**U.S. Department of Labor**

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

BRB No. 22-0002 BLA

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| GEORGE A. SIMPSON | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| UNICORN MINING, INCORPORATED | ) | |
| | ) | |
| and | ) | |
| | ) | |
| OLD REPUBLIC INSURANCE COMPANY | ) | DATE ISSUED: 6/23/2023 |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

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

Ann Marie Scarpino (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) Jason A. Golden's Decision and Order Awarding Benefits (2019-BLA-05970) rendered on a subsequent claim filed on August 31, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ accepted the parties' stipulation that Claimant worked at least fifteen years in coal mine employment and found he has complicated pneumoconiosis. 20 C.F.R §718.304. Thus, the ALJ found Claimant 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) (2018), and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.304, 725.309(c). He further found Claimant's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203(b).

On appeal, Employer argues the ALJ lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution.[2] It also argues the removal provisions applicable to ALJs

[1] This is Claimant's fourth claim for benefits. Director's Exhibits 1-3. The district director denied Claimant's prior claim for failure to establish any element of entitlement, and Claimant took no further action on that claim. Director's Exhibit 3.

When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *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 Claimant's third claim was denied for failure to establish any element of entitlement, he had to submit new evidence establishing any element of entitlement to obtain review of the merits of his current claim. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3.

[2] 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,

render his appointment unconstitutional. Further, it contends the ALJ erred in refusing to consider its closing brief. On the merits of entitlement, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis and failed to determine whether he established a change in an applicable condition of entitlement since the denial of his prior claim. Finally, it contends the ALJ erred in finding that the date for the commencement of benefits is August 2009.[3] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, responded, urging rejection of Employer's constitutional challenges. Employer filed a reply,[4] reiterating its arguments.

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.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc*., 380 U.S. 359, 361-62 (1965).

**Appointments Clause and Removal Provisions**

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

> 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.

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

[4] Employer filed its reply brief a day late, filing with it a Motion for Leave to File Brief Instanter. The Benefits Review Board granted Employer's motion and accepted its brief as a part of the record in an order issued June 29, 2022.

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 18.

U.S. , 138 S. Ct. 2044 (2018).[6] Employer's Brief at 32-37; Employer's Reply 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,[7] but maintains the ratification was insufficient to cure the constitutional defect in ALJ Golden's prior appointment. Employer's Brief at 34-36; Employer's Reply 1-4. In addition, it challenges the constitutionality of the removal protections afforded to ALJs. Employer's Brief at 39-42. Employer generally argues the removal provisions in the Administrative Procedure Act (APA), 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 39-40; Employer's Reply at 2-4. In addition, it relies on the 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 40-42; Employer's Reply at 3-4. For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , 22-0022 BLA, slip op. at 3-6 (May 26, 2023) and *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

[6] *Lucia* involved a challenge to the appointment of an ALJ 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 ALJs are "inferior officers" subject to the Appointments Clause. *Lucia*, 138 S. Ct. at 2055 (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) 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.

[7] The Secretary issued a letter to ALJ Golden on December 21, 2017, stating:

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

Secretary's December 21, 2017 Letter to ALJ Golden. ALJ Golden issued no orders in this case until his November 1, 2019 Notice of Assignment and Hearing.

**Evidentiary Challenge**

At the hearing, the ALJ set the deadline to submit post-hearing closing briefs as January 22, 2021. Hearing Transcript at 30. On January 20, 2021, Employer filed a Joint Motion for Extension of the Briefing Deadline, requesting that the deadline be extended until February 22, 2021.[8] One day after the requested deadline, on February 23, 2021, Employer filed an Unopposed Motion to Submit Brief One Day Out of Time, along with its closing brief.

The ALJ found Employer untimely filed its brief without asserting or even suggesting its late filing was justified by excusable neglect. Decision and Order at 2 n.3. He noted Claimant[9] did not oppose the request, but found the parties are not free to disregard deadlines even by agreement without permission from the ALJ and pointed to the need to effectively manage and maintain control over his docket. *Id.* Thus, he found Employer did not establish "excusable neglect" and declined to consider the brief. *Id.*

Employer argues the ALJ "failed to undertake the excusable neglect analysis" and erred in refusing to accept its brief given that Claimant did not object and it was filed only one day after Employer's requested deadline extension of February 22 (but 32 days after the ALJ's January 22 deadline). Employer's Brief at 31. Citing one order issued by the ALJ in another case, it also contends the ALJ has not always enforced deadlines in the past when claimants have filed late briefs and thus his "uneven" treatment violates the APA and due process.[10] *Id.* We disagree.

An ALJ exercises broad discretion in resolving procedural and evidentiary matters. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc). Thus, a party seeking to overturn the disposition of a procedural or evidentiary issue must establish an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

[8] The ALJ, for good cause shown, granted the joint motion *nunc pro tunc.* Decision and Order at 2 n.3.

[9] Claimant was represented by a lay representative. Decision and Order at 2 n.3.

[10] Employer points to the Administrative Procedure Act provision that "requirements or privileges relating to evidence or procedure apply equally to agencies and persons." Employer's Brief at 31 (quoting 5 U.S.C. §559, as incorporated into the Act by 30 U.S.C. §932(a)).

When an act "must be done within a specified time," the ALJ "may, for good cause, extend the time . . . on motion made after time has expired if the party failed to act because of excusable neglect." 29 C.F.R. §18.32(b)(2). The moving party bears the burden of proving that its delay is excusable. *Drippe v. Tobelinski*, 604 F.3d 778, 784 (3d Cir. 2010) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 896 n.5 (1990)).

We reject Employer's argument that the ALJ failed to consider whether Employer established excusable neglect and erred in rejecting its late submission in light of the fact that it was only one day late and Claimant did not object. Employer's Brief at 31. The ALJ set a deadline of January 22. Two days before the expiration of the deadline, Employer requested an extension to February 22. It then allowed the requested deadline to expire before it filed a second motion for an extension. *See* Employer's Unopposed Motion. The ALJ specifically considered whether Employer established excusable neglect, accurately found it provided no argument as to why its delay should be excused, and observed that the enforcement of deadlines supports the tribunal's interest in effectively and timely administering justice. Decision and Order at 2 n.3. We discern no abuse of discretion in the ALJ's determination. *Blake*, 24 BLR at 1-113; *see also Selph v. Council of L.A.*, 593 F.2d 881, 884 (9th Cir. 1979) (excusable neglect does not cover the excuse that the lawyer is too busy, which can be used in almost every case).

In addition, Employer has pointed to no evidence demonstrating that the ALJ was biased against it.[11] *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992) (charge of bias against an ALJ is not substantiated by a mere allegation but must be established by concrete evidence of prejudice against a party's interest); *see also Orange v. Island Creek Coal Co*., 786 F.2d 724 (6th Cir. 1986) (adverse rulings in a proceeding are not by themselves sufficient to show bias on the part of the ALJ). We find no bias or abuse of discretion where, as here, the ALJ declined to dispense with reasonable deadlines for the submission of closing arguments when Employer provided no information or argument to excuse its late filing. *Blake*, 24 BLR at 1-113.

[11] Employer cites to one instance in which it alleges the ALJ accepted a claimant's untimely brief in a different case. Employer's Brief at 31; Attachment to Employer's Brief. But in the case cited by Employer, the ALJ noted multiple factors in finding excusable neglect, including the declining health of the attorney who attended the hearing and the fact that the claimant had not received the employer's brief. *See* Attachment to Employer's Brief.

**Invocation of the Section 411(c)(3) Presumption**

Section 411(c)(3) of the Act 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 large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In determining whether Claimant has invoked the irrebuttable presumption, the ALJ must weigh together all evidence relevant to the presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc). The ALJ found Claimant established complicated pneumoconiosis based on the x-ray evidence and the evidence as a whole.[12] 20 C.F.R. §718.304(a); Decision and Order at 9, 13-14.

**X-ray Evidence**

The ALJ considered nine interpretations of four x-rays dated April 13, 2018, September 19, 2018, January 17, 2019, and May 7, 2019. Director's Exhibits 14, 19-22; Employer's Exhibits 1, 2; Claimant's Exhibit 2; Decision and Order at 6-9. All the interpreting physicians are dually qualified as B readers and Board-certified radiologists. Decision and Order at 7. There are conflicting readings as to the presence of both simple and complicated pneumoconiosis. *Id.* at 6-7.

Dr. DePonte interpreted the April 13, 2018 x-ray as positive for simple pneumoconiosis, profusion 1/2, and complicated pneumoconiosis, Category A. Director's Exhibit 19 at 2. Dr. Meyer interpreted the x-ray as negative for both simple and complicated pneumoconiosis.[13] Employer's Exhibit 1. The ALJ found this x-ray inconclusive for the presence of pneumoconiosis based on the conflicting readings by equally qualified physicians. Decision and Order at 7.

[12] The record contains no biopsy evidence; thus, Claimant cannot establish complicated pneumoconiosis at 20 C.F.R. §718.304(b). Decision and Order at 16.

[13] Dr. Meyer noted in his narrative report "scattered discrete bilateral nodules . . . favoring healed granulomatous infection . . . and [w]axing and waning dependent airspace opacity . . . most consistent with recurrent aspiration." Employer's Exhibit 1.

Dr. DePonte interpreted the September 19, 2018 x-ray as positive for simple pneumoconiosis, profusion 1/2, and complicated pneumoconiosis, Category A. Director's Exhibit 14 at 25. Dr. Ramakrishnan also interpreted this x-ray as positive for simple pneumoconiosis, with a 2/1 profusion, and complicated pneumoconiosis, Category B. Director's Exhibit 20 at 2. Dr. Meyer interpreted the x-ray as negative for pneumoconiosis.[14] Director's Exhibit 21 at 4. Based on the preponderance of positive readings by two dually-qualified physicians, the ALJ found this x-ray positive for simple and complicated pneumoconiosis. Decision and Order at 7.

Dr. DePonte interpreted the January 17, 2019 x-ray as positive for simple pneumoconiosis, profusion 1/2, and complicated pneumoconiosis, Category A.[15] Claimant's Exhibit 2. Dr. Meyer interpreted the x-ray as negative for pneumoconiosis.[16] Director's Exhibit 22. The ALJ found this x-ray inconclusive based on the conflicting readings by equally qualified physicians. Decision and Order at 8.

Drs. DePonte and Meyer both interpreted the May 7, 2019 x-ray as positive for simple pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 2. Dr. DePonte also determined complicated pneumoconiosis was present, Category A, while Dr. Meyer found no large opacities.[17] Claimant's Exhibit 1; Employer's Exhibit 2. The ALJ found the x-

[14] In his narrative report, Dr. Meyer stated "[t]he right middle lobe opacity has increased compared with January 2016 and is due to right middle lobe volume loss and tethering of the mediastinal fat . . . ." Director's Exhibit 21. He concluded there were no findings consistent with pneumoconiosis and the "[s]cattered, discrete bilateral nodules" favor a finding of healed granulomatous infection. *Id.*

[15] Dr. DePonte commented, "Right basilar 4-5 [centimeter] opacity, consistent with Category A large opacity. Suspect left suprahilar large opacity. CT [scan] may be confirmatory." Claimant's Exhibit 2.

[16] Dr. Meyer again noted basilar nodules that favor "prior granulomatous infection" and indicated an opacity in the right base was "demonstrated to be right middle lobe volume loss and tethering of mediastinal fat on prior chest CT [scan]s." Director's Exhibit 22.

[17] Dr. Meyer also stated in his narrative report:

> By ILO rules I must classify these findings as described[;] however[,] the bronchovascular distribution and time course favor cellular bronchiolitis which may be seen with aspiration or atypical mycobacterial infection. Recommend correlation with Chest CT [scan].

ray positive for simple pneumoconiosis but its readings inconclusive regarding complicated pneumoconiosis. Decision and Order at 8.

Weighing the x-rays together, the ALJ concluded Claimant established simple and complicated pneumoconiosis. 20 C.F.R. §§718.201, 718.304(a); Decision and Order at 9. With respect to complicated pneumoconiosis, he found that a preponderance of the x-rays establishes the disease because one is positive, three are inconclusive, and none are negative. Decision and Order at 9. After finding a preponderance of the x-rays establishes complicated pneumoconiosis, the ALJ also concluded that Dr. Meyer's interpretation of the May 7, 2019 x-ray as positive for simple pneumoconiosis lessened the credibility of his earlier negative interpretations and therefore gave his interpretations "little weight."[18] *Id.*

Employer contends the ALJ erroneously relied on a "simple headcount" in finding complicated pneumoconiosis. Employer's Brief at 47. It further argues Dr. DePonte's comments in her x-ray interpretations made them equivocal for complicated pneumoconiosis. Employer's Brief at 47-49. We disagree.

First, the ALJ did not merely count heads, but conducted both a qualitative and quantitative analysis of each x-ray, taking into consideration the physicians' radiological qualifications. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); Decision and Order at 6-9. He then weighed all of the x-rays together to conclude that a preponderance establishes complicated pneumoconiosis as one is positive, three are inconclusive, and none are negative. Decision and Order at 9.

In addition, Employer asserts that Dr. DePonte's September 19, 2018 positive x-ray reading[19] must be found equivocal because she identified "a 4-5 [centimeter] right infrahilar opacity" and added "[c]ompare to previous [x-ray] or chest CT [scan] to exclude

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Employer's Exhibit 2.

[18] Employer does not challenge this credibility finding; thus, it is affirmed. *See Skrack*, 6 BLR at 1-711; Decision and Order at 9.

[19] Employer argues Dr. DePonte provided "equivocal readings" of the September 19, 2018 and January 17, 2019 x-rays because she indicated a computed tomography (CT) scan should be utilized to exclude a malignancy. Employer's Brief at 47-49. While Dr. DePonte stated "[c]ompare to previous [x-ray] or chest CT [scan] to exclude malignancy" in the comments of her September 19, 2018 x-ray interpretation, Director's Exhibit 14, in the January 17, 2019 interpretation, Dr. DePonte did not indicate that malignancy should be excluded. Claimant's Exhibit 2.

malignancy." Employer's argument, however, misunderstands the burden of proof.[20] Claimant's burden is not to definitively establish complicated pneumoconiosis or to rule out all possible causes of an opacity. Rather, Claimant's burden is to establish it is more likely than not that he suffers from complicated pneumoconiosis. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282-83 (4th Cir. 2010). And in so doing, a physician's "refusal to express a diagnosis in categorical terms is candor, not equivocation." *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006). Thus, although Dr. DePonte stated a comparison to prior x-rays could "exclude malignancy," she nevertheless explicitly diagnosed a Category A large opacity of complicated pneumoconiosis. Moreover, in addressing various physicians' comments recommending comparisons to other x-rays and CT scans to exclude malignancy, the ALJ gave "little weight" to the alternative diagnoses because Claimant's most recent treatment records contain no diagnosis of lung cancer. Decision and Order at 17; Claimant's Exhibit 4. Indeed, Employer does not claim that malignancy could be the cause of the large opacity identified by the physicians, but rather contends it is due to recurrent pneumonias or other infections. Employer's Brief at 5, 51.

Moreover, even assuming the ALJ did not sufficiently address Dr. DePonte's comment regarding malignancy, Employer has not explained how this would change the outcome. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). The ALJ found Dr. Meyer's x-ray interpretations, the only x-ray evidence designated in the record that did not identify complicated pneumoconiosis, to be worthy of less weight, and further found no reason to reduce the weight accorded to Dr. Ramakrishnan's diagnosis of complicated pneumoconiosis. Decision and Order at 8-9. Employer does not challenge either of these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Thus, any alleged error by the ALJ in inadequately addressing Dr. DePonte's recommendation that malignancy be ruled out in her earlier x-ray interpretation is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

As he performed both a qualitative and quantitative analysis of the x-ray evidence, we affirm the ALJ's finding that the x-rays establish complicated pneumoconiosis. 20 C.F.R. §718.304(a); *Staton*, 65 F.3d at 59; *Woodward*, 991 F.2d at 321; Decision and Order at 9.

[20] Contrary to Employer's argument, the ALJ did not shift the burden to Employer to prove the large opacity was not the result of complicated pneumoconiosis. Employer's Brief at 50. Rather, the ALJ weighed each category of evidence, separately and together, and correctly indicated that Claimant had the burden to establish complicated pneumoconiosis by a preponderance of the evidence. Decision and Order at 13-14.

**Other Medical Evidence**

The ALJ next considered the "other medical evidence" in the form of CT scans, Claimant's treatment records, and medical opinion evidence. 20 C.F.R. §718.304(c); Decision and Order at 9-13.

**CT Scan**

The record contains one newly-submitted CT scan, dated April 8, 2013 and read by Dr. DePonte. Claimant's Exhibit 5. She diagnosed clinical pneumoconiosis and noted nodules as large as fifteen millimeters, but she did not specifically diagnose complicated pneumoconiosis or complete an International Labour Organization (ILO) form. *Id.* While Employer argues the ALJ failed to consider this evidence, the ALJ specifically discussed Dr. DePonte's CT scan reading and found it consistent with his findings that the x-ray evidence is positive for simple pneumoconiosis, and that it weighed neither for nor against a finding of complicated pneumoconiosis. Decision and Order at 9-10. We affirm the ALJ's finding as it is rational and supported by substantial evidence. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984) (ALJ has discretion to find an x-ray that is silent on the existence of pneumoconiosis as inconclusive); Employer's Brief at 51. Moreover, given the progressive and irreversible nature of pneumoconiosis, Employer has not explained how Dr. DePonte's interpretation of the April 2013 CT scan as positive for at least simple pneumoconiosis undermines her diagnoses of complicated pneumoconiosis on x-rays taken five to six years later. *See Woodward*, 991 F.2d at 319-20 (recognizing that pneumoconiosis is a progressive disease).

**Medical Opinions**

The ALJ considered the medical opinions of Drs. Ajjarapu, Jarboe, and Rosenberg. Decision and Order at 11-13. Dr. Ajjarapu diagnosed complicated pneumoconiosis, while Drs. Jarboe and Rosenberg did not, opining the large opacity identified on x-ray is consolidation or volume loss due to recurrent infections. Director's Exhibits 14, 23; Employer's Exhibits 4, 5.

The ALJ found all the physicians' opinions undermined. He gave Dr Ajjarapu's opinion "little weight" as her diagnosis was simply a restatement of Dr. DePonte's x-ray reading. Decision and Order at 11; Director's Exhibit 14. He found Dr. Jarboe's opinion undermined as reliant on Dr. Meyer's x-ray interpretations. Decision and Order at 12. Finally, he determined that Dr. Rosenberg's opinion was inadequately explained. *Id.* at 13. Thus, he found the medical opinion evidence worthy of little weight. *Id.*

Employer contends the ALJ erred in "summarily" rejecting Drs. Jarboe's and Rosenberg's opinions based on an impermissible headcount of the x-ray readings, and

otherwise ignoring their conclusions that complicated pneumoconiosis could be excluded based on Claimant's "whole health picture," which demonstrates the large opacity is the result of recurrent pneumonia. Employer's Brief at 47, 50-51. We disagree.

As we held above, the ALJ did not simply perform a "headcount" of the x-ray readings; he performed the requisite qualitative and quantitative analysis. *See supra* at 9-10. Nor did the ALJ "ignore" Drs. Jarboe's and Rosenberg's opinions.

As noted, the ALJ accorded Dr. Jarboe's opinion "little weight" because he relied heavily upon Dr. Meyer's x-ray readings in forming his diagnosis, and the ALJ accorded Dr. Meyer's x-ray interpretations little weight, a finding we have affirmed. Decision and Order at 12. Employer has not challenged this basis for finding Dr. Jarboe's opinion undermined; thus, it is also affirmed. *See Skrack*, 6 BLR at 1-711.

In addition, contrary to Employer's argument, the ALJ considered Dr. Rosenberg's opinion that the large opacity was not complicated pneumoconiosis but was rather a post-inflammatory process and that the "natural history" of Claimant's respiratory issues do not "seem to support" a finding of complicated pneumoconiosis. Employer's Brief at 50-52; Employer's Exhibit 5; Decision and Order at 12-13. He found Dr. Rosenberg did not adequately explain how he came to this conclusion, particularly given the progressive nature of pneumoconiosis. Decision and Order at 12-13. Employer does not identify any specific error in this finding. Further, it is within the purview of the ALJ to weigh the evidence, draw inferences and determine credibility. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). Thus, we affirm the ALJ's permissible finding that Dr. Rosenberg's opinion on complicated pneumoconiosis is inadequately reasoned and entitled to little weight. *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 13.

Finally, Employer contends the ALJ erred by ignoring evidence that Claimant is not totally disabled by a respiratory or pulmonary impairment, which would be inconsistent with a diagnosis of complicated pneumoconiosis. Employer's Brief at 47, 52. However, Claimant is not required to establish that he has a disabling respiratory impairment to establish complicated pneumoconiosis. *See* 30 U.S.C. §921(c)(3); *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 n.4 (1976).

Thus, we affirm the ALJ's decision to accord little weight to the medical opinion evidence.[21] Decision and Order at 13. Weighing all the evidence together, and according

[21] The ALJ also considered diagnoses of complicated pneumoconiosis by Dr. Habre contained in Claimant's treatment records. Decision and Order at 10; Claimant's Exhibit 4. However, he noted that Dr. Habre appeared to have misinterpreted the medical report

the most weight to the x-ray evidence, the ALJ concluded Claimant has complicated pneumoconiosis and thus invoked the irrebuttable presumption at 20 C.F.R. §718.304. *Id.* at 13-14. We affirm the ALJ's findings as supported by substantial evidence.[22] *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Gray*, 176 F.3d at 388-89.

**Change in an Applicable Condition of Entitlement**

Employer next argues the ALJ failed to consider whether Claimant established a change in an applicable condition of entitlement since his previous claim was denied. 20 C.F.R. §725.309; *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Specifically, Employer alleges the ALJ simply made a "bare conclusion" that Claimant met his burden and did not consider that, in Claimant's second claim, he established pneumoconiosis and the presence of large opacities but not complicated pneumoconiosis. Employer's Brief at 44-45.

First, the ALJ did not simply assert that Claimant met his burden, but indicated he did so by establishing complicated pneumoconiosis and invoking the irrebuttable presumption at 20 C.F.R. §718.304. Decision and Order at 14-15. The Section 411(c)(3) presumption establishes that Claimant is totally disabled due to pneumoconiosis, thus establishing a change in an applicable condition of entitlement since his prior claim, in which no element was established. *See E. Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-12 (4th Cir. 2015) ("any applicable statutory presumptions may aid a miner's subsequent claim"); Decision and Order at 15; Director's Exhibit 3.

Further, Employer urges comparing the evidence from Claimant's prior claims to the evidence in his current claim in assessing a change in applicable condition of entitlement. Employer's Brief at 44-46. The United States Court of Appeals for the Sixth Circuit, whose law applies here, has rejected Employer's position. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 487 (6th Cir. 2012) ("the ALJ need not compare the old and new evidence to determine a change in condition; rather, he will consider only the new evidence to determine whether the element of entitlement previously found lacking is now present"); *see also Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 759-60 (6th Cir. 2013).

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upon which he relied to make his diagnosis. Decision and Order at 10-11. Thus, the ALJ found Dr. Habre's opinion not well-reasoned or well-documented and that it weighed neither for nor against a finding of complicated pneumoconiosis. *Id.*

[22] We further affirm, as unchallenged, the ALJ's finding that Employer did not rebut the presumption that Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack*, 6 BLR at 1-711; Decision and Order at 14.

In Claimant's prior claim, the district director determined Claimant did not establish any element of entitlement. Director's Exhibit 3. As Claimant has now established total disability due to pneumoconiosis by invoking the Section 411(c)(3) presumption, he has met his burden to establish a change in an applicable condition of entitlement from his prior claim.[23] *See* 20 C.F.R. §725.309; Decision and Order at 15.

Thus, we affirm the ALJ's determination that Claimant is entitled to benefits. Decision and Order at 15.

**Commencement Date for Benefits**

Finally, Employer challenges the ALJ's determination that because Claimant was first credibly diagnosed with complicated pneumoconiosis in August 2009, benefits should commence as of that date. Decision and Order at 15-19.

Employer argues the regulations preclude an award of benefits for any period before the prior claim was denied, and the district director denied benefits in the prior claim in July 2017. Employer's Brief at 53. Thus, Employer argues the earliest benefits could commence would be July 2017. *Id.* Employer's argument has merit, in part.

The commencement date for benefits is the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). Where a miner suffers from complicated pneumoconiosis, the fact-finder must consider whether the evidence establishes the date of onset of the disease. *See Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989); *Truitt v. N. Am. Coal Corp.*, 2 BLR 1-199 (1979). If not, the commencement date is the month in which the claim was filed, unless the evidence establishes the miner had only simple pneumoconiosis for any period subsequent to the date of filing. In that case, the date for the commencement of benefits follows the period of simple pneumoconiosis. *Williams*, 13 BLR at 1-30; 20 C.F.R. §725.503(b). *However*, in a subsequent claim, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

[23] Even assuming Employer is correct that a finding of pneumoconiosis cannot be a basis for a change in an applicable condition of entitlement given it was found to be established in Claimant's second claim, Claimant now has also established total disability, which had not been previously established. Employer's Brief at 44-45; Director's Exhibits 1-3.

In the prior claim, the district director denied benefits in a Proposed Decision and Order issued July 5, 2017. Director's Exhibit 3. As no response was filed nor any further action taken, the order became final thirty days later, in August 2017. 20 C.F.R. §725.419(d); Director's Exhibit 3. Thus, as benefits cannot be awarded prior to that date, we modify the ALJ's decision to reflect that benefits commence as of September 2017, the month following the month in which the decision denying the prior claim became final. 20 C.F.R. §§725.309(c)(6), 725.503; *see Richards v. Union Carbide Corp.*, 25 BLR 1-31, 1-39 (2012).

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed, as modified to reflect a commencement date of September 2017 for the payment of benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge