U.S. Department of Labor

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

BRB No. 21-0277 BLA

RONALD L. DOLAN (deceased)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEIVASY MINING CORPORATION	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 02/22/2023
	)	
Employer/Carrier-Respondents	)	
	)	
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 and Decision and Order Granting Reconsideration and Denying Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Daniel K. Evans (Advanced Administrative Litigation Clinic, Washington and Lee University School of Law), Lexington, Virginia, for Claimant.

Chris M. Green (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for Employer and its Carrier.

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

GRESH, Chief Administrative Law Judge, and BUZZARD, Administrative Appeals Judge:

Claimant[1] appeals Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Denying Benefits and Decision and Order Granting Reconsideration and Denying Benefits (2019-BLA-05124) rendered on a claim filed on August 7, 2017,[2] filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found the Miner had simple, but not complicated pneumoconiosis; therefore, he 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) (2018); 20 C.F.R. §718.304. Further, although the ALJ credited the Miner with at least twenty-five years of coal mine employment, she found he was not totally disabled. 20 C.F.R. §718.204(b)(2). Thus, she determined he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] Because a necessary element of entitlement, total disability, was not established, the ALJ denied benefits.

The Miner moved for reconsideration, contending the ALJ erred in finding that he did not invoke the irrebuttable presumption. On reconsideration, while amending some of her initial findings regarding complicated pneumoconiosis, the ALJ still found the evidence insufficient to establish the disease and again denied benefits.

[1] Ronald Dolan (the Miner) died on January 25, 2021. Claimant's Brief at 2 n.1. His widow (Claimant) is pursuing the claim on behalf of his estate. *Id.*

[2] The ALJ erroneously indicates this is a subsequent claim for benefits. Decision and Order at 1. This appears to be a scrivener's error, as the ALJ did not analyze the case as a subsequent claim; thus, the error is harmless. *See* 20 C.F.R. §725.309; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

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

On appeal, Claimant, the Miner's widow, argues the ALJ erred in finding the Miner failed to establish complicated pneumoconiosis and total disability.[4] Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief. Claimant filed a reply brief, reiterating her contentions.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order and Reconsideration Decision and Order if they are rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc*., 380 U.S. 359 (1965).

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 of total disability due to pneumoconiosis if a miner suffers from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray, yielded one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yielded massive lesions in the lung; or (c) when diagnosed by other means, was a condition which would have yielded results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c). The ALJ must examine all relevant evidence, determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then weigh the evidence together at subsections (a), (b), and (c) before determining whether a 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, 256 (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 that the x-ray evidence, biopsy evidence, medical opinion evidence, and the Miner's treatment records failed to establish complicated pneumoconiosis, while the CT scan evidence supports a finding of complicated pneumoconiosis. 20 C.F.R.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established the Miner had at least twenty-five years of coal mine employment and simple clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 36.

[5] We will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 27.

§718.304(a)-(c); Decision and Order at 10, 13, 15-16, 29, 35; Reconsideration Decision and Order at 9-10 (unpaginated). Weighing the evidence together, she found the evidence did not establish complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 35-36; Reconsideration Decision and Order at 9-10 (unpaginated).

Claimant argues the ALJ erred in her weighing of the medical opinion evidence and in weighing the evidence together as a whole.[6] Claimant's Brief at 4-23. Specifically, Claimant contends the ALJ failed to explain why the positive CT scan evidence was outweighed by the earlier radiographic and biopsy evidence given the progressivity of pneumoconiosis. *Id.* at 14-16; 19-23. She also argues "a single piece of relevant evidence" can support an ALJ's finding that the irrebuttable presumption was successfully invoked if that piece of evidence outweighs conflicting evidence in the record. *Id.* at 20-21, *citing Scarbro*, 220 F.3d at 256. Finally, she argues the ALJ failed to address shortcomings in Dr. Spagnolo's medical opinion when she accorded his opinion that the Miner did not have complicated pneumoconiosis normal probative weight. Claimant's Brief at 10-15. We agree.

Claimant's arguments center around the September 19, 2018 CT scan interpretation by Dr. DePonte. Claimant's Exhibit 3; Employer's Exhibit 6. Dr. DePonte found "mild coalescence of the subpleural opacities into larger opacities measuring up to 11 mm, meeting the criteria for a large opacity of complicated coal workers' pneumoconiosis." Claimant's Exhibit 3 at 1. She concluded this opacity would measure in size greater than one centimeter on an x-ray. *Id.* at 2. There were no contrary readings of this CT scan in the record.[7]

While initially finding Dr. DePonte did not provide an equivalency determination, Decision and Order at 16, the ALJ subsequently found on reconsideration that Dr. DePonte did provide an equivalency determination and determined that the CT scan evidence supports a finding of complicated pneumoconiosis.[8] Reconsideration Decision and Order

[6] We affirm, as unchallenged on appeal, the ALJ's findings that the biopsy and x-ray evidence do not establish complicated pneumoconiosis. *See* 20 C.F.R. §718.304(a)-(b); *Skrack*, 6 BLR at 1-711; Decision and Order at 35; Director's Exhibit 12; Employer's Exhibits 1-2; Claimant's Exhibit 2.

[7] Dr. Rose interpreted the 2018 CT scan for treatment purposes as indicating: "Fibrosis. Bronchiectasis and emphysema." Claimant's Exhibit 6 at 15.

[8] Employer argues the ALJ "could have" given Dr. DePonte's CT scan reading diminished weight, contending her equivalency determination was not reasoned as she did not explain why the identified opacity would appear larger than one centimeter on x-ray.

at 6 (unpaginated). The ALJ, however, found this single CT scan interpretation was not dispositive, as all evidence must be weighed together and "other factors ought to be considered." *Id.* at 10.

Since the ALJ's ultimate conclusion regarding the weight of all the evidence relied, in part, on her consideration of the medical opinion evidence, we address Claimant's allegations of error regarding that evidence. *Id.* at 7-9.

Medical Opinion Evidence

The ALJ considered the medical opinions of Drs. Gaziano, Swedarsky, Go, Durham, and Spagnolo. Decision and Order at 27-29; Reconsideration Decision and Order at 7-9 (unpaginated). Drs. Gaziano, Swedarsky, and Spagnolo opined that simple, but not complicated, pneumoconiosis was present. Director's Exhibit 12; Employer's Exhibits 2-3, 5. In contrast, Drs. Durham and Go opined that complicated pneumoconiosis was present. Director's Exhibits 14, 14 Suppl.; Claimant's Exhibits 1, 1A, 10. The ALJ accorded less weight to Dr. Gaziano's opinion as he was unaware of the biopsy and positive 2018 CT scan evidence, and less weight to Dr. Swedarsky's opinion[9] because he too was unaware of the positive 2018 CT scan. Decision and Order at 27; Reconsideration Decision and Order at 7 (unpaginated). In addition, the ALJ provided little weight to Dr. Durham's opinion because he did not demonstrate an understanding of complicated pneumoconiosis as defined in the regulations and because his opinion was unclear and conclusory. Decision and Order at 28; Reconsideration Decision and Order at 9 (unpaginated). The ALJ accorded Dr. Go's opinion "normal probative weight," finding his opinion well-documented and well-reasoned. Decision and Order at 27. She also assigned Dr. Spagnolo's opinion "normal probative weight," as he considered all the evidence of record and explained the bases for his opinions. *Id.* at 29. Weighing the two credited opinions together, the ALJ found the experts similarly qualified as Board-certified pulmonologists and found no reason to credit one opinion over the other; thus, she found their opinions in equipoise and thus insufficient to establish complicated pneumoconiosis. Decision and Order at 27, 29, 35; Reconsideration Decision and Order at 8-9 (unpaginated).

Employer's Response at 20. Employer's argument is a request to reweigh the evidence, which the Board is not permitted to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Response at 20-21.

[9] The ALJ initially gave Dr. Swedarsky's opinion normal weight, Decision and Order at 28, but on reconsideration agreed that his opinion was undermined as he was unaware of Dr. DePonte's positive 2018 CT scan reading and thus gave his opinion less weight. Reconsideration Decision and Order at 7.

Claimant argues the ALJ erred in crediting Dr. Spagnolo's opinion and thus in giving it equal weight as the conflicting opinion of Dr. Go.[10] Claimant's Brief at 14. Specifically, Claimant contends the ALJ did not address whether Dr. Spagnolo's opinion regarding whether the Miner's simple pneumoconiosis could progress to complicated pneumoconiosis within a year's time could be reasoned given that he defined complicated pneumoconiosis as a three-centimeter mass rather than a greater-than-one-centimeter opacity. *Id.* at 10-12. We agree.

Dr. Go explained that while he initially opined there was insufficient evidence to diagnose complicated pneumoconiosis, he later noted Dr. Swedarsky's biopsy report mentioned macules and, considering it along with Dr. DePonte's subsequent positive CT scan reading, diagnosed complicated pneumoconiosis.[11] Claimant's Exhibits 10 at 17-18, 23; 1A at 3. He explained that it would not be "unusually fast" for the Miner's simple pneumoconiosis noted in September 2017 to progress to complicated pneumoconiosis at the time of the CT scan obtained in September 2018. Claimant's Exhibit 1A.

Dr. Spagnolo opined that the Miner did not have complicated pneumoconiosis, noting Dr. DePonte is "the only one that saw something greater than 1 centimeter" and the disease does not "go from simple to complicated that quickly." Employer's Exhibit 5 at 37, 72. He explained that the process by which simple pneumoconiosis progresses to complicated pneumoconiosis is "lengthy," taking years for the smaller nodules to coalesce to become greater than three centimeters. Employer's Exhibit 5 at 20-21.

[10] The parties do not specifically contest the ALJ's credibility determinations regarding Drs. Gaziano's, Swedarsky's, and Durham's opinions. While Claimant argues the ALJ's criticism of Dr. Durham's opinion is "unduly harsh," she does not argue the criticisms are in error. Claimant's Brief at 17. Accordingly, we affirm these credibility findings. *See Skrack*, 6 BLR at 1-711; Decision and Order at 27-28; Reconsideration Decision and Order at 7-9 (unpaginated).

[11] Employer argues that Dr. Go irrationally changed his opinion, initially diagnosing only simple pneumoconiosis while aware of Dr. Perper's biopsy report and Dr. DePonte's CT scan reading, but later diagnosing complicated pneumoconiosis after considering Dr. Swedarsky's biopsy report in conjunction with Dr. DePonte's CT scan reading. Employer's Response at 19-20. The ALJ found Dr. Go adequately explained his bases for changing his opinion. Decision and Order at 27. As it is within the purview of the ALJ to assess the credibility of the experts' opinions, we affirm the ALJ's crediting of Dr. Go's opinion as supported by substantial evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000).

As Claimant argues, the ALJ did not consider that Dr. Spagnolo's opinion may have been based, at least in part, on his view that simple pneumoconiosis could not progress into a three-centimeter mass in one year's time. The regulations do not require a three-centimeter mass to diagnose complicated pneumoconiosis. 20 C.F.R. §718.304; *see Scarbro*, 220 F.3d at 257-58 (complicated pneumoconiosis is established by the application of "congressionally-defined criteria;" when medical and legal standards for the disease diverge, the standard established by Congress applies). Thus, the ALJ did not consider whether Dr. Spagnolo's opinion was undermined based on his incorrect understanding of the regulatory definition of complicated pneumoconiosis.[12] Because the ALJ did not fully consider Dr. Spagnolo's explanation as to how simple pneumoconiosis progresses into complicated pneumoconiosis and how complicated pneumoconiosis is defined in the regulations, we must vacate her credibility findings as to his opinion, as well as her weighing of the medical opinion evidence.[13] 20 C.F.R. §718.304(c); *Milburn Colliery Co.*

[12] Our dissenting colleague cites passages from Dr. Spagnolo's report and testimony where he provided boilerplate International Labour Organization classifications for opacities of various sizes (Employer's Exhibit 3 at 5); explained that complicated pneumoconiosis is "rarely" diagnosed radiographically because "a [one] centimeter density in the lung could be cancer" (Employer's Exhibit 5 at 51-52); and discussed Dr. DePonte's identification of an opacity greater than one centimeter (*Id*. at 35-36, 70-71). But as noted, when specifically asked to address Dr. DePonte's identification of a "coalescence of opacities into larger opacities measuring up to 11 millimeters," Claimant's Exhibit 3, Dr. Spagnolo refuted Dr. DePonte's diagnosis of complicated pneumoconiosis by stating that while smaller nodules can coalesce to form a "larger density," "the definition of a mass is something greater than [three] centimeters . . . ." Employer's Exhibit 19-20. While our colleague would hold Dr. Spagnolo adequately understood that complicated pneumoconiosis is defined as an opacity measuring greater than one centimeter (not three centimeters), the extent to which Dr. Spagnolo's various statements support or undermine his opinion is for the ALJ to decide in the first instance. Nor are we persuaded by our colleague's attempt to differentiate between Dr. Spagnolo's use of the term "mass," and the terms "large opacity" and "complicated pneumoconiosis." *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 364-365 (4th Cir. 2006) (diagnosis of a "massive" opacity "becomes a proxy for the tissue mass characteristic of complicated pneumoconiosis" and satisfies the "statutory ground for application of the presumption"); *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7, 96 S. Ct. 2882, 2888 (1976) (term "[c]omplicated pneumoconiosis . . . involves progressive *massive* fibrosis") (emphasis added).

[13] In addition to the arguments addressed above, Claimant also asserts the ALJ erred in crediting Dr. Spagnolo's opinion because the physician believed Dr. DePonte was interpreting an x-ray, not a CT scan. Claimant's Brief at 13-14. Claimant did not raise this argument below; thus, we decline to address it. *See Dankle v. Duquesne Light Co.*, 20 BLR

v. Hicks, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 29, 36; Reconsideration Decision and Order at 7-9 (unpaginated).

Treatment Records

Finally, the ALJ also considered the Miner's numerous treatment records, which contained multiple x-ray readings, 2017 and 2018 CT scan readings, surgery and hospitalization records, and Dr. Durham's treatment notes. Decision and Order at 30-35; Director's Exhibits 14,16; Claimant's Exhibits 4-9. The ALJ found the treatment records were unreasoned, conclusory, and not specific enough to support a finding of simple or complicated pneumoconiosis. Decision and Order at 35-36; Reconsideration Decision and Order at 9.

Claimant argues the ALJ erred in considering the Miner's treatment records in her analysis of the issue of complicated pneumoconiosis. Claimant's Brief at 16-17. She also points to several x-rays and CT scans in the treatment records which note fibrosis, which she argues would support a finding of simple pneumoconiosis, contrary to the ALJ's findings. Claimant's Brief at 18-20; Claimant's Reply at 6-14.

Initially, we reject Claimant's argument that the ALJ erred in considering the Miner's treatment records on the issue of complicated pneumoconiosis. An ALJ must consider all evidence relevant to complicated pneumoconiosis and thus may consider relevant evidence contained in treatment records. 20 C.F.R. §718.304(c); *Melnick*, 16 BLR at 1-33. Moreover, as Claimant acknowledges, none of the evidence contained within the Miner's treatment records note a large opacity, which is the issue here. Claimant's Reply at 6-14. Thus, the ALJ permissibly found the treatment records insufficient to support a finding of complicated pneumoconiosis. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984) (ALJ has discretion to determine the weight to accord an x-ray that is silent on the existence of pneumoconiosis); Decision and Order at 35.

Based on the foregoing, we vacate the ALJ's finding that Claimant failed to establish complicated pneumoconiosis and thus failed to invoke the irrebuttable presumption at Section 411(c)(3). 20 C.F.R. §718.304; Decision and Order at 36; Reconsideration Decision and Order at 10 (unpaginated).

1-1, 1-4-7 (1995) (cannot raise argument before the Board for the first time on appeal); Claimant's Closing Argument; Claimant's Motion for Reconsideration.

For judicial efficiency, we will next address Claimant's arguments regarding whether she established total disability without the benefit of the irrebuttable presumption.

Invocation of the Section 411(c)(4) Presumption- Total Disability

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 on 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 consider all relevant evidence and weigh the evidence supporting total disability against the 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 failed to establish total disability by any means. Decision and Order at 36 n.23, 37-42.

Claimant argues that, on reconsideration, the ALJ should have reweighed the medical opinion evidence on the issue of total disability after discrediting Dr. Swedarsky's opinion that the Miner did not have complicated pneumoconiosis. Claimant's Brief at 25. She further generally argues the evidence supports a finding of total disability. *Id.* at 25-27. We disagree.

As Employer notes, Claimant did not raise any arguments on reconsideration as to the presence of total disability absent a finding of complicated pneumoconiosis. Employer's Response at 23; Claimant's Motion for Reconsideration. Moreover, Claimant fails to explain how the ALJ's amended findings on reconsideration regarding Dr. Swedarsky's complicated pneumoconiosis opinion would make a difference in the outcome regarding total disability under 20 C.F.R. §718.204(b)(2). The ALJ already accorded reduced weight to Dr. Swedarsky's opinion that the Miner was not totally disabled when she found Claimant did not establish total disability. *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 40-41.

Finally, Claimant argues that the ALJ ignored the medical opinions stating that the Miner's abnormal diffusion capacity was totally disabling. Claimant's Brief at 26-27. However, the ALJ specifically addressed Dr. Go's opinion that the abnormal diffusion capacity rendered the Miner disabled, finding Dr. Go did not sufficiently explain why there would be such an impairment reflected in the diffusion capacity but not in the other objective testing. Decision and Order at 39-40. She further found Dr. Go acknowledged that diffusion capacity may become "skewed" depending on how much gas is inhaled and

that none of the other testing suggested total disability. *Id.* at 21. Similarly, the ALJ found Dr. Durham's opinion that the Miner was totally disabled to be unclear and inadequately reasoned. Decision and Order at 40. She indicated that while he noted "gas exchange abnormalities," he did not explain the basis of this finding and, if his opinion was based on an abnormal diffusion capacity, did not explain how this rendered the Miner disabled given the other objective testing. *Id*. at 40.

It is the province of the ALJ to evaluate the medical evidence, draw inferences, and assess probative value. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). Claimant's arguments are a request to reweigh the evidence, which we are not permitted to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ weighed all of the relevant evidence and her credibility findings are supported by substantial evidence, we affirm her finding that the medical opinion evidence is insufficient to support total disability. 20 C.F.R. §718.204(b)(2)(iv); *Compton*, 211 F.3d at 211; Decision and Order at 38-42. Thus, we affirm the ALJ's finding that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2). Consequently, we also affirm the ALJ's finding that Claimant failed to invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.305.

Remand Instructions

On remand, the ALJ must reconsider whether Claimant has established complicated pneumoconiosis. 20 C.F.R. §718.304. The ALJ must reconsider Dr. Spagnolo's opinion in her weighing of the medical opinion evidence. In her evaluation of his opinion, she must consider the relative qualifications of the physicians,[14] the explanations for his conclusions, the documentation underlying his medical judgments, and the sophistication of, and bases for, his diagnoses. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Then the ALJ must again weigh all evidence together as a whole, providing adequate explanations for her findings. 20 C.F.R. §718.304; *Melnick*, 16 BLR at 1-33. As Claimant argues, a factor that should be considered in weighing the evidence is the progressivity of the disease. *See* 20 C.F.R. §718.201(c); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Claimant's Brief at 7-10, 15-16.

[14] We note that Drs. Spagnolo and Go are Board-certified in internal medicine and pulmonary diseases. Employer's Exhibit 3; Claimant's Exhibit 16. Dr. DePonte is dually-qualified as a Board-certified radiologist and B-reader. Claimant's Exhibit 13.

If on remand the ALJ again finds the weight of the overall medical evidence is insufficient to establish complicated pneumoconiosis, she may reinstate the denial of benefits. *Scarbro*, 220 F.3d at 255-56; *Lester*, 993 F.2d at 1145-46; *Melnick*, 16 BLR at 1-33-34.

However, if the ALJ finds the evidence sufficient to support a finding of complicated pneumoconiosis and thus invokes the irrebuttable presumption, Claimant is also entitled to the presumption that the Miner's complicated pneumoconiosis arose out of his coal mine employment, as Claimant established he had more than ten years of coal mine employment. 20 C.F.R. §718.203(b). The ALJ must address any evidence of record to determine if Employer has rebutted this presumption before awarding benefits. *Id.*

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I respectfully disagree with my colleagues and would affirm the ALJ's Decision and Order. Contrary to the view of the majority, remand is not required for further consideration of Dr. Spagnolo's opinion and weighing of the evidence as to whether the Miner had complicated pneumoconiosis.

It is clear from Dr. Spagnolo's report and deposition, read in their entirety, that he correctly defines complicated pneumoconiosis as an opacity of greater than one centimeter in diameter when diagnosed by x-ray or as massive fibrosis. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-93 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-297 (1984); 20 C.F.R. §718.304. Further, he employs that correct definition to opine the Miner did not have complicated pneumoconiosis and the Miner's simple pneumoconiosis would not have progressed from simple pneumoconiosis to complicated pneumoconiosis between the time of the pre-operative x-ray and the lung tissue reviewed by the pathologists and his

post-operative x-ray. Thus, the ALJ's findings with respect to Dr. Spagnolo's opinion are supported by substantial evidence and remand is not necessary.

More particularly, in his medical report, when summarizing three 2017 radiographic and thoracic CT reports, Dr. Spagnolo correctly noted "Large opacities are defined as any opacity that is *greater than 1 cm* that is present in a film. They are classified as category A . . . , category B . . . , or category C . . .." Employer's Exhibit 3 at 5 (emphasis added). He also correctly stated the lung tissue obtained in 2017 was reviewed by pathologists, all of whom noted the presence of simple pneumoconiosis, but none of whom stated there was evidence of progressive massive fibrosis or complicated pneumoconiosis. *Id.*

In his deposition, which the majority quotes selectively, he observed that a "*mass"* (not complicated pneumoconiosis) is defined as "something greater than 3 centimeters." Employer's Exhibit 5 at 23. When giving his opinion as to *complicated pneumoconiosis,* however, he specifically employed the statutory and regulatory definition. When explaining his reasons for opining that the Miner did not have complicated pneumoconiosis, he applied the greater than one centimeter definition:

> Q. In your opinion does Mr. Dolan have complicated coal workers' pneumoconiosis?
> A. No. I do not think he has that.
> Q. And can you put the information together, and explain your finding concerning complicated pneumoconiosis for the ALJ?
> A. Well, several things. *None of the x-rays showed it except for I think it's Dr. DePonte who recently thinks there may be something that's 1.1.* None of the pathology showed it, and we have multiple pathologists who looked at the pathology. The problem that she has on her x-ray is that it's post-op.

> And nothing pre-op showed complicated pneumoconiosis. And finally, you don't go from simple to complicated that quickly. So for all of those reasons.

Employer's Exhibit 5 at 35-36 (emphasis added). When discussing the diagnosis of complicated pneumoconiosis, he used one centimeter (not three centimeters) as the reference point:

> Q. Do you agree that complicated coal workers' pneumoconiosis can be diagnosed either radiologically or pathologically?
> A. Yes, it has been diagnosed both of those ways. We rarely do it today radiographically, because we're very concerned that a *1 centimeter* density in the lung could be a cancer.

Id. at 52 (emphasis added). When discussing the definition of complicated pneumoconiosis, he confirmed use of *greater than 1 centimeter* as the usually appropriate measurement:

> Q. Do you agree that complicated pneumoconiosis is characterized by one or more coal dust-induced large, *greater than 1 centimeter* fibrotic masses in the lungs?
> A. Well, that's a pretty good definition. It's usually greater—it's usually *greater than 1 centimeter*, yes.

Id. (emphasis added). Also, when discussing the diagnosis of complicated pneumoconiosis, he talked about a "large opacity" which in his earlier report (Employer's Exhibit 3) he defined as an opacity greater than one centimeter:

> Q. [I]n order for it [complicated pneumoconiosis] to be diagnosed on the pathology, would it be correct that the part of the lung tissue that is removed and examined would need to include the large opacity?
> A. Well, you would rely on your surgeon . . . . He wouldn't be biopsying tissue, unless it looked abnormal. And he would also have the chest x-ray at the time of surgery, or the CT scan at the time of surgery that would help

> guide him when he did the biopsy. And as you know, *there was no evidence of a large opacity on the x-rays before surgery.*

Employer's Exhibit 5 at 53 (emphasis added). In addition, when further discussing his opinion as to whether the Miner had complicated pneumoconiosis he again used the greater than one centimeter definition:

> Q. And concerning complicated pneumoconiosis, what is your opinion concerning whether Mr. Dolan had complicated pneumoconiosis that was missed by the surgeon, and then ultimately seen by Dr. DePonte on the CT scan?
> A. Well, that's a stretch. She's the only one that saw anything *greater than 1 centimeter*.

Employer's Exhibit 5 at 71-72 (emphasis added).

Thus, the ALJ's treatment of Dr. Spagnolo's opinion is fully affirmable as is her weighing of the evidence as to complicated pneumoconiosis in its entirety. I agree with the majority with respect to its determinations as to Claimant's other allegations of error. Consequently, I would not remand this case for further consideration and would affirm the ALJ's Decision and Order.

JUDITH S. BOGGS
Administrative Appeals Judge