U.S. Department of Labor

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

BRB No. 20-0545 BLA

RICKY A. GREEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELK RUN COAL COMPANY, INCORPORATED	)	DATE ISSUED: 11/30/2021
	)	
Employer-Petitioner	)	
	)	
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 of Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

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

T. Jonathan Cook (Cipriani & Werner, P.C.), Charleston, West Virginia, for Employer.

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

BOGGS, Chief Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2019-BLA-05437) on a miner's subsequent claim filed on

March 12, 2018,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). After crediting Claimant with 42.68 years of qualifying coal mine employment, the ALJ found the evidence established the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.304, 718.203. He therefore found Claimant 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), and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[2] Accordingly, the ALJ awarded benefits.

On appeal, Employer asserts the ALJ erred in finding Claimant established complicated pneumoconiosis and is therefore entitled to the irrebuttable presumption at Section 411(c)(3). Employer further argues the evidence does not establish total disability at 20 C.F.R. §718.204(b)(2), and Claimant, therefore, cannot establish entitlement to benefits. Claimant filed a response brief in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response.[3]

The Benefits Review 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

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[1] The district director denied Claimant's initial claim, filed on April 14, 2016, for failure to establish total disability. Director's Exhibit 1.

[2] 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 he 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)(1); *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 Claimant did not establish a totally disabling respiratory or pulmonary impairment in his prior claim, he had to submit evidence establishing this element in order to obtain review of the merits of his current claim. *Id.* Claimant may establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309 by invoking the Section 411(c)(3) presumption. *See Eastern Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-12 (4th Cir. 2015).

[3] We affirm, as unchallenged, the ALJ's finding that Claimant established 42.68 years of qualifying coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

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).

Complicated Pneumoconiosis

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. 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); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46 (4th Cir. 1993); *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. Further finding the record contained no other evidence to refute the positive x-rays, he concluded Claimant invoked the irrebuttable presumption.[5] Employer contends the ALJ erred in weighing the x-ray evidence to find Claimant established complicated pneumoconiosis. Employer's Brief at 3-10 (unpaginated).

X-ray Evidence

The ALJ considered eight interpretations of two x-rays dated May 25, 2018 and August 3, 2018. All of the interpreting physicians are dually qualified as B-readers and Board-certified radiologists.

Dr. DePonte interpreted the May 25, 2018 x-ray as showing both small opacities and a Category A large opacity consistent with pneumoconiosis; she specifically referred

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hr. Tr. at 18.

[5] The ALJ noted the record contains no biopsy evidence. 20 C.F.R. §718.304(b); Decision and Order at 12, 14 n.15. He further noted that the only medical opinion of record by Dr. Nader also diagnosed complicated pneumoconiosis based on Dr. DePonte's positive interpretation of the May 25, 2018 x-ray. Decision and Order at 8.

to the existence of "bilateral pseudoplaques in [the] mid to upper zones bilaterally with [a] 17 mm Category A pseudoplaque [in the] left upper lobe." Director's Exhibit 18 at 21. Drs. Crum and Meyer read the same x-ray as showing small opacities consistent with pneumoconiosis but no large opacities consistent with the disease; they did not comment as to the presence of pseudoplaques. Employer's Exhibits 1, 4. Dr. Tarver read the same x-ray as "normal" and indicated there are no small or large opacities consistent with pneumoconiosis; he did not comment as to the presence of pseudoplaques.[6] Director's Exhibit 24. Dr. DePonte interpreted the August 3, 2018 x-ray as showing both small opacities and Category A large opacities consistent with pneumoconiosis, and reported "bilateral pseudoplaques forming at least Category A large opacities." Claimant's Exhibit 2. Dr. Crum read the x-ray as positive for both small and Category A large opacities and noted the following: 1) "likely 'A' opacity suggesting PMF [progressive massive fibrosis]" that could be confirmed with a computed tomography scan; 2) "bilateral nodularity, nonspecific retrocardiac dust"; and 3) "f[ollow] u[p] recommended." Claimant's Exhibit 2. Although Dr. Meyer noted the presence of simple pneumoconiosis and "peripheral subpleural pseudo-plaque[s] in the upper zones," he read the film as negative for complicated pneumoconiosis. Employer's Exhibit 2. Dr. Tarver interpreted the August 3, 2018 x-ray as positive for simple pneumoconiosis and negative for complicated pneumoconiosis, and he indicated observing no other abnormalities. Employer's Exhibit 3.

The ALJ found Dr. Meyer is the most qualified radiologist of record.[7] *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order at 13. He thus credited Dr. Meyer's negative reading of the May 25, 2018 x-ray, as corroborated by the negative readings by Drs. Crum and Tarver, over Dr. DePonte's positive reading. Decision and Order at 15. The ALJ therefore found the May 25, 2018 x-ray does not support a finding of complicated pneumoconiosis.

With regard to the August 3, 2018 x-ray, the ALJ found Dr. Meyer's negative reading entitled to less weight because, although he noted pseudoplaques, he "did not address [them] in relation to the potential for a large opacity." Decision and Order at 15. By contrast, he found the x-ray reports of Drs. DePonte and Crum to be "more thorough" and therefore entitled to greater weight, because they "addressed how they believed the

[6] The record also contains a 'quality only' reading of the May 25, 2018 x-ray by B-reader Dr. Gaziano. Director's Exhibit 19; Decision and Order at 6.

[7] The ALJ noted he considered the physicians' professional credentials, including their dual certifications, radiology experience, publications related to black lung or miners, professorships, and affiliation with a sizeable university or hospital. Decision and Order at 13.

pseudoplaques to be affecting or impacting Claimant's lung condition." *Id*. The ALJ therefore found the August 3, 2018 x-ray positive for complicated pneumoconiosis.

Considering the x-ray evidence as a whole, the ALJ stated:

> In weighing this evidence together with respect to complicated pneumoconiosis, there is one positive x-ray and one negative x-ray, with the later x-ray being positive. I do not mechanically apply the later-is-better approach; but rather, I note that the later x-ray demonstrates a worsening of Claimant's condition. Specifically, Dr. Crum's thorough x-ray interpretations demonstrate that Claimant's condition worsened between the two x-rays, and his subsequent finding of a large opacity, along with his suggestion of progressive massive fibrosis, are enlightening.

Decision and Order at 15. Thus, the ALJ concluded Claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(a). *Id*.

Regarding the August 2018 x-ray, Employer argues the ALJ failed to adequately explain why he credited the positive readings of Drs. Crum and DePonte over Dr. Meyer's negative reading, given that the ALJ specifically determined Dr. Meyer was the most qualified radiologist. Employer's Brief at 9 (unpaginated). Employer also asserts the ALJ mischaracterized that Drs. Crum and DePonte better explained Claimant's lung condition because they did not analyze the x-ray evidence beyond their respective readings. *Id.* at 8-9 (unpaginated). Employer's arguments have merit, in part.

Contrary to Employer's contention, the ALJ is not required to assign greater weight to Dr. Meyer's reading based on his superior credentials. *Adkins*, 958 F.2d at 52. While the ALJ is required to weigh the relevant evidence, he has the discretion to draw his own conclusions. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). However, the ALJ did not adequately explain the basis for his credibility determinations. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

None of the physicians define pseudoplaques or explain how they relate to the progression of simple to complicated pneumoconiosis, and the ALJ did not adequately explain his basis for inferring that this process has occurred in Claimant. Contrary to the ALJ's finding, Drs. DePonte and Crum did not "address[] how they believed the pseudoplaques to be affecting or impacting Claimant's lung condition." Decision and Order at 15; *see* Claimant's Exhibits 1, 2. Rather, Dr. DePonte merely identified pseudoplaques forming category A opacities on both x-rays films. Although Dr. Crum identified a "likely 'A' opacity" of progressive massive fibrosis on Claimant's latter x-ray, he did not address the presence of pseudoplaques on either film. Further, even if the ALJ permissibly inferred that pseudoplaques reflect a progression of pneumoconiosis, Dr. Meyer specifically identified pseudoplaques on the August 3, 2018 x-ray but stated there

were no Category A opacities for complicated pneumoconiosis. Dr. Tarver also found no large opacities consistent with complicated pneumoconiosis. Because the ALJ did not adequately explain how he resolved the conflict in this evidence, his determination that Claimant established complicated pneumoconiosis does not satisfy the Administrative Procedure Act (APA).[8] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Wojtowicz*, 12 BLR at 165. Thus, we vacate his determination at 20 C.F.R. §718.304(a) and his overall finding that Claimant invoked the irrebuttable presumption.[9]

[8] The Administrative Procedure Act provides 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] Although our dissenting colleague deftly attempts to bridge the gap between the record and the ALJ's stated basis for his credibility determination, we are not empowered to do so. *See Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) (When the ALJ fails to make necessary factual findings, the proper course for the Board is to remand the case to the ALJ rather than attempt to fill the gaps in the ALJ's opinion); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand). As Employer correctly asserts, to the extent the ALJ found either Dr. DePonte or Dr. Crum explicitly addressed an adverse impact of pseudoplaques on Claimant's lung function as support for the ALJ's apparent conclusion that Claimant's pseudoplaques progressed to complicated pneumoconiosis, the ALJ mischaracterizes their ILO reports. Employer's Brief at 8-9 (unpaginated) (explaining "neither [doctor's] report says what the OALJ wrote in the decision"). Because the ALJ's rationale for resolving the conflict in the readings of the August 2018 x-ray is based on factual mischaracterizations and is not adequately explained, we cannot affirm it, despite the inferences our dissenting colleague invites us to draw from the evidence. Further, even if the physicians agree that Claimant has pseudoplaques, a determination of complicated pneumoconiosis based on x-ray requires a diagnosis of a *chronic disease of the lung* yielding one or more large opacities *greater than one centimeter in diameter and classified in Category A, B or C in accordance with the ILO classification system*. 20 CFR 718.304 (emphasis added). Dr. Meyer, who the ALJ determined was the most qualified radiologist, identified pseudoplaques but opined Claimant does not have an opacity satisfying the regulatory standard. The ALJ did not explain how the criteria he used were appropriate for discriminating among physicians' opinions to determine if the required criteria for complicated pneumoconiosis are met. Under these circumstances, we are obligated to remand the case for the ALJ to explain his finding. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016) (quoting *Nken v. Holder*, 585 F.3d 818, 822 (4th Cir. 2009) ("We cannot guess at what the ALJ meant to say, but didn't because '[e]stablished

Remand Instructions

On remand, the ALJ must initially reconsider whether the August 3, 2018 x-ray supports a finding of complicated pneumoconiosis. In so doing, he must resolve the conflict in interpretations and adequately explain his credibility determinations. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998). Next, the ALJ should address whether the x-ray evidence, as a whole, establishes complicated pneumoconiosis at 20 C.F.R. §718.304(a). *Id.* In rendering all of his findings on remand, the ALJ must comply with the APA. *Wojtowicz*, 12 BLR at 165.

If the ALJ finds the x-ray evidence sufficient to establish Claimant has complicated pneumoconiosis, he may reinstate his finding that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis and reinstate the award of benefits.[10] *Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 255-56; *Lester*, 993 F.2d at 1145-46; *Melnick*, 16 BLR at 1-33-34. If Claimant is unable to establish complicated pneumoconiosis, the ALJ must deny benefits as Claimant cannot establish a totally disabling respiratory or pulmonary impairment without the benefit of the irrebuttable presumption on this record.[11]

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precedent dictates that a court may not guess at what an agency meant to say, but must instead restrict itself to what the agency actually did say.'").

[10] Employer does not challenge the ALJ's finding that if Claimant has the disease his complicated pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(b). *See The Daniels Co. v. Mitchell*, 479 F.3d 321, 337 (4th Cir. 2007); Decision and Order at 19.

[11] While this case was pending before the ALJ, Claimant argued only that the evidence establishes he has complicated pneumoconiosis; he did not argue an alternative theory of entitlement. Claimant's Post-Hearing Brief at 3-8. Further, Claimant does not challenge the ALJ's characterizations of the pulmonary function and blood gas study evidence as non-qualifying and of Dr. Nader's disability opinion, the only medical opinion of record, as predicated on x-ray findings of complicated pneumoconiosis. *See* 20 C.F.R. §718.204(b); Decision and Order at 7-9, 19. Accordingly, Claimant waived any argument that he established a totally disabling respiratory or pulmonary impairment without the benefit of the irrebuttable presumption. *See* 20 C.F.R. §802.301 (Board not empowered to engage in a de novo proceeding or unrestricted review of a case brought before it); *Bucschon v. Peabody Coal Co.*, 4 BLR 1-608, 610 n.2 (1982) (Board generally will not address uncontested findings of ALJ); *Taylor v. 3D Coal Co.*, 3 BLR 1-350, 1-356 (1981) (issue waived where party failed to avail itself of opportunity to raise issue before ALJ).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur:

MELISSA LIN JONES
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to remand this case and would affirm the award of benefits for two reasons. First, longstanding precedent supports the ALJ's decision to grant more weight to the more recent x-ray readings diagnosing Claimant's deteriorating condition from simple to complicated pneumoconiosis given the regulatory recognition pneumoconiosis can be a progressive disease. 20 C.F.R. §718.201(c); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992).

Second, neither the minimal argument Employer raises alleging the ALJ's decision is insufficiently reasoned -- nor my colleagues' argument the ALJ had to recognize a difference between pseudoplaques and opacities rather than simply equate the two -- are persuasive given Claimant's burden of proof under the BLBA and the standard governing the duty of explanation under the APA. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 272-76 (1994), aff'g sub nom. *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 736 (3d Cir. 1993) (Claimant need establish it more likely than not that he suffers from complicated pneumoconiosis; he need not prove it to a certainty); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999) (the duty of explanation under

the APA "is not intended to be a mandate for administrative verbosity or pedantry"; if a reviewing court can discern "what the ALJ did and why he did it," the duty is satisfied).[12]

There is no dispute the Claimant's nearly forty-five years of underground mining or its equivalent in dust exposure have created opacities in his lungs, synonymously referred to as pseudoplaques by some readers, which constitute simple, clinical pneumoconiosis. All four readers recognized the disease by the August 2018 x-ray. Claimant's Exhibits 1, 2; Employer's Exhibits 2, 3.

There is also no dispute the majority of the interpretations of the two x-rays further describe a progression of the disease in this case: Dr. Tarver acknowledged pneumoconiosis appearing by the second x-ray, after previously denying it, Director's Exhibit 24, Employer's Exhibit 3; Dr. Crum found the simple pneumoconiosis he previously identified had coalesced into at least one likely Category A opacity in a process he diagnosed as *progressive massive fibrosis*, Claimant's Exhibit 1, Employer's Exhibit 4; and Dr. DePonte similarly found the pseudoplaques she previously described forming one qualifying opacity on the first x-ray had further coalesced into "*at least Category A large opacities*" by the time of the second x-ray, Director's Exhibit 18, Claimant's Exhibit 2. The only remaining dispute, all other things being equal, thus is whether it was within the

[12] As a threshold matter, while my colleagues take for granted Employer adequately raised an Administrative Procedure Act argument, actually identifying it is more difficult: the APA does not appear in Employer's brief. Instead, Employer merely characterizes the notion the x-rays show a progression from simple to complicated pneumoconiosis as "pure nonsense like pig Latin or dogs barking." Employer's Brief at 9 (unpaginated). But even assuming Employer's bare pejorative sufficiently raises an APA argument, and even after considering the extraneous issues my colleagues have inserted to bolster it, the ALJ's discussion still meets his duty of explanation. *Piney Mountain Coal Co.*, 176 F.3d at 762.

Conversely, the arguments Employer does sufficiently raise on its own -- that the ALJ was required to credit Dr. Meyer based on his qualifications and the Board should just "defer[] to the numerical superiority of x-ray evidence" -- both run counter to well-established law. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016) (ALJ must weigh the quality, and not just the quantity, of the evidence); *Adkins*, 958 F.2d at 51-52 (ALJ not required to assign greater weight to a physician's opinion based on his radiological qualifications, but must weigh the reliability of each piece of evidence and explain his credibility determinations).

ALJ's discretion to find Dr. DePonte's and Dr. Crum's identification of a Category A opacity more persuasive than the other physicians' bare denial of the disease.[13]

It undeniably was. Because while it may be possible to favor another method to settle the conflict in the readings (as urged by Employer and implied by my colleagues), it is impossible to reasonably deny the inferences the ALJ made were within his authority as a fact-finder, or that his method for resolving the dispute comports with well-established law. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012) (quoting *Smith v. Chater*, 99 F.3d 635, 637–38 (4th Cir.1996) ("As long as substantial evidence supports an ALJ's findings, '[w]e must sustain the ALJ's decision, even if we disagree with it.").

The ALJ considered the totality of the x-ray evidence, found nothing qualitatively wrong with the individual readings, and decided the progression of the disease they described favored crediting the more recent diagnoses of complicated pneumoconiosis on the August 2018 x-ray. That qualitative and quantitative analysis adequately fulfills his duty as the jury in this claim. *See Adkins*, 958 F.2d at 52; *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155

[13] For more than fifty years, the ILO has published guidelines for the classification of chest x-rays of pneumoconiosis. The classification system seeks to codify x-ray abnormalities of pneumoconioses in a simple, reproducible manner. 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). Categories 1, 2, and 3 indicate simple pneumoconiosis; categories A, B, and C indicate complicated pneumoconiosis. 20 C.F.R. §718.304.

Both Dr. DePonte and Dr. Crum checked the box for a Category A opacity in the relevant portion of the ILO form for the August 2018 x-ray, and they each provided further documentation Claimant suffers from complicated pneumoconiosis in the narrative section. Conversely, as the ALJ found, neither Dr. Meyer nor Dr. Tarver explained why they believed Claimant suffered from simple, but not complicated, pneumoconiosis given the progression of the disease -- other than offering bare denials that any of the opacities meet the statutory size requirement. Under these circumstances, my colleagues notation that complicated pneumoconiosis "based on x-ray requires a diagnosis of a *chronic disease of the lung* yielding one or more large opacities *greater than one centimeter in diameter and classified in Category A, B or C in accordance with the ILO classification system*", *supra* note 9, is puzzling: both Drs. DePonte and Crum provided precisely that diagnosis in their x-ray readings rather than simply noting an opacity. 30 U.S.C. §921(c)(3). And there has been no suggestion otherwise.

(1989) (en banc) (it is the ALJ's job to weigh evidence, draw inferences, and determine credibility; Board must not substitute its inferences). And there is nothing irrational, unexplained, or unlawful about his verdict.

Indeed, the United States Court of Appeals for the Fourth Circuit has long recognized that the potentially escalating nature of the disease can be used to resolve evidentiary conflicts, holding that where x-rays show that a miner's condition *has worsened*, "[a]ll other considerations aside, the later evidence is more likely to show the miner's current condition." *Adkins*, 958 F.2d at 52. That is because: "(1) pneumoconiosis is a progressive disease; (2) therefore, claimants cannot get better; (3) therefore, a later test or exam is a more reliable indicator of a miner's condition than an earlier one." *Id* at 51-52.

The ALJ understandably invoked the potential progressive nature of pneumoconiosis as a reasonable way to harmonize the x-ray readings, and his resulting acceptance of a Category A opacity -- by operation of law -- establishes Claimant is totally disabled. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Employer's obvious mischaracterization of the ALJ's decision as "pure nonsense" or my colleagues' more sophisticated allegation that the ALJ did not explain how he determined Drs. DePonte and Crum "addressed how pseudoplaques are affecting or impacting Claimant's lung condition" thus are simply without merit. We need, and should, go no further to affirm the ALJ's decision and reject Employer's appeal. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (U.S. 2020) ("In both civil and criminal cases, ... we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.") (citation omitted).[14]

Regardless, even accepting my colleagues' invitation to retry the case to refute their further reservations about the ALJ's reasoning leads to the same outcome. According to

[14] Without explanation, my colleagues suggest the ALJ "mischaracterized" the facts and failed to explain his findings -- and that this opinion therefore relies on impermissible inferences to fill the gaps he created. *See supra* note 9. But none of that is true. As the ALJ accurately recognized, Drs. DePonte and Crum read the August 2018 x-ray to contain "one or more large opacities greater than one centimeter in diameter" that "would be classified as Category A, B, or C." 30 U.S.C. §921(c)(3). The ALJ then permissibly relied on the progressive nature of pneumoconiosis to reconcile their readings with readers who did not diagnose a Category A opacity. *Adkins*, 958 F.2d at 52. Nothing material is left unexplained, there are no inferences that need to be made, and there are no gaps to fill. And it is not our role to create them. My colleagues' suggestion the ALJ was required to resolve a second dispute over the presence of pseudoplaques as a particular type of opacity

my colleagues, Claimant had a burden to define pseudoplaques, explain their relationship to opacities, and resolve an entirely presumed conflict between the physicians who used that term synonymously with opacities and those who did not. *See* discussion *supra* slip op. at 5. But the statute and regulations require none of that for Claimant to meet his burden of proof, 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304, and Employer argued none of it below to frame it as a conflict for the ALJ to resolve under his duty of explanation. *Piney Mountain Coal Co.*, 176 F.3d at 762.

Moreover, all of my colleague's objections stem from their unarticulated assumption pseudoplaques *are* different from opacities for the purposes of the Act. That has not been established in this case. Any plain reading of Dr. DePonte's interpretation identifying a coalescence of them forming Category A opacities refutes it, no other physician took a contrary position regarding the two terms, and the ALJ thus understandably and permissibly equated them here. *See, e.g.*, *Pittsburg & Midway Coal Mining Co.*, 508 F.3d 957, 987 (11th Cir. 2007) (explaining where the DOL has not defined terms by regulation, it has elected to proceed in a common law fashion based on the facts of each case). He unquestionably was within his authority in doing so. *Clark*, 12 BLR at 1-155.

And, incidentally, he was not wrong: "A pseudoplaque *is a pulmonary opacity* contiguous with the visceral pleura formed by coalescent small nodules. It simulates the appearance of a pleural plaque. This entity is encountered most commonly in sarcoidosis, silicosis, and coal-worker's pneumoconiosis." *Fleischers Society Glossary of Thoracic Imaging*, Hansell et al., Radiology Volume 246, March 2008, pg. 715, (emphasis added); *see also*, *Thorn v. Itman Coal Co.*, 3 F.3d 713, 716, n.2 (4th Cir. 1993) (using medical dictionary to construe terms not defined in the Act or regulations).

I therefore would affirm the award of benefits, even after considering the objections my colleagues raise for Employer on appeal.

JONATHAN ROLFE
Administrative Appeals Judge

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after Claimant met his statutory burden thus is a red herring: there simply is nothing in the statute, regulations, or case law that creates such a hurdle.