U.S. Department of Labor

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

BRB No. 22-0113 BLA

WILLIAM W. WOLFGANG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BARREN COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED C/O OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 04/06/2023
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for Claimant.

Michael A. Pusateri and Brian D. Straw (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

David Casserly (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lauren C. Boucher's Decision and Order Awarding Benefits on Remand (2017-BLA-05792) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent miner's claim filed on March 21, 2016, and is before the Benefits Review Board for the second time.[1]

In her initial May 30, 2019 Decision and Order Denying Benefits, the ALJ found Claimant did not establish complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. The ALJ credited Claimant with at least eighteen years of underground coal mine employment. She found Claimant did not establish total disability and therefore found he did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), or establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309.[3] Thus, she denied benefits.

[1] Claimant filed two previous claims. Director's Exhibits 1, 2. On May 25, 2010, the district director denied his most recent prior claim for failure to establish total disability. Director's Exhibit 2.

[2] Section 411(c)(4) 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] 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 finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White*

Claimant appealed and the Board affirmed the ALJ's findings that Claimant established at least eighteen years of underground coal mine employment and the existence of simple clinical pneumoconiosis but failed to establish total disability. *Wolfgang v. Barren Coal Co., Inc.*, BRB No. 19-0413 BLA, slip op. at 3 n.4, 10-11 (Jan. 1, 2021) (unpub.). However, the Board vacated the ALJ's finding that Claimant did not establish complicated pneumoconiosis because she did not adequately explain how Claimant's *right lung* biopsy, computed tomography (CT) scan, and the medical opinions provided an alternative diagnosis for the large opacities identified in both of his lungs. *Id.* at 9. Thus, the Board vacated the ALJ's findings at 20 C.F.R. §§718.304 and 725.309 and remanded the case for further consideration. *Id.*

On remand, the ALJ determined Employer waived its right to challenge her authority to decide the case because it failed to timely raise arguments regarding her removal protections at the time of the hearing or on appeal before the Board. On the merits, she found Claimant suffers from complicated pneumoconiosis arising out of his coal mine employment. 20 C.F.R. §§718.203, 718.304. Thus, she determined Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §§718.304, 725.309. Accordingly, the ALJ awarded benefits.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because she was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] It further asserts the removal provisions applicable to the

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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 Claimant's most recent prior claim was denied for failure to establish total disability, he was required to submit new evidence establishing this element to warrant a review of his subsequent claim on the merits. Director's Exhibit 2.

[4] 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.

ALJ rendered her appointment unconstitutional. On the merits, Employer argues 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 the Board to reject Employer's constitutional challenges. Employer responds to Claimant and the Director, reiterating its prior contentions.

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.[5] 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, 362 (1965).

Appointments Clause

Employer argues the ALJ erred in finding it waived its Appointments Clause challenge because it is a structural constitutional issue which can be raised at any time and because the Board and the ALJ are not able to decide constitutional issues. Employer's Brief at 12, *citing Carr v. Saul*, U.S. , 141 S. Ct. 1352 (2021).[6] The Director responds that Employer's arguments should be rejected because it has forfeited its Appointments Clause challenges. Director's Brief at 3, *citing David Stanley Consultants v. Dir., OWCP*, 800 F. App'x 123, 127 (3d Cir. 2020) (parties must raise Appointments Clause issues in administrative proceedings to avoid forfeiture). Employer replies, further expounding upon its argument that an Appointments Clause challenge can be raised at any time. Employer's Reply to the Director's Brief at 2-8. We agree with the Director's argument.

Appointments Clause issues are "non-jurisdictional" and thus are subject to the doctrines of waiver and forfeiture. *See Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Edd Potter Coal Co. v. Dir., OWCP* [*Salmons*], 39 F.4th 202, 207 (4th Cir. 2022) (because Appointments Clause challenges are

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

[6] In *Carr v. Saul*, U.S. , 141 S. Ct. 1352, 1360-62 (2021), the United States Supreme Court held that Appointments Clause challenges need not be raised during administrative proceedings before the Social Security Administration (SSA) because the SSA adjudicatory system is not suited to address such challenges and its adjudicators do not have the power to grant the requested relief.

not jurisdictional, "they are 'subject to ordinary principles of waiver and forfeiture'"), *quoting Joseph Forrester Trucking v. Dir., OWCP* [*Davis*], 987 F.3d 581, 587 (6th Cir. 2021); *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 4 (Oct. 25, 2022) (en banc).

Employer failed to raise its challenge to the ALJ's appointment when it was initially before the ALJ or during its first appeal to the Board, and instead waited until after the Board remanded the case to raise the issue. *See* Employer's Brief on Remand at 5-10. Had Employer timely raised the argument when the case was initially before the ALJ, she could have addressed it and, if appropriate, taken steps to have the case assigned for a new hearing before a different ALJ. *Kiyuna v. Matson Terminals Inc.*, 53 BRBS 9, 11 (2019). Likewise, the Board could have ordered such relief, if warranted, had Employer preserved the issue. *See Salmons*, 39 F.4th at 207-08; *Bailey*, BLR , BRB No. 20-0094 BLA, slip op. at 7-8.

The Supreme Court's holding in *Carr*, 141 S. Ct. 1352, does not assist Employer because, unlike the Department of Labor (DOL), the SSA does not have the same issue exhaustion regulatory scheme. *See Ramsey v. Comm'r*, 973 F.3d 537, 547 n.5 (6th Cir. 2020); *see also Morris v. McDonough*, 40 F.4th 1359, 1364 (Fed. Cir. 2022) ("declin[ing] to read *Carr* as upending our well-established precedents and eliminating the exhaustion requirement before the [Board of Veterans' Appeals]"); *Davis*, 987 F.3d at 590 (Appointments Clause challenges "left unexhausted" before the ALJ and the Board are "not properly preserved for review"). We therefore conclude Employer forfeited its challenge to the ALJ's appointment. Further, because Employer has not raised any basis for excusing its forfeiture, we see no reason to entertain its additional arguments regarding the validity of the ALJ's ratification. *See Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Kiyuna*, 53 BRBS at 11; *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against resurrecting lapsed arguments because of the risk of sandbagging); Employer's Brief at 13-14.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded to DOL ALJs. Employer's Brief at 12-17; Employer's Brief on Remand before the ALJ at 5-10. Employer generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. *Id.* Employer also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the holding of the United States Court of Appeals for the Federal Circuit in *Arthrex*,

Inc. v. Smith & Nephew, Inc., 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). *Id*.

As the Director argues, however, the removal argument is subject to issue preservation requirements and Employer likewise forfeited this issue by not raising it before the ALJ. *Davis*, 987 F.3d at 588; *see also Fleming v. USDA*, 987 F.3d 1093, 1097 (D.C. Cir. 2021) (constitutional arguments concerning §7521 removal provisions are subject to issue exhaustion); Director's Brief at 3-9. Because Employer has not identified any basis for excusing its forfeiture of the issue, we see no reason to further entertain its arguments. *See Davis*, 987 F.3d at 588; *Jones Bros.*, 898 F.3d at 677. Further, even had Employer preserved its argument, we would reject it for the reasons set forth in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022).

Invocation of the Section 411(c)(3) Presumption

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In determining whether Claimant has invoked the irrebuttable presumption, the ALJ must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found the x-ray evidence supports a finding of complicated pneumoconiosis, while the biopsy evidence, CT scans, medical opinions, and Claimant's treatment records do not. Decision and Order on Remand at 16-17. Weighing all of the evidence together, the ALJ concluded Claimant established complicated pneumoconiosis and therefore invoked the irrebuttable presumption of total disability due to pneumoconiosis. *Id.*

Employer contends the ALJ erred in weighing the x-ray evidence, did not explain how she weighed the contrary evidence, and did not adequately explain, as the APA requires, her conclusion that Claimant established complicated pneumoconiosis and invoked the presumption. Employer's Brief at 18-29. Employer's contentions are unpersuasive.

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

The ALJ considered five interpretations of three chest x-rays. Decision and Order on Remand at 5-8. All the interpreting physicians are dually-qualified B readers and Board-certified radiologists. *Id.* at 7.

Dr. Meyer, the only physician to interpret the January 22, 2013 and July 5, 2016 x-rays, read both films as positive for simple and complicated pneumoconiosis, with Category B large opacities in both lungs. Employer's Exhibit 4 at 3-6. The ALJ noted Dr. Meyer's comments in his narrative reports that there might be "other considerations" for the large opacities observed in both upper lung zones but determined his comments were equivocal and did not detract from his explicit identification of large opacities of complicated pneumoconiosis. Decision and Order on Remand at 8. Thus, the ALJ found both x-rays supported a finding that Claimant has complicated pneumoconiosis. *Id.*

Concerning the May 26, 2016 x-ray, all of the interpreting physicians found it positive for at least simple pneumoconiosis. Director's Exhibits 10, 11; Claimant's Exhibit 1. Dr. Colella noted an "early conglomerate opacity" but did not diagnose complicated pneumoconiosis, while Drs. Meyer and Smith both interpreted the x-ray as positive for complicated pneumoconiosis with a Category A opacity in Claimant's right lung. Director's Exhibits 10 at 24, 11 at 2-3; Claimant's Exhibit 1. Relying on the preponderance of the readings by the dually-qualified radiologists, the ALJ found the May 26, 2016 x-ray positive for complicated pneumoconiosis. Decision and Order on Remand at 8.

Weighing all the x-rays together the ALJ concluded Claimant established simple and complicated pneumoconiosis. 20 C.F.R. §718.304(a); Decision and Order on Remand at 8.

We reject Employer's assertion that the ALJ erred in not finding the x-ray readings by Drs. Meyer and Smith equivocal in light of the physicians' comments and improperly substituted his opinion for that of the medical experts in concluding their readings were positive for complicated pneumoconiosis. Employer's Brief at 18-21, *citing Melnick*, 16 BLR 1-31. Contrary to Employer's contentions, the weight accorded a physician's comments regarding the interpretation of an x-ray is within the ALJ's discretion. *See Melnick*, 16 BLR at 1-37. In *Melnick* the Board recognized that a physician's comment that constitutes an alternative diagnosis could call into question the physician's diagnosis of a large opacity, but that determination is the ALJ's to make. *Id.* Here, the ALJ thoroughly considered Dr. Meyer's comments on both x-rays and permissibly found they

did not detract from his explicit identification of large opacities of complicated pneumoconiosis. Decision and Order on Remand at 7-8.

On the International Labour Organization (ILO) classification forms he completed for both the January 22, 2013 and July 5, 2016 x-rays, Dr. Meyer identified Category B large opacities consistent with pneumoconiosis. Employer's Exhibit 4. In narrative reports attached to his readings of both films, Dr. Meyer wrote identical comments. *Id*. He stated that "[b]y ILO rules, I must classify these findings as consistent with complicated coal workers' pneumoconiosis" because the findings were "not typical of granulomatosis with polyangiitis (Wegener's vasculitis)"; however, because Claimant had "prior bronchoscopic biopsy results revealing a granuloma and vasculitis, other considerations *might include* necrotizing sarcoidal angiitis or drug-induced granulomatous vasculitis . . . ." Employer's Exhibit 4 (emphasis added).

The ALJ accurately observed that while Dr. Meyer stated there might be other possible causes of the large opacities he identified on Claimant's x-rays, he also "did not specifically offer the opinion that Claimant does not suffer from complicated pneumoconiosis" sufficient to dispute his own ILO classifications. Decision and Order on Remand at 8. Thus, the ALJ permissibly concluded that "Dr. Meyer's indication that he 'must classify' these findings as consistent with complicated pneumoconiosis" could be construed as "' a disagreement with the ILO classification system itself" but was not a retraction of his own determination that the readings are positive for complicated pneumoconiosis under the ILO system and thus did not "diminish or negate" them. *Id.*; *see Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986). Further, because the statute and regulations provide for the identification of complicated pneumoconiosis based on the ILO system,[7] we see no error in the ALJ's permissible reliance on Dr. Meyer's specific ILO-classified readings revealing Category B large opacities consistent with pneumoconiosis in both lung fields, and his permissible determination that Dr. Meyer's additional comments were equivocal. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a); *Melnick*, 16 BLR at 1-37; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *see also Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287 (4th Cir. 2010) (physicians' "equivocal and speculative" diagnoses for masses on x-ray do not "constitute affirmative evidence . . . that the opacities were not due to pneumoconiosis"). We therefore affirm the ALJ's

[7] In claims for black lung benefits, pneumoconiosis may be established with a chest x-ray "classified as Category 1, 2, 3, A, B, or C, according to the ILO classification system[.]" 20 C.F.R. §718.102(d); *see* 30 U.S.C. §921(c)(3). Categories 1, 2, and 3 indicate simple pneumoconiosis while categories A, B, and C indicate complicated pneumoconiosis. 20 C.F.R. §718.304.

findings that the January 22, 2013 and July 5, 2016 x-rays are positive for complicated pneumoconiosis.

Employer also asserts Drs. Meyer's and Smith's positive readings of the May 26, 2016 x-ray do not support a finding of complicated pneumoconiosis because they both recommended either correlation with prior x-rays or a CT scan to further confirm their readings.[8] Employer's Brief at 20; Director's Exhibit 11; Claimant's Exhibit 1 at 2. We disagree.

Dr. Smith did not suggest any possible alternative diagnoses for the large opacities he observed, *see Melnick*, 16 BLR at 1-37; instead, he specifically commented that the x-ray findings reveal "mild complicated pneumoconiosis" consistent with his ILO classification. Claimant's Exhibit 1. He noted only that "[i]f further more definitive evaluation of complicated CWP and large opacity are desired, then correlation with follow up CT chest would be helpful, as needed." *Id*. Similarly, while Dr. Meyer indicated a CT scan could distinguish between "a large opacity/conglomerate fibrosis or malignancy," he did not retract his determination that the x-ray is positive for complicated pneumoconiosis. Director's Exhibit 11. Rather, he specifically reaffirmed in his comments that the radiographic findings are "consistent with complicated coal workers' pneumoconiosis." *Id*.

Moreover, Employer's assertion that either reading must be found equivocal misstates the burden of proof in black lung claims. Employer's Brief at 19-21. Claimant's burden is not, as Employer suggests, to "definitively" establish complicated pneumoconiosis by ruling out all possible causes of the large opacities identified on x-ray. *See id*. at 19-20. Rather, as the ALJ implicitly recognized, Claimant's burden is to establish it is "more likely than not" that he suffers from complicated pneumoconiosis. *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174 (4th Cir 1997); Decision and Order on Remand at 3. And in that endeavor, a physician's "refusal to express a diagnosis in categorical terms is candor, not equivocation." *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006). We therefore affirm the ALJ's determination that the May 26, 2016 x-ray is positive for complicated pneumoconiosis.

Lastly, Employer contends that the ALJ erred by simply "counting heads" to find complicated pneumoconiosis established by x-ray. Employer's Brief at 18. Contrary to

[8] Employer's assertion that Dr. Meyer reported the opacity "probably was not" complicated pneumoconiosis and that it "more likely shows vasculitis given [Claimant's] history" mischaracterizes Dr. Meyer's comments as summarized above. Employer's Brief at 19-20.

Employer's contention, the ALJ properly performed both a qualitative and quantitative analysis of the conflicting x-ray readings, taking into consideration the physicians' opinions and their qualifications. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); *Staton v. Norfolk & W. Ry. Co.*, 65 F.3d 55, 58-60 (6th Cir. 1995); Decision and Order on Remand at 7-8. Because it is supported by substantial evidence, we affirm the ALJ's conclusion that the x-ray evidence establishes complicated pneumoconiosis at 20 C.F.R. §718.304(a). Decision and Order on Remand at 8.

Biopsy Evidence at 20 C.F.R. §718.304(b)

Dr. Stelmach performed a bronchoscopic biopsy of Claimant's right upper lung on June 30, 1998. Employer's Exhibit 5. He described the specimens taken from Claimant's right upper lung as "five soft tan-pink irregular tissue fragments 0.1 to 0.4 cm in greatest dimension." *Id*. Upon microscopic examination, Dr. Stelmach observed "a small well-circumscribed focus of necrotic tissue surrounded by epithelioid histiocytes meeting diagnostic criteria for a granuloma," and "several medium caliber blood vessels which are infiltrated by small numbers of lymphocytes and also contain nuclear dust with their edematous walls." *Id*. He opined that the biopsy showed "vasculitis with noninfectious granuloma formation." *Id*.

The ALJ noted Dr. Stelmach did not identify pneumoconiosis or any abnormalities consistent with pneumoconiosis. Decision and Order on Remand at 9. Although she considered the biopsy evidence to be insufficient to establish the absence of complicated pneumoconiosis, she found Dr. Stalmach's "association of Claimant's right lung mass with vasculitis tends to support a finding that Claimant does not suffer from complicated pneumoconiosis in his *right upper lung*." Decision and Order on Remand at 9-10 (emphasis in original). As Employer does not challenge the ALJ's characterization of the biopsy evidence or her rationale, we affirm it. S*ee Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

CT Scans

Dr. Meyer interpreted a March 2, 2010 CT scan and identified small nodules in both lungs with a coalescent opacity in both upper lobes. Employer's Exhibit 4 at 1-2. The ALJ noted Dr. Meyer stated he "must" classify the CT scan findings as consistent with "possible complicated coal workers' pneumoconiosis" but offered "alternative explanations consistent with Claimant's [right lung] biopsy results." Decision and Order on Remand at 11. She further noted he did not affirmatively opine that Claimant did not have complicated pneumoconiosis and did not explain how the right lung biopsy results could support an alternative diagnosis in both upper lobes of Claimant's lungs. *Id.* Thus, she found his opinion to be "highly equivocal" and insufficient to support a finding of either the presence

or absence of complicated pneumoconiosis. *Id.* As Employer does not specifically challenge these findings, they are affirmed. S*ee Skrack*, 6 BLR at 1-711.

Medical Opinions

The ALJ considered the medical opinions of Drs. Watson, Futerfas, and Levinson. Decision and Order on Remand at 12-15. Dr. Watson evaluated Claimant on March 20, 2010, and reviewed a March 2, 2010 CT scan. Claimant's Exhibit 3. He diagnosed simple pneumoconiosis and noted the presence of a large mass in Claimant's right lung and "calcified granulomas" in both lungs but did not diagnose complicated pneumoconiosis. *Id*. The ALJ gave Dr. Watson's opinion reduced weight as the record does not contain information regarding his experience or training in treating pulmonary conditions and because he only considered Claimant's 2010 CT scan. Decision and Order on Remand at 14.

Dr. Futerfas performed the DOL-sponsored complete pulmonary exam of Claimant on September 9, 2016, and diagnosed coal workers' pneumoconiosis based on Claimant's May 26, 2016 x-ray interpretation by Dr. Colella. Director's Exhibit 10. The ALJ noted Dr. Futerfas did not diagnose complicated pneumoconiosis and gave his opinion reduced weight because he only considered Dr. Colella's x-ray reading and did not consider other relevant medical evidence. Decision and Order on Remand at 14; Director's Exhibit 10.

Dr. Levinson examined Claimant on July 26, 2017, conducted a review of additional records, and opined that Claimant does not have complicated pneumoconiosis but vasculitis with a non-infectious granuloma in his right lung. Employer's Exhibits 1 at 3, 5; 2 at 19, 38; 3. The ALJ noted that his opinion focused solely on the mass in Claimant's right lung and not the evidence of a mass in his left lung. Decision and Order on Remand at 14-15. Thus, the ALJ found his opinion does not undermine the diagnoses on x-ray of a large opacity of complicated pneumoconiosis in Claimant's left lung.[9] *Id.* Also, to the extent Dr. Levinson relied on Dr. Champak's x-ray, the ALJ discredited his opinion because the x-ray was not designated by either party and was not an ILO interpretation.[10]

[9] Employer states there is "no evidence of large opacities in the left lung." Employer's Reply to Claimant's Brief at 3, *citing* Claimant's Exhibit 1-2. This is incorrect, as the March 2010 CT scan and the January 22, 2013 and July 5, 2016 x-rays identified large opacities in both lungs. Decision and Order on Remand at 15 n.8; Employer's Exhibit 4.

[10] Dr. Champak observed "multiple faint small nodular densities in both lungs" that "most likely represent granulomatous disease" and "moderate-sized densities in the right

Id. at 15. Thus, the ALJ gave reduced weight to Dr. Levinson's opinion on the issue of complicated pneumoconiosis. *Id.* She therefore concluded that while the medical opinion evidence did not establish complicated pneumoconiosis, it also did not detract from a finding that he has the disease based on the x-ray evidence. *Id*.

Although the ALJ found the medical opinions do not support Claimant's burden of proof, Employer generally asserts the ALJ erred in not giving them full weight as establishing Claimant does not have complicated pneumoconiosis. Employer's Reply to Claimant's Brief at 2-3, *quoting* Employer's Brief at 24, 27 ("the fact that three doctors were asked to offer their expert opinions on whether Wolfgang had pneumoconiosis and not one of them diagnosed complicated pneumoconiosis is probative of whether Wolfgang suffered from complicated pneumoconiosis"). Because Employer does not identify specific error in the ALJ's individual rationales for the weight she accorded each of the respective medical opinions, we affirm her credibility findings. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Claimant's Treatment Records

The ALJ next considered Claimant's treatment records from visits to Reading Hospital and Medical Center in August 1992 for a work-related injury and in June 1998 for a bronchoscopy. Decision and Order on Remand at 15-16; *see* Employer's Exhibits 6, 7. As none of the treatment records mention the presence or absence of complicated pneumoconiosis, the ALJ concluded they do not weigh in favor for or against a finding of the disease. Decision and Order on Remand at 16. Although Employer asserts the treatment records' silence constitutes affirmative evidence that Claimant does not have complicated pneumoconiosis, it misconstrues the law it cites.[11] The ALJ has discretion to

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hilum which "most likely represent [a] combination of small vascular shadows and overlying multiple granuloma." Employer's Exhibit 1.

[11] Employer relies on *Amax Coal Co. v. Burns*, 855 F.2d 499, 502 (7th Cir. 1988) and *Marra v. Consolidation Coal Co.*, 7 BLR 1-216 (1984). Employer's Brief at 22; Employer's Reply to Claimant's Brief at 7-8. In *Burns*, the United States Court of Appeals for the Seventh Circuit stated that "[f]aced with a complete report of the miner's physical condition which contained no diagnosis of lung disease nor any evidence supporting such a diagnosis, [an ALJ] *reasonably inferred* that lung disease was not present." 855 F.2d at 502 (emphasis added). In *Marra*, the Board held that "an [ALJ] may generally assume that if the physician reading the x-ray does not mention pneumoconiosis, then pneumoconiosis is not present," but there is no requirement that x-rays containing no mention of pneumoconiosis be automatically deemed negative for pneumoconiosis. 7 BLR at 1-218-

interpret and determine the weight to accord Claimant's treatment records and Employer's arguments to the contrary are a request that we reweigh the evidence, which we cannot do. *See Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 217-18 (1984).

Weighing the Evidence as a Whole

The ALJ found Claimant did not establish complicated pneumoconiosis based on the biopsy evidence at 20 C.F.R. §718.304(b) or other evidence at 20 C.F.R. §718.304(c). Decision and Order on Remand at 17. However, weighing the evidence as a whole, she found the x-ray evidence showing large opacities consistent with complicated pneumoconiosis in both of Claimant's lungs establishes Claimant has the disease, and "outweighs the 1998 negative biopsy (which relates only to Claimant's right lung), the equivocal CT scan interpretation (which relied on the biopsy to suggest other causes of Claimant's large opacities while acknowledging that complicated pneumoconiosis was a possible cause), and the physician opinion and treatment record evidence (none of which merited great weight on the issue of complicated pneumoconiosis)." *Id* at 16-17.

Employer asserts the ALJ rejected any evidence that "shed light" on whether the opacities are complicated pneumoconiosis[12] and improperly shifted the burden of proof. Employer's Brief at 21-25. We disagree.

The ALJ discussed all the relevant evidence, interrelating the categories of evidence to reach a conclusion on the existence of complicated pneumoconiosis with the burden of proof on Claimant to establish he has the disease by a preponderance of the evidence. As the ALJ adequately explained her credibility determinations in accordance with the APA, and her conclusion that Claimant has complicated pneumoconiosis is supported by substantial evidence, we affirm it. *See Soubik v. Director, OWCP*, 366 F.3d 226, 233 (3d

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19. Rather, the issue is a question of fact for the ALJ to resolve, who may "consider, in his discretion, whether an inference that the x-rays establish the absence of pneumoconiosis is warranted." *Id.* at 1-219. Neither case dictates what an ALJ must do with evidence that is silent as to the existence of the disease; both cases confirm that such findings are within the ALJ's purview.

[12] There is no merit to Employer's argument that the ALJ failed to consider Claimant's lack of disability in weighing the evidence of complicated pneumoconiosis. Employer's Brief at 28-29. Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), does not require Claimant establish total disability nor does it require Claimant show evidence of disability in order to invoke the presumption of total disability due to complicated pneumoconiosis. *See* 20 C.F.R. §718.304.

Cir. 2004) (substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); *see also Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354 (3d Cir. 1997); *Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (duty of explanation under the APA is satisfied as long as the reviewing court can discern what the ALJ did and why she did it).

We further affirm, as unchallenged on appeal, the ALJ's determination that Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203; *see Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 17. We therefore affirm the ALJ's conclusion that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.304, 725.309; Decision and Order on Remand at 3, 17.

Accordingly, the ALJ's Decision and Order Awarding Benefits on Remand is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge