U.S. Department of Labor

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

BRB No. 22-0331 BLA

JERRY W. OWENS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 11/21/2023
	)	
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 Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Kendra R. Prince (Penn, Stuart, & Eskridge), Abingdon, Virginia, for Employer.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

BOGGS and JONES, Administrative Appeals Judges:

Employer appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Granting Benefits (2019-BLA-05220) rendered on a claim filed on

September 28, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ accepted the parties' stipulation that Claimant has 29.93 years of underground coal mine employment and has clinical pneumoconiosis. The ALJ found the evidence does not support a finding of complicated pneumoconiosis and therefore Claimant cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). She further found the evidence established he has a totally disabling pulmonary or respiratory impairment, 20 C.F.R. §718.204(b)(2), and therefore found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). The ALJ determined Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and therefore erred in invoking the Section 411(c)(4) presumption.[3] Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed an appeal, a cross-appeal, or a response brief.

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

[1] While it is true that Claimant is a self-represented respondent, he has not filed an appeal or a cross-appeal. Consequently, the majority declines to address issues not raised by Claimant including those surrounding entitlement to benefits based upon invocation of the 411(c)(3) irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3) (2018). Should the ALJ determine, on remand, that Claimant is not entitled to benefits, Claimant may appeal from that determination.

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

[3] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant has 29.93 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

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).

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based upon pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Employer contends the ALJ erred in finding the medical opinions establish total disability.[5] Employer's Brief at 5-9.

The ALJ considered the medical opinions of Drs. Forehand, Harris, and Fino. Decision and Order at 9-10. Dr. Forehand examined Claimant on May 9, 2016 as part of his Department of Labor sponsored examination. Director's Exhibit 22. He noted symptoms of a daily productive cough and dyspnea for the last two years when walking uphill, and a qualifying[6] exercise blood gas study showed "significant" impairment. *Id*. at 5. Based on Claimant's job duties as a roof bolter and ram car operator, Dr. Forehand opined Claimant has "insufficient residual oxygen transfer capacity" to perform his last coal mine job. *Id*. at 6. Similarly, after reviewing Claimant's treatment records and the other medical opinions of record, Dr. Harris opined Claimant is totally disabled based on "severe dyspnea on exertion" and "severe exertional hypoxemia" as evidenced by the May 9, 2016 exercise blood gas study. Claimant's Exhibit 7 at 5. He noted Claimant's job duties as a roof bolter, belt worker, and scoop operator, and he opined Claimant cannot perform the exertional requirements of his last coal mine employment. *Id.* at 3, 5. Dr. Fino

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 19.

[5] The ALJ found the pulmonary function studies and arterial blood gas studies do not establish total disability and that there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 10-12.

[6] A "qualifying" arterial blood gas study yields values equal to or less than the applicable table values listed in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields values in excess of those values. 20 C.F.R. §718.204(b)(2)(ii).

admitted the May 19, 2016 exercise study showed significant, qualifying hypoxemia, but he opined Claimant does not have a totally disabling pulmonary impairment based on an exercise study dated June 25, 2018, which he opined produced normal results using pulse oximetry[7] instead of blood gases to measure the Claimant's oxygen saturation. Director's Exhibit 26 at 8. He further opined Claimant can perform his last job requiring heavy to very heavy labor. Employer's Exhibit 8 at 6, 20. The ALJ "afford[ed] all medical opinions some weight" and found Claimant established total disability based on the preponderance of the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 12.

Employer contends the ALJ erred in her weighing of the medical opinion evidence. Employer's Brief at 5-9. We agree.

While the ALJ summarized the medical opinions, she made no determination as to whether they are reasoned or documented. Consequently, her findings are not in accordance with the Administrative Procedure Act.[8] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016) (ALJ must conduct an appropriate analysis of the evidence to support a conclusion and render necessary credibility findings); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998) (ALJ erred by failing to adequately explain why he credited certain evidence and discredited other evidence); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). Thus, we vacate the ALJ's finding that the medical opinion evidence establishes total disability and that the evidence as whole establishes total disability. 20 C.F.R. §718.204(b)(2). We therefore vacate her finding Claimant invoked the Section 411(c)(4) presumption and the award of benefits.

On remand, the ALJ must reconsider whether the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv). She must first determine the

[7] Dr. Fino opined pulse oximetry is an accepted practice or test in the medical community to determine the existence or effect of pulmonary disease. Employer's Exhibit 8 at 17. Noting Dr. Fino "only [utilized] a pulse oximeter," Dr. Harris opined that the use of an arterial blood gas sample is routine practice and the Department of Labor has specifically "created tables to facilitate disability determination based on PaCO2 and PaO2 levels." Claimant's Exhibit 7 at 3.

[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).

exertional requirements of Claimant's usual coal mine work and consider the medical opinions in light of those requirements.[9] *Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991) (physician who asserts a claimant is capable of performing assigned duties should state his knowledge of the physical efforts required and relate them to the miner's impairment); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991). In rendering her credibility findings, she must consider the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). After reaching a determination on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), the ALJ must then weigh all relevant evidence together to determine whether Claimant is totally disabled and has invoked the Section 411(c)(4) presumption. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

If the ALJ finds total disability established, she may reinstate her prior finding that Claimant invoked the Section 411(c)(4) presumption. Decision and Order at 12; 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. Moreover, as Employer does not challenge the ALJ's finding that Employer failed to rebut the Section 411(c)(4) presumption, the ALJ must reinstate the award if she finds Claimant established total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14-15. But if the ALJ finds Claimant cannot establish total disability, she must deny benefits, as Claimant will have failed to establish an essential element of entitlement. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). In rendering her findings on remand, the ALJ must explain the bases for her findings in accordance with the APA. 5 U.S.C. §557(c)(3)(A); *see Wojtowicz*, 12 BLR at 1-165.

[9] Contrary to Employer's assertion that Drs. Forehand and Harris reviewed less data in forming their opinions, specifically the more recent, non-qualifying blood gas studies, that consideration does not render their opinions insufficient to establish total disability. *See Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). Moreover, Dr. Harris did review Dr. Fino's report which noted the June 25, 2018 blood gas study. Claimant's Exhibit 7 at 3.

Accordingly, the ALJ's Decision and Order Granting Benefits is affirmed in part and vacated in part, and we remand the case for further consideration consistent with this decision.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the award of benefits. The question in this case is whether Claimant is eligible for two statutory presumptions that assist miners in establishing entitlement under the Black Lung Benefits Act.

The first arises under Section 411(c)(4) of the Act. It establishes a presumption that a miner is totally disabled due to pneumoconiosis if he proves: 1) he is totally disabled; and 2) he had at least fifteen years of underground or "substantially similar" surface coal mine employment. 30 U.S.C. §921(c)(4). Because the presumption is rebuttable, if invoked the liable coal mine operator has an opportunity to disprove entitlement by establishing the miner does not have pneumoconiosis or is not disabled by it. *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015).

The second arises under Section 411(c)(3) of the Act. It establishes a presumption that a miner is totally disabled, and his total disability is due to pneumoconiosis, if he proves one thing: he suffers from the most severe form of pneumoconiosis, known as complicated pneumoconiosis or progressive massive fibrosis. 30 U.S.C. §921(c)(3). Because the presumption is irrebuttable, successfully invoking it conclusively entitles the miner to benefits with no further opportunity for the liable operator to prove otherwise. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 10 (1976).

A claimant's burden for invoking either presumption is a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 277-78 (1994). This standard "simply requires the [ALJ] to believe that the existence of a fact is more probable than its nonexistence." *Metropolitan Stevedore Co. v. Rambo* [*Rambo II*], 521 U.S. 121, 137 n.9 (1997) (citations omitted). Thus, a claimant meets his burden if the

evidence he offers on the factual predicates for invoking either presumption is "more convincing than the evidence . . . offered in opposition to it." *Greenwich Collieries v. Director, OWCP* [*Ondecko*], 990 F.2d 730, 736 (3d Cir. 1993), *aff'd*, 512 U.S. 267 (1994).

In vacating the award, the majority focuses on why it believes the ALJ erred in finding Claimant totally disabled for purposes of invoking the Section 411(c)(4) rebuttable presumption. However, the ALJ made dispositive findings on complicated pneumoconiosis that affirmatively establish Claimant met his burden to invoke the Section 411(c)(3) irrebuttable presumption, thus conclusively entitling him to benefits under the Act.[10]

The ALJ first considered nine interpretations of four x-rays and gave equal weight to all of the physicians because they are either B readers (Drs. Forehand and Fino) or dually-qualified radiologists/B readers (Drs. DePonte, Simone, Crum, and Alexander). 20 C.F.R. §718.304(a); Decision and Order at 5-6. Because an equal number of the physicians interpreted the April 14, 2015, June 25, 2018, and March 12, 2021 x-rays as positive and negative for complicated pneumoconiosis, the ALJ found these x-rays "in equipoise," meaning they "neither support[] nor refute[] a finding of complicated pneumoconiosis." *Id*. However, the ALJ found the fourth x-ray, dated May 9, 2016, positive for complicated

[10] The majority errs in declining to consider the ALJ's findings on complicated pneumoconiosis on the basis that Claimant did not file an appeal or cross-appeal. Although Employer appealed the ALJ's finding that Claimant is entitled to the Section 411(c)(4) presumption, it is well within the Board's scope of review to address the ALJ's findings with respect to the Section 411(c)(3) presumption. As explained herein, because the ALJ's dispositive findings on complicated pneumoconiosis are "in support of the decision [awarding benefits] below," they are among the arguments the Board could consider if raised by a represented miner in response to Employer's appeal. 20 C.F.R. §802.212(b). Yet the miner in this claim, Mr. Owens, is unrepresented and thus is not required to identify any issues to be considered by the Board. *See* 20 C.F.R. §802.220 (Board may waive formal compliance with procedural rules including identification of issues to be appealed). The Board therefore must review the decision below to ensure that it is supported by substantial evidence and consistent with law. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). Further, while Employer's arguments are framed in terms of the Section 411(c)(4) presumption, Employer itself squarely challenges the ALJ's finding that Claimant is totally disabled. The Section 411(c)(3) presumption, in turn, is but another ground on which Claimant established total disability and thus constitutes a legitimate basis for rejecting Employer's allegations of error. 33 U.S.C. §921(b)(3) ("findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole").

pneumoconiosis because a greater number of the equally-qualified physicians read it as positive for the disease. *Id*. at 6. Having performed the requisite quantitative and qualitative analysis of each x-ray – taking into consideration the number of interpretations, the readers' qualifications, and the findings set forth in their readings – the ALJ permissibly found one x-ray is positive for complicated pneumoconiosis, none are negative, and three "neither support nor refute" the disease.[11] *See Sea "B" Mining Company v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016).

The ALJ then considered eight interpretations of five CT scans and gave equal weight to readings by B readers (Dr. Fino), radiologists (Dr. Biosca), and dually-qualified radiologists/B readers (Drs. DePonte and Simone), but lesser weight to a physician whose credentials are not in the record (Dr. Haines). 20 C.F.R. §718.304(c); Decision and Order at 7-8. She found Dr. Haines' interpretation of the July 9, 2015 CT scan equivocal and thus determined it "neither supports nor refutes a finding of complicated pneumoconiosis." *Id*. at 8. She also found the January 14, 2016, January 23, 2017, and June 30, 2020 CT scans "neither support[] nor refute[] a finding of complicated pneumoconiosis" because an equal number of the physicians interpreted them as positive and negative for the disease. *Id*. However, the ALJ found the fifth CT scan, dated September 15, 2015, positive for complicated pneumoconiosis based on Dr. Boscia's uncontradicted interpretation. *Id*. Thus, based on a quantitative and qualitative analysis of each CT scan, the ALJ permissibly found one CT scan positive for complicated pneumoconiosis, none are negative, and four "neither support nor refute" the disease.[12] *See Addison*, 831 F.3d at 256-57.

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[11] To be clear, the ALJ did not clearly explain why she gave equal weight to the B readers and the dually-qualified radiologists/B readers. 20 C.F.R. §718.202(a)(1) (if x-ray readings conflict, consideration must be given to the radiological qualifications of the physicians interpreting the x-rays); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016) (simply identifying the readers' qualifications is too "sparse" of an explanation to determine "how, or if, [the ALJ] weighed the x-ray readings in light of the readers' qualifications"). But even had she given less weight to the physicians who are only B readers (Drs. Forehand and Fino), the outcome would be the same. *Larioni v. Director*, OWCP, 6 BLR 1-1276, 1-1278 (1984). The May 9, 2016 x-ray read by Drs. Forehand, DePonte, and Simone would be in equipoise; the June 25, 2018 x-ray read by Drs. Fino and Crum would be positive; and the April 14, 2015 and March 12, 2021 x-rays would remain in equipoise based on the positive and negative reading of each film by dually-qualified radiologists.

[12] Here again, even had the ALJ given less weight to the physician who is only a B reader (Dr. Fino), or even to the radiologist who is not dually-qualified as a B reader, the CT scan evidence would still support a finding of complicated pneumoconiosis. *Larioni*,

Despite permissibly finding one x-ray and one CT scan positive for complicated pneumoconiosis, and the remaining radiographic evidence either equivocal or in equipoise, the ALJ inexplicably concluded Claimant did not establish he has the disease at 20 C.F.R. §718.304(a), (c). Decision and Order at 6, 8. In so doing, she erroneously credited the equivocal/equipoise radiographic evidence over the positive x-ray and CT scan, despite her own rational conclusion – and well-established case law – that such evidence "neither supports nor refutes a finding of complicated pneumoconiosis." *See Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 843 (6th Cir. 2016) (a finding that one x-ray is positive and four are in equipoise satisfies the claimant's burden of proving pneumoconiosis by a preponderance of the evidence).[13] Stated another way, the x-rays and CT scans the ALJ found to be neither positive nor negative for complicated pneumoconiosis do not contradict the remaining radiographic evidence she affirmatively found positive for the disease.[14] *Ondecko*, 512 U.S. at 272-73 ("equally probative" or

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6 BLR at 1-1278. The January 14, 2016 scan read by Drs. Fino and DePonte would be positive; Dr. Haines' reading of the September 9, 2015 scan would remain equivocal; Dr. Boscia's positive reading of the September 15, 2015 scan would remain uncontradicted; and the January 23, 2017, and June 30, 2020 scans would remain in equipoise based on the positive and negative reading of each film by dually-qualified radiologists.

[13] The evidence in *Hensley* also included an x-ray found to be negative, but the ALJ determined it did not undermine the finding of complicated pneumoconiosis because it was less recent than the remaining positive and equipoise evidence.

[14] The Board has consistently held that x-rays found to be in equipoise neither support nor undermine a finding of simple clinical or complicated pneumoconiosis, and thus do not weigh against x-rays found to be affirmatively positive for the disease. *See, e.g., Back v. Sapphire Coal Co.*, BRB No. 22-0092 BLA, 2023 WL 4683363, at *2 (June 27, 2023) (affirming finding that one positive x-ray and one in equipoise establishes complicated pneumoconiosis); *Simpson v. Unicorn Mining, Inc.*, BRB No. 22-0002 BLA, 2023 WL 4683345, at *5 (June 23, 2023) (affirming finding that one positive x-ray and three in equipoise establishes complicated pneumoconiosis); *Yates v. Paramont Contura, LLC*, BRB No. 21-0477 BLA, 2022 WL 3551989, at *3 (July 29, 2022) (holding that one positive x-ray and two in equipoise establishes complicated pneumoconiosis); *Smith v. Stillhouse Mining, LLC*, BRB No. 20-0401 BLA, 2021 WL 5769287, at *4–5 (Oct. 26, 2021) (reversing ALJ's finding of no clinical pneumoconiosis because the three x-rays in equipoise are "not contrary to the [one] positive reading of record"); *Houchins v. Clinchfield Coal Co.*, BRB No. 20-0292 BLA, 2021 WL 2036330, at *2 (Apr. 30, 2021) (affirming finding that one positive x-ray and four in equipoise establishes complicated

"evenly balanced" evidence cannot preponderantly establish the fact for which it is proffered); *U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 390–91 (4th Cir. 1999) (evidence that two opposite propositions are equally possible is insufficient to establish that either proposition "more likely than not" exists); *see also E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256 (4th Cir. 2000) ("inconclusive" evidence does not reduce the probative force of "x-ray evidence vividly displaying opacities exceeding one centimeter").

Because the ALJ found one x-ray and one CT scan positive for complicated pneumoconiosis and the remaining radiographic evidence "neither supports nor refutes" the disease, Claimant established by a preponderance of the radiographic evidence that he has complicated pneumoconiosis.[15] *Ondecko*, 512 U.S. at 277-78; *Rambo II*, 521 U.S. at

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pneumoconiosis). The undersigned cannot identify a single case in which the Board has held otherwise.

[15] I note the ALJ also considered three medical opinions from Drs. Fino, Forehand, and Harris on the issue of complicated pneumoconiosis and committed the obvious error of simply "counting heads" to determine they "do[] not support a finding of complicated pneumoconiosis." *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); *accord Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41 (4th Cir. 1997); Decision and Order at 10 (generally giving all medical opinions "some weight" and finding no complicated pneumoconiosis, apparently because one doctor, Dr. Harris, diagnosed the disease and two, Drs. Fino and Forehand, did not). Moreover, contrary to the ALJ's finding, Dr. Forehand diagnosed complicated pneumoconiosis both on the x-ray taken during his examination and in the text of his medical opinion itself. Director's Exhibit 22 at 5, 8. Thus, of the medical opinions submitted, only Dr. Fino opined Claimant does not have the disease, while Drs. Forehand and Harris opined he does.

Remand is not required for the ALJ to reconsider these opinions, however. Correcting the ALJ's error with respect to Dr. Forehand's opinion lends support to, rather than undermines, Claimant's entitlement. Meanwhile, Dr. Fino's contrary diagnosis of no complicated pneumoconiosis was simply a summary of what he and the other physicians of record observed on the x-rays and CT scans, followed by a conclusory restatement of his belief Claimant does not have the disease – an opinion which is inconsistent with the overall positive weight of the x-rays and CT scans and lacks any explanation the ALJ could credit as undermining the radiographic evidence. *See E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256 (4th Cir. 2000) (x-ray evidence demonstrating large opacities of complicated pneumoconiosis "can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be"). Nor

137 n.9. Given the ALJ's permissible, dispositive findings on this issue, remand is not required for the ALJ to further consider whether Claimant has complicated pneumoconiosis.[16] *Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187 (4th Cir. 2014) (reversal of ALJ decision is appropriate where "no factual issues remain to be determined").

And because Claimant established entitlement to benefits by invoking the irrebuttable presumption of total disability due to pneumoconiosis as Section 411(c)(3) of the Act, the Board need not address whether the ALJ erred in finding Claimant separately established entitlement by operation of the rebuttable presumption at Section 411(c)(4). *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (alleged error is harmless unless it "could have made [a] difference"); *Larioni v. Director*, OWCP, 6 BLR 1-1276, 1-1278 (1984).

I therefore dissent from the majority's decision and would affirm the award of benefits.

GREG J. BUZZARD
Administrative Appeals Judge

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can this evidence rebut the presumption that the Miner's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b).

[16] The law on these issues is clear. Given the majority's decision to not address the ALJ's findings, I encourage the ALJ, in the interests of justice and judicial economy, to correct her errors on remand because, as the majority notes, Claimant is permitted to appeal, albeit at a later date, her Section 411(c)(3) determination if she again denies benefits on remand. *See Edd Potter Coal Co. v. Director, OWCP*, 39 F.4th 202, 210 (4th Cir. 2022) (mandate rule binds ALJ only with respect to issues conclusively or impliedly decided, or issues which could have been raised on appeal but were not); *see also Invention Submission Corp. v. Dudas*, 413 F.3d 411, 415 (4th Cir. 2005) (lower court retains discretion to deviate from appellate court mandate when "a blatant error in the prior decision will, if uncorrected, result in a serious injustice") (citations omitted).