**U.S. Department of Labor**

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

BRB No. 24-0324 BLA

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| WILMA DYE<br>(o/b/o Estate of DOLPHAS J. DYE)<br><br>Claimant-Petitioner<br><br>v.<br><br>J & A MINING, INCORPORATED<br><br>and<br><br>ROCKWOOD INSURANCE COMPANY c/o VIRGINIA PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION<br><br>Employer/Carrier-Respondents<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | **NOT-PUBLISHED**<br><br>DATE ISSUED: 05/15/2025<br><br>DECISION and ORDER |

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

Wilma Dye, Swords Creek, Virginia.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer and its Carrier.

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

PER CURIAM:

Claimant[1] appeals, without representation,[2] Administrative Law Judge (ALJ) Heather C. Leslie's Decision and Order Denying Benefits (2021-BLA-05549) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim[3] filed on November 9, 2018.

The ALJ credited the Miner with twenty years of underground coal mine employment but found Claimant did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[4] 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), nor establish a change in an applicable condition of entitlement.[5] 20 C.F.R. §725.309(c). She therefore denied benefits.

[1] Claimant is the widow of the Miner, who died on January 31, 2022, while his claim was pending before the Office of Administrative Law Judges. Employer's Exhibit 15. She is pursuing the miner's claim on behalf of her husband's estate. Claimant's February 28, 2022 Request to Re-caption Claim to Reflect the Survivor.

[2] On Claimant's behalf, Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested that the Benefits Review Board review the administrative law judge's (ALJ) decision, but she is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] This is the Miner's fourth claim for benefits. Director's Exhibit 6. On May 28, 2013, the district director denied the Miner's most recent prior claim, filed April 20, 2012, because he failed to establish total disability. Director's Exhibit 3.

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally 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.

[5] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she

On appeal, Claimant generally challenges the denial of benefits. Employer and its Carrier respond in support of the denial. The Acting Director, Office of Workers' Compensation Programs, has not 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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls, Assocs., Inc.*, 380 U.S. 359 (1965).

**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 was totally disabled due to pneumoconiosis if he suffered 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 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, the computed tomography (CT) scans, the medical opinion evidence, and the Miner's treatment records do not support a finding of

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finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the Miner did not establish total disability in his prior claim, Claimant had to submit new evidence establishing this element to obtain review of the merits of the Miner's current claim. *Id*.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in Virginia. *See Shupe v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2; Director's Exhibit 7.

complicated pneumoconiosis.[7] 20 C.F.R. §718.304(a), (c); Decision and Order at 10-20. She thus found the evidence as a whole does not establish complicated pneumoconiosis. Decision and Order at 20.

**20 C.F.R. §718.304(a) – Chest X-rays**

The ALJ considered nine interpretations of two x-rays dated October 29, 2018, and December 6, 2018. Decision and Order at 10-13. She correctly found all the physicians who interpreted these x-rays are dually-qualified as B readers and Board-certified radiologists. *Id*. at 12; Director's Exhibits 27, 30, 32, 35; Claimant's Exhibits 1-3.

Dr. Crum read the October 29, 2018 x-ray as positive for simple pneumoconiosis and complicated pneumoconiosis, Category A, while Dr. Seaman read the x-ray as positive for simple pneumoconiosis only. Director's Exhibits 30, 32. Drs. DePonte, Ahmed, and Crum read the December 6, 2018 x-ray as positive for simple pneumoconiosis and complicated pneumoconiosis, Category A, while Drs. Simone, Seaman, Adcock, and Miller read the x-ray as positive for simple pneumoconiosis only. Director's Exhibits 27, 35; Claimant's Exhibits 1-3.

The ALJ permissibly found the readings of the October 29, 2018 x-ray to be in equipoise concerning complicated pneumoconiosis because an equal number of dually-qualified radiologists read the x-ray as positive and negative for the disease. Decision and Order at 13. She also permissibly found the December 6, 2018 x-ray negative for complicated pneumoconiosis because the preponderance of the negative readings for the disease from Drs. Seaman, Simone, Adcock, and Miller outweighed Drs. DePonte's, Ahmed's, and Crum's positive readings for the disease. *Id*. Thus, we affirm her finding that the x-ray evidence does not support a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(a); Decision and Order at 13.

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

The ALJ also considered whether the CT scans, the Miner's treatment records, or the medical opinions support a finding of complicated pneumoconiosis. Decision and Order at 13-20.

[7] The ALJ found there is no biopsy or autopsy evidence in the record. 20 C.F.R. §718.304(b); Decision and Order at 14.

*CT Scans*

The ALJ considered two interpretations of a CT scan dated December 3, 2018. Decision and Order at 14-15. Dr. McReynolds found the quality of the CT scan degraded by motion and identified small nodules "suggestive of silicosis of coal workers (sic) pneumoconiosis." Claimant's Exhibit 6 at 1. Dr. Simone found the quality of the CT scan good and identified low profusion small nodules that did not serve as definitive evidence of any form of pneumoconiosis. Employer's Exhibits 8, 10.

The ALJ found Dr. McReynolds's CT scan interpretation equivocal and thus entitled to less weight than Dr. Simone's contrary CT scan interpretation. Decision and Order at 15. She thus found the CT scan evidence does not support a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(c). *Id*. As we see no error in the ALJ's finding, we affirm it.

*The Miner's Treatment Records*

The ALJ considered the Miner's treatment records and his death certificate and accurately noted the causes of his death were listed as "generalized debilitation, dementia and senile degeneration of the brain with a history of cerebral infarction and diabetes also noted as an underlying cause of death." Decision and Order at 15-16; *see* Employer's Exhibits 11-15. We therefore affirm her finding that the Miner's treatment records and death certificate do not support a finding of complicated pneumoconiosis. Decision and Order at 16.

*Medical Opinions*

The ALJ next considered the medical opinions of Drs. Habre, Fino, and Mitchell. Decision and Order at 16-20. Dr. Habre initially opined the Miner had simple clinical pneumoconiosis based upon December 2018 chest x-ray results and his coal mine employment history. Director's Exhibit 27 at 2. He subsequently opined in a supplemental report that the Miner had complicated pneumoconiosis based on the December 2018 x-ray, which he now stated showed a Category A large opacity, and a May 2019 pulmonary function study. Director's Exhibit 29 at 1-2. The ALJ permissibly found Dr. Habre's report unpersuasive because he did not explain why he changed his diagnosis to complicated pneumoconiosis in his supplemental report. *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); Decision and Order at 18-20.

Dr. Fino opined the Miner did not have complicated pneumoconiosis based on his review of x-ray and CT scan interpretations. Employer's Exhibits 9 at 8-9; 16 at 9. The ALJ permissibly found Dr. Fino's opinion well-reasoned because his conclusions

reasonably followed the Miner's diagnoses and his objective testing results. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 19-20. Further, she accurately stated Dr. Mitchell noted the Miner's hospice status but did not render an opinion on the presence or absence of complicated pneumoconiosis. Decision and Order at 19; Claimant's Exhibit 5.

Because the ALJ acted within her discretion in weighing the medical opinions, we affirm her finding that the medical opinions do not support a finding of complicated pneumoconiosis. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000). We therefore affirm her finding that the CT scans, the Miner's treatment records, and the medical opinions do not support a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(c). Decision and Order at 20.

We further affirm the ALJ's finding that the evidence considered as a whole does not establish complicated pneumoconiosis and Claimant therefore did not invoke the Section 411(c)(3) presumption. 20 C.F.R. §718.304; *see Melnick*, 16 BLR at 1-33; Decision and Order at 20.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful employment. *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,[8] 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. 20 C.F.R. §718.204(b)(2); Decision and Order at 26.

[8] A "qualifying" pulmonary function study or arterial blood gas study yields results that are equal to or less than the applicable table values listed 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).

*Pulmonary Function Studies*

The ALJ considered the results of five pulmonary function studies dated April 4, 2009, June 28, 2012, May 30, 2019, December 6, 2018, and October 29, 2018. Decision and Order at 21-23. The April 4, 2009 and June 28, 2012 studies produced non-qualifying results without the administration of bronchodilators. Employer's Exhibits 1, 2. The May 30, 2019 study produced qualifying results before and after the administration of bronchodilators. Director's Exhibit 29. The December 6, 2018 study produced non-qualifying results before the administration of bronchodilators and qualifying results after the administration of bronchodilators. Director's Exhibit 27. The October 29, 2018 study produced qualifying results without the administration of bronchodilators. Claimant's Exhibit 4. The ALJ found the April 4, 2009 and June 28, 2012 studies reliable but the May 30, 2019, December 6, 2018, and October 29, 2018 studies unreliable. Decision and Order at 22-23. She concluded the only two reliable pulmonary function studies produced non-qualifying results and thus the pulmonary function study evidence does not support a finding of total disability. *Id*. at 23.

It is within the ALJ's discretion, as the trier of fact, to determine the weight and credibility to accord the medical evidence. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986). When weighing pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). The ALJ, as the fact-finder, must determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). "In the absence of evidence to the contrary, compliance with the [regulatory quality standards] shall be presumed." 20 C.F.R. §718.103(c). Thus, the party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

The ALJ initially considered the reporting physicians' comments concerning the validity and reliability of the April 4, 2009 and June 28, 2012 pulmonary function studies. Decision and Order at 22.

Dr. Baker administered the April 4, 2009 pulmonary function study and noted in his ventilatory study report that the Miner had fair cooperation and good effort. Employer's Exhibit 1 at 1. Dr. Habre administered the June 28, 2012 pulmonary function study and noted in his ventilatory study report that the Miner had good cooperation and good ability to understand instructions and follow directions. Employer's Exhibit 2 at 1. The ALJ noted that Drs. Baker and Habre "gave no indication of invalidity" concerning the April 4,

2009 and June 28, 2012 studies, and thus she found both studies reliable. Decision and Order at 22.

We see no error in the ALJ's finding that the results of the April 4, 2009 and June 28, 2012 pulmonary function studies are reliable based on the uncontroverted comments of the reporting physicians. *See Compton*, 211 F.3d at 207-08; *Hicks*, 138 F.3d at 528; Decision and Order at 22.

The ALJ next considered the technicians' and reporting physicians' comments and the medical opinions concerning the validity and reliability of the October 29, 2018, December 6, 2018, and May 30, 2019 pulmonary function studies. Decision and Order at 22-23.

The technician who administered the October 29, 2018 pulmonary function study noted the American Thoracic Society (ATS) reproducibility criteria were not met and the Miner "had a really hard time understanding proper testing." Claimant's Exhibit 4 at 1. Dr. Rosenberg reviewed the study's results and noted that while the $FEV_1$ and FVC results met the ATS criteria for variation, the Miner's spirometric curves do not meet the ATS criteria because they were performed with inconsistent and incomplete efforts. Employer's Exhibit 3 at 1. He thus opined the study is invalid. *Id*. He further opined the study's MVV results are invalid because the study does not contain three acceptable tracings. *Id*.

The technician who administered the December 6, 2018 pulmonary function study noted "[p]oor session quality" and the post-bronchodilator $FEV_1$ and FVC results were "not repeatable." Director's Exhibit 27 at 11, 13. Dr. Habre noted in his ventilatory study report that the Miner had fair cooperation and fair ability to understand and follow directions, his "hemiplegia and CVA did interfere with his performance," and the results were "not reproducible due to suboptimal effort." *Id*. at 3, 4, 14. Dr. Ranavaya reviewed the study's results and checked boxes indicating that the "[v]ents are not acceptable" due to "[l]ess than optimal effort, cooperation and comprehension." Director's Exhibit 25. Dr. Rosenberg reviewed the study's results, noted the spirometric curves revealed inconsistent and incomplete spirometry attempts, and opined the spirometric results are invalid. Employer's Exhibit 4 at 1.

Dr. Habre administered the May 30, 2019 pulmonary function study and noted in his ventilatory study report that the Miner had fair cooperation and fair ability to understand and follow directions. Director's Exhibit 29 at 5. He further noted in a supplemental medical report that the Miner "could not deliver optimal performance due to his underlying [cerebrovascular accident (CVA)], which did interfere with testing." *Id*. at 1-2. Dr. Michos reviewed the study's results and checked boxes indicating that the "[v]ents are not acceptable" due to "[l]ess than optimal effort, cooperation and comprehension," and he

recommended repeat testing. Director's Exhibit 26. Dr. Rosenberg reviewed the study's results, noted the spirometric curves indicated inconsistent and incomplete attempts, and opined the study is invalid. Employer's Exhibit 5.

We see no error in the ALJ's finding that the results of the October 29, 2018, December 6, 2018, and May 30, 2019 pulmonary function studies are unreliable based on the uncontroverted comments of the technicians, reporting physicians, and consulting physicians. *See Compton*, 211 F.3d at 207-08; *Hicks*, 138 F.3d at 528; Decision and Order at 23. Because the ALJ permissibly determined the only two valid pulmonary function studies produced non-qualifying results, we affirm, as supported by substantial evidence, her finding that the pulmonary function study evidence does not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); *see Compton*, 211 F.3d at 207-08; Decision and Order at 23.

*Arterial Blood Gas Studies*

The ALJ considered the results of three arterial blood gas studies dated April 4, 2009, June 28, 2012, and December 6, 2018, and accurately found they produced non-qualifying results. Decision and Order at 23-24; *see* Employer's Exhibits 6, 7; Director's Exhibit 27 at 15. Thus, 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 24.

*Cor Pulmonale*

The ALJ correctly found there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 24-25. Thus, we affirm her determination that Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(iii). *Id*. at 25.

*Medical Opinions*

The ALJ next considered the medical opinions of Drs. Habre, Fino, and Mitchell. Decision and Order at 16-20, 25. Dr. Habre initially opined the Miner was disabled based on the December 6, 2018 pulmonary function study results. Director's Exhibit 27 at 3-4. He subsequently opined in a supplemental report that the Miner was "not able to perform any coal mine dust-related job based on his chest x-ray" interpretations and "[e]ven if [he] had higher ventilatory measurement." Director's Exhibit 29 at 2. The ALJ permissibly found Dr. Habre's opinion unpersuasive because it is based on invalid pulmonary function studies. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 25.

Dr. Fino opined the Miner did not have any respiratory or pulmonary impairment based on his pulmonary function and arterial blood gas study results. Employer's Exhibits

9 at 9; 16 at 9-10, 13-14. The ALJ permissibly found Dr. Fino's opinion persuasive because the doctor reviewed all the objective testing and his opinion is "consistent," "well thought out," and reasonably "explained." Decision and Order at 25; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Dr. Mitchell noted the Miner was admitted to hospice care, had dementia caused by Alzheimer's Disease, and had suffered a prior stroke. Claimant's Exhibit 5. He opined the Miner was unable to perform the activities of daily living, including walking, dressing, or feeding himself. Claimant's Exhibit 5 at 1. In addition, he advised that requiring the Miner to travel for further evaluation would create severe hardship and he would be unable to provide the cooperation needed to create meaningful results. *Id*. The ALJ stated Dr. Mitchell "does not render any opinions pertinent to the issues regarding pneumoconiosis and pulmonary disability as a result of pneumoconiosis." Decision and Order at 25. Contrary to the ALJ's finding, the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the Miner had 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* 20 C.F.R. §718.204(b), (c); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *Mabe*, 9 BLR at 1-68; *Sisak v. Helen Mining Co*., 7 BLR 1-178, 1-181 (1984). However, because Dr. Mitchell did not render an opinion on whether the Miner had a disabling pulmonary or respiratory impairment, the ALJ's error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Because it is supported by substantial evidence, we affirm the ALJ's finding that the medical opinion evidence does not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); *Compton*, 211 F.3d at 207-08; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 25.

As Claimant did not establish the Miner had a totally disabling respiratory or pulmonary impairment by any method set forth at 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the ALJ's finding that Claimant did not invoke the Section 411(c)(4) presumption, 20 C.F.R. §718.305, or establish a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). Further, because Claimant did not establish total disability, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the denial of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge