U.S. Department of Labor

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

BRB No. 18-0543 BLA

CLEATIS CLINE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MINGO LOGAN COAL COMPANY	)	DATE ISSUED: 12/04/2019
	)	
Employer-Petitioner	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

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

Scott A. White (White & Risse, LLP), Arnold, Missouri, for employer.

Sarah M. Hurley (Kate S. O'Scannlain, 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-05894) of Administrative Law Judge Richard A. Morgan, rendered on a subsequent claim filed on February 8, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge found employer is the responsible operator, and credited claimant with 24.83 years of coal mine employment.[2] He found the evidence established complicated pneumoconiosis, entitling claimant to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304, and establishing a change in an applicable condition of entitlement. 20 C.F.R. §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.

On appeal, employer argues the administrative law judge lacked the authority to hear and decide the case because he had not been appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2. It also challenges his authority to hear and decide this case in light of the removal provisions governing administrative law judges. It further argues he improperly found complicated pneumoconiosis established[3] and erred in finding it is the responsible operator. Claimant

[1] Claimant's initial claim, filed on March 15, 2010, was denied by the district director on February 1, 2011 because he failed to establish total disability. Director's Exhibit 1.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 40-41; Director's Exhibit 57 at 113.

[3] Employer has filed a motion objecting to the application of the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), to this case in light of the decision in *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018), *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), *appeal docketed*, No. 19-10011 (5th Cir. Jan. 7, 2019) that the Affordable Care Act (ACA) individual mandate is unconstitutional and the remainder of the legislation is not severable. As the Director, Office of Workers' Compensation Programs (the Director) notes, the administrative law judge did not apply the Section 411(c)(4) presumption to this case. Director's Brief at 1-2. Therefore we need not address employer's motion.

responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing the administrative law judge had authority to decide the case. The Director concedes, however, that the case must be remanded for further consideration of the responsible operator issue.[4]

The 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. 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 Associates, Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer challenges the administrative law judge's authority to hear and decide this case.[5] It notes the Supreme Court held in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), that Securities and Exchange Commission (SEC) administrative law judges were not properly appointed in accordance with the Appointments Clause[6] of the Constitution because they were not appointed by the SEC Commissioners as the Heads of the Department. Employer's Brief at 12-16. It argues that the administrative law judge in this

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant has 24.83 years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[5] Employer raised this issue before the administrative law judge in a Motion to Hold Claim in Abeyance. The administrative law judge denied employer's motion, finding that the Secretary of Labor's ratification of his appointment on December 21, 2017 foreclosed employer's argument. *Cline v. Mingo Logan Coal Co.*, 2017-BLA-05894 (Feb. 12, 2018) (Order) (unpub.).

[6] 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.

case was similarly first appointed to his position by officials other than the Secretary of Labor. *Id*. Thus it contends he was appointed by the same improper process by which the SEC appointed its administrative law judges.[7] *Id*.

Employer acknowledges that after the administrative law judge's initial appointment, the Secretary of Labor ratified the prior appointment of all Department of Labor (DOL) administrative law judges on December 21, 2017.[8] Employer's Brief at 13-14. It also concedes that this case was assigned to the administrative law judge after the Secretary's ratification and thus the administrative law judge took no actions before ratification. *Id*. It maintains, however, that the Secretary's ratification was insufficient to "cure the defect" in the administrative law judge's initial appointment, and thus the administrative law judge was not properly appointed. *Id*. at 12-14.

The Director responds that the administrative law judge had the authority to hear and decide this case because the Secretary's December 21, 2017 ratification of the prior appointment was proper under the Appointments Clause. Director's Brief at 4-6. We agree with the Director.

As the Director notes, 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,

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[7] The Department of Labor (DOL) has expressly conceded that the Supreme Court's holding in *Lucia* applies to DOL administrative law judges. *See Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6; *see also Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).

[8] The Secretary 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 a District Chief 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 Administrative Law Judge Morgan.

371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). In cases involving the Appointments Clause, 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). Further, under the "presumption of regularity," courts presume that 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).

The Secretary had, at the time of ratification, the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603. Congress has 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. In evaluating these factors, we note the Secretary did not generally ratify the appointment of all administrative law judges in a single letter. Rather, he specifically identified Administrative Law Judge Morgan and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Morgan. The Secretary further stated that he was acting in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Morgan "as a District Chief Administrative Law Judge." *Id*. Employer does not assert that the Secretary had no "knowledge of all the material facts" or that he did not make a "detached and considered judgement" when he ratified Judge Morgan's appointment, and therefore employer does not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (holding mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340.

Based on the foregoing, we hold that the Secretary's action constituted a proper ratification of the appointment of the administrative law judge. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (holding as valid the appointment of civilian members of the Coast Guard Court of Criminal Appeals where the Secretary of Transportation issued a memorandum "adopting" the General Counsel's assignments to the Coast Guard Court of Military Review "as judicial appointments of my own"); *Advanced Disposal*, 820 F.3d 592, 604-05 (holding that a properly constituted NLRB can retroactively ratify the appointment of a Regional Director with statement that it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" all its earlier actions as an invalid Board).

Employer argues that *Lucia* precludes the administrative law judge from hearing this case, notwithstanding the Secretary's ratification. Specifically, employer argues that the Supreme Court made clear that where an adjudication is in any way "tainted" by an Appointments Clause violation, the proper remedy is a new hearing before a new, constitutionally appointed administrative law judge. Employer's Brief at 14, *quoting Lucia*, 138 S.Ct. at 2055. Contrary to employer's argument, the Supreme Court explained in *Lucia* that the adjudication was "tainted" because the improperly-appointed administrative law judge "already both heard [petitioner's] case and issued an initial decision on the merits [and thus] cannot be expected to consider the matter as though he had not adjudicated it before." *Lucia*, 138 S.Ct. at 2055. As discussed above, this case was not assigned to the administrative law judge until after the Secretary properly ratified his appointment. *See FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708–09 (D.C. Cir. 1996) (holding that remand in an Appointments Clause case was unnecessary where agency head properly ratified action and where outcome on remand was clear). Thus, unlike the situation in *Lucia*, nothing in this case would affect this administrative law judge's ability "to consider the matter as though he had not adjudicated it before." *Lucia*, 138 S.Ct. at 2055. Therefore we reject employer's argument that this case should be remanded for a new hearing before a new administrative law judge. Employer's Brief at 12-16.

Removal Provisions

Employer argues the administrative law judge's decision is still "open to attack so long as questions remain regarding removal of [administrative law judges] and whether limitations" on their removal "violate the separation of powers." Employer's Brief at 14-15. We decline to address this issue, as it is inadequately briefed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

The Board's procedural rules impose certain threshold requirements for alleging specific error before the Board will consider the merits of the appeal. In relevant part, a petition for review "shall be accompanied by a supporting brief, memorandum of law or other statement which . . . [s]pecifically states the issues to be considered by the Board." 20 C.F.R. §802.211(b). The petition for review must also contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." *Id*. Further, to "acknowledge an argument" in a petition for review "is not to make an argument" and "a party forfeits any allegations that lack developed argument." *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018), *citing United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009). A reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (refusing to

consider the merits of argument that the FTC is unconstitutional because its members exercise executive powers yet can be removed by the President only for cause).

As the Director notes, employer generally refers to the removal provisions for administrative law judges contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521. Director's Brief at 6. Employer vaguely states that "questions remain regarding . . . separation of powers" in the context of these removal provisions. Employer's Brief at 14-15. Employer has not specified how those provisions violate the separation of powers doctrine or explained how such a holding undermines the administrative law judge's authority to hear and decide this case.[9] Thus we decline to address this issue. *Cox*, 791 F.2d at 446-47; *Jones Bros.*, 898 F.3d at 677; *Hosp. Corp.*, 807 F.2d at 1392; 20 C.F.R. §802.211(b).

Entitlement to Benefits

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, establish an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he is suffering or suffered 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). 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 E.*

[9] Employer cites the Supreme Court's decisions in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010) and *Lucia*. Employer's Brief at 14-15. It notes that in *Free Enterprise*, the Supreme Court invalidated a statutory scheme that provided the Public Company Accounting Oversight Board two levels of "for cause" removal protection and thus resulted in a "constitutionally impermissible diffusion of accountability." *Id*. Employer does not set forth how *Free Enterprise* applies to the administrative law judge. Further, as the Director notes, the Supreme Court in *Free Enterprise* stated that its holding "does not address that subset of independent agency employees who serve as administrative law judges." *Free Enter. Fund*, 561 U.S. at 507 n.10; *see* Director's Brief at 6. Further, the majority opinion in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1.

Assoc. Coal Corp. v. Director, OWCP [*Scarbro*], 220 F.3d 250, 255 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge found the x-ray and medical opinion evidence supports a finding of complicated pneumoconiosis, 20 C.F.R. §718.304(a), (c), while the biopsy, CT scan, and treatment record evidence does not. 20 C.F.R. §718.304(b), (c); Decision and Order at 25-40. Weighing all of the evidence, the administrative law judge found the x-ray and medical opinion evidence outweighed the contrary evidence, thus entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis.[10] *Id*.

The administrative law judge first considered ten interpretations of five x-rays taken on April 12, 2016, August 30, 2016, January 17, 2017, February 7, 2018, and February 15, 2018. 20 C.F.R. §718.304(a); Decision and Order at 8-10. He noted he may consider the radiological qualifications of the physicians who render x-ray interpretations, and correctly identified that all of the physicians who did so in this case are dually qualified as B readers and Board-certified radiologists. *Id*. at 32.

Because Dr. Crum read the April 12, 2016 x-ray as positive for complicated pneumoconiosis, Category B, Dr. Miller read it as positive for complicated pneumoconiosis, Category A, and no physician read it as negative, the administrative law judge found this x-ray is positive for the disease based on a preponderance of the readings from the dually-qualified radiologists. Decision and Order at 32; Director's Exhibits 13, 20. He found the August 30, 2016, January 17, 2017, February 7, 2018, and February 15, 2018 x-rays inconclusive because an equal number of dually-qualified radiologists read the respective films as positive and negative for complicated pneumoconiosis. Decision and Order at 32-33. Specifically, Dr. Crum read the August 30, 2016 and January 17, 2017 x-rays as positive for complicated pneumoconiosis, Category B, but Dr. Kendall read both x-rays as negative. Director's Exhibits 21, 24, 27; Claimant's Exhibit 1. Further, Dr. DePonte read the February 7, 2018 and February 15, 2018 x-rays as positive for complicated pneumoconiosis, Category A, but Dr. Kendall read both films as negative. Claimant's Exhibit 4; Employer's Exhibit 12.

Because he found that one x-ray is positive for complicated pneumoconiosis, four are inconclusive, none are negative, and three of the four dually-qualified radiologists read

[10] Employer argues the administrative law judge erred in applying the preamble to the 2001 revised regulations when weighing the medical evidence. Employer's Brief at 27-35. The administrative law judge did not apply the preamble when weighing the evidence in this case, however.

the x-rays as positive for the disease, the administrative law judge found the x-ray evidence established complicated pneumoconiosis. 20 C.F.R. §718.304(a); Decision and Order at 33. Employer does not challenge this finding and therefore it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer instead argues the administrative law judge erred in weighing the medical opinion evidence. 20 C.F.R. §718.304(c); Employer's Brief at 32-33. Employer's argument lacks merit. Drs. Tuteur and Rosenberg opined that claimant does not have complicated pneumoconiosis based, in part, on their review of x-ray evidence. Director's Exhibits 24, 61; Employer's Exhibits 1, 9, 10, 17. As noted by the administrative law judge, Dr. Tuteur indicated he "personally reviewed" the August 30, 2016 x-ray that he interpreted as negative for complicated pneumoconiosis. Director's Exhibit 24 at 2; Decision and Order at 38-39. Moreover, he also reviewed Dr. Tarver's interpretations of the x-rays dated April 12, 2016 and August 30, 2016. Director's Exhibits 24 at 2; 61 at 43-44. Dr. Rosenberg also reviewed Dr. Tarver's interpretations of the same x-rays. Employer's Exhibit 1 at 2. The administrative law judge found that neither Dr. Tuteur's August 30, 2016 x-ray interpretation nor the interpretations by Dr. Tarver of the April 12, 2016 and August 30, 2016 x-rays were contained in the record.[11] Decision and Order at 16, 38-39.

Contrary to employer's argument, the administrative law judge permissibly rejected their opinions because they based their conclusions on x-ray readings which were not in evidence. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc) (McGranery and Hall, JJ., concurring and dissenting); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004); Decision and Order at 39. Employer does not challenge the administrative law judge's determination as to the evidentiary status of the x-ray readings and the physicians' reliance on them.

Further, Dr. Tuteur excluded pneumoconiosis because claimant had no radiographic evidence of the disease in 2010, five years after he left coal mining.[12] Employer's Exhibits 1 at 7-8; 6 at 69-72. The administrative law judge permissibly found this reasoning

[11] Dr. Tarver's x-ray interpretations were withdrawn by the parties at the hearing. Hearing Transcript at 45-58. Further, employer concedes that Dr. Tuteur reviewed "x-ray interpretation[s] by Dr. Tarver not in the record." Employer's Brief at 7.

[12] Dr. Tuteur explained that when there is "no radiographic evidence of a pneumoconiosis at the time of cessation of [dust] exposure, the emergence of radiographic findings consistent with coal workers' pneumoconiosis almost never occurs" two to five years after exposure or thereafter. Employer's Exhibit 6 at 69-72.

inconsistent with the DOL's recognition that pneumoconiosis can be "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."[13] 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Scarbro*, 220 F.3d at 258-59; *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); Decision and Order at 39.

We also reject employer's argument that the administrative law judge erred in crediting the opinions of Drs. Raj and Green that claimant has complicated pneumoconiosis. Employer's Brief at 27, 36-37. Dr. Raj opined that claimant has progressive massive fibrosis based on an abnormal chest x-ray and his twenty-four year history of exposure to "respirable coal dust." Director's Exhibit 13. He testified that claimant was hospitalized for a head injury that caused him to develop pneumonia and sepsis, but disagreed with Drs. Tuteur and Rosenberg that pneumonia would appear as a large opacity of complicated pneumoconiosis on an abnormal x-ray taken eighteen months later. Director's Exhibit 25 at 205-06. Moreover, he disagreed with their diagnosis of sarcoidosis because claimant had no objective testing or examination findings to support this diagnosis. *Id*. at 201-05. Dr. Green also opined that claimant has complicated pneumoconiosis based on an abnormal chest x-ray and claimant's years of exposure to coal and rock dust. Claimant's Exhibit 3. Contrary to employer's argument, the administrative law judge permissibly found their opinions well-reasoned and documented and consistent with the weight of the x-ray evidence. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441;

[13] In his Decision and Order, the administrative law judge excluded treatment records "from Dr. Marzouk for the period of September 21, 2015 to March 9, 2016." Decision and Order at 23. Employer argues that the administrative law judge erroneously excluded this evidence in his Decision and Order without giving notice to the parties, and then used that as a reason to discredit Drs. Tuteur and Rosenberg because they reviewed tests contained in the excluded evidence. Employer's Brief at 27, 34-35. It also argues the administrative law judge erred in finding Dr. Rosenberg's opinion inconsistent with the DOL's recognition that pneumoconiosis can be a latent and progressive disease. *Id*. at 32-33. We note that neither Dr. Tuteur's August 30, 2016 x-ray interpretation nor the interpretations by Dr. Tarver of the April 12, 2016 and August 30, 2016 x-rays, which we discussed above, were excluded by the administrative law judge in this evidentiary ruling. Further, because the administrative law judge provided valid reasons for discrediting Drs. Tuteur and Rosenberg, any error in discrediting their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). We therefore need not address employer's remaining arguments regarding the weight accorded the opinions of Drs. Tuteur and Rosenberg.

Decision and Order at 37-39. Thus we affirm his finding that the medical opinion evidence establishes complicated pneumoconiosis. 20 C.F.R. §718.304(c).

Further, employer does not identify specific error in the administrative law judge's finding that the x-ray and medical opinion evidence outweigh the biopsy, CT scan, and treatment record evidence. *Scarbro*, 220 F.3d at 255; *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.304; Decision and Order at 32-39. Nor does employer challenge his finding that claimant's complicated pneumoconiosis arose out of coal mine employment. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.203(b). Thus these findings are affirmed. Consequently, we affirm the award of benefits.

Responsible Operator

The responsible operator is the "potentially liable operator"[14] that most recently employed the miner for at least one year. 20 C.F.R. §§725.494, 725.495(a)(1). Once a potentially liable operator has been properly identified by the Director, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits, or that another operator financially capable of assuming liability for benefits more recently employed the miner for at least one year. *See* 20 C.F.R. §725.495(c).

The administrative law judge noted that claimant worked for employer from 2002 to 2004, left coal mining because of a back injury, and then returned to work for Brody Coal Company from January to March 2013. Decision and Order at 5-6. Finding claimant's employment with Brody Coal Company lasted less than one year, the administrative law judge determined that it could not be the responsible operator. *Id*. Thus he found employer is the responsible operator because it was the potentially liable operator that most recently employed claimant for a cumulative year. *Id*.

Employer argues the administrative law judge erred because he failed to address its argument that claimant had additional time with Brody Coal Company. Employer's Brief

[14] In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, at least one day of the employment must have occurred after December 31, 1969, and 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).

at 24-27. The record reflects that claimant worked for Golden Chance Mining from 1998 to 2002 and CK Coal in 2002. Director's Exhibit 7. When this case was before the administrative law judge, employer argued that deposition testimony from claimant submitted at the district director level, along with claimant's hearing testimony, established that the same individuals owned Brody Coal Company, CK Coal, and Golden Chance Mining. July 14, 2017 Motion to Dismiss; March 26, 2018 Motion to Dismiss; Post-Hearing Brief at 5-6; Hearing Transcript at 37-41, 61-62; Director's Exhibit 57 at 101-03. Therefore, employer asserted that the time claimant worked for CK Coal and Golden Chance Mining should be added to the time he worked for Brody Coal Company for the purpose of assessing whether he worked for Brody Coal Company for a cumulative year. July 14, 2017 Motion to Dismiss at 1. The administrative law judge's Decision and Order contains no discussion of this issue. Decision and Order at 5-6.

The Director asserts that the evidence upon which employer relies does not establish that Brody Coal Company, CK Coal, and Golden Chance Mining are one entity, or that a successor relationship[15] exists between the companies, but agrees that the administrative law judge erred in not addressing employer's argument. Director's Brief at 8-10. In view of the Director's concession, we vacate the administrative law judge's finding that employer is the responsible operator and remand this case for the limited purpose of addressing this issue. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). We instruct the administrative law judge to reconsider whether employer met its burden to prove that Brody Coal Company more recently employed claimant for one year. *See* 20 C.F.R. §725.495(c)(2). Further, we note claimant testified that a relationship existed between CK Coal, Golden Chance Mining, and employer, Mingo Logan Coal Company. Director's Exhibit 57 at 108-12. The administrative law judge should address this testimony when reconsidering the responsible operator issue.

[15] If a successor relationship is established, a miner's tenure with a prior and successor operator may be aggregated to establish one year of employment. *See* 20 C.F.R. §§725.101(a)(32), 725.103, 725.494(c). A "successor operator" is "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge