Based on Dr. Meyer's uncontradicted interpretations of the CT scans, the ALJ permissibly found the affirmative evidence CT scan evidence does not support a finding of complicated pneumoconiosis. Decision and Order at 18.

Dr. Jawad found the November 5, 2019 treatment record CT scan demonstrated evidence of multiple nodules and upper lobe nodular fibrosis consistent with pneumoconiosis. Claimant's Exhibit 4 at 12. He also found the November 25, 2019 PET CT scan shows "[i]rregular stellate right lower lobe pulmonary nodule noted with minimal accumulation." *Id.* at 18. Further, he found the January 20, 2020 CT scan showed chronic bronchitis, severe obstructive airway disease, and pneumoconiosis. *Id.* at 21. He repeated his opinion for the June 1, 2020 CT scan. *Id.* at 30. Additionally, he found the July 7, 2021 CT scan showed a new five millimeter nodule in the right upper lobe, and a new 10.5 millimeter nodule in the right lower lobe. Employer's Exhibit 8 at 16-17. Finally, he found the October 14, 2021 CT scan showed an improvement in the size of the nodule in the right lower lobe. *Id*. at 17.

At his deposition, Dr. Jawad testified the CT scan evidence demonstrated an increase in size consistent with complicated pneumoconiosis. Employer's Exhibit 8 at 12-13. Dr. Jawad further stated he is unable to say with "one hundred percent certainty" that Claimant has complicated pneumoconiosis because the CT scans contain evidence of malignancy. *Id*. at 12.

As discussed, the Fourth Circuit has held that refusal to express a diagnosis in categorical terms in some circumstances can be "candor, not equivocation." *Perry*, 469 F.3d at 366. The ALJ has not adequately explained why she found Dr. Jawad's opinion concerning the CT scans equivocal. As the ALJ failed to adequately explain her findings in rejecting Dr. Jawad's opinion concerning the CT scans in light of the applicable law, her finding does not comply with the APA and remand is required. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165. Therefore, we vacate the ALJ's finding that the CT scan evidence does not support a finding of complicated pneumoconiosis and remand the case for further consideration. 20 C.F.R. §718.304(c); Decision and Order at 18, 25.

Medical Opinions

The ALJ next considered the medical opinions of Drs. Basheda and Forehand. Decision and Order at 20-22; Director's Exhibits 17 at 2; 23 at 19; Employer's Exhibit 10. She accurately stated Dr. Basheda opined Claimant does not have complicated pneumoconiosis. Director's Exhibit 23 at 11. Further, she accurately stated that while Dr. Forehand initially diagnosed Claimant with complicated pneumoconiosis or progressive massive fibrosis due to his obstructive lung disease, the doctor retracted his diagnosis of complicated pneumoconiosis in a subsequent supplemental report after reviewing additional medical records. Director's Exhibits 17 at 5; 25.

Because neither Dr. Basheda nor Dr. Forehand opined Claimant has complicated pneumoconiosis, the ALJ permissibly found the medical opinion evidence does not support a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998)*; Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 23.

However, because we vacate the ALJ's finding that the x-ray, biopsy, and CT scan evidence does not support a finding of complicated pneumoconiosis, we also vacate her finding that the evidence as a whole does not support a finding of complicated pneumoconiosis and remand the case for further consideration. 20 C.F.R. §718.304; Decision and Order at 25.

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

To invoke the Section 411(c)(4) presumption, a 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). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[10] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The ALJ found Claimant failed to establish total disability by any method.[11] 20 C.F.R. §718.204(b)(2); Decision and Order at 28-31.

Pulmonary Function Studies

The ALJ considered the results of three pulmonary function studies dated July 18, 2019, October 17, 2019, and August 6, 2020. Decision and Order at 26-28; Director's Exhibits 17 at 14; 20 at 3; 23 at 25. She found none of the studies produced qualifying values before or after the administration of bronchodilators. *Id.* at 26, 28. Thus, she found the pulmonary function study evidence does not support a finding of total disability.[12] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 11.

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[10] A "qualifying" pulmonary function study or arterial blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[11] The ALJ found there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 29-30.

[12] The ALJ noted the comments in the pulmonary function study reports recorded Claimant as having good cooperation and effort. Decision and Order at 28. She also considered that none of the doctors who administered the studies gave any indication of their invalidity. *Id.* Thus, she permissibly found all of the studies reliable. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 28.

However, the ALJ's analysis of the pulmonary function study evidence is flawed. For a pulmonary function study to constitute evidence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), it must produce both a qualifying FEV_1 value and one of the following: either an FVC value or MVV value equal to or less than the values appearing in the tables set forth in Appendix B of 20 C.F.R. Part 718, or an FEV_1/FVC ratio equal to or less than fifty-five percent. *See* 20 C.F.R. §718.204(b)(2)(i)(A)-(C). The qualifying values in Appendix B are based on gender, height, and age. 20 C.F.R. Part 718, Appendix B.

Because the ALJ found all of the pulmonary function studies reported varying heights for Claimant falling between sixty-seven and sixty-eight inches, she permissibly calculated an average height of sixty-eight inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 26. Further, the July 18, 2019, October 17, 2019, and August 6, 2020 pulmonary function studies were administered when Claimant was either eighty-two or eighty-three years old. Director's Exhibits 17 at 14; 20 at 3. Absent contrary probative evidence, however, the values for a seventy-one-year-old miner listed in Appendix B of the regulations should be used to determine if pulmonary function studies of miners over the age of seventy-one qualify for total disability. *K.J.M.* [*Meade*] v. *Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008).

Using the closest greater table height of 68.1 inches set forth at Appendix B of 20 C.F.R. Part 718, *see Toler v. E. Associated Coal Corp*., 43 F.3d 109, 114, 116 n.6 (4th Cir. 1995); *Carpenter v. GMS Mine & Repair Maint. Inc*., 26 BLR 1-35, 1-38-39 (2023); *Protopappas*, 6 BLR at 1-223, an FEV_1 value of 1.73, an FVC value of 2.24, an FEV_1/FVC ratio of 55 percent or less, and an MVV value of 69 are qualifying values for a male who is seventy-one years old and 68.1 inches tall. 20 C.F.R. Part 718, Appendix B.

The July 18, 2019 pulmonary function study without the administration of bronchodilators produced an FEV_1 value of 1.35, an FVC value of 2.59, an FEV_1/FVC ratio of 52 percent, and an MVV value of 41.74. Director's Exhibit 20 at 3. The October 17, 2019 pulmonary function study before the administration of bronchodilators produced an FEV_1 value of 1.73, an FVC value of 3.42, and an FEV_1/FVC ratio of 50.6 percent, while the study after the administration of bronchodilators produced an FEV_1 value of 1.69, an FVC value of 3.61, and an FEV_1/FVC ratio of 46.9 percent. Director's Exhibit 17 at 14. The August 6, 2020 pulmonary function study before the administration of bronchodilators produced an FEV_1 value of 1.91, an FVC value of 3.69, an MVV value of 38, and an FEV_1/FVC ratio of 52 percent, while the study after the administration of bronchodilators produced an FEV_1 value of 1.83, an FVC value of 3.61, and an FEV_1/FVC ratio of 51 percent. Director's Exhibit 23 at 25.

As the July 18, 2019 pulmonary function study produced qualifying pre-bronchodilator FEV_1 and MVV values and an FEV_1/FVC ratio of less than 55 percent, and

as the October 17, 2019 pulmonary function study produced qualifying pre- and post-bronchodilator FEV_1 values and FEV_1/FVC ratios of less than 55 percent, the ALJ inaccurately characterized these studies as non-qualifying. *See* 20 C.F.R. Part 718, Appendix B; *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985) (explaining if the ALJ misconstrues relevant evidence, the case must be remanded for reevaluation of the issue to which the evidence is relevant). We therefore vacate the ALJ's finding that the pulmonary function study evidence does not support a finding of total disability and remand the case for further consideration. 20 C.F.R. §718.204(b)(2)(i).

Arterial Blood Gas Studies

The ALJ considered two arterial blood gas studies dated October 17, 2019, and August 6, 2020. Decision and Order at 29. She accurately noted that neither study produced qualifying results. *Id*.; Director's Exhibits 17 at 13; 23 at 25. As it is supported by substantial evidence, we affirm her finding that the arterial blood gas study evidence does not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 29.

Medical Opinions

Before weighing the medical opinions, the ALJ addressed the exertional requirements of Claimant's usual coal mine employment. Decision and Order at 11. A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time. *Pifer v. Florence Mining Co.*, 7 BLR 1-153, 1-155 (1985); *Daft v. Badger Coal Co.*, 7 BLR 1-124, 1-127 (1984); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

The ALJ considered Claimant's testimony that he last worked for Employer as an electrician and a mechanic, which required him to lift thirty to forty pounds and pull or drag heavy power chains for a few feet by himself. Decision and Order at 4, 11 (citing Hearing Tr. at 17-18). She initially concluded Claimant's usual coal mine work required a "*medium* level of exertion." *Id*. at 11 (emphasis added). However, she subsequently concluded Claimant failed to establish "a disabling respiratory or pulmonary impairment that prevented him from performing the *heavy* level of exertion required by his last coal mining job." *Id*. at 31 (emphasis added). Thus, the ALJ failed to adequately explain her finding regarding the exertional requirements of Claimant's usual coal mine work as the APA requires. *See Wojtowicz*, 12 BLR at 1-165. Nevertheless, because the medical opinions are phrased in terms of whether Claimant is totally disabled and do not provide a medical assessment that could support a finding of total disability based on the exertional requirements, the ALJ's error in failing to adequately explain her finding regarding the

exertional requirements of Claimant's usual coal mine work is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

The ALJ next considered the medical opinions of Drs. Forehand and Basheda. Decision and Order at 20-22, 30-31; Director's Exhibits 17 at 2; 23 at 2; Employer's Exhibit 10. She found neither doctor opined Claimant is totally disabled. Decision and Order at 30. Thus, she concluded the medical opinion evidence does not support a finding of total disability. *Id.* at 31.

However, the ALJ inaccurately characterized Dr. Basheda's opinion. Decision and Order at 30-31. She stated Dr. Basheda opined Claimant does not have an impairment based on the July 18, 2019 and August 6, 2020 pulmonary function studies as they showed improvement and "coal dust included obstructive lung disease is a fixed disorder" that "will not improve over time." Decision and Order at 30; Director's Exhibit 23 at 12. She also found Dr. Basheda opined Claimant "would be able to perform his last coal mining work or work of similar effort." Decision and Order at 30.

While Dr. Basheda stated Claimant would be able perform the exertional requirements of his usual coal mine employment because there was no impairment indicated on pulmonary function testing, the doctor also opined Claimant has hypoxemia due to unstable cardiovascular status and tobacco induced chronic obstructive pulmonary disease. Director's Exhibit 23 at 12. Dr. Basheda further opined Claimant developed exercise-induced oxygen desaturation on pulse oximetry during his testing, which he related to cardiovascular disease. *Id.* at 12-13. In addition, he opined Claimant would be "unable to perform his last coal mining work, or work of similar effort, due to underlying cardiovascular disease." *Id.* at 13. He also testified Claimant would be prevented from performing the exertional requirements of his usual coal mine work due to his "unstable cardiovascular status." Employer's Exhibit 10 at 19.

The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the miner has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *see also* 20 C.F.R. §718.204(a) ("If . . . a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis."). Moreover, total disability may be established with reasoned medical opinion evidence, even "[w]here total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i) [and] (ii) . . . of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000) (physician can offer a reasoned medical

opinion diagnosing total disability, even though the objective studies are non-qualifying). Thus, to the extent the ALJ conflated total disability and disability causation in considering Dr. Basheda's opinion, she erred in finding the doctor's opinion does not support a finding of total disability. *Tackett*, 7 BLR at 1-706; *see Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993); Decision and Order at 30-31.

Additionally, the ALJ's errors in weighing the pulmonary function studies at 20 C.F.R. §718.204(b)(2)(i) may have affected her weighing of Dr. Basheda's opinion. Thus, we vacate her finding that Claimant did not establish total disability based on the medical opinions, 20 C.F.R. §718.204(b)(2)(iv), or in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); Decision and Order at 30-31. We therefore vacate the ALJ's finding that Claimant did not invoke the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), and the denial of benefits. Consequently, we remand the case for further consideration.

Remand Instructions

On remand, the ALJ must first reconsider whether the x-ray evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(a). She must then weigh all relevant evidence of complicated pneumoconiosis together, interrelating the evidence from each category and resolving any conflicts. *See* 20 C.F.R. §718.304; *Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 255-56; *Melnick*, 16 BLR at 1-33. If the ALJ finds that Claimant has met his burden to establish complicated pneumoconiosis, he will have invoked the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304. The ALJ must then consider whether Claimant's complicated pneumoconiosis arose out of his coal mine employment, applying the relevant rebuttable presumption.[13] 20 C.F.R. §718.203(b). If the ALJ finds Claimant has invoked the Section 411(c)(3) presumption and established that his complicated pneumoconiosis arose out of his coal mine employment, then he will have established entitlement to benefits.

If the ALJ finds that Claimant is unable to invoke the Section 411(c)(3) irrebuttable presumption, she must reconsider whether the pulmonary function study evidence establishes a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(i), taking into consideration the qualifying results of the July 18, 2019 and

[13] If Claimant establishes complicated pneumoconiosis, the disease is presumed to have arisen out of his coal mine employment because he established more than ten years of coal mine employment; consequently, the burden will then be on Employer, as the party opposing entitlement, to disprove disease causation. 20 C.F.R. §718.203(b).

October 17, 2019 studies. Director's Exhibits 17 at 14; 20 at 3. In doing so, she must undertake a quantitative and qualitative analysis of the conflicting pulmonary function study results and adequately explain her basis for resolving the conflict in the evidence as the APA requires. *See Wojtowicz*, 12 BLR at 1-165; *see also Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 149 n.23 (1987) (ALJ must "weigh the quality, and not just the quantity, of the evidence"); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-54 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992).

The ALJ must then reconsider the medical opinion evidence in light of her findings regarding the pulmonary function study evidence and render findings pursuant to 20 C.F.R. §718.204(b)(2)(iv). She must resolve the conflict in the medical opinion evidence by addressing the physicians' comparative credentials, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. In making her determinations, she must set forth her findings in detail and explain her rationale in accordance with the APA's requirements. *Wojtowicz*, 12 BLR at 1-165. If Claimant establishes total disability based on the medical opinion evidence, the ALJ must then determine whether he has established total disability based on consideration of the evidence as a whole. *See* 20 C.F.R. §718.204(b)(2); *see also Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability on remand, he will have invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. The ALJ must then determine whether Employer can rebut the presumption. *See* 20 C.F.R. §718.305(d); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). If Claimant fails to establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. 20 C.F.R. Part 718; *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).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from my colleagues' decision to vacate the ALJ's findings that the x-rays, biopsies, CT scans, and evidence as a whole do not support a finding of complicated pneumoconiosis.

The ALJ stated there are seven readings of four x-rays dated August 12, 2019, October 17, 2019,[14] August 6, 2020, and April 28, 2021. Decision and Order at 14-16. She noted Dr. Ramakrishnan, who is dually-qualified as a Board-certified radiologist and B reader, read the August 12, 2019 x-ray as positive for simple and complicated pneumoconiosis, Category A. Decision and Order at 14; Director's Exhibit 20 at 2. She also noted Dr. DePonte, a dually-qualified radiologist, read the April 28, 2021 x-ray as positive for complicated pneumoconiosis, Category A. Decision and Order at 15; Claimant's Exhibit 1. She further noted that while Dr. Forehand read the October 17, 2019 x-ray as positive for simple and complicated pneumoconiosis, Category A, Drs. Meyer and Tarver, both of whom are dually-qualified radiologists, read the x-ray as negative for the disease. Decision and Order at 14; Director's Exhibit 17 at 7; Employer's Exhibits 2, 3. In addition, she noted that whereas Dr. DePonte read the August 6, 2020 x-ray as positive

[14] Dr. Gaziano read the October 17, 2019 x-ray for quality purposes only. Director's Exhibit 18.

for complicated pneumoconiosis, Category A, Dr. Meyer read the x-ray as negative for the disease. Decision and Order at 14-15; Claimant's Exhibit 2; Employer's Exhibit 4.

After acknowledging that the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, disfavors a counting heads approach to resolving conflicts, the ALJ permissibly declined to resolve the conflict in the x-ray readings by relying on the number of best qualified readers. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992) ("counting heads" is a "hollow" way to resolve conflicts in the evidence); Decision and Order at 15. Rather, she acted within her discretion in resolving the conflict by considering Dr. Meyer's deposition as supported by Dr. Forehand's 2020 supplemental report based on his review of additional medical records, including Drs. Tarver and Basheda's reports, dispositive. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 15-16; Director's Exhibit 25; Employer's Exhibit 9. She noted Dr. Meyer reviewed the October 17, 2019, and August 6, 2020 x-rays, CT scans from November 5, 2019 and June 1, 2020, a November 25, 2019 PET scan, and a needle biopsy, and concluded there was no evidence of coal workers' pneumoconiosis. Decision and Order at 15-16. In addition, she noted Dr. Forehand concluded Claimant's medical records no longer support the conclusion that he has coal workers' pneumoconiosis. *Id.* at 16.

I also would affirm her determination that Dr. Jawad's opinion was "unpersuasive" because "[h]e noted that the decrease in the right lower lobe nodule and the stable presentation of the upper lobe nodular densities[] after the 2020 Cyberknife treatment was not indicative of coal workers['] pneumoconiosis but based his diagnosis of complicated pneumoconiosis on an earlier 2019 biopsy, regardless of the decrease in size of the nodule in 2020." Decision and Order at 25. Clearly, the ALJ found Dr. Jawad's explanation for his opinion inadequate, given the data before him. *See Looney*, 678 F.3d at 316 (explaining that if a reviewing court can discern what the ALJ did and why she did it, the duty of explanation is satisfied); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999). This was a determination entirely within her discretion. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ evaluates the credibility of the evidence of record).

Because the ALJ permissibly found Dr. Meyer's reasoning, taking account of other evidence, in concert with Dr. Forehand's supplemental report, persuasive and entitled to dispositive weight, I would affirm her finding that Claimant failed to establish the presence

of complicated pneumoconiosis.[15] 20 C.F.R. §718.304; *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). Consequently, I would affirm the ALJ's finding that 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). *See* 20 C.F.R. §718.304.

I otherwise concur with the majority in all other respects.

JUDITH S. BOGGS
Administrative Appeals Judge

[15] While the ALJ erred in failing to consider that Dr. Crum, who is dually-qualified as a Board-certified radiologist and B reader, read the October 17, 2019 x-ray as positive for both simple and complicated pneumoconiosis, her error is harmless because she permissibly found Dr. Meyer's deposition and Dr. Forehand's 2020 supplemental report entitled to dispositive weight in resolving the conflicting x-ray evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 15-16; Director's Exhibit 20. Moreover, had she counted Dr. Crum's reading, she would have arrived at the same number of dually-qualified readers providing positive readings. The weighing of the evidence is within the discretion of the ALJ, and it was within her discretion to give dispositive weight to Dr. Meyer's opinion which thoroughly explained the basis for his determination, taking into account what was shown on the sequence of x-rays, CT scans, and CT/PET scan, and also considering the needle biopsy. *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).