U.S. Department of Labor

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

BRB No. 21-0631 BLA

MICHAEL PARKHILL, (o/b/o CLYDE D. PARKHILL) Claimant-Respondent v. OLD BEN COAL COMPANY and THE TRAVELERS' COMPANIES Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	))	 DATE ISSUED: 04/14/2023 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits in a Subsequent Claim of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for Claimant.

Michael A. Pusateri and Patricia C. Karppi (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

David Casserly (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Granting Benefits in a Subsequent Claim (2019-BLA-05587) pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim[1] filed on August 18, 2016.[2]

The ALJ found Old Ben Coal Company (Old Ben) is the properly designated responsible operator. He credited the Miner with thirty-eight years of coal mine employment. Further, he found Claimant[3] established the Miner had complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Thus, he found Claimant established a change in an applicable condition of entitlement.[4] 20 C.F.R.

[1] The Miner filed three prior claims. Director's Exhibits 1 at 65, 2 at 150, 3 at 103. The district director denied his previous claim, filed on April 18, 2014, because he failed to establish any element of entitlement. Claimant's Exhibit 4; *see* Director's Exhibit 3 at 7.

[2] The ALJ incorrectly stated the Miner filed this claim on April 18, 2016. Decision and Order at 2. Because this error did not affect any other aspect of his Decision and Order, we deem it to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[3] The Miner died on December 13, 2016, while this claim was pending. Director's Exhibit 13. His surviving widow pursued this claim on behalf of his estate until her death on September 27, 2020. Claimant's Exhibit 13. On October 15, 2020, counsel for the widow filed a Notice of Party-in-Interest requesting the Miner's son, who is also the executor of the widow's estate, be substituted as Claimant in this case. Claimant's Exhibit 12; *see* Decision and Order at 2-3.

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

§725.309. He further found the Miner's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203, and awarded benefits commencing in August 2016.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[5] It also argues the removal provisions applicable to ALJs rendered his appointment unconstitutional. Employer further argues the ALJ erred in finding Old Ben the responsible operator and The Travelers' Companies ("Travelers") the correct surety. It also challenges the exclusion from the record of Dr. Meyer's March 1, 2018 letter discussing x-ray evidence. On the merits, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis and in determining the commencement date for benefits.[6]

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Benefits Review Board to reject Employer's constitutional challenges. The Director also

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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 this current claim. *Id.*

[5] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[6] We affirm, as unchallenged on appeal, the ALJ's finding that the Miner worked for thirty-eight years in coal mine employment, with at least fifteen years in underground coal mines. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

urges the Board to affirm the ALJ's determination that Employer is liable for the payment of benefits. Employer has filed two separate reply briefs, reiterating its contentions.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in 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 and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[8] Employer's Brief at 12-18; Employer's Reply Brief [to the Director] at 1-2. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[9] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's

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[7] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because the Miner performed his coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6; Hearing Transcript at 19.

[8] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[9] The Secretary of Labor issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Kane.

prior appointment. Employer's Brief at 14-18; Employer's Reply Brief [to the Director] at 1-2. The Director argues the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance with the Appointments Clause. Director's Brief at 3-8. We agree with the Director's position.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 5 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Further, ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre Hosp. Co.*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Moreover, under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter. Rather, he specifically identified ALJ Kane and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Kane. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of ALJ Kane "as an Administrative Law Judge." *Id.*

Employer does not allege the Secretary had no "knowledge of all the material facts" when he ratified ALJ Kane's appointment. Employer's Brief at 13-15. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification is insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the ALJ's appointment.[10] *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997)

[10] While Employer notes the Secretary merely "signed or initialed and dated a memorandum approving the ratification," Employer's Brief at 15, this does not render the appointment invalid. *See e.g., Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d

(appointment of civilian members of the United States Coast Guard Court of Criminal Appeals were valid where Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" its earlier invalid actions was proper).

We further reject Employer's argument that Executive Order 13843, which removes ALJs from the competitive civil service, supports its Appointments Clause argument because incumbent ALJs remain in the competitive service. Employer's Brief at 22-23. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Kane's appointment, which we have held constituted a valid exercise of his authority, thereby bringing his appointment into compliance with the Appointments Clause.

Thus, we reject Employer's argument that this case should be remanded to the Office of Administrative Law Judges (OALJ) for a new hearing before a different ALJ.

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 18-23; Employer's Reply Brief [to the Director] at 3-4. It generally argues the removal provisions in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 18-23. Employer also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 18-23. For the reasons set forth in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022), we reject Employer's arguments.

1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act").

Responsible Operator and Surety

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[11] The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates the responsible operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or another operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

The district director issued a Notice of Claim (NOC) identifying Old Ben as a potentially liable operator and notifying Travelers of its potential interest as the surety on an indemnity bond Old Ben obtained as a self-insured operator. Director's Exhibit 28. The NOC identified the specific surety bond (2S100302631) that covered Old Ben's black lung benefits liability for the time period when it employed the Miner. *Id.* Employer timely responded, arguing that Horizon Natural Resources (Horizon), Old Ben's successor, should be named the responsible operator, and denying Travelers was a surety for this claim because the bond identified in the NOC was no longer valid and Travelers never held a bond for Horizon. Director's Exhibit 33. It further denied that the district director had jurisdiction to decide that Travelers carried surety coverage for the claim or that it was the correct surety. Director's Exhibit 33 at 3 n.3. The district director issued a Proposed Decision and Order designating Old Ben as the responsible operator. Director's Exhibits 36. Employer requested a hearing and the claim was transferred to the OALJ.

In adjudicating the responsible operator issue, the ALJ determined Old Ben satisfied the first four criteria of a potentially liable operator. 20 C.F.R. §725.494(a)-(d); Decision

[11] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

and Order at 15. He further noted that it shall be presumed, in the absence of evidence to the contrary, that the designated responsible operator is capable of assuming liability for the payment of benefits. 20 C.F.R. §725.495(b); Decision and Order at 15. Further, he determined there is no evidence demonstrating Old Ben is financially incapable of assuming liability or that the Miner was more recently employed by another potentially liable operator. Decision and Order at 15. The ALJ acknowledged Employer's argument that the district director identified a surety bond that is no longer valid, but concluded he did not have jurisdiction to render a finding on the validity of the bond as this is an issue to be decided in federal district court. *Id.* at 15.

Employer does not challenge the ALJ's determination that Old Ben meets the criteria at 20 C.F.R. §725.494(a)-(d), but argues Travelers was incorrectly identified as the surety, as a bond held by Frontier Insurance Company replaced the bond that the NOC identified as covering Old Ben on the last day of the Miner's employment. Employer's Brief at 33-34; Employer's Reply [to the Director] at 7. It also contends that because the district director did not provide evidence showing Travelers holds a bond covering the claim, the DOL cannot now find it liable for benefits. Employer's Brief at 33-34; Employer's Reply [to the Director] at 5-6. It further argues ALJ erred in relying on the Director's assertion that Old Ben was self-insured on the date of the Miner's last employment. *Id*. We disagree with Employer's arguments.

As the ALJ correctly held, "in the absence of evidence to the contrary," the regulation presumes the designated responsible operator is capable of assuming liability for the payment of benefits. Decision and Order at 15 (quoting 20 C.F.R. §725.495(b)). The named responsible operator may be relieved of liability only if it proves either it is financially incapable of assuming liability or another operator that more recently employed the miner is financially capable of doing so. 20 C.F.R. §725.495(c). The ALJ found no evidence demonstrating Old Ben was incapable of assuming liability.[12] Decision and Order at 15. While Employer argues the bond that the district director identified in the NOC has been replaced, and the district director provided no evidence that the identified bond is still valid, Employer's Brief at 33-34, it is not the Director's burden to establish Old Ben is capable of paying benefits. 20 C.F.R. §725.495(b). Moreover, questions concerning enforcement of the Travelers surety bond to satisfy Old Ben's black lung benefits liability are not within the ALJ's or this Board's jurisdiction, but rather must be decided in federal court. *See* 28 U.S.C. §§1342, 1345; 30 U.S.C. §934; *Peabody Coal Co. v. Director, OWCP*

[12] An operator is "deemed capable of assuming liability for a claim" by purchasing commercial insurance, qualifying as a self-insurer during the time period that the operator last employed the miner, or possessing sufficient assets to secure payments of benefits. 20 C.F.R. §725.494(e).

[*Ayers*], 40 F.3d 906, 909-10 (7th Cir. 1994) (district court is the appropriate forum for enforcing black lung benefits liability because administrative proceedings are limited to "questions in respect of such claim"); Employer's Brief at 33-34. We therefore decline to address Employer's arguments regarding the surety bond and thus affirm the ALJ's determination that Employer is the responsible operator.

Exclusion of Evidence

Employer argues ALJ Larry A. Temin[13] erred in excluding evidence relevant to the issue of complicated pneumoconiosis when this case was previously before him. Employer's Brief at 24-25. We disagree.

ALJs exercise broad discretion in resolving procedural and evidentiary matters. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc). A party seeking to overturn the disposition of an evidentiary issue must establish the ALJ's action represented an abuse of discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

The regulations set limits on the number of specific types of medical evidence the parties can submit into the record. *See* 20 C.F.R. §§725.414, 725.456(b)(1). Each party may submit, in support of its affirmative case, no more than two medical reports. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Medical reports exceeding that limitation "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1). A medical report is "a physician's written assessment of the miner's respiratory or pulmonary condition" and "may be prepared by a physician who examined the miner and/or reviewed the available admissible evidence." 20 C.F.R. §725.414(a)(1).

During the October 15, 2020 telephonic hearing, Employer moved to admit a March 1, 2018 letter from Dr. Meyer marked Employer's Exhibit 1. Dr. Meyer indicated that, at Employer's request, he compared the April 29, 2014 x-ray that he had previously read as negative for complicated pneumoconiosis to the October 14, 2016 x-ray that he had previously read as positive for complicated pneumoconiosis, Category A. *Id*. Based on his comparison of the two x-rays, he agreed with Employer that "coal workers'

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[13] This case was originally assigned to ALJ Larry A. Temin, who held a hearing on October 15, 2020. During that hearing, ALJ Temin excluded Employer's Exhibit 1, a letter from Dr. Meyer. Hearing Tr. at 12-13. Thereafter District Chief ALJ John P. Sellers, III issued an Order notifying the parties of ALJ Temin's retirement and, because he would be unavailable, reassigning the case to ALJ Kane. August 12, 2021 Order. Employer challenges ALJ Temin's exclusion of Employer's Exhibit 1.

pneumoconiosis should not change that rapidly" between the time of the x-rays. Employer's Exhibit 1.

Because Dr. Meyer compared his two prior x-ray interpretations to one another to render an opinion on the progression of the Miner's pneumoconiosis, ALJ Temin permissibly found Dr. Meyer's statement constitutes a medical report rather than an x-ray reading. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); 20 C.F.R. §725.414(a) ("A physician's written assessment of a *single* objective test, such as a chest [x]-ray or pulmonary function test, shall not be considered a medical report for purposes of this section.") (emphasis added); Hearing Tr. at 12-13. Although Employer generally argues ALJ Temin erred, it has not set forth how he abused his discretion in reaching this finding. *See Blake*, 24 BLR at 1-113; *Dempsey*, 23 BLR at 1-63. Thus we affirm ALJ Temin's finding that Employer's Exhibit 1, the March 1, 2018 letter from Dr. Meyer, constitutes a medical report.

Employer does not dispute that it submitted its full complement of medical reports under 20 C.F.R. §725.414(a)(3)(i), as it designated the medical opinions of Drs. Rosenberg and Tuteur as its affirmative evidence. *See* Hearing Tr. at 12-13; Employer's Evidence Form. Thus Employer's Exhibit 1 was not admissible as a medical report under 20 C.F.R. §725.414(c) in the absence of good cause. Employer did not allege good cause before ALJ Temin or ALJ Kane. Nor does it do so before the Board. Thus, we affirm ALJ Temin's exclusion of Employer's Exhibit 1.

The Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In determining whether a claimant has invoked the irrebuttable presumption, the ALJ must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56 (4th Cir. 2000); *Gray v. SLC Coal Co.*, 176 F.3d 382 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (en banc).

The ALJ found the x-ray and medical opinion evidence establishes complicated pneumoconiosis, while the computed tomography (CT) scans and the Miner's treatment

records do not. 20 C.F.R. §718.304(a), (c); Decision and Order at 7-11. Weighing all of the evidence together, the ALJ found the contrary evidence of record does not undermine the x-ray and medical opinion evidence of complicated pneumoconiosis.[14] *Id*.

Section 718.304(a) – X-rays

Employer argues the ALJ erred in weighing the x-ray evidence. Employer's Brief at 25-26, 28. We disagree.

The ALJ considered six interpretations of three x-rays dated April 29, 2014, October 14, 2016, and November 12, 2016. Decision and Order at 7-8. He found all the interpreting physicians are dually qualified Board-certified radiologists and B readers. *Id.*

Dr. Meyer read the April 29, 2014 x-ray as negative for complicated pneumoconiosis. Employer's Exhibit 13. Although the ALJ found this x-ray negative for complicated pneumoconiosis because of Dr. Meyer's unrebutted reading, he permissibly assigned it diminished weight because it is two years older than the 2016 x-rays and the regulations recognize pneumoconiosis as a progressive and irreversible disease.[15] *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); Decision and Order at 8.

Drs. Meyer and Seaman read the October 14, 2016 x-ray as positive for complicated pneumoconiosis, Category A, whereas Drs. Whitehead and Miller read it as negative for the disease. Director's Exhibit 16; Claimant's Exhibits 2, 7; Employer's Exhibit 2. The ALJ permissibly found the readings of this x-ray are in equipoise because an equal number of dually-qualified radiologists read it as positive and negative for complicated pneumoconiosis. *Adkins*, 958 F.2d at 51-52.

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[14] The record does not contain biopsy evidence. 20 C.F.R. §718.304(b).

[15] The ALJ held, in the alternative, that he cannot weigh the April 29, 2014 x-ray because it is part of the Miner's prior claim and thus cannot be considered until Claimant establishes a change in an applicable condition of entitlement. 20 C.F.R. §725.309; Decision and Order at 8. Employer argues this was error. Employer's Brief at 28. Because the ALJ assigned this x-ray diminished weight based on its age, and Employer does not challenge this alternative finding, it has not set forth 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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Dr. Seaman interpreted the November 12, 2016 x-ray as positive for complicated pneumoconiosis, Category A. Claimant's Exhibit 8. The ALJ found this x-ray positive for complicated pneumoconiosis based on Dr. Seaman's unrebutted reading. Decision and Order at 8-9. He ultimately found the preponderance of the x-ray evidence establishes complicated pneumoconiosis because the "most recent designated x-ray is positive for complicated pneumoconiosis." *Id.*; *see Woodward*, 991 F.2d at 319-20; *Adkins*, 958 F.2d at 51-52.

Employer argues the ALJ erred in crediting the November 12, 2016 x-ray because it alleges the ALJ failed to consider the medical opinions of Drs. Rosenberg and Tuteur. Employer's Brief at 25-27. It contends both doctors explained why this x-ray does not support a finding of complicated pneumoconiosis. *Id.* Contrary to Employer's argument, the ALJ weighed these medical opinions under 20 C.F.R. §718.304(c) and found them unpersuasive as discussed below. Decision and Order at 10-11.

We also reject Employer's argument that the ALJ erred in failing to consider the x-rays from the Miner's treatment records. Employer's Brief at 25-27. An ALJ has discretion to determine the weight to accord diagnostic testing that is silent on the existence of pneumoconiosis. *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). The ALJ acknowledged the "Miner's treatment records include additional x-rays that revealed pleural effusions, infiltrates in the lung bases, chronic interstitial lung changes and disease, and hyperinflation." Decision and Order at 9. He found, however, that because "the interpretations do not attribute the changes to coal mine dust exposure and are silent as to the presence or absence of pneumoconiosis," they are entitled to "little weight." *Id.* Because we see no error in the ALJ's consideration of these x-rays, we affirm his finding that they do not weigh against a finding of complicated pneumoconiosis. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012) (ALJ's function is to weigh the evidence, draw appropriate inferences, and determine credibility); Decision and Order at 9.

Because it is supported by substantial evidence, we affirm the ALJ's conclusion that Claimant established complicated pneumoconiosis based on the November 12, 2016 x-ray. 20 C.F.R. §718.304(a).

Section 718.304(c) - Medical Opinions

Employer challenges the ALJ's finding that the medical opinion evidence establishes complicated pneumoconiosis. 20 C.F.R. 718.304(c); Employer's Brief at 29-30. The ALJ considered Dr. Sood's opinion that the Miner had complicated pneumoconiosis and the contrary opinions of Drs. Rosenberg and Tuteur that he did not. Claimant's Exhibits 5, 11; Employer's Exhibits 3, 4, 12. The ALJ attributed little weight

to the opinions of Drs. Rosenberg and Tuteur as he found them inadequately reasoned, and he assigned probative weight to Dr. Sood's opinion as he found it well-reasoned and documented.[16] Decision and Order at 10-11.

Employer argues the ALJ erred in crediting Dr. Sood's opinion. Employer's Brief at 30. We disagree.

Dr. Sood initially opined he was unable to confirm or deny the presence of complicated pneumoconiosis because the x-rays he reviewed were conflicting. Claimant's Exhibit 5. After reviewing additional x-ray interpretations showing large opacities and reviewing additional medical records, however, Dr. Sood diagnosed complicated pneumoconiosis. Claimant's Exhibit 11. The ALJ found Dr. Sood based his opinion on the Miner's coal mine employment, social and medical histories, objective testing, and review of other medical reports. Decision and Order at 10. The ALJ permissibly found Dr. Sood's opinion well-reasoned and documented.[17] *See Banks*, 690 F.3d at 489; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 10.

Employer argues the ALJ erred in discrediting the opinions of Drs. Rosenberg and Tuteur. Employer's Brief at 29-30. We disagree.

Dr. Rosenberg opined the Miner did not have complicated pneumoconiosis. Employer's Exhibit 3. He attributed the radiographic abnormalities to the Miner's congestive heart failure and associated fluid retention rather than coal mine dust exposure. Employer's Exhibit 12 at 38. Specifically, he explained the large densities in the Miner's lungs are not attributable to pneumoconiosis because cases of "latent and progressive pneumoconiosis are rare," especially where "a miner has left coal mine employment with a negative x-ray." *Id.* The ALJ permissibly found this explanation unpersuasive because Dr. Rosenberg did not explain why the Miner could not be "one of the rare cases of latent

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[16] The ALJ also considered Dr. Istanbouly's opinion that the Miner had only simple pneumoconiosis. Decision and Order at 10; Director's Exhibit 15. He permissibly assigned the opinion less weight as the physician simply restated Dr. Whitehead's negative x-ray reading and did not review additional medical evidence of record. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 10; Director's Exhibit 15.

[17] Contrary to Employer's argument, the ALJ was not required to discredit Dr. Sood's opinion as equivocal because the doctor initially did not diagnose complicated pneumoconiosis but subsequently did after reviewing additional medical records. *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006) ("refusal to express a diagnosis in categorical terms is candor, not equivocation"); Employer's Brief at 30.

pneumoconiosis." Decision and Order at 11; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012); *Spring Creek Coal Company v. McLean*, 881 F.3d 1211, 1224-26 (10th Cir. 2018); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

Dr. Tuteur opined the Miner's interstitial pulmonary process is a "manifestation of the increased lung water caused by [his] congestive heart failure." Employer's Exhibit 4. Based on his review of the medical evidence, he found it revealed the Miner developed neither pneumoconiosis nor a pulmonary disease related to the inhalation of coal mine dust. *Id.* The ALJ permissibly found his opinion inadequately explained because he did not set forth "how he determined the changes in [the] Miner's lungs were [due to] increased water in the lungs" as a result of congestive heart failure and not attributable to the inhalation of coal mine dust. Decision and Order at 11; *see Banks*, 690 F.3d at 489; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Employer argues Dr. Sood's opinion is not adequately reasoned, and Drs. Rosenberg and Tuteur persuasively explained why the Miner did not have complicated pneumoconiosis. Employer's Brief at 25-30. Employer's argument amounts to a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established the Miner had complicated pneumoconiosis based on the medical opinion evidence. 20 C.F.R. §718.304(c).

We also affirm the ALJ's finding that all of the relevant evidence, when weighed together,[18] establishes complicated pneumoconiosis.[19] 20 C.F.R. §718.304; *see Gray*, 176 F.3d at 389; *Melnick*, 16 BLR at 1-33-34; Decision and Order at 11-12.

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[18] The ALJ permissibly assigned diminished weight to the negative CT scans dating from 2013 and 2014 because they "pre-date[] the designated chest x-rays in the record and so cannot be used to preclude a diagnosis of complicated pneumoconiosis as pneumoconiosis is recognized as a latent and progressive disease." Decision and Order at 12; *see Woodward*, 991 F.2d at 319-20; *Adkins*, 958 F.2d at 51-52.

[19] Employer also argues the ALJ erred in finding complicated pneumoconiosis because the objective tests do not demonstrate a disabling respiratory impairment. Employer's Brief at 29. We disagree. Contrary to Employer's assertion, the regulations do not require pulmonary function study or blood gas study results that meet the DOL standards for establishing total disability to invoke the irrebuttable presumption. 20 C.F.R. §718.304(a)-(c).

We also affirm his unchallenged finding that the Miner's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12. Consequently, we affirm his finding that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis and the award of benefits. 30 U.S.C. §921(c)(3).

Commencement Date for Benefits

The date for the commencement of benefits is the month in which the Miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date is not ascertainable, benefits commence the month the claim was filed, unless evidence the ALJ credits establishes the Miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4 (4th Cir. 1986); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). If the ALJ finds Claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, the ALJ must determine whether the evidence establishes the onset date of complicated pneumoconiosis. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979).

We disagree with Employer that the ALJ was required to find that benefits commence the month in which the Miner's complicated pneumoconiosis was first diagnosed in the record. Employer's Brief at 30-31. As the Board explained in *Owens*, 14 BLR at 1-50, the onset date is not established by the first medical evidence of record indicating total disability, as such medical evidence shows only that the Miner became totally disabled at some prior date. *See also Meraschoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-109 (1985).

Weighing all of the evidence, the ALJ permissibly found "the record does not establish when [the] Miner's simple pneumoconiosis first became complicated pneumoconiosis" because "[n]o physician of record expressed an opinion on this matter and the objective studies do not reflect a decline from which one could infer a date upon which the transition occurred." Decision and Order at 13; *see Banks*, 690 F.3d at 489; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Because it is supported by substantial evidence, we affirm the ALJ's finding that benefits commence in August 2016, the month and year in which the Miner filed his claim for benefits. 20 C.F.R. §725.503(b).

Accordingly, the ALJ's Decision and Order Granting Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge