U.S. Department of Labor

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

BRB No. 20-0262 BLA

BOBBY S. JUSTUS Claimant-Respondent v. WELLMORE ENERGY COMPANY and OLD REPUBLIC INSURANCE COMPANY, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/20/2021 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Jeffrey S. Goldberg (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Jonathan C. Calianos's Decision and Order Granting Benefits (2018-BLA-05677) rendered on a claim filed on February 28, 2017, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

In his Decision and Order issued March 23, 2020, the administrative law judge accepted the parties' stipulation that Claimant established more than fifteen years of underground coal mine employment. He determined Claimant established complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.304, 718.203, and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018). Accordingly, the administrative law judge awarded benefits.

On appeal, Employer argues the administrative law judge lacked the authority to preside over the case because he had not been appointed in a manner consistent with the Appointments Clause of the Constitution.[1] It also argues that the removal provisions applicable to administrative law judges violate the separation of powers doctrine and render his appointment unconstitutional. On the merits, Employer contends the administrative law judge erred in finding Claimant established complicated pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting the

[1] 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.

administrative law judge had authority to adjudicate the claim. Employer replied to Claimant's brief, reiterating its contentions.[2]

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

Appointments Clause Challenge

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[4] Employer's Brief at 9-17; Employer's Reply Brief at 1-3. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[5] but maintains the ratification was insufficient to cure the

[2] We affirm, as unchallenged, the administrative law judge's finding that Claimant established over fifteen years of qualifying coal mine employment. S*ee Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2, 3 n.2.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 11.

[4] *Lucia* involved an Appointments Clause challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC administrative law judges 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)).

[5] The Secretary of Labor issued a letter to the administrative law judge 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

constitutional defect in the administrative law judge's prior appointment.[6] Employer's Brief at 13; Employer's Reply Brief at 2.

The Director argues the administrative law judge 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 2-3. We agree with the Director's argument.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 2 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). 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). Ratification is permissible so long as the agency head: 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 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). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with "the burden shifting to the attacker to show 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 administrative law judges 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 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 administrative law judges in a single letter. Rather, he specifically identified Administrative Law Judge Calianos and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge

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> Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to Administrative Law Judge Calianos.

[6] On July 20, 2018, the Department of Labor (DOL) expressly conceded the Supreme Court's holding in *Lucia* applies to the DOL administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

Calianos. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Calianos "as an Administrative Law Judge." *Id.*

Employer does not assert the Secretary had no "knowledge of all the material facts," and generally speculates he did not make a "genuine, let alone thoughtful, consideration" when he ratified Judge Calianos's appointment. Employer's Brief at 12. 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 administrative law judge's appointment.[7] *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (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 592, 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 also reject Employer's argument that Executive Order 13843, which removes administrative law judges from the competitive civil service, "confirms" its Appointments Clause argument because incumbent administrative law judges remain in the competitive service pending promulgation of implementing regulations. Employer's Brief at 17. 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 Judge Calianos's appointment, which we have held constituted a valid exercise of his authority, bringing the administrative law judge's 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 for a new hearing before a different administrative law judge.

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[7] That the Secretary signed the ratification letter "with an autopen" does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 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"); Employer's Brief at 12.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded administrative law judges. Employer's Brief at 13-17; Employer's Reply Brief at 4. Employer 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 13-16. 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), *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), and 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. , 2021 WL 2519433 (U.S. June 21, 2021). Employer's Brief at 13-16; Employer's Reply Brief at 1-3.

In *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as administrative law judges" who, "unlike members of the [PCAOB] . . . perform adjudicative rather than enforcement or policymaking functions." *Id*. at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[8] 140 S. Ct. at 2201. It did not address administrative law judges.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 2021 WL 2519433, at *11. The Court explained "the *unreviewable authority* wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* (emphasis added). In contrast, DOL administrative law judges' decisions are subject to further executive agency review by this Board.

[8] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

Employer has not explained how or why these legal authorities should apply to DOL administrative law judges or otherwise undermine the administrative law judge's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized that "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional.

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, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The administrative law judge must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether 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, 255-56 (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 (1991) (en banc).

The administrative law judge found the x-ray evidence in equipoise but the computed tomography (CT) scan evidence supported a finding of complicated pneumoconiosis. He assigned little weight to the medical opinion evidence. Weighing all the evidence together, the administrative law judge found Claimant invoked the irrebuttable presumption. Employer challenges the administrative law judge's weighing of the x-ray, CT scan, and medical opinion evidence.

X-ray Evidence at Section 718.304(a)

The administrative law judge considered ten interpretations of three x-rays dated May 11, 2017;[9] October 6, 2017;[10] and December 14, 2017.[11] He found an equal number of physicians, dually qualified as Board-certified radiologists and B readers, interpreted each x-ray as positive for complicated pneumoconiosis, Category A large opacities, or as negative for complicated pneumoconiosis. Director's Exhibits 11, 15-17; Claimant's Exhibits 2, 4; Employer's Exhibits 1, 8, 9. The administrative law judge found each x-ray, and the x-ray evidence as a whole, to be in equipoise as to the existence of complicated pneumoconiosis. Decision and Order at 7-8.

Employer argues the x-ray evidence is not in equipoise. It asserts Dr. Crum's positive readings are not "definitive" diagnoses of complicated pneumoconiosis because he noted findings "consistent" with complicated pneumoconiosis and either recommended comparison with prior x-rays or confirmation by a CT scan. Employer's Brief at 18.

[9] Drs. Adcock and Meyer, both dually qualified as Board-certified radiologists and B readers, interpreted the May 11, 2017 x-ray as showing no large opacities consistent with complicated pneumoconiosis. Director's Exhibit 17; Employer's Exhibit 9. Dr. Meyer additionally observed an "[i]ll-defined opacity in both upper zones, right greater than left," and found that a "[v]ague opacity over the right first rib may be axillary coalescence." Employer's Exhibit 9. By contrast, Drs. DePonte and Crum, also both dually qualified, interpreted this x-ray as showing a Category A opacity. Director's Exhibit 11; Claimant's Exhibit 4. Dr. Crum additionally observed "[e]xtensive parenchymal disease, coalescence, [and] likely upper lobe lung opacity, which could be confirmed with CT. F[ollow-]u[p] recommended." Claimant's Exhibit 4.

[10] Dr. Adcock and Dr. Meyer interpreted the October 6, 2017 x-ray as showing no large opacities consistent with complicated pneumoconiosis. Director's Exhibit 18; Employer's Exhibit 8. By contrast, Drs. DePonte and Crum interpreted this x-ray as showing a Category A opacity. Director's Exhibit 16 at 2, 11. Dr. Crum additionally observed "likely upper lobe opacity [is] obscured by scapula; [t]his could be confirmed with [a] CT [of the] chest; [follow-up] recommended." *Id.* at 3.

[11] Dr. Adcock interpreted the December 14, 2017 x-ray as showing no large opacities consistent with complicated pneumoconiosis. Employer's Exhibit 1. By contrast, Dr. Crum interpreted this x-ray as showing a Category A opacity and commented, "[f]indings [are] consistent with complicated [pneumoconiosis]; [c]omparison to priors [and follow-up] recommended to document stability." Claimant's Exhibit 2.

Employer also alleges the administrative law judge did not properly consider whether Claimant has a chronic lung disease. Employer's arguments lack merit.

Statutory "complicated pneumoconiosis" is established by the application of congressionally defined criteria. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Under the statute, "complicated pneumoconiosis" is a chronic dust disease of the lung which, when diagnosed by chest x-ray, "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 Pneumoconioses by the International Labour Organization" (ILO System). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; *see Scarbro*, 220 F.3d at 257-58. Because the ILO System classifies x-ray opacities as "consistent with" pneumoconiosis, the administrative law judge permissibly concluded that each of the five ILO classified x-ray readings identifying Category A large opacities support a finding that Claimant has complicated pneumoconiosis, a chronic lung disease as defined by the Act. *See* 30 U.S.C. §921(c)(3); 20 C.F.R §§718.201, 718.304(c); *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999).

Additionally, Employer's assertion that Dr. Crum's opinion lacks credibility because he did not read the x-rays "in a series" is unpersuasive because Dr. Crum reviewed all the available radiological evidence. Director's Exhibit 16; Claimant's Exhibits 2, 4. Moreover, he confirmed his diagnosis by CT scan. As discussed below, after reading the x-ray evidence and noting his preference for CT scan confirmation, he specifically reviewed earlier CT scans and maintained his diagnosis of complicated pneumoconiosis. Claimant's Exhibits 1, 3. Because we see no error in the administrative law judge's finding that the x-ray evidence is in equipoise for complicated pneumoconiosis, we affirm it. Decision and Order at 8.

Other Medical Evidence pursuant to Section 718.304(c)[12]

CT Scan Evidence

The administrative law judge considered four interpretations of two CT scans dated December 11, 2014, and February 9, 2015. Dr. Crum interpreted both CT scans as positive for complicated pneumoconiosis, while Dr. Adcock interpreted them as negative for complicated pneumoconiosis. Claimant's Exhibits 1, 3; Employer's Exhibits 2, 3; Decision and Order at 8-11.

[12] The administrative law judge noted the record contains no biopsy or autopsy evidence for consideration at 20 C.F.R. §718.304(b). Decision and Order at 6.

Dr. Crum interpreted the December 11, 2014 CT scan as:

> reveal[ing] multiple bilateral small opacities predominantly within the upper and middle lung zones. . . . Also within the right upper lung is multiple large opacity's [sic] with greatest dimensions totaling greater than 5 cm in size consistent with category B complicated pneumoconiosis. . . . The CT scan findings confirm the presence of large opacity's [sic] consistent with complicated pneumoconiosis which was reported on numerous chest x-rays.

Claimant's Exhibit 1. Dr. Crum concluded this CT scan is "consistent with category B complicated pneumoconiosis/progressive massive fibrosis." *Id.* In contrast, Dr. Adcock interpreted the same CT scan as showing:

> [t]wo dense nodules, likely calcified, are present in the lateral aspect of the posterior segment of the right upper lobe. . . . No small or large opacities of occupational lung disease.

Employer's Exhibit 2 at 1. Dr. Adcock opined that Claimant's right upper lobe fibrosis is "most consistent with remote mycobacterial infection, considering its configuration, the absence of small opacities, and the presence of granulomata." *Id.* at 2.

With regard to the February 9, 2015 CT scan, Dr. Crum stated that the images "were somewhat suboptimal secondary to breathing motion, artifact, and slice acquisition." Claimant's Exhibit 3 at 1. Despite these issues, Dr. Crum saw: "multiple small opacities consistent with pneumoconiosis;" "multiple areas of coalescence . . . within the right upper lung;" and a large opacity measuring greater than 5 cm in size "most consistent with category B complicated pneumoconiosis/progressive massive fibrosis." *Id.* He concluded these findings were consistent with "severe parenchymal and interstitial lung disease consistent with category B complicated pneumoconiosis." *Id.*

Reviewing the same CT scan, Dr. Adcock observed "no change" since Claimant's December 11, 2014 CT scan and stated "[t]he few, scattered, dense nodules apparent on the previously [sic] study are poorly demonstrated [on this CT scan] due to the low mA technique." Employer's Exhibit 3 at 1. He again concluded: "[t]here are no small or large opacities characteristic of occupational lung disease," and Claimant's right upper lobe fibrosis is "most consistent with remote mycobacterial infection, considering its configuration, the absence of small opacities, and the presence of granulomata as demonstrated on the comparison study." *Id.* at 1-2.

The administrative law judge noted that "while Dr. Adcock concluded that there are no large opacities 'of occupational disease,' this is not the same as a determination that there are no large opacities present, regardless of the underlying etiology." Decision and

Order at 10, *quoting* Employer's Exhibit -2 at 1 (emphasis added). He further noted Dr. Adcock indicated "the [December 11, 2014] CT scan showed '[t]wo dense nodules . . . in the lateral aspect of the posterior segment of the right upper lobe,' which is the same location in which Crum identified large opacities greater than 5 centimeters in size." Finding Dr. Crum's readings more persuasive regarding the etiology of the large opacities, the administrative law judge concluded the CT scan evidence supported a finding of complicated pneumoconiosis. Decision and Order at 10-11.

Initially, we reject Employer's assertion that the administrative law judge mischaracterized Dr. Crum's CT scan interpretations as definitive diagnoses of complicated pneumoconiosis because he identified a large opacity "consistent with category B complicated pneumoconiosis/progressive massive fibrosis." Employer's Brief at 19; Claimant's Exhibits 1, 3. It was within the administrative law judge's discretion to find Dr. Crum's opinion unequivocal and sufficient to support a finding that Claimant has complicated pneumoconiosis as he diagnosed a 5 centimeter Category B large opacity consistent with complicated pneumoconiosis/progressive massive fibrosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); Decision and Order at 8-9; Claimant's Exhibits 1, 3. We see no error in the administrative law judge's finding that Dr. Crum's radiological description establishes a chronic lung disease that satisfies the regulatory criteria. *See* 30 U.S.C. §921(c)(3); *Perry*, 469 F.3d at 366.

We also reject Employer's argument the administrative law judge erred in finding Drs. Crum and Adcock equally qualified to review the CT scan evidence because he "overlooked" Dr. Adcock's "special expertise" in reading CT scans.[13] *See* Employer's Brief at 19-20; Employer's Reply Brief at 3-4. The DOL has not issued guidelines for administrative law judges to follow when assessing the reliability of a CT scan reading. In the absence of controlling statutory or regulatory rules, an administrative law judge's weighing of CT scan evidence may be accorded deference, unless it is found to be irrational or unlawful. *See Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 893-94 (7th Cir. 2002). The administrative law judge permissibly found Drs. Crum and Adcock equally qualified to review the CT scan evidence because each is a Board-certified radiologist and a B-reader. Decision and Order at 10; Claimant's Exhibit 1; Employer's Exhibit 4. The administrative law judge was not required to give Dr. Adcock greater weight based on his allegedly specialized expertise in interpreting CT scans. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc), *aff'd on recon*., 24 BLR 1-13 (2007) (en banc); *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003);

[13] Employer asserts Dr. Adcock described training and experience in interpreting CT scans for occupational lung disease, while Dr. Crum did not. Employer's Brief at 19-20 (referencing Employer's Exhibits 2 and 3); Employer's Reply Brief at 3.

Worhach v. Director, OWCP, 17 BLR 1-105, 1-108 (1993); *see also J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78, 1-90 n.13 (2008); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-65 (2004) (en banc). Thus, we reject Employer's contention of error.

Lastly, Employer asserts the administrative law judge did not apply the same level of scrutiny in weighing Drs. Adcock's and Crum's opinions, and improperly shifted the burden of proof because he required Dr. Adcock to rule out complicated pneumoconiosis. We disagree.

The administrative law judge permissibly found Dr. Adcock's opinion that Claimant's "pulmonary condition is 'likely' a result of a mycobacterial infection is speculative and equivocal and not based on any medical evidence that [he] has a history of mycobacterial infection." Decision and Order at 11; *see Cox*, 602 F.3d at 287. Further, the administrative law judge noted Dr. Adcock "provided no explanation of how the configuration seen on the CT scans supported a finding of mycobacterial infection, how he determined the presence of granulomata, or how his findings were inconsistent with a diagnosis of pneumoconiosis." Decision and Order at 11; *see Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). The administrative law judge also permissibly discounted Dr. Adcock's CT scan interpretations because they were predicated on his belief that Claimant does not have simple coal workers' pneumoconiosis, contrary to the parties' stipulation. Decision and Order at 14; *see Hicks*, 138 F.3d at 533.

Conversely, we see no error in the administrative law judge's finding that Dr. Crum credibly diagnosed complicated pneumoconiosis based on his identification of simple pneumoconiosis on the CT scans, large opacities measuring over five centimeters, and other radiological findings he noted to be consistent with complicated pneumoconiosis. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 10-11, 14. Consequently, the administrative law judge's analysis does not reflect an improper shifting of the burden of proof, but rather a proper exercise of his discretion in determining the credibility of the evidence. *See Clark*, 12 BLR at 1-155.

Thus, Employer's arguments amount 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). We therefore affirm the administrative law judge's determination that the CT scan evidence supports a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(c).

Medical Opinion Evidence

The administrative law judge also considered the medical opinions of Drs. Green[14] and Fino.[15] Decision and Order at 12-13; Director's Exhibit 11; Employer's Exhibits 5, 6. He gave little weight to Dr. Green's opinion diagnosing complicated pneumoconiosis because it was based on a single positive x-ray interpretation. Decision and Order at 13; Director's Exhibit 11. He also rejected Dr. Fino's opinion that Claimant does not have complicated pneumoconiosis for failing to consider all of the CT scan evidence. *Id.*

Employer argues the administrative law judge failed to properly consider that Dr. Fino reviewed "the entire record, including pulmonary function studies and blood gas tests [that] did not suggest total disability." Employer's Brief at 21. Dr. Fino, however, excluded a diagnosis of complicated pneumoconiosis based on his consideration of the radiological evidence and did not mention the objective testing as support for his opinion. Employer's Exhibits 15, 16. Moreover, the administrative law judge permissibly found Dr. Fino's opinion less credible for failing to discuss the positive CT scan evidence; we thus affirm his determination to give it little weight. Decision and Order at 13-14; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Weighing the Evidence as a Whole

The administrative law judge found Claimant established the existence of complicated pneumoconiosis based on Dr. Crum's positive readings of the CT scan evidence at 20 C.F.R. §718.304(c) and his consideration of the evidence as a whole. Employer does not identify any specific error with the administrative law judge's finding other than its arguments that we have previously addressed and rejected. Thus, we affirm

[14] Dr. Green examined Claimant on DOL's behalf on May 11, 2017. Director's Exhibit 11. Based on Claimant's x-ray conducted on that date, Dr. Green diagnosed a large Category A opacity consistent with progressive massive fibrosis. *Id.* at 4.

[15] Dr. Fino examined Claimant on Employer's behalf on December 14, 2017, and conducted a medical records review. Employer's Exhibits 5, 6. He initially diagnosed Claimant with complicated pneumoconiosis based on his review of the December 14, 2017 x-ray. Employer's Exhibit 5 at 6-7. However, upon reviewing Dr. Adcock's negative interpretations of the December 11, 2014 and February 9, 2015 CT scans, Dr. Fino concluded "CT scans are more precise and accurate than a plain film. Therefore, I can now rule out the presence of complicated coal workers' pneumoconiosis in this case." Employer's Exhibit 6.

the administrative law judge's finding that Claimant established complicated pneumoconiosis as supported by substantial evidence. 20 C.F.R. §718.304; *Cox*, 602 F.3d at 283; *Lester*, 993 F.2d at 1145-46; Decision and Order at 14.

20 C.F.R. §718.203 - Disease Causation

Employer contends the administrative law judge failed to adequately explain his finding that Claimant's complicated pneumoconiosis arose out of his coal mine employment. We disagree. As the parties stipulated that Claimant has more than fifteen years of qualifying coal mine employment, the administrative law judge properly found Claimant entitled to the presumption that his complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); Decision and Order at 14-15. Further, because the administrative law judge permissibly found Dr. Adcock's opinion speculative as to the etiology of Claimant's pulmonary condition, we see no error in his conclusion that Employer did not rebut the presumption of disease causation. We therefore affirm the administrative law judge's finding that Claimant established his complicated pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(b) and invoked the irrebuttable presumption. Decision and Order at 15.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge