No. 21-3032

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMUEL CUMMINGS
Petitioner

v.

ISLAND CREEK COAL COMPANY
Employer-Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT

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REGULATIONS

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Party-In-Interest/Respondent

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This case involves a claim for disability benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944, filed by Samuel Cummings. Cummings' jurisdictional statement is accurate but incomplete. On September 18, 2019, Administrative Law Judge Jerry DeMaio (the ALJ) issued a decision

denying benefits. Joint Appendix (JA) 20. Cummings appealed this decision to the United States Department of Labor (DOL) Benefits Review Board on October 1, 2019, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

On November 24, 2020, the Board affirmed the denial of benefits. JA 10. The Court docketed Cummings' petition for review of that decision on January 11, 2021. JA 7. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. Cummings' exposure to coal mine dust—the injury contemplated by 33 U.S.C. § 921(c)—occurred in the Commonwealth of Kentucky, within this Court's territorial jurisdiction. The Court therefore has jurisdiction over Cummings' petition for review.

STATEMENT OF THE ISSUE

Miners who suffer from complicated pneumoconiosis are irrebuttably presumed to be totally disabled due to pneumoconiosis. 30 U.S.C. § 921(c)(3); 20 C.F.R. § 718.304. Section 921(c)(3) enumerates three methods for establishing complicated pneumoconiosis: by x-ray evidence of large opacities; by biopsy or

autopsy evidence of massive lesions; and by other means that diagnose "a condition which could reasonably be expected to yield the results described" by x-ray, biopsy, or autopsy. A second BLBA provision, 30 U.S.C. § 923(b), mandates, in relevant part, that "[in] determining the validity of claims . . , all relevant evidence shall be considered." Interpreting these two provisions together, this Court held in *Gray v. SLC Coal Co.*, 176 F.3d 382, 388-90 (6th Cir. 1999), that an ALJ must weigh not only the conflicting evidence within each category listed in Section 921(c)(3), but also the "evidence from different categories (e.g., x-ray vs. autopsy) against one another." Cummings nonetheless contends that Section 921(c)(3) requires invocation of the irrebuttable presumption based on a single credible diagnosis of complicated pneumoconiosis. Is *Gray* binding precedent and correct?

STATEMENT OF THE CASE

Cummings filed this claim for black lung benefits on January 10, 2017.[1] The district director issued a proposed decision and order denying the claim. JA 385. The ALJ also denied benefits, and the Board affirmed the denial. JA 10, 20.

[1] Cummings filed a previous claim on March 20, 2000, which the district director denied because Cummings failed to establish any element of medical entitlement. JA 11 n.1. He then filed a second claim, but withdrew it. *Id*. A withdrawn claim is considered "not to have been filed." 20 C.F.R. § 725.306(b).

Cummings then timely petitioned this Court for review.

STATEMENT OF THE FACTS

A. Statutory and regulatory background

The Black Lung Benefits Act compensates coal miners who prove that they are totally disabled by pneumoconiosis arising out of coal mine employment. 30 U.S.C. § 901; 20 C.F.R. § 725.201(a). Pneumoconiosis "means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

There are two types of pneumoconiosis, "clinical" and "legal." 20 C.F.R. § 718.201. "*Clinical pneumoconiosis*" refers to a collection of diseases recognized by the medical community as fibrotic reactions of lung tissue to the "permanent deposition of substantial amounts of particulate matter in the lungs." 20 C.F.R. § 718.201(a)(1); *see Central Ohio Coal Co. v. Director, OWCP*, 762 F.3d 483, 486 (6th Cir. 2014). It is typically diagnosed by chest x-ray, biopsy, or autopsy. 20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1)-(2). "*Legal pneumoconiosis*," by contrast, is a broader category, including "*any* chronic lung disease or impairment . . . arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2); *Central Ohio Coal Co.*, 762 F.3d at 486. The issue in this case relates to clinical pneumoconiosis.

Clinical pneumoconiosis "is customarily classified as 'simple' or

'complicated,'" the latter being the more serious form of the disease. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976). Since the BLBA's inception in 1969, "a miner shown by x-ray or other clinical evidence to be afflicted with complicated pneumoconiosis is 'irrebuttably presumed' to be totally disabled due to pneumoconiosis." *Id*. at 10-11 (citing 30 U.S.C. § 921(c)(3)).

Section 921(c)(3) states,

> If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B), when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed [in] clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be.

30 U.S.C. § 921(c)(3). *See also* 20 C.F.R. § 718.304 (DOL's substantially similar regulation implementing Section 921(c)(3)).

"The claimant has the burden of proof in establishing the irrebuttable presumption of total disability." *Sexton v. Switch Energy Coal Corp.*, 20 F. App'x 325, 328 (6th Cir. 2001), citing *Lester v. Director, OWCP*, 993 F.2d 1143, 1146 (4th Cir. 1993). Proof by one enumerated method does not automatically invoke the presumption. "Any of the three types of proof is sufficient, in the absence of

other evidence, to invoke the irrebuttable presumption, but none is conclusive if outweighed by contrary evidence. The disjunctive ["or"] therefore serves to give miners flexibility in proving their claims, but does not establish three separate and independent irrebuttable presumptions." *Gray*, 176 F.3d at 389. Accordingly, the ALJ must consider "all relevant evidence," which "means just that—all evidence that assists the ALJ in determining whether a miner suffers from complicated pneumoconiosis." *Id*. In short, the ALJ must weigh not only "all relevant evidence within each category" but also the "evidence from different categories (e.g., x-ray vs. autopsy) against one another." *Id*.; *Whitaker Coal Corp. v. Osborne*, 526 F. App'x 567, 571-72 (6th Cir. 2013) (same, quoting *Gray*, 176 F.3d at 389).

B. Relevant medical evidence

The relevant medical evidence is discussed in the description of the ALJ's decision.

C. Decisions below

1. The ALJ declines to invoke the irrebuttable presumption.

The ALJ reviewed the x-ray evidence under subsection (A) of 30 U.S.C. § 921(c)(3) and then CT scans, medical opinions, and other medical records under subsection (C). JA 34-37. (The record contained no biopsy or autopsy evidence under subsection (B).)

Starting with the x-ray evidence, the ALJ found the January 30, 2017, x-ray

negative for complicated pneumoconiosis because two dually-qualified doctors (Drs. Tarver and Alexander) read the film as negative, whereas only one dually-qualified doctor (Dr. Crum) read the film as positive.[2] JA 34. The ALJ applied the same reasoning in finding the April 25, 2017, film negative for complicated pneumoconiosis (Drs. Tarver and Miller versus Dr. Crum). *Id*. He found the June 29, 2017, and August 13, 2018, films in equipoise because they received one positive reading and one negative reading from dually-qualified doctors (Dr. Crum versus Drs. Kendall and Tarver respectively). *Id*. In reaching these conclusions, the ALJ declined to accord greater weight to Dr. Crum's readings on the basis of the doctor's deposition testimony, reasoning that Dr. Crum admitted that Cummings' x-rays showed conditions unrelated to coal mine dust exposure that could explain Cummings' opacities and that Dr. Crum's large opacity findings (category A) were "borderline." JA 34-35. The ALJ thus determined that the x-ray evidence did not establish complicated pneumoconiosis. *Id*.

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[2] A dually-qualified x-ray reader is both a Board-certified radiologist and B-reader. A "Board-certified radiologist" is a radiologist who is certified "in radiology or diagnostic radiology by the American Board of Radiology, Inc. or the American Osteopathic Association." 20 C.F.R. § 718.102(e)(2)(i). A "B-reader" is "a physician [who] has demonstrated ongoing proficiency in evaluating chest radiographs for radiographic quality and in the use of the ILO classification [required by section 20 C.F.R. § 718.102(d)] for interpreting chest radiographs for pneumoconiosis and other diseases." 20 C.F.R. § 718.102(e)(2)(iii). *See Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993) (explaining that "board certified radiologists have comparable qualifications to B-readers").

Turning to subsection (C) and the CT scan evidence, the ALJ found the February 20, 2017, scan negative because neither reader diagnosed complicated pneumoconiosis. JA 35. He found the March 22, 2017, scan in equipoise given that the equally-qualified Drs. Crum and Tarver offered contrary readings. *Id*. The ALJ also found Dr. Crum's testimony concerning the CT scans unpersuasive for the same reasons he rejected it vis-à-vis the x-rays. JA 36.

The ALJ then weighed the medical opinion evidence, observing that two doctors had diagnosed complicated pneumoconiosis (Drs. Chavda and Majmudar) while two had not (Drs. Tuteur and Vuskovich). JA 36. He rejected Drs. Chavda's and Majmudar's diagnoses because they relied on x-rays that he had previously found to be negative for the disease. JA 36. Finally, he found no evidence of complicated pneumoconiosis or large opacities in Cummings' treatment records. He thus concluded that the opinion evidence, like the x-ray and CT scan evidence, weighed against a complicated pneumoconiosis finding, and denied benefits. JA 37.

2. The Benefits Review Board affirms the denial of benefits.

The Board affirmed the denial of benefits. JA 10. It addressed Cummings' numerous challenges to the ALJ's weighing of the evidence, but found the ALJ's decision supported by substantial evidence. Basically, it ruled that the ALJ's determinations fell within his discretion as fact finder and that Cummings'

arguments amounted to impermissible requests to reweigh the evidence.[3] *See* JA 14-18.

SUMMARY OF THE ARGUMENT

Cummings contends that a single credible diagnosis of complicated pneumoconiosis establishes the disease and invokes the BLBA Section 921(c)(3) irrebuttable presumption of total disability due to pneumoconiosis. This Court necessarily rejected that argument in *Gray v. SLC Coal Co.* when it held that an ALJ must not only "weigh all relevant evidence within each category set forth in § 921[(c)(3)]" but also "weigh evidence from different categories (e.g., x-ray vs. autopsy) against one another." 176 F.3d at 388-89. *Gray* is both correct and binding. The Court must reject Cummings' argument.

ARGUMENT

A. Standard of review

The issue of whether a single credible diagnosis of complicated pneumoconiosis invokes the irrebuttable presumption is a legal one. The Court

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[3] Because Cummings did not raise the issue before the Board, neither the Board nor the Director addressed his argument that a single credible diagnosis of complicated pneumoconiosis invokes the irrebuttable presumption. Accordingly, the Court may decline to consider it. *Island Creek Coal Co. v. Bryan*, 937 F.3d 738 (6th Cir. 2019) (holding that parties must exhaust issues before the Board to preserve them in court).

exercises plenary review with respect to questions of law. *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 571 (6th Cir. 1998).

B. Before invoking the irrebuttable presumption of total disability due to pneumoconiosis under 30 U.S.C. § 921(c)(3), an ALJ must consider all relevant evidence in deciding whether a miner suffers from complicated pneumoconiosis.

The ALJ here declined to invoke the irrebuttable presumption because Cummings' evidence of complicated pneumoconiosis was outweighed by contrary evidence demonstrating that he did not suffer from the disease. Cummings argues that the ALJ was required to disregard the contrary evidence and invoke the irrebuttable presumption based on a single credible diagnosis of complicated pneumoconiosis. Pet. Bf. at 15.

This Court has already rejected Cummings' argument. In *Gray v. SLC Coal Co.*, it held that an ALJ must not only "weigh all relevant evidence within each category set forth in § 921[(c)(3)]" but also "weigh evidence from different categories (e.g., x-ray vs. autopsy) against one another." 176 F.3d at 388-89; *accord Whitaker Coal Corp.*, 526 F. App'x at 571-72 (quoting *Gray*). These holdings necessarily dispose of Cummings' broader contention that a single piece of positive evidence is sufficient to invoke the presumption. As a published decision of this Court, *Gray* is binding authority "on all later panels unless overruled or abrogated en banc or by the Supreme Court." *Wright v. Spaulding*, 939 F.3d 695, 700 (2019 6th Cir.). Because it remains good law, *Gray* compels

rejection of Cummings' argument.

Attempting to evade *Gray's* controlling effect, Cummings turns to the plain text of Section 921(c)(3) as support.[4] Pet. Bf. at 15. But, as *Gray* explains, that Section requires a miner to be "*suffering or suffered from a chronic dust disease of the lung*." 176 F.3d at 388 (emphasis in original). (The "chronic dust disease" to which the statute refers is "commonly known as complicated pneumoconiosis." *Id*.) A single positive diagnosis, viewed in a vacuum and without considering contrary evidence, simply does not establish that the miner is *suffering or suffered* from a *chronic* dust disease. *Id*. Likewise, the factual premise underlying the irrebuttable presumption—that the miner is totally disabled by pneumoconiosis—is not present when a single positive diagnosis is outweighed by more reliable conflicting evidence demonstrating the absence of complicated pneumoconiosis. *See Mullins Coal Co. of VA v. Director, OWCP*, 484 U.S. 135 (1987) (single item

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[4] Without citing any legislative history, Cummings also argues that Congress "likely intended" for a single positive piece of evidence to invoke the irrebuttable presumption. Pet. Bf. 15. But *Gray* disposes of this supposition:

> Mandating that an ALJ ignore autopsy and other relevant medical evidence if the x-rays show opacities of greater than one centimeter in diameter would doubtless have the effect of forcing operators to compensate the families of miners who did not, in fact, have complicated pneumoconiosis. . . . This irrational result was surely not what Congress intended when it established the irrebuttable presumption for miners who in fact have complicated pneumoconiosis.

178 F.3d at 389.

of qualifying evidence insufficient to invoke "interim presumption" of total disability due to pneumoconiosis when overcome by more reliable conflicting evidence). *Gray* thus directs that "the existence of one piece of evidence should not exclude contrary evidence from consideration," and it is only after "the presence of the chronic dust disease is established by evidence satisfactory to the ALJ" that the irrebuttable presumption can be invoked. *Id*. *Gray* demands that the conflicting evidence within each Section 921(c)(3) category be considered and weighed.

As noted above, *Gray* also holds that the ALJ must "weigh evidence from different categories (e.g., x-ray vs. autopsy) against one another." *Id*. at 389; *see also Whitaker Coal Corp.*, 526 F. App'x at 571-72 (same). In addition to the plain text of Section 921(c)(3), *Gray* relies on 30 U.S.C. § 923(b)'s mandate that "all relevant evidence shall be considered" in the adjudication of a claim. This provision, *Gray* explains, "means just that—all evidence that assists the ALJ in determining whether a miner suffers from complicated pneumoconiosis" must be considered. *Gray*, 176 F.3d at 389. *Gray's* second holding thus similarly refutes Cummings' contention that a single credible diagnosis of complicated pneumoconiosis invokes the irrebuttable presumption.

Gray applied both holdings in affirming the ALJ's weighing of the evidence of complicated pneumoconiosis. Although there was x-ray evidence of the disease under subsection (A), the ALJ found the negative autopsy findings more

persuasive under subsection (B) "because they are more reliable and allow for more complete examination of the lungs." *Id*. at 388. And regarding the conflicting autopsy reports within subsection (B), the ALJ accorded greater weight to Dr. Kleinerman's diagnosis of no complicated pneumoconiosis based on the doctor's superior medical credentials. *Id*. In finding the ALJ's factual findings supported by substantial evidence, *Gray* reiterated the well-established principle that "ALJs may evaluate the relative merits of conflicting physicians' opinions and choose to credit one opinion over the other." 178 F.3d at 388; *see also Whitaker Coal Corp.*, 526 F. App'x at 571 (approving of ALJ's weighing of conflicting evidence within each category and weighing of all the evidence "in its entirety, not just categorically").

Here, the ALJ followed the evidence-weighing procedures set forth in *Gray* and *Whitaker Coal Corp*. He separately weighed the conflicting x-ray evidence under subsection (A) and then the conflicting CT scans, medical opinions, and treatment records under subsection (C). He found the evidence negative for complicated pneumoconiosis under both subsections. Because both were negative, the ALJ was not required to weigh the categories against each other, and he properly declined to invoke the irrebuttable presumption.[5] JA 34-36.

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[5] Cummings also asks the Court to follow the Fourth Circuit's approach in *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010), which he claims requires an Employer to "provide evidence that affirmatively shows the

CONCLUSION

The Court should reject Cummings' legal challenge to the ALJ's methodology in weighing evidence of complicated pneumoconiosis.

Respectfully submitted,

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opacities [on x-ray] are not there or that they are from a disease process other than complicated pneumoconiosis." Pet. Bf. 15-16. But *Westmoreland Coal Co.*, like *Gray*, stresses that claimants have the burden of proving complicated pneumoconiosis and that the ALJ must consider all relevant evidence. 602 F.3d at 282-83. The statement Cummings relies on merely illustrates how to compare evidence from different categories.

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2021, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and the following:

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STATEMENT REGARDING ORAL ARGUMENT

The Director agrees with Island Creek that oral argument is unnecessary.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 2,923 words, as counted by Microsoft Office Word 2010.

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