U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 14-0300 BLA
and 14-0300 BLA-A

BUFORD CONN	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
PONTIKI COAL COMPANY, d/b/a EXCELL MINING	)	DATE ISSUED: 02/27/2015
	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order Granting Benefits (2010-BLA-5112) of Administrative Law Judge Stephen R. Henley on a claim filed on July 17, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). The administrative law judge found that claimant established approximately ten years and four months of coal mine employment. He also found that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and that his complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b).[1] Therefore, the administrative law judge found that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). The administrative law judge awarded benefits as of July 2008, based on the filing date of the claim.

On appeal, employer contends that the administrative law judge erred in finding the claim timely filed. Employer also argues that the administrative law judge erred in his evaluation of the opinions of Drs. Wheeler and Repsher pursuant to Section 718.304 and erred, therefore, in finding that claimant established the existence of complicated pneumoconiosis and that claimant was entitled to invocation of the Section 411(c)(3) presumption. Claimant responds to employer's appeal, urging that the administrative law judge's award of benefits be upheld. The Director, Office of Workers' Compensation Programs (the Director), responds to employer's appeal, arguing that the administrative law judge's Decision and Order is supported by substantial evidence and should be affirmed.

On cross-appeal, claimant contends that the administrative law judge's finding regarding the commencement date of benefits should be vacated and the case remanded for reconsideration of that issue. Claimant further contends that, if the case is remanded, the administrative law judge should consider additional grounds for discounting Dr. Wheeler's opinion and, if reached, should make a finding on the issue of disability causation pursuant to 20 C.F.R. §718.204(c). Employer responds to claimant's cross-

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established less than fifteen years of coal mine employment and was not, therefore, entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4)(2012). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

We also affirm, as unchallenged on appeal, the administrative law judge's finding that employer did not rebut the presumption that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *Skrack*, 6 BLR at 1-711; Decision and Order at 8, 27.

appeal, urging that the commencement date of benefits be affirmed. The Director has not responded to claimant's cross-appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Timeliness of the Claim

Initially, we address employer's contention that the administrative law judge erred in finding this claim timely filed. Section 422(f) of the Act, 30 U.S.C. §932(f), and its implementing regulation at Section 725.308, provide that a claim for benefits must be filed within three years of a medical determination of total disability due to pneumoconiosis, which has been communicated to the miner. 20 C.F.R. §725.308(a). Additionally, Section 725.308 provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(c). In *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this cases arises, stated that it is "employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [the miner]" more than three years prior to the filing of his claim. *Kirk*, 264 F.3d at 607, 22 BLR at 2-296. An administrative law judge is charged with determining the credibility of the witnesses and their respective testimony. *See Harris v. Director, OWCP*, 3 F.3d 103, 106, 18 BLR 2-1, 2-5 (4th Cir. 1993); *Miller v. Director, OWCP*, 7 BLR 1-693, 1-694 (1985).

Employer asserts that the administrative law judge failed to provide valid reasons for finding that employer failed to rebut the presumption of timeliness. Specifically, employer asserts that claimant's hearing testimony "does not agree with the history he gave various treating physicians," as shown by his treatment notes and Dr. Cole's 2005 CT scan report. Employer's Brief at 3. Rather, employer contends that the evidence establishes that claimant was told by his physicians that he was totally disabled due to pneumoconiosis more than three years prior to the filing of his claim.

The administrative law judge addressed whether the claim was timely filed based on claimant's testimony and the medical evidence of record, including Dr. Cole's May

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 6.

31, 2005 interpretation of claimant's May 27, 2005 CT scan diagnosing coal worker's pneumoconiosis (CWP), a 2008 hospital discharge summary referencing "a diagnosis of CWP and progressive massive fibrosis in 2002," and "testimony that [c]laimant knew in 1985 [that] he had breathing problems." Decision and Order at 7. Specifically, considering claimant's testimony, the administrative law judge noted that claimant, in response to questions from his counsel, testified as follows:

> Q. When were you first told by a doctor that you were totally disabled by your black lung?
>
> A. I can't remember them, you know, telling me, you know, direct, you know, flat out that I, you know, totally, but Dr. DeLeon told me that - that's when I first started seeing him, that the shape of my lungs was in that I'd be on oxygen within a year.
>
> Q. But you were still working at that time?
>
> A. And I kept working as long as I could.
>
> Q. Okay. So he didn't actually tell you that you were totally disabled at that time?
>
> A. Well, he just, you know, I wasn't able to work but, you know, they can't come right out and tell you that.
>
> Q. Now, I know you saw Dr. Kaufman for the Department of Labor in March of 2009. Did he tell you that you were totally disabled by black lung?
>
> A. He never said –
>
> Q. He never talked to you about it?
>
> A. No.
>
> Q. Let me ask you this: has any doctor ever actually said that and told you that you're disabled by your black lung?
>
> A. Well, there was one, by the shape I was in, he said if I decided to go ahead and give it up that he'd do everything he could in order to keep on working a little bit longer.

Q. Do you know when that was?

A. That was probably, I'm guessing it'd be around '85 or '86. I was having a lot of trouble then.

Q. Okay, did he actually say it was black lung or just your breathing?

A. Yeah, the breathing and all, and my lungs being, you know, bad.

Q. Because it looks like the first record we have in here that you were disabled by black lung was in 2005. Does that sound right to you?

A. Well, more like 2008.

Q. That's when you first knew you had black lung?

A. That was when, you know, I come to the conclusion I couldn't go no more.

Hearing Transcript at 17-19; Decision and Order at 5-6.

In response to questions from employer's counsel, claimant testified as follows:

Q. Earlier you indicated that sometime back around '85 or '86, there was a doctor that told you I guess that your breathing, that he thought your breathing would cause you problems working or does that sound correct?

A. He didn't think I was able at that time to keep on working, but I didn't want to, you know give it up at that time.

Q. Was that a family doctor or?

A. I think the family doctor told me that, and a lung doctor.

Hearing Transcript at 29-30; Decision and Order at 6-7.

Turning to the medical evidence, the administrative law judge found that the evidence relied on by employer failed to establish that claimant was ever apprised by a physician that he was totally disabled due to pneumoconiosis. Decision and Order at 5-7. Specifically, the administrative law judge found that although Dr. Huhta[3] diagnosed the existence of pneumoconiosis in 2005, based on an x-ray and CT scan, he did not make a finding of total disability.[4] Likewise, the administrative law judge found that, on May 31, 2005, Dr. Cole interpreted the May 27, 2005 CT scan as positive for pneumoconiosis,[5] but did not opine that claimant was totally disabled. Additionally, the administrative law judge found that claimant received a diagnosis of pneumoconiosis and progressive massive fibrosis on his August 2008 hospital discharge summary, which also noted that pneumoconiosis and progressive massive fibrosis had been diagnosed in 2002.

Based on claimant's testimony and the medical evidence, the administrative law judge concluded that, while claimant knew he had breathing problems as early as 1985, and was aware of the medical diagnoses of pneumoconiosis in 2002, there is no evidence that a physician "ever connected the two conditions and told [c]laimant, more than three years before the July 17, 2008 filing [date of the claim], that he was totally disabled due to pneumoconiosis." Decision and Order at 5. The administrative law judge, therefore, reasonably concluded that no physician diagnosed total disability due to pneumoconiosis, and communicated such a diagnosis to claimant. Decision and Order at 7. As substantial evidence supports the foregoing findings, we affirm the administrative law judge's finding that employer failed to rebut the Section 725.308(c) presumption of timeliness. *Kirk*, 264 F.3d at 607, 22 BLR at 2-298; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Harris*, 3 F.3d at 106, 18 BLR at 2-5; *Miller*, 7 BLR at 1-694.

Merits of Entitlement: 1. Preamble to the Regulations

We reject employer's argument that the administrative law judge erred in relying on the medical studies cited by the Department of Labor (DOL) in the preamble to the

[3] The administrative law judge mistakenly referred to Dr. Huhta as Dr. Huerta. Director's Brief at 3 n.2; *see* Decision and Order at 5; Claimant's Exhibit 6.

[4] In diagnosing pneumoconiosis, Dr. Huhta concluded that claimant "has an interesting combination of multiple disease states, which have similar long-term effects on lung tissue." Decision and Order at 5; Claimant Exhibit 6.

[5] Specifically, Dr. Cole interpreted the CT scan as follows: "fairly typical of coal worker's pneumoconiosis with associated areas of conglomerating fibrosis in the upper lobes." Claimant Exhibit 10.

2001 revised regulations, in evaluating the credibility of the medical opinion evidence. Contrary to employer's argument, the administrative law judge properly consulted these medical studies, and permissibly evaluated the medical opinions in light of those studies.[6] *See A&E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir., 2012); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009). Further, contrary to employer's contention, the preamble is not a legislative ruling requiring notice and comment. *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-139 (1990). Accordingly, employer's assertion that the administrative law judge failed to analyze "the medical evidence on its own merits, rather than the degree to which it agrees with the preamble," is unfounded. *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009); *see also Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-255 (4th Cir. 2013) (Traxler, C.J., dissenting); Employer's Brief at 6.

2. Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides, in pertinent part, an irrebuttable presumption of totally disabling pneumoconiosis:

> If a miner is suffering or suffered from a *chronic dust disease of the lung* which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B).

30 U.S.C. §921(c)(3)(emphasis added). A determination of whether complicated pneumoconiosis has been demonstrated is, however, a finding of fact and the administrative law judge must consider and weigh all relevant evidence before making a

[6] Employer has not submitted any medical studies or other documentation that refute or contradict the studies found credible by the Department of Labor.

finding on the issue. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(en banc).

In this case, the administrative law judge found the presence of complicated pneumoconiosis established as the weight of the readings by the better-qualified physician/readers was positive for complicated pneumoconiosis and the weight of the CT scan evidence was positive for complicated pneumoconiosis.[7] *See* Decision and Order at 10-11, 16-18, 21-22. As the administrative law judge's weighing of this evidence is uncontested on appeal, his findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge next considered the relevant medical opinions, namely those of Drs. Kaufman,[8] Miller,[9] Castle,[10] Repsher[11] and Wheeler.[12] The

[7] The administrative law judge noted that the March 23, 2009 analog x-ray was read as positive for complicated pneumoconiosis by Dr. Miller and as negative by Dr. Wheeler, dually-qualified readers. However, because the x-ray was also read as positive for complicated pneumoconiosis by Dr. Kaufman, whose radiological qualifications are not given, the administrative law judge determined that the x-ray was positive for complicated pneumoconiosis. *See* Decision and Order at 22.

The administrative law judge also determined that the January 25, 2011 digital x-ray was positive for complicated pneumoconiosis, as two of the three dually-qualified physicians who read the x-ray, namely Drs. Miller and Smith, read it as positive for complicated pneumoconiosis. Decision and Order at 22.

Further, the administrative law judge found that the preponderance of the CT scan evidence was positive for the existence of complicated pneumoconiosis as a majority of the CT scans were read as positive for complicated pneumoconiosis, progressive massive fibrosis or coal workers' pneumoconiosis by dually-qualified readers or Board-certified radiologists, while Dr. Wheeler alone read CT scans as showing granulomatous disease (histoplasmosis) rather than coal worker's pneumoconiosis. *See* Decision and Order at 17; Claimant's Exhibits 3, 4, 5, 8, 10, 19, 20; Employer's Exhibits 5, 7, 8, 9, 10; Director's Exhibit 10.

[8] Dr. Kaufman performed an examination of claimant on behalf of the Department of Labor on March, 23, 2009, and reported a chest x-ray suggestive of pneumoconiosis with a mass that he did not believe to be lung cancer, but progressive massive fibrosis. Decision and Order at 15, 23; Director's Exhibit 12, Employer's Exhibit 6; Claimant's Exhibit 9.

administrative law judge assigned greater probative weight to the opinions of Drs. Kaufman and Miller, who diagnosed complicated pneumoconiosis, and less weight to the contrary opinions of Castle, Repsher and Wheeler. Decision and Order at 24. The administrative law judge found that the opinions of Drs. Kaufman and Miller are well-reasoned, as they are supported by the medical studies found reliable by the DOL in the preamble to the 2001 regulations and the weight of the medical evidence. The administrative law judge, therefore, credited the diagnoses of complicated pneumoconiosis by Drs. Kaufman and Miller as well-documented, credible and convincing. *Id*. at 26. Conversely, he assigned "less weight" to the opinion of Dr. Castle

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[9] Dr. Miller performed a medical records review and diagnosed complicated pneumoconiosis by x-ray and CT scans based on a right lung 4.2 centimeter mass and a left lung 3.7-5.2 centimeter mass. He ruled out malignancy and fungal causation, since the opacities were symmetrical, stable for over four years, irregularly shaped, and because necrosis was absent. Decision and Order at 23; Claimant's Exhibit 11 at 11-12, 19, 51, 54.

[10] Dr. Castle conducted a medical evidence review, and opined that claimant has equivocal radiographic evidence of pneumoconiosis, although it is not possible to exclude a very mild degree of simple pneumoconiosis. He also identified a right upper lobe mass suggesting malignancy of undeterminable etiology. He further noted that claimant lacks the characteristic findings of pneumoconiosis, and that it is "entirely possible" that all of his radiographic findings are due to granulomatous disease such as histoplasmosis, atypical tuberculosis or tuberculosis." Decision and Order at 15, 23; Employer's Exhibit 4.

[11] Dr. Repsher, who examined claimant and opined that he has no pulmonary impairment and is fully fit to perform his usual coal mine work, ruled out any form of pneumoconiosis, opining that the x-ray findings represent "classic" healed tuberculosis or other granulomatous disease. Decision and Order at 14, 23; Employer's Exhibit 1.

[12] Dr. Wheeler performed a medical records review and opined that claimant does not have complicated pneumoconiosis, but has conglomerate granulomatous disease caused by histoplasmosis of undetermined etiology, which is very common east of the Mississippi River. He identified large masses, some over five centimeters, which he believed are neither cancer, nor opacities of complicated pneumoconiosis, because they involve the pleura. Dr. Wheeler further opined that large opacities require high unprotected exposures, which have been illegal for decades. Consequently, he stated that he would assume that the large masses are due to fungal infection, "if you don't find anything else." Decision and Order at 15, 23-24; Employer's Exhibit 12 at 6, 9-12, 14, 23-24, 34-3544-47, 52, 54-55, 61-69.

because his view regarding the etiology of claimant's masses was equivocal and vague. *Id*. at 15, 24. Similarly, the administrative law judge discounted Dr. Repsher's opinion that claimant has no evidence of pneumoconiosis because: he is not a Board-certified radiologist; he did not consider all the CT scans; his opinion is contrary to the "overwhelming" radiological evidence; and his opinion is based, in part, on views inconsistent with the medical studies found credible by the DOL in the preamble. Finally, the administrative law judge accorded little weight to Dr. Wheeler's opinion that claimant suffered from histoplasmosis rather than complicated pneumoconiosis, as there is no evidence of record that supports a finding that claimant suffers from tuberculosis or histoplasmosis. *Id*. at 15, 25-27.

Employer asserts, however, that the administrative law judge "mischaracterize[d]" Dr. Wheeler's testimony and improperly substituted the preamble and regulations for medical science.[13] Employer's Brief at 4-5. We disagree.

The administrative law judge properly found that Dr. Wheeler's opinion was not well-reasoned as it was: undocumented; based on generalizations; speculative; and inconsistent with the regulations adopted by the DOL and the medical studies found credible by the DOL in the preamble.[14] *See Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985). He rationally found that Dr. Wheeler's opinion, that a diagnosis of pneumoconiosis cannot be made based on x-rays and CT scans, but that histologic studies are necessary to make a diagnosis of pneumoconiosis, is in conflict with the regulations.[15] *See* 20 C.F.R. §§718.304(a); 718.202(a)(1); Decision and Order at 25.

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[13] Because the administrative law judge's evaluation of the opinions of Drs. Miller, Kaufman, and Castle is uncontested on appeal, his credibility determinations regarding those opinions are affirmed. *Skrack*, 6 BLR at 1-711.

Further, as employer fails to specify errors in the administrative law judge's analysis of Dr. Repsher's opinion, employer's general argument that Dr. Repsher's opinion was improperly discredited is rejected. *Id*.; Employer's Brief at 4; *see* Director's Response at 4 n.3.

[14] The administrative law judge observed that Dr. Wheeler "did not cite to any medical literature or evidence to support his reasoning." Decision and Order at 25.

[15] Dr. Wheeler testified that he would need a biopsy to diagnose pneumoconiosis, and that:

> there are no x-ray modalities that can diagnose pneumoconioses. That's for histology. The [] routine x-rays

Next, the administrative law judge permissibly discounted, as contrary to the regulations, Dr. Wheeler's opinion that complicated pneumoconiosis would not involve the pleura.[16] 20 C.F.R. §§718.304(a); 718.201(a)(1); Decision and Order at 25-27; *see* Employer's Exhibit 12 at 52, 60, 64, 68-69. Instead, the administrative law judge credited Dr. Miller's explanation that opacities of a certain size may indeed touch the pleura, and his opinion that "whether or not opacities touch the pleura does not distinguish tuberculosis from complicated pneumoconiosis." Decision and Order at 23, 25, 26. Thus, we reject employer's assertion that the administrative law judge's

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> and CT scans can detect patterns that are compatible with various pneumoconios[e]s.

He stated that claimant's:

> masses are conglomerate granulomatous disease I think without a doubt. The nodules, some of them could be [coal worker's pneumoconiosis] but all the nodules could be granulomatous disease. And it would be up to somebody to biopsy and to tell us exactly what they are.

Describing his approach in reading x-rays for the presence of pneumoconiosis, he stated:

> confronted with masses and nodules, I have to know what they are, I'm having to give a differential diagnosis. And the differential diagnosis could include coal workers' pneumoconiosis. It could include granulomatous disease, occasionally metastases. But the vast majority of cases I'm going to be very conservative until I know from a pathologist I trust that it's Disease X, Disease Y or Disease Z.

Employer's Exhibit 12 at 6, 55, 60-64.

[16] A pleura is the serous membrane investing the lungs and lining the thoracic cavity, completely enclosing a space known as the pleural cavity. Dorland's Illustrated Medical Dictionary 1210 (25th ed. 1974). Any chronic dust disease of the lung which meets the statutory and regulatory criteria qualifies for the irrebuttable presumption. 20 C.F.R. §718.304(a).

assessment of Dr. Wheeler's diagnosis "inappropriately substitute[d] the regulations for medical science."[17] Employer's Brief at 5.

Additionally, the administrative law judge permissibly discounted Dr. Wheeler's opinion, attributing claimant's condition to histoplasmosis based on claimant's geographical location,[18] as the record does not contain any evidence that claimant has or had histoplasmosis. *See* Employer's Brief at 5; Decision and Order at 15, 25.

As the administrative law judge's reasons for discounting Dr. Wheeler's opinion are rational, we affirm his assignment of "little weight" to Dr. Wheeler's opinion. Decision and Order at 25-27; *see generally Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287, 24 BLR 2-269, 2-286 (4th Cir. 2010)(an opinion excluding the existence of complicated pneumoconiosis is not affirmative evidence sufficient to undermine claimant's x-ray evidence of complicated pneumoconiosis if the opinion offers speculative, unsupported diagnoses).

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[17] The regulations do not exclude consideration of lesions in the pleural area for determining the existence of complicated pneumoconiosis. *See* 20 C.F.R. §718.201(a)(1).

[18] On deposition, Dr. Wheeler testified that:

> histoplasmosis is the most common granulomatous disease, especially east of the Mississippi, …. I think if you went to Kansas, I don't think you'd find as much histoplasmosis as you do in Kentucky, West Virginia, and parts of Maryland.

Employer's Exhibit 12 at 11, 63.

Additionally, the deposition testimony includes the following exchange:

> Q. You're saying that the changes are compatible with histoplasmosis in light of the fact that histoplasmosis is the most prevalent disease that causes these types of opacities in residents east of the Mississippi; is that correct?
>
> A. Yes.

Employer's Exhibit 12 at 64-65.

Evaluating all of the relevant medical evidence together, the administrative law judge found that the chest x-rays, when considered in conjunction with the CT scan findings and the opinions of Drs. Kaufman and Miller, are sufficient to support a finding of complicated pneumoconiosis, and that the contrary evidence offered by employer is insufficiently probative. The administrative law judge found that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, based upon a thorough consideration of all of the available medical evidence. *See Gray*, 176 F.3d at 389, 21 BLR at 2-628-29; *see also Cox*, 602 F.3d at 285, 24 BLR at 2-284; Decision and Order at 27. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that all of the relevant evidence, considered together, establishes the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, thereby entitling claimant to invocation of the Section 411(c)(3) irrebuttable presumption of total disability due to pneumoconiosis. Accordingly, we affirm the administrative law judge's decision awarding benefits.[19]

Claimant's Cross-Appeal: Onset Date

Claimant contends that the earliest evidence of complicated pneumoconiosis is the May 27, 2005 CT scan, based on the positive reading by Dr. Miller.[20] Claimant

[19] Because we have affirmed the administrative law judge's resolution of the conflicting medical opinion evidence, we need not address claimant's contention that Dr. Wheeler's opinion is deficient on additional grounds not considered by the administrative law judge. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Claimant's Brief on Cross-Appeal at 21-23.

[20] The CT scan evidence consists of CT scans taken May 27, 2005, July 8, 2008, February 4, 2009, June 7, 2010, December 23, 2010 and January 25, 2011. The May 27, 2005 CT scan was interpreted by Dr. Miller as positive for complicated pneumoconiosis, positive for coal worker's pneumoconiosis by Dr. Cole, and as negative for any pneumoconiosis by Dr. Wheeler. Claimant's Exhibits 10, 19; Employer's Exhibit 7. The July 8, 2007 CT scan was interpreted by Dr. Cole as positive for coal worker's pneumoconiosis and progressive massive fibrosis, as positive for complicated pneumoconiosis by Dr. Miller, and as not showing any coal worker's pneumoconiosis by Dr. Wheeler. Director's Exhibit 10; Claimant's Exhibit 3; Employer's Exhibit 8. The February 4, 2009 CT scan was interpreted as showing progressive massive fibrosis by Dr. Cole, complicated pneumoconiosis by Dr. Miller, and no coal worker's pneumoconiosis by Dr. Wheeler. Claimant's Exhibits 8, 20; Employer's Exhibit 9. The June 7, 2010 CT scan was interpreted as showing progressive massive fibrosis by Dr. Lawson, complicated pneumoconiosis by Dr. Miller and as not showing coal worker's pneumoconiosis by Dr. Wheeler. Claimant's Exhibits 8, 21; Employer's Exhibit 10. The December 23, 2010 CT scan was interpreted as showing complicated pneumoconiosis by

concedes, however, that in addition to being read as positive for complicated pneumoconiosis by Dr. Miller, the 2005 CT scan was read by Dr. Cole as positive for coal workers' pneumoconiosis, and by Dr. Wheeler as negative for any pneumoconiosis. Claimant contends, therefore, that the administrative law judge must determine whether the May 2005 CT scan establishes the onset date of complicated pneumoconiosis and, thereby the date that claimant became totally disabled due to pneumoconiosis. Further, claimant contends that, if the administrative law judge finds that the May 2005 CT scan establishes the onset date of complicated pneumoconiosis, benefits should commence as of May 2005.

As a general rule, once entitlement to benefits has been established, the date from which benefits commence is determined by the month in which claimant became totally disabled due to pneumoconiosis. If the evidence does not establish that date, the date from which benefits commence is the month in which the claim was filed unless there is credible evidence showing that claimant was not disabled on or after the filing date of the claim. 20 C.F.R. §725.503(b); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). In a case where a miner is found entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304, the administrative law judge must determine whether the evidence establishes the onset date of complicated pneumoconiosis. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979).

Here, the administrative law judge stated that, "it is unclear when the [c]laimant became totally disabled, but he was likely totally disabled by the time he filed for benefits." Decision and Order at 28. The administrative law judge, therefore, concluded that benefits should commence from July 2008, based on the filing date of the claim. Decision and Order at 28. The administrative law judge, however, found that the credited CT scan readings along with the x-ray and other diagnositic evidence were dispositive

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Dr. Miller and as not showing coal worker's pneumoconiosis by Dr. Wheeler. Claimant's Exhibit 4; Employer's Exhibit 11. Finally, the January 25, 2011 CT scan was interpreted as showing complicated pneumoconiosis by Dr. Miller and as not showing coal worker's pneumoconiosis by Dr. Wheeler. Claimant's Exhibit 5; Employer's Exhibit 5. Claimant concedes, however, that in addition to being read as positive for complicated pneumoconiosis by Dr. Miller, the 2005 CT scan was read by Dr. Cole as positive for coal worker's pneumoconiosis and by Dr. Wheeler as negative for any pneumoconiosis.

with respect to a finding of complicated pneumoconiosis.[21] Decision and Order at 27. The administrative law judge further noted that Dr. Miller, attesting to the medical acceptability and reliability of the CT scan as a diagnostic tool for diagnosing the existence of pneumoconiosis, stated that a CT scan "is the gold standard for grading complicated pneumoconiosis." Decision and Order at 22; Claimant's Exhibit 11 at 42.

Thus, because the administrative law judge fully credited the 2005 CT scan read by Dr. Miller, as positive for complicated pneumoconiosis;[22] gave his reading greater weight based on his being a dually qualified reader; and determined that the x-rays and other diagnostic evidence (which included the CT scans) were dispositive;[23] we conclude that the first evidence establishing the onset date of complicated pneumoconiosis is the May 27, 2005 CT scan. Consequently, we modify the administrative law judge's decision to reflect that the commencement date of benefits is May 2005.

[21] The diagnoses of complicated pneumoconiosis are the 2009 analog x-ray, the 2011 digital x-ray, the positive readings of the 2005, 2008, 2009, 2010 and 2011 CT scans, and the 2009 and 2013 opinions of Drs. Kaufman and Miller.

[22] Dr. Cole's reading in treatment records of the May 2005 CT scan, as showing coal worker's pneumoconiosis with areas of conglomerating fibrosis in the upper lobes, is not inconsistent with Dr. Miller's reading of complicated pneumoconiosis.

[23] Dr. Wheeler consistently interpreted all of the CT scans as negative for coal worker's pneumoconiosis, but positive for granulomatous disease, more likely histoplasmosis than tuberculosis. The administrative law judge, however, permissibly rejected Dr. Wheeler's CT scan interpretations of histoplasmosis as there was no evidence in the record showing that claimant was ever diagnosed with that disease. Decision and Order at 17-18; Employer's Exhibits 5, 7, 8, 9, 10, 11.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed and modified so that benefits commence as of May 2005.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge