U.S. Department of Labor

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

BRB No. 21-0016 BLA

JERRY L. LUSK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL, LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 12/20/2022
	)	
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 and Denying Employer Request for Modification of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for Employer and its Carrier.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

BUZZARD and ROLFE, Administrative Appeals Judges:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Awarding Benefits and Denying Employer Request for Modification[1] (2018-BLA-06221) rendered on a claim filed on August 1, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Eastern Associated Coal, LLC (Eastern) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. She accepted the parties' stipulation that Claimant had twenty-four years of qualifying coal mine employment. The ALJ also determined Claimant established complicated pneumoconiosis and therefore found he invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. She further found Claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203(b), and therefore awarded benefits.

On appeal, Employer argues the ALJ erred in finding Peabody Energy is the liable carrier. On the merits, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis and invoked the irrebuttable presumption.[2] Claimant responds, urging affirmance of the ALJ's award of benefits. The Director, Office of

[1] The district director found Employer's request for a hearing in response to the Proposed Decision and Order awarding benefits to be untimely. Director's Exhibits 41, 43, 48. Employer subsequently requested modification and submitted additional medical evidence. Director's Exhibit 55. The district director denied modification and Employer requested a hearing. Director's Exhibits 57, 63.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-four years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 32.

Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to affirm the ALJ's determination that Employer is liable for benefits.

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.[3] 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).

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Eastern is the correct responsible operator and it was self-insured by Peabody Energy on the last day Eastern employed Claimant; thus, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 35-36. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund (the Trust Fund).

Patriot was initially another Peabody Energy subsidiary. Director's Exhibit 5; Director's Response at 2.[4] In 2007, after Claimant ceased his coal mine employment with Eastern, Peabody Energy transferred a number of its other subsidiaries, including Eastern, to Patriot. Director's Response at 2. That same year, Patriot was spun off as an independent company. *Id*. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. *Id.* Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Eastern, Patriot later went bankrupt and can no longer provide for those benefits. Director's Exhibit 5 at 1-3; Director's Response at 2. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Eastern when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 36-40.

[3] 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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200,1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 28.

[4] While Employer submitted documentary liability evidence at Employer's Exhibit 5, which potentially sets forth these facts, the documents are only partially readable and Employer cites no evidence in its brief. Thus, where necessary, the Board has relied on the facts as set forth in the Director's Response.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated the self-insured carrier in this claim and thus the Trust Fund is responsible for the payment of benefits following Patriot's bankruptcy: (1) the Director failed to present evidence that Peabody Energy self-insured Eastern; (2) the Department of Labor (the DOL) released Peabody Energy from liability; (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) the Director is equitably estopped from imposing liability on the company; (5) before transferring liability to Peabody Energy, the DOL must establish it exhausted any available funds from the security bond Patriot gave to secure its self-insurance status; and (6) the DOL violated Employer's due process rights by not maintaining adequate records with respect to Patriot's bond and failing to monitor Patriot's financial health. Employer's Brief at 19-31. Employer maintains that a separation agreement – a private contract between Peabody Energy and Patriot – released it from liability and the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. *Id.* at 20-23, 30-31.

The Board has previously considered and rejected these arguments in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc); *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 5-17 (Oct. 18, 2022); and *Graham v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments. Thus, we affirm the ALJ's determination that Eastern and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.

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

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.

The ALJ must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether Claimant has invoked the irrebuttable presumption. *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, 1-33-34 (1991) (en banc). The

ALJ found complicated pneumoconiosis established by the chest x-ray evidence and the evidence as a whole.[5] Decision and Order at 12, 31-32.

X-ray Evidence

The ALJ considered six readings of three x-rays dated October 12, 2016, September 16, 2019, and September 28, 2019. 20 C.F.R. §718.304(a); Decision and Order at 9-12; Director's Exhibits 18, 55; Claimant's Exhibit 1-2; Employer's Exhibit 8. All the interpreting physicians were dually-qualified as B readers and Board-certified radiologists, with the exception of Dr. Forehand, who is solely a B reader. Decision and Order at 11.

Three readings of the October 12, 2016 x-ray conflicted regarding the presence of simple clinical pneumoconiosis but none of the physicians found the presence of a large opacity consistent with complicated pneumoconiosis. Decision and Order at 9, 11; Director's Exhibits 18, 55. Thus, the ALJ found the 2016 x-ray negative for complicated pneumoconiosis.[6] Decision and Order at 11.

The ALJ next weighed the two conflicting interpretations of the September 16, 2019 x-ray. Dr. DePonte interpreted it as positive for pneumoconiosis, profusion 1/0, with a Category A large opacity. Claimant's Exhibit 1. She also noted a "2.4 cm irregular opacity [in the] right lower lung zone. Malignancy should be excluded." *Id.* Dr. Seaman interpreted the x-ray as negative for pneumoconiosis but noted an "[a]pproximately 2 cm nodular opacity in right lower zone could represent lung malignancy. Chest CT scan is recommended for further evaluation." Employer's Exhibit 8. The ALJ found Dr. DePonte's reading supported a finding of complicated pneumoconiosis while Dr. Seaman's reading did not. Decision and Order at 11. Noting both physicians were dually-qualified and finding no reason to accord more weight to either reading, she found the September 16, 2019 x-ray to be in equipoise for complicated pneumoconiosis. *Id.*

Finally, the ALJ considered the sole reading of the September 28, 2019 x-ray, which Dr. DePonte read as positive for pneumoconiosis, 1/0, with a Category A large opacity.

[5] The ALJ noted there is no biopsy evidence of record, so Claimant cannot establish complicated pneumoconiosis under 20 C.F.R. §718.304(b). Decision and Order at 7 n.6. She found Claimant's medical treatment records neither supported nor weighed against the presence of complicated pneumoconiosis and the medical opinions did not support a finding of the disease. Decision and Order at 22, 31; 20 C.F.R. §718.304(c).

[6] The parties do not challenge the ALJ's finding that the October 12, 2016 x-ray is negative for complicated pneumoconiosis; thus, it is affirmed. *See Skrack*, 6 BLR at 1-711.

Claimant's Exhibit 2. Similar to her prior reading, she identified an "[a]pproximately 2.5 cm irregular opacity [in the] right lower lung zone. Malignancy should be excluded." *Id.* The ALJ found Dr. DePonte's interpretation supported a finding of complicated pneumoconiosis. As there were no conflicting readings, she found the September 28, 2019 x-ray positive for complicated pneumoconiosis. Decision and Order at 11.

Weighing the x-ray evidence together, the ALJ gave the two September 2019 x-rays "equal probative weight based on recency" since they were contemporaneous. Decision and Order at 11-12. She accorded the October 2016 x-ray little weight, finding the more recent 2019 x-rays more reflective of Claimant's current condition given the progressive nature of pneumoconiosis. *Id.* at 12. Finding the October 12, 2016 x-ray negative but entitled to little weight, the September 16, 2019 x-ray in equipoise, and the September 28, 2019 x-ray positive, the ALJ determined the "overall weight" of the x-ray evidence supports a finding of complicated pneumoconiosis. *Id.*

Employer argues the ALJ erred in relying upon Dr. DePonte's readings of the September 2019 x-rays to find complicated pneumoconiosis because it contends they did not contain "a specific finding of complicated pneumoconiosis." Employer's Brief at 6. It further alleges Dr. DePonte's notations that a malignancy "should be excluded" inherently would render any such diagnosis too equivocal because it demonstrates Dr. DePonte "was not certain of the cause of the opacity" and did not provide a "definitive reading." *Id.* We disagree with both points.

First, the ALJ accurately concluded Dr. DePonte diagnosed complicated pneumoconiosis based on the statutory requirements and the International Labour Organization (ILO) forms she completed. For more than fifty years, the ILO has published guidelines for the classification of chest x-rays of pneumoconiosis for diagnostic forms. The classification system seeks to codify x-ray abnormalities of pneumoconioses in a simple, reproducible manner. *See* INTERNATIONAL LABOUR ORGANIZATION, GUIDELINES FOR THE USE OF THE ILO INTERNATIONAL CLASSIFICATION OF RADIOGRAPHS OF PNEUMOCONIOSES, at 1 (2000).

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); 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. Dr. DePonte checked the box indicating Category A, complicated pneumoconiosis, on both readings -- and she described an opacity meeting the statutory size requirement she found consistent with pneumoconiosis. No more is required. Indeed, her simple, straightforward indications compelled the ALJ's conclusion, given the uncomplicated design of the ILO form and the Act's statutory and regulatory

requirements. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.102(d); 20 C.F.R. §718.304. And it would be irrational to interpret the reading any other way. Employer's argument that Dr. DePonte did not diagnose complicated pneumoconiosis is simply wrong. *Id.*

Second, Employer's assertion that Dr. DePonte's reading must be found equivocal misunderstands the burden of proof in black lung claims. Claimant's burden is not to establish complicated pneumoconiosis "definitively" or to rule out all possible causes of an opacity. Rather, as the ALJ implicitly recognized, Claimant's burden merely 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). 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). The ALJ correctly found that Dr. DePonte interpreted the most recent x-ray as positive for complicated pneumoconiosis and that her most recent reading is uncontradicted. In resolving a discrepancy with an earlier negative reading, the ALJ permissibly reasoned that the progressive nature of pneumoconiosis provided a basis to credit the more recent x-rays over the older ones, leaving no conflict unresolved. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993) (a "later test or exam" is a "more reliable indicator of a miner's condition than an earlier one" where a "miner's condition has worsened" given the progressive nature of pneumoconiosis), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th Cir. 1993). Having done a proper qualitative and quantitative analysis, we thus affirm her finding the x-rays establish complicated pneumoconiosis. *Id.*[7]

[7] Asserting an argument not raised by Employer -- based on authority not contained anywhere in its brief -- our dissenting colleague argues *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991) (en banc) requires remand for the ALJ to more explicitly state her conclusion that Dr. DePonte's notations do not call into question the physician's diagnosis of complicated pneumoconiosis. But our colleague's intrusion into the parties' dispute simply is not warranted under the facts of *Melnick*. In *Melnick*, an ALJ credited an x-ray as positive for complicated pneumoconiosis without considering the readers' notation "can't rule out mesothelioma either side." *Id*. at 1-33. In one line of commentary, the Board held "it is unclear from [that] record" whether the comment represented an alternative diagnosis or "merely an additional one." *Id.* It thus remanded the claim for the ALJ to so determine. Not so here. On *this* record, a notation to "exclude" malignancy, as a matter of law, could not represent either diagnosis: there simply is no mention of cancer anywhere in the record or anywhere in Employer's brief. Rather, Employer insists -- in thirteen pages of discussion of the subject -- the opacites Dr. DePonte describes must be the result of scarring from pneumonia. *See, e.g.*, Employer's Brief at 4-17. No party is (or plausibly could) claim a malignancy is either an alternative or additional diagnosis; indeed,

Medical Opinion and Treatment Record Evidence

While the ALJ determined the medical opinion evidence does not support a finding of complicated pneumoconiosis, Employer asserts the ALJ did not adequately consider the evidence together with the treatment records to determine the cause of the large opacities identified on the September 2019 x-rays. Employer's Brief at 7-18.

The ALJ considered the medical opinions of Drs. Zaldivar, Agarwal, and Rosenberg.[8] 20 C.F.R. §718.304(c). Only Dr. Agarwal diagnosed complicated pneumoconiosis. Claimant's Exhibit 2. The ALJ gave Dr. Agarwal's opinion no probative weight because he relied solely on Dr. DePonte's x-ray interpretation and it was unclear whether he believed the nodule on the x-ray represented complicated pneumoconiosis or was caused by smoking.[9] Decision and Order at 20-21. The ALJ found Dr. Zaldivar's opinion undermined because he was unaware of the two recent 2019 x-rays which revealed large opacities. *Id.* at 21. Additionally, she found Dr. Rosenberg's opinion that the opacity seen on the September 2019 x-rays was not complicated pneumoconiosis to be inadequately explained and thus not well-reasoned. *Id*.

Employer argues the treatment records demonstrate that the opacity seen on the 2019 x-rays is scarring due to "serious pneumonia" Claimant suffered in 2013 in the same area of the lung where the opacity was later identified in the September 2019 x-ray interpretations, as well as additional pneumonias in the same area in 2014, 2016, and 2017. Employer's Brief at 7-9. It also points to a 2018 CT scan record indicating "parenchyma scarring" in the same area of the lung with no mention of pneumoconiosis. *Id.* at 9-10. It argues the ALJ did not sufficiently consider this evidence when evaluating the actual cause of the large opacity seen on Claimant's x-rays. *Id.* at 10. We disagree.

The ALJ summarized the treatment records, noting, among other issues, the multiple diagnoses of pneumonia identified by Employer. Decision and Order at 22-30. She also

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the suggestion categorically undermines Employer's central theory of the case. Using *Melnick* sua sponte as a blunt instrument to remand this case for an unstated but utterly forgone conclusion thus is neither necessary nor warranted.

[8] Also of record were the medical opinions of Drs. Forehand and Werchowski. Director's Exhibit 18; Claimant's Exhibit 1. However, as the ALJ indicated, neither physician addressed the presence or absence of complicated pneumoconiosis. Decision and Order at 20.

[9] The parties do not challenge the ALJ's credibility findings regarding Dr. Agarwal's opinion; thus, we affirm them. *Skrack*, 6 BLR at 1-711.

considered the medical opinions in conjunction with this evidence.[10] First, she noted that while Dr. Zaldivar considered several x-ray and CT scan interpretations which he opined did not support a diagnosis of pneumoconiosis, he did not consider the September 2019 x-rays that showed the large opacity. Decision and Order at 20; Employer's Exhibit 7. Because Dr. Zaldivar did not consider the most recent x-ray evidence, the ALJ permissibly discredited his opinion that pneumoconiosis is not present. Decision and Order at 21; *see Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986) (ALJ may assign less weight to a physician's opinion that reflects an incomplete picture of the miner's health).

Next, the ALJ considered Dr. Rosenberg's opinion that Claimant does not have complicated pneumoconiosis. She noted his opinion that Claimant's treatment records show that the changes identified on the September 2019 x-rays were actually "chronic scarring" related to "pneumonia and emphysema."[11] Decision and Order at 21; Employer's Exhibit 9 at 5. But she found Dr. Rosenberg only "briefly" addressed the issue of complicated pneumoconiosis and did not adequately explain how Claimant's treatment records supported his conclusion, particularly given the multiple radiographic interpretations, testing, and numerous medical encounters contained in the treatment records. Decision and Order at 21. The ALJ thus permissibly found Dr. Rosenberg's opinion not well-reasoned and entitled to reduced weight. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000) (it is the province of the ALJ to evaluate the physician's opinions); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Employer next argues the ALJ erred in discounting the treatment record CT scan readings that did not diagnose pneumoconiosis. It asserts the ALJ erred in according the

[10] Employer seems to argue the ALJ should have compared the treatment records to the x-ray readings to independently determine the cause of the large opacity. *See* Employer's Brief at 10-12. While the ALJ must assess the evidence and make factual findings and inferences based on the evidence, the interpretation of medical data is for the medical experts. *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

[11] Dr. Rosenberg stated "[t]he treatment records support the fact that any changes referred to as complicated disease by Dr. DePonte reflect chronic scarring related to previous pneumonia and *empyema*." Employer's Exhibit 9 at 5 (emphasis added). Empyema is defined as an abscess or "a pleural effusion . . . containing pus." Dorland's Illustrated Medical Dictionary 610 (32d ed. 2012). While the ALJ referred to "pneumonia and emphysema," this error is harmless as it makes no difference in the ALJ's credibility determination regarding Dr. Rosenberg's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

readings little weight because it was unclear if the physicians were aware of Claimant's coal mine employment, when those physicians could be expected to report any abnormalities present yet did not identify any large opacities. Employer's Brief at 11. We disagree.

The ALJ permissibly found the treatment records do not establish either the presence or absence of pneumoconiosis. Decision and Order at 31. Whether the ALJ could infer from the treatment records' silence on the presence of pneumoconiosis that the disease is absent is a question of fact to be resolved by the ALJ. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). Moreover, the ALJ correctly found all the treatment records predate the September 2019 chest x-rays in which the large opacities were identified; thus, she found the earlier treatment records insufficient to show that complicated pneumoconiosis was not present in 2019. Decision and Order at 31. Employer does not challenge this specific finding; thus, it is affirmed. *Skrack*, 6 BLR at 1-711.

Based on the foregoing, we affirm the ALJ's weighing of the medical opinions and treatment record evidence on the issue of complicated pneumoconiosis. Decision and Order at 22, 30-31; 20 C.F.R. §718.304(c).[12]

[12] Our dissenting colleague ostensibly argues the ALJ did not weigh CT scans in the treatment records in violation of the statutory mandate that all relevant evidence must be considered. 30 U.S.C. § 923(b). But she does not actually identify any evidence the ALJ did not weigh. Instead, her real disagreement appears to be that the ALJ did not consider evidence *in a particular way*. ("[W]hile the ALJ noted the CT scans contained in the treatment records and addressed them in conjunction with the medical opinion evidence, I would also require her to consider the treatment records in conjunction with the x-ray evidence.") But the ALJ interrelated all of the relevant evidence in this case from all three categories and gave permissible reasons why she determined Dr. DePonte's x-ray readings carried the day, as outlined above. No more is required. Given the ALJ's findings are reasonable, supported by substantial evidence, and in accordance with the law, instructing the ALJ how she must interpret evidence is beyond the Board's authority. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999) (a reviewing court may not set aside a finding "merely because it finds the opposite conclusion more reasonable"); *Elkins v. Sec'y of HHS*, 658 F.2d 437, 439 (6th Cir. 1981) ("If the [ALJ's] findings are supported by substantial evidence we must affirm the [ALJ's] decision, even though as triers of fact we might have arrived at a different result.").

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits and Denying Employer Request for Modification.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring and dissenting:

While I agree with the majority's rejection of Employer's responsible carrier arguments, I respectfully dissent from the majority's affirmance of the award of benefits. The sole issue on the merits is whether the ALJ erred in finding Claimant established complicated pneumoconiosis, thus invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. In order to reach a proper conclusion on that issue, it is the duty of the ALJ to consider all relevant evidence. 30 U.S.C. § 923(b); 20 C.F.R. §718.304*; Island Creek Coal Co. v. Compton* 211 F.3d 203, 211 (4th Cir. 2000); *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). Because the ALJ did not do so in this case, I would vacate the award of benefits and remand for the further consideration required.

More specifically, I would hold the ALJ erred in her consideration of the September 16, 2019 and September 28, 2019 x-ray readings. An ALJ must consider a physician's entire x-ray report at 20 C.F.R. §718.304(a), including any additional notations by the physician. *Melnick*, 16 BLR at 1-33-34 (a comment that constitutes an alternative diagnosis could call into question the physician's diagnosis of a large opacity of complicated pneumoconiosis). The narrative portion of an x-ray reading may affect the proper characterization of a doctor's opinion regarding whether the manifestations on the x-ray are of a "chronic dust disease" or another disease process, e.g. it may indicate that the doctor has not rendered a definitive opinion and that the diagnosis is equivocal . *See Cox*, 602 F.3d at 283; *Melnick*, 16 BLR at 1-37; 20 C.F.R. §718.304.

Here, while the ALJ summarized the physician's notations on the September 16, 2019 and September 28, 2019 x-ray reports, she did not address whether these notations undermined the credibility of the diagnoses. Decision and Order at 10-12. Thus, I would remand for the ALJ to address whether Dr. DePonte's comments call into question her diagnosis of complicated pneumoconiosis. *Melnick*, 16 BLR at 1-37; *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).[13]

In addition, while the ALJ noted the CT scans contained in the treatment records and addressed them in conjunction with the medical opinion evidence, I also would require her to consider the treatment records in conjunction with the x-ray evidence. As Employer points out, the treatment records address what the reviewing physicians saw in the lungs on x-ray. The September 21, 2018 CT scan in particular, conducted less than a year before the September 2019 chest x-rays, identified two nodules, measuring "up to" five millimeters and scarring in the lower lung area, but did not identify a large opacity. Employer's Exhibit 6. The ALJ's failure to consider this evidence, particularly the 2018 CT scan, and whether it supported or detracted from the x-ray evidence, was also a failure to consider all relevant evidence. *Compton*, 211 F.3d 203 at 211; *Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 255-56; *McCune*, 6 BLR at 1-998. The ultimate question is whether the evidence establishes, more likely than not, that Claimant has complicated pneumoconiosis. The evidence not considered by the ALJ is directly relevant to answering that question. The ALJ's failure consequently renders the ALJ's conclusion unaffirmable.[14]

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[13] Contrary to my colleagues' contention, Employer specifically raised this issue. It argued:

> Dr. DePonte annotated the interpretation to demonstrate that she was not certain of the cause of the large opacity, noting that it was an irregular opacity in the right lower lung zone (as opposed to the upper lung zones where complicated pneumoconiosis typically appears first) and that malignancy needed to be excluded. That is not a definitive reading that the film shows complicated coal worker's pneumoconiosis. The ALJ erred in finding it to be a specific finding of complicated coal workers' pneumoconiosis.

Employer's Brief at 6.

[14] My colleagues suggest that this is requiring the ALJ to consider the evidence in a particular way. On the contrary, it is doing what the law requires. The United States Court of Appeals for the Fourth Circuit has held that the ALJ must consider all of the relevant evidence together. This means considering all of the contrary evidence, including the CT

Therefore, I would vacate the ALJ's findings that Claimant established complicated pneumoconiosis and remand for the ALJ to further evaluate the x-ray evidence and consider the treatment records in conjunction with this evidence.

Accordingly, I respectfully concur in part and dissent in part.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

scan evidence, when considering what the x-ray evidence shows. *Compton*, 211 F.3d 203 at 211.