U.S. Department of Labor

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

BRB Nos. 22-0370 BLA
and 22-0371 BLA

SHARON R. O'QUINN (o/b/o and Widow of CARLOS W. O'QUINN)	)	
Claimant-Petitioner	)	
v.	)	
TRIPLE B COAL COMPANY	)	DATE ISSUED: 9/28/2023
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

Sharon R. O'Quinn, Lebanon, Virginia.

Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer.

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

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Denying Benefits (2020-BLA-05581 and 2021-BLA-05196) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on June 7, 2018,[2] and a survivor's claim filed on December 6, 2019.[3]

The ALJ found Claimant did not establish the Miner had complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304. She also credited the Miner with 11.92 years of underground coal mine employment based on the parties' stipulation and thus found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[4] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, she found Claimant established total disability and therefore a change in an applicable condition of entitlement.[5] 20 C.F.R. §§718.204(b)(2), 725.309(c). However,

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

[2] This is the Miner's fourth claim for benefits. On April 12, 1999, the district director denied the Miner's first claim, filed on January 12, 1999, because he failed to establish any element of entitlement. Miner's Claim (MC) Director's Exhibit 1. He subsequently filed two more claims, but withdrew them. Director's Exhibits 2, 3. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b). The Miner took no further action until filing his current claim. MC Director's Exhibit 5.

[3] Claimant is the widow of the Miner, who died on October 30, 2019, while his claim was pending before the district director. MC Director's Exhibit 17. She is pursuing the miner's claim on her husband's estate's behalf and her survivor's claim. Survivor's Claim (SC) Director's Exhibit 2.

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

[5] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date

she found Claimant did not establish the Miner had clinical pneumoconiosis or legal pneumoconiosis and thus denied benefits in the miner's claim.

Further, the ALJ determined that because the Miner was not entitled to benefits at the time of his death, Claimant is not automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[6] Because she also found Claimant did not establish the Miner had clinical pneumoconiosis or legal pneumoconiosis, 20 C.F.R. §§718.202(a), 718.304, she denied benefits in the survivor's claim.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[7] 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).

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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 the Miner did not establish any element of entitlement in his prior claim, Claimant had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of his current claim. *Id*.

[6] Under Section 422(*l*) of the Act, a survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 6; SC Director's Exhibit 3; Hearing Tr. at 23.

Miner's 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 was totally disabled due to pneumoconiosis if he suffered from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more 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); *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 weigh together the evidence at subsections (a), (b), and (c) before determining whether Claimant has invoked the irrebuttable presumption. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Associated 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 the x-rays insufficient to support a finding of complicated pneumoconiosis, there is no biopsy or autopsy evidence, and that no physician diagnosed the disease on computed tomography (CT) scans, in medical opinions, or in the Miner's treatment records. 20 C.F.R. §718.304(a)-(c); Decision and Order at 12-21.

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

The ALJ considered five readings of two x-rays dated May 9, 2018, and August 1, 2018. All of the interpreting physicians are dually qualified as Board-certified radiologists and B readers. Decision and Order at 13-14. Dr. Adcock read the May 9, 2018 x-ray as negative for simple and complicated pneumoconiosis. Miner's Claim (MC) Employer's Exhibit 4. Dr. Crum read the August 1, 2018 x-ray as positive for complicated pneumoconiosis, category A large opacity, while Dr. DePonte read the x-ray as positive for simple pneumoconiosis only. MC Director's Exhibit 22; MC Claimant's Exhibit 1. Drs. Adcock and Simone each read the August 1, 2018 x-ray as negative for simple and complicated pneumoconiosis. MC Director's Exhibit 28; MC Employer's Exhibit 8.

The ALJ found Dr. Adcock's uncontradicted negative reading of the May 9, 2018 x-ray does not support a finding of complicated pneumoconiosis. Decision and Order at 14. With respect to the August 1, 2018 x-ray, she found Dr. Crum was the only physician to identify complicated pneumoconiosis but he failed to "offer a definitive conclusion about the presence, location, or cause" of the large opacity. *Id.* Further, she noted that while Dr. DePonte read the x-ray as positive for simple pneumoconiosis, the doctor did not diagnose complicated pneumoconiosis or find evidence of large opacities. *Id.* She

additionally noted that Drs. Adcock and Simone each read the August 1, 2018 x-ray as negative for pneumoconiosis. She thus determined the August 1, 2018 x-ray does not support a finding of complicated pneumoconiosis. *Id.* Because it is supported by substantial evidence, we affirm the ALJ's finding that the x-ray evidence does not support a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(a); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order at 14.

As the record is devoid of any other evidence relevant to the presence of complicated pneumoconiosis, progressive massive fibrosis, or massive lesions, we affirm the ALJ's finding that Claimant failed to establish the existence of complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c); *see Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 256; *Melnick*, 16 BLR at 1-33-34. Thus, we affirm her finding that Claimant did not invoke the irrebuttable presumption at Section 411(c)(3).

Entitlement under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(4) presumption,[8] Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment);

[8] Claimant is unable to invoke the Section 411(c)(4) presumption based on the parties' stipulation that the Miner worked 11.92 years in coal mine employment because a requisite element for invoking the presumption is at least fifteen years of qualifying coal mine employment. Decision and Order at 5; Hearing Tr. at 17-18 (stipulation by Claimant's lay representative). Stipulations of fact entered into freely and fairly are not to be set aside except to avoid manifest injustice. *Richardson v. Director, OWCP*, 94 F.3d 164, 167 (4th Cir. 1996); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013); *Fairway Constr. Co. v. Allstate Modernization, Inc*., 495 F.2d 1077, 1079 (6th Cir. 1974); *Nippes v. Florence Mining* Co., 12 BLR 1-108, 1-109 (1985). The Miner alleged twelve years of coal mine employment on his claim form. Director's Exhibit 5. He subsequently indicated his coal mine employment was between 1974 and 1986. Director's Exhibits 6, 7. While the ALJ did not acknowledge that the Miner's Social Security Administration earnings records reflect he earned more than $50.00 for one quarter in 1972 and for two quarters in 1973, she accurately stated these records reflect that the Miner worked in coal mine employment "from October 1974 through early 1987." Decision and Order at 5; MC Director's Exhibits 10-12. Thus, we discern no error by the ALJ in accepting the parties' stipulation to less than fifteen years of coal mine employment within these calendar years. *See Richardson*, 94 F.3d at 167; *Fairway Constr. Co.*, 495 F.2d at 1079; *Nippes*, 12 BLR at 1-109. Consequently, we affirm the ALJ's finding that

disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Total Disability

Initially, we address Employer's argument that the ALJ erred in finding Claimant established total disability. A miner is considered to have been totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[9] 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).

The ALJ found Claimant established total disability based on the arterial blood gas study and medical opinion evidence, and the evidence as a whole.[10] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 8, 11.

Claimant did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305; Decision and Order at 6.

[9] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[10] The ALJ correctly found Claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii). She found the only new pulmonary function study does not support a finding of total disability. Decision and Order at 7; Director's Exhibit 22 at 11. Further, she stated the record contains no evidence that the Miner suffered from cor pulmonale with right-sided congestive heart failure. Decision and Order at 8. Thus, as substantial evidence supports these findings, we affirm them.

Arterial Blood Gas Studies

The ALJ considered the new arterial blood gas study dated August 1, 2018. Decision and Order at 7-8. She correctly determined this study produced qualifying results at rest. *Id*. at 8; MC Director's Exhibit 22 at 18. She thus found the arterial blood gas study evidence supports a finding of total disability.

Employer argues the ALJ erred in failing to explain why "a single qualifying" arterial blood gas study "outweighed non-qualifying pulmonary function tests and another non-qualifying arterial blood gas test in the record." Employer's Brief at 12. We disagree.

In the absence of contrary probative evidence, an ALJ may rely on a single valid qualifying objective study to find total disability established. *See* 20 C.F.R. §718.204(b)(2) ("in the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) of this section shall establish a miner's total disability"). Further, an ALJ may find, within a proper exercise of her discretion, that contrary evidence, such as non-qualifying pulmonary function studies or medical opinions that do not diagnose total disability, are nonetheless not credible and, therefore, do not weigh against the evidence supportive of total disability. *See Milburn Colliery Co. v. Hicks*, 138 F.3d, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). Moreover, non-qualifying pulmonary function tests do not undermine qualifying blood gas study evidence because the studies measure different types of impairment. *Sheranko v. Jones & Laughlin Steel Corp*., 6 BLR 1-797, 1-798 (1984).

Here, the ALJ summarized the previously submitted February 3, 1999 arterial blood gas study Dr. Forehand conducted that produced non-qualifying results at rest and during exercise. Decision and Order at 7; MC Director's Exhibit 1 at 41. However, she permissibly weighed only the newly submitted August 1, 2018 study, as the relevant threshold inquiry in a subsequent claim involves determining whether a claimant has established a change in an applicable condition of entitlement based on the evidence newly submitted in the subsequent claim. *See* 20 C.F.R. §725.309(c). In order to obtain review of the merits of the claim, a claimant bears the burden of first establishing through newly submitted evidence that the applicable element of entitlement "upon which the prior denial was based" had changed since that denial. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); 20 C.F.R. §725.309(c); Decision and Order at 8. Having found Claimant established a change in the Miner's respiratory condition based on the August 1, 2018 blood gas study, we reject Employer's argument that the ALJ erred in failing to explain why that blood gas study outweighed the February 3, 1999 study submitted in the earlier claim. *Id*.; Employer's Brief at 12.

We also reject Employer's assertion that the ALJ erred in failing to explain why the August 1, 2018 arterial blood gas study is reliable, asserting that Drs. Tuteur and Fino "offered uncontradicted testimony" that it was administered "during a state of acute trauma following [the Miner's] lung cancer diagnosis."[11] Employer's Response Brief at 12-13. We disagree.

Appendix C to 20 C.F.R. Part 718 provides that arterial blood gas studies should "not be performed during or soon after an acute respiratory or cardiac illness," and 20 C.F.R. §718.105(d) provides that arterial blood gas studies performed during a hospitalization that ended in the miner's death must be "accompanied by a physician's report that the test results were produced by a chronic respiratory or pulmonary condition." Here, contrary to Employer's assertion, neither Dr. Tuteur nor Dr. Fino indicated that the study was performed during a hospitalization that ended in the Miner's death, or during or soon after an acute respiratory or cardiac illness. MC Employer's Exhibits 2, 6; *see* 20 C.F.R. §718.105(d), (e). Dr. Tuteur reviewed the February 3, 1999 and August 1, 2018 arterial blood gas studies and found "all [values] within normal limits for age recognizing that some samples were collected at low barometric pressures resulting in normal difference between alveolar and arterial oxygen (DA-aO2)."[12] MC Employer's Exhibit 2

[11] We reject Employer's assertion that the ALJ erred in failing to explain why the August 1, 2018 arterial blood gas study is reliable as it was "taken at high altitude." Employer's Response Brief at 12. The ALJ noted "[t]he arterial blood gas testing was done at an altitude of 0-2999 feet above sea level." Decision and Order at 8. She correctly applied the tables in Appendix C to 20 C.F.R. Part 718, which already account for the effects of altitude. *Id.* at 7-8; *Big Horn v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1055 (10th Cir. 1990).

[12] We reject Employer's assertion that the ALJ "overlooked" Dr. Tuteur's analysis that the Miner's "arterial blood gas levels were 'always normal except when there was an acute consolidation due to airway occlusion caused by carcinoma of the lung.'" Employer's Response Brief at 14 (citing MC Employer's Exhibit 2 at 6). Contrary to Employer's characterization of Dr. Tuteur's report, the doctor stated "there is no convincing data to indicate the presence of a medical coal workers' pneumoconiosis of sufficient severity and profusion to produce clinical symptoms (all explained by the heart disease and the mild COPD), physical examination abnormality (always normal except when there was an acute consolidation due to airway occlusion caused by carcinoma of the lung), impairment of pulmonary function (no restrictive ventilatory abnormality and no impairment of oxygen gas exchange, either at rest or during exercise), or radiographic change of a diffuse interstitial pulmonary process consistent with coal workers'

at 4. Dr. Fino simply noted that the study "was [administered] only a month after the nodules which proved to be malignant were found."[13] MC Employer's Exhibit 6 at 7.

Thus, as it is supported by substantial evidence, we affirm the ALJ's finding that the new arterial blood gas study evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii).

Medical Opinions

The ALJ next considered the newly submitted medical opinions of Drs. Nader, Tuteur, and Fino. Decision and Order at 8-11. Dr. Nader opined the Miner had a totally disabling respiratory or pulmonary impairment, while Drs. Tuteur and Fino opined he did not. MC Director's Exhibit 22 at 3; MC Employer's Exhibits 2 at 6; 6 at 8; 11 at 21. The ALJ found Dr. Nader's opinion well-reasoned and documented, but she found Drs. Tuteur's and Fino's opinions not well-reasoned. Decision and Order at 9-11. She thus concluded the medical opinion evidence supports a finding of total disability based on Dr. Nader's opinion. *Id.* at 11.

The ALJ's finding that Dr. Fino's opinion is not well-reasoned is unchallenged on appeal; thus, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9-11.

Employer generally argues the ALJ erred in "affording Dr. Tuteur diminished weight, and overlooking additional reasons to discredit Dr. Nader." Employer's Response Brief at 11. Because Employer does not allege specific error in the ALJ's discrediting of Dr. Tuteur's opinion and in her crediting of Dr. Nader's opinion on the issue of total disability, we decline to address these assertions. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21

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pneumoconiosis seen either on standard radiograph or CT scan." MC Employer's Exhibit 2 at 5-6.

[13] The ALJ inaccurately characterized Dr. Fino as stating "the qualifying August 1, 2018 [arterial blood gas study] was not a marker of disability because it was obtained only a month *before* the malignant nodules were found in the Miner's lung." Decision and Order at 11 (emphasis added). However, as Employer does not point to any evidence that indicates the study was performed during a hospitalization that ended in the Miner's death, or during or soon after an acute respiratory or cardiac illness, the ALJ's error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §718.105(d), (e).

(1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 109 (1983); 20 C.F.R. §802.211(b); Decision and Order at 9-11.

Employer further argues the ALJ erred in stating that Drs. Nader, Tuteur, and Fino, "while disagreeing about the cause, all agree that [the Miner] had some degree of pulmonary disability." Employer's Response Brief at 11. It maintains that "Drs. Tuteur and Fino both found [the Miner] capable of returning to work from a respiratory standpoint." *Id.*

As Employer has neither challenged the ALJ's discrediting of Dr. Fino's opinion nor alleged any specific error in her crediting of Dr. Nader's opinion or in her discrediting of Dr. Tuteur's opinion, it has failed to explain how the error it alleges would make a difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

Thus, we affirm, as supported by substantial evidence, the ALJ's finding that the newly submitted medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv). Further, we affirm the ALJ's finding that Claimant established total disability based on her consideration of the evidence as a whole. *See* 20 C.F.R. §718.204(b); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; *see also Sheranko*, 6 BLR at 1-798 (non-qualifying pulmonary function tests do not undermine qualifying blood gas study evidence because the studies measure different types of impairment); Decision and Order at 11. We therefore affirm the ALJ's finding that Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c); Decision and Order at 12.

Clinical Pneumoconiosis

In considering whether Claimant established simple clinical pneumoconiosis,[14] the ALJ considered two readings of an x-ray dated February 3, 1999, one reading of an x-ray

[14] Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

dated May 9, 2018,[15] and four readings of an x-ray dated August 1, 2018.[16] Decision and Order at 13-14.

Drs. Forehand and Lippman, who are B readers, read the February 3, 1999 x-ray as negative for pneumoconiosis. MC Director's Exhibit 1. As these readings are uncontradicted, the ALJ found this x-ray negative for simple pneumoconiosis. Decision and Order at 14. Dr. Adcock, a dually-qualified radiologist, read the May 9, 2018 x-ray as negative for simple pneumoconiosis. MC Employer's Exhibit 4. As this reading is also uncontradicted, the ALJ found this x-ray negative for simple pneumoconiosis. Decision and Order at 14. Drs. DePonte and Crum, dually-qualified radiologists, read the August 1, 2018 x-ray as positive for simple pneumoconiosis, while Drs. Adcock and Simone, who are also dually-qualified radiologists, read the x-ray as negative for simple pneumoconiosis. MC Director's Exhibits 22, 28; MC Claimant's Exhibit 1; MC Employer's Exhibit 8. The ALJ permissibly found the readings of this x-ray to be in equipoise based on the equal number of positive and negative readings from equally qualified radiologists. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994); Decision and Order at 14.

Having found two x-rays negative and the readings of one x-ray inconclusive, the ALJ reasonably found the preponderance of the x-rays does not support a finding of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1); *see Ondecko*, 512 U.S. at 280-81; *see also Addison*, 831 F.3d at 256-57; *Adkins*, 958 F.2d at 52; Decision and Order at 14. As it is supported by substantial evidence, we affirm the ALJ's finding that the x-ray evidence does not establish the existence of clinical pneumoconiosis.

The ALJ also considered Dr. Adcock's interpretation of a CT scan dated July 10, 2017, and the Miner's treatment records, which contain CT scans dated March 20, 2019, August 9, 2018, and September 10, 2019, and bronchoscopy and surgical pathology reports. 20 C.F.R. §718.107; Decision and Order at 17-20; MC Director's Exhibits 26, 29.

Dr. Adcock found the July 10, 2017 CT scan revealed centrilobular emphysema, old granulomatous disease, and lingular ground glass opacities, but "no evidence of coal workers' pneumoconiosis." MC Director's Exhibit 29. Dr. Mendrek found the March 20,

[15] The ALJ indicated the Miner's treatment records contain narrative x-ray reports generated during the Miner's hospitalizations but accurately found none of them support a finding of clinical pneumoconiosis. Decision and Order at 17-20; *see* MC Director's Exhibits 26, 29; MC Employer's Exhibit 1; SC Employer's Exhibits 7-9.

[16] Dr. Ranavaya read the August 1, 2018 x-ray for film quality only. MC Director's Exhibit 24.

2019 CT scan revealed severe emphysema along with "partial response therapy with decreasing size of [the] right perihilar mass, minimal residual ground-glass opacity," and the near complete resolution of the lobe in the anterior right lung zone, likely due to "an infectious or inflammatory process." MC Director's Exhibit 26 at 59. Similarly, Dr. Mendrek found the August 9, 2018 CT scan revealed "stable bilateral pulmonary nodules, peribronchovascular ground-glass opacities in the right middle lobe" representing an infectious or inflammatory process, and severe emphysema. MC Director's Exhibit 26 at 24. Finally, Dr. Saadeh found the September 10, 2019 CT scan revealed extensive abnormalities in the right upper lobe "presumably related to radiation pneumonitis" and "relatively recent brachytherapy to the right hilar region." MC Director's Exhibit 26 at 161.

The ALJ reasonably found that the CT scan interpretations are not consistent with coal workers' pneumoconiosis. Decision and Order at 20. As it is supported by substantial evidence, we affirm her finding that the CT scan evidence does not support a finding of clinical pneumoconiosis. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Hicks*, 138 F.3d at 528; Decision and Order at 20; MC Director's Exhibits 26, 29.

The ALJ also considered three treatment bronchoscopy and surgical pathological reports, dated May 17, 2019, June 28, 2019, and September 13, 2019, for the Miner's lung cancer located in the right upper lobe and the right hilar region. Decision and Order at 19-20; MC Director's Exhibit 26 at 65, 80, 154, 166. As none of the pathology reports mentioned pneumoconiosis, the ALJ correctly found the record contains no biopsy or autopsy evidence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(2); Decision and Order at 13 n.8.

The ALJ next considered the medical opinions of Drs. Nader, Tuteur, and Fino.[17] Decision and Order at 15-17. Dr. Nader opined the Miner had clinical pneumoconiosis. MC Director's Exhibit 22. In contrast, Drs. Tuteur and Fino opined the Miner did not have clinical pneumoconiosis. MC Employer's Exhibits 2, 6, 11.

The ALJ permissibly rejected Dr. Nader's diagnosis of clinical pneumoconiosis because it is based on a positive x-ray reading, which is inconsistent with her finding that the x-ray evidence did not establish the existence of the disease. *See Furgerson v. Jericol*

[17] The ALJ correctly found that the Miner's death certificate, which listed the immediate cause of his death as multiple system organ failure, sepsis, and lung cancer, does not support a finding of clinical pneumoconiosis or legal pneumoconiosis. Decision and Order at 20; MC Director's Exhibit 17.

Mining Inc., 22 BLR 1-216, 1-226 (2002) (en banc) (reliability of a physician's opinion may be "called into question" when the diagnostic tests upon which the physician based his diagnosis have been undermined); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Decision and Order at 15. Because the ALJ permissibly discredited Dr. Nader's opinion, the only medical opinion that could support a finding of clinical pneumoconiosis, we affirm the ALJ's finding that the medical opinion evidence did not establish the existence of clinical pneumoconiosis. Decision and Order at 15.

Legal Pneumoconiosis

To establish legal pneumoconiosis,[18] Claimant must demonstrate the Miner had a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b).

The ALJ considered the medical opinions of Drs. Nader, Tuteur, and Fino. Decision and Order at 15-17. Dr. Nader opined the Miner had legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) related to coal mine dust exposure and smoking. MC Director's Exhibit 22. In contrast, Dr. Tuteur opined the Miner did not have legal pneumoconiosis, but had COPD related to smoking and unrelated to coal mine dust exposure. MC Employer's Exhibit 2 at 6. Similarly, Dr. Fino opined the Miner did not have legal pneumoconiosis, but had lung cancer and mild obstructive lung disease related to smoking and unrelated to coal mine dust exposure. MC Employer's Exhibits 6 at 7, 11 at 12-21.

The ALJ found Dr. Nader's opinion poorly reasoned and not well-documented, and thus entitled to "little" weight. Decision and Order at 15. Further, she found both Drs. Tuteur's and Fino's opinions credible as they relied on a comprehensive set of medical records in reaching their conclusions, but found Dr. Fino's opinion well-reasoned and documented, and thus "more probative" than Dr. Tuteur's opinion. *Id*. at 17. She concluded Drs. Tuteur's and Fino's opinions outweighed Dr. Nader's contrary opinion. *Id*.

While the burden remains on Claimant to establish the existence of legal pneumoconiosis, the ALJ did not satisfy the explanatory requirements of the

[18] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic pulmonary disease or respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Administrative Procedure Act (APA)[19] as she failed to adequately explain why she found Drs. Tuteur's and Fino's opinions credible and Dr. Nader's opinion poorly reasoned and not well-documented. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 15-17. An ALJ must consider all of the relevant evidence and apply the same level of scrutiny in determining the credibility of the medical opinion evidence. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999) (en banc).

Drs. Tuteur and Fino

Dr. Tuteur noted the Miner worked in underground coal mine employment for "around" twelve years and smoked one pack of cigarettes a day from 1972 through 2017. MC Employer's Exhibit 2 at 2. In addition, he noted the "normal pulmonary function studies in 1999 . . . never became worse than a mild obstructive ventilatory abnormality" and the arterial blood gas study values "were far above disability standards" even "though there was a mild impairment of an obstructive nature." *Id*. at 4. He opined "the only impairment is a mild obstructive abnormality fully explained by the symptoms of chronic bronchitis and the demonstration of emphysema by [computed tomography] CT scan." *Id*. at 6. Further, he concluded the Miner's COPD, mild pulmonary impairment, and lung carcinoma were related to cigarette smoking and unrelated to coal mine dust exposure. *Id*. at 6-7.

Dr. Fino noted the Miner worked eleven or fourteen years in coal mine employment and had a "smoking history of anywhere from [sixteen] pack-years going up to over . . . [forty-two] pack-years." MC Employer's Exhibit 11 at 12. In addition, he noted "[t]he pulmonary function studies show no more than a mild obstructive abnormality" and the qualifying August 1, 2018 arterial blood gas study "is not a 'chronic steady state' blood gas because [the Miner] had developed lung cancer." MC Employer's Exhibit 6 at 7. He diagnosed lung malignancy and emphysema and concluded the Miner's lung cancer and mild obstructive lung disease were related to smoking and unrelated to coal mine dust exposure. MC Employer's Exhibits 6 at 7-8; 11 at 18-21.

The ALJ found that even though "Dr. Tuteur dismissed the qualifying [arterial blood gas study] results as being 'within normal limits for [the Miner's] age' and therefore did

[19] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

not opine whether they related to coal dust exposure, lung cancer, or something else," the doctor's opinion that the Miner did not have legal pneumoconiosis is persuasive because he supported it "with reference to the mild impairment on objective tests and the degree of emphysema seen on CT scan and [pulmonary function studies]." Decision and Order at 16. She also credited Dr. Fino's opinion, in part, because he "opined that the mild obstructive abnormality present at Dr. Nader's August 1, 2018 exam would not have been sufficient to disable [the Miner] from performing his last coal mining job, assuming that job involved at least intermittent periods of heavy manual labor." *Id*. at 17. However, whether Drs. Tuteur and Fino considered the Miner had a "mild" impairment as opposed to a "disabling" impairment is irrelevant to a determination regarding the existence of legal pneumoconiosis. Rather, as discussed, the relevant inquiry is whether the Miner had "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b).

Moreover, given that definition, the ALJ failed to reconcile her crediting of Dr. Tuteur's opinion that the Miner did not have legal pneumoconiosis, with her finding that he did not address whether the Miner's disabling impairment on blood gas testing was related to coal mine dust exposure. *Id*. Finally, although the ALJ found "Dr. Fino believed [the Miner's] August 2018 [arterial blood gas study] qualified not due to a chronic pulmonary condition but due to lung cancer, based on the diagnosis of malignant nodules near the same time of that [arterial blood gas study] and on [the Miner's] non-qualifying [arterial blood gas studies] thirteen years after leaving the mines," she did not consider whether his opinion was credible in light of the regulatory definition's inclusion of cases in which coal mine dust is a significant co-contributor or substantial aggravator. *See, e.g.*, *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006) (doctor need not apportion a specific percentage of a miner's lung disease to cigarette smoke versus coal mine dust exposure to establish the existence of legal pneumoconiosis).

Dr. Nader

Dr. Nader examined the Miner on August 1, 2018, and noted his fourteen-year coal mine employment history, forty-pack-year smoking history, pulmonary function study and arterial blood gas study results, and history of symptoms. MC Director's Exhibit 22 at 1-3. The ALJ stated "Dr. Nader seemed to opine that [the Miner's] coal dust exposure significantly contributed to and aggravated [his] COPD (despite acknowledging that [the] miner had at best a moderate obstruction)." Decision and Order at 15. She found Dr. Nader "supported [his] opinion with only a reference to his diagnosis of clinical pneumoconiosis and a bare assertion that both smoking and coal dust exposure contributed to [the Miner's] COPD." *Id*. Further, she found "there is no evidence that Dr. Nader ever was asked to

consider the impact of [the Miner's] lung cancer diagnosis in October 2018 on his overall opinion." *Id*.

Contrary to the ALJ's findings, in addition to the information cited by the ALJ, Dr. Nader also stated that the Miner's COPD "is based on [his] reported [fourteen-year history of] occupational . . . exposure to respirable coal and rock dust" and the Miner's history of symptoms of "chronic cough, wheezing, shortness of breath and mucus expectoration support [his] diagnosis of . . . [COPD]."[20] Decision and Order at 15. The ALJ did not address this information.

Because the ALJ did not consider all relevant information and adequately explain her bases for discrediting Dr. Nader's opinion, her findings do not comply with the APA. *Wojtowicz*, 12 BLR at 1-165.

In view of the foregoing errors, we vacate her finding that the medical opinion evidence does not establish legal pneumoconiosis and remand the case for further consideration of all the relevant medical opinions. 20 C.F.R. §§718.201(a)(3), 718.202(a)(4); Decision and Order at 17. The ALJ must set forth her findings in detail, including the underlying rationale for her decision as the APA requires. *See Wojtowicz*, 12 BLR at 1-165. She should address 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 diagnoses. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441. Further, she must consider all the relevant evidence in reaching her determinations. *See* 30 U.S.C. §923(b) (fact-finder must address all relevant evidence); *Addison*, 831 F.3d at 252-53; *McCune v. Cent. Appalachian Coal Co*., 6 BLR 1-996, 1-998 (1984) (failure to discuss relevant evidence requires remand).

Survivor's Claim

In a survivor's claim where no statutory presumptions are invoked, a claimant must establish the miner had pneumoconiosis arising out of coal mine employment and his death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.205(b)(1), (2). Death is considered due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis are direct causes of the miner's death, or if pneumoconiosis was a substantially contributing cause of his death. 20 C.F.R. §718.205(b)(1), (2).

[20] This information was included in Dr. Nader's report under the heading *Pulmonary Diagnosis*; however, as Dr. Nader explained in that section that his diagnosis was "based on" the cited items, it is clear that they formed the basis for his opinion. *Id*. The information cited by the ALJ was included in Dr. Nader's report under the heading *Etiology of Pulmonary Diagnosis* and also is part of his proffered explanation for his diagnosis.

Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6). The ALJ determined Claimant did not establish the Miner had clinical pneumoconiosis or legal pneumoconiosis, and thus denied benefits in the survivor's claim. Decision and Order at 23-26.

Because we vacate the ALJ's finding that the medical opinion evidence does not establish legal pneumoconiosis and therefore the denial of benefits in the miner's claim, and as the ALJ found the Miner did not have legal pneumoconiosis for the same reasons in the survivor's claim, we also vacate the denial of benefits in the survivor's claim and remand the case for further consideration. Decision and Order at 24-26.

Summary of Remand Instructions

On remand in the miner's claim, the ALJ must first determine whether Claimant established legal pneumoconiosis based on the medical opinion evidence. 20 C.F.R. §718.202(a)(4). If she determines Claimant has established legal pneumoconiosis,[21] she must also determine whether Claimant established total disability due to the disease. 20 C.F.R. §718.204(c).

If Claimant does not establish legal pneumoconiosis in the miner's claim, the ALJ may reinstate her denial of benefits in the miner's claim.

If the ALJ awards benefits in the miner's claim on remand, then Claimant is entitled to automatic survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018). If she does not award benefits in the miner's claim, the ALJ must reconsider whether Claimant can establish entitlement to benefits in the survivor's claim at 20 C.F.R. Part 718. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205.

[21] It is unnecessary for the ALJ to separately consider whether the Miner's legal pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203 as her finding at 20 C.F.R. §718.202(a)(4) necessarily subsumes that inquiry. *See* 20 C.F.R. §718.201(a)(2), (b); *see also Kiser v. L & J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge