BRB No. 01-0318 BLA

KENNETH L. ATKINS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY)		DATE ISSUED:
	)	
	)	
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 of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Douglas A. Smoot and Kathy L. Snyder (Jackson & Kelly), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (00-BLA-0348) of Administrative Law Judge Stuart A. Levin awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] The administrative law judge found that the instant claim, Director's Exhibit

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

1, was a duplicate claim pursuant to 20 C.F.R. §725.309(d) (2000), *see* 20 C.F.R. §725.2(c), filed more than one year after the denial of claimant's prior claim, Director's Exhibit 36-1.[2] The administrative law judge considered the relevant, newly submitted evidence that was dated subsequent to the prior denial pursuant to 20 C.F.R. Part 718 and found that it was sufficient to establish the existence of complicated pneumoconiosis and, therefore, entitled claimant to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Thus, the administrative law judge found that a material change in conditions was established, *see* 20 C.F.R. §725.309(d) (2000). Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in finding the existence of complicated pneumoconiosis established pursuant to Section 718.304 and in determining the date of onset of claimant's total disability due to complicated pneumoconiosis from which to award benefits. Neither claimant nor the Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has responded to this appeal.

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[2] Claimant originally filed a claim on November 30, 1993, Director's Exhibit 36-1. In a Decision and Order issued on November 3, 1995, Administrative Law Judge Vivian Schreter-Murray found approximately thirty-eight years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. Part 718, Director's Exhibit 36-48. Judge Schreter-Murray found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b), but further found that total disability was not established pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000), as revised at 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied. Claimant appealed and the Board affirmed Judge Schreter-Murray's findings as to the length of claimant's coal mine employment and pursuant to Sections 718.202(a)(1), (4), 718.203(b), and 718.204(c)(1)-(3) (2000), as revised at 20 C.F.R. §718.204(b)(2)(i)-(iii), but vacated Judge Schreter-Murray's finding pursuant to Section 718.204(c)(4) (2000), as revised at 20 C.F.R. §718.204(b)(2)(i)-(iii), and remanded the case for reconsideration, Director's Exhibit 36-55. *Atkins v. Westmoreland Coal Co.*, BRB No. 96-0396 BLA (June 28, 1996)(unpub.).

In a Decision and Order On Remand issued on September 10, 1996, Judge Schreter-Murray found that total disability due to pneumoconiosis was not established pursuant to Section 718.204 and, again, denied benefits, Director's Exhibit 36-56. Claimant appealed and the Board affirmed Judge Schreter-Murray's finding that total disability was not established pursuant to Section 718.204(c) (2000), as revised at 20 C.F.R. §718.204(b)(2), and, therefore, affirmed the denial of benefits, Director's Exhibit 36-62. *Atkins v. Westmoreland Coal Co.*, BRB No. 97-0194 BLA (Sep. 29, 1997)(unpub.).

Claimant filed the instant, duplicate claim on March 9, 1999, Director's Exhibit 1, at issue herein.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to establish a material change in conditions in a duplicate claim pursuant to Section 725.309(d), a claimant must prove "under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him," *see Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 519 U.S. 1090 (1997). In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement, *id.*

Before determining whether invocation of the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304(a)-(c), has been established, the administrative law judge shall first determine whether the evidence in each category under Section 718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis and then all relevant evidence pursuant to Section 718.304(a)-(c) must be considered and weighed together, *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *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*).[3] However,

[3] Section 718.304, implementing the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides in relevant part:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis ... if such miner is suffering ... from a chronic dust disease of the lung which:
>
> > (a) When diagnosed by chest X-ray ... yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C [pursuant to the International Classification of the International Labour Organization]; or
> >
> > (b) When diagnosed by biopsy or autopsy, yields massive

the irrebuttable presumption under Section 411(c)(3) of the Act does not refer to the triggering condition for invocation of the presumption as "complicated pneumoconiosis," nor incorporate a purely medical definition of "complicated pneumoconiosis," but rather the presumption is triggered by the application of congressionally defined criteria, *see Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, BLR (4th Cir. 1999). Thus, the Fourth Circuit has held that the irrebuttable presumption at Section 411(c)(3) of the Act provides three different ways of establishing the triggering condition and requires that the administrative law judge make an equivalency determination to make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the presumption, *i.e.*, if a diagnosis is by biopsy or autopsy, a miner must have "massive lesions" which would, if x-rayed, show as opacities greater than one centimeter in diameter, *see Blankenship*, *supra*.

> lesions in the lung; or
>
> (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: Provided, however, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304.

The administrative law judge considered the relevant, newly submitted x-ray evidence which consisted of four x-rays dating from 1999.[4] The administrative law judge also

[4] An April, 1999, x-ray was read as indicating a Category A large opacity, complicated pneumoconiosis, by Drs. Patel and Burrett, who are both board-certified radiologists and B-readers, Director's Exhibits 7, 10, as well as by Dr. Ranavaya, whose qualifications are not in the record, Director's Exhibit 9. Nevertheless, "by official notice of the List of B-Readers issued by the National Institute of Occupational Safety and Health (NIOSH)," the administrative law judge noted that Dr. Ranavaya is also a B-reader, Decision and Order at 3-4. However, the April, 1999, x-ray was read as negative by five physicians who were board-certified radiologists and B-readers, *i.e.*, no Category A, B, or C large opacities, Director's Exhibits 24-25, 27; Employer's Exhibits 1, 6, and by Dr. Gaziano, a B-reader, Director's Exhibit 8, although the administrative law judge noted that they all found evidence of a mass or lesion in claimant's right lung which they believed to be old granulomatous disease. Specifically, Dr. Myer described a 2 centimeter opacity, Employer's Exhibit 6, and Dr. Wheeler described a 2.5 centimeter mass, Director's Exhibit 25.

A May, 1999, x-ray was read as indicating a Category A large opacity, which "may"and/or "likely" represents complicated pneumoconiosis, by Dr. Deponte, a board-certified radiologist and B-reader, Director's Exhibit 19, who also reviewed x-rays dating from January, 1996, and December, 1997, as being consistent with the May, 1999, x-ray, Director's Exhibit 19. However, the May, 1999, x-ray was read as negative by five physicians who were board-certified radiologists and B-readers, *i.e.*, no Category A, B, or C large opacities, Employer's Exhibits 5-6, 8, 10, although the administrative law judge noted that again they all found evidence of a density in claimant's right lung which they attributed to either tuberculosis or tumor and which, specifically, Dr. Wheeler described as a 3 centimeter mass, Employer's Exhibit 5.

An August, 1999, x-ray was read as indicating a Category A large opacity, complicated pneumoconiosis, by Drs. Aycoth, Cappiello and Robinette, who are all B-readers, Claimant's Exhibit 1; Director's Exhibits 26, 31, and as revealing a "density" by Dr. Mullens, Director's Exhibits 26, 31; Employer's Exhibit 2. However, the August, 1999, x-ray was read as negative by five physicians who were board-certified radiologists and B-readers, *i.e.*, no Category A, B, or C large opacities, Employer's Exhibits 10-11, and by Dr. Dahhan, a B-reader, Employer's Exhibit 13, although the administrative law judge noted that they all found evidence of an opacity, infiltrate or fibrosis in claimant's right lung. Specifically, Dr. Wheeler described a 4-2 centimeter infiltrate, Employer's Exhibit 10.

Finally, a September, 1999, x-ray was read as only negative by four board-certified radiologists and B-readers, *i.e.*, no Category A, B, or C large opacities, Employer's Exhibit 9; Director's Exhibits 28-29, and by three B-readers, Employer's Exhibits 1-2; Director's

considered the relevant, newly submitted medical opinion evidence from Drs. Dahhan, Fino, Castle, Jarboe and Chillag, all of whom found that claimant did not have a respiratory or pulmonary impairment or disability or complicated pneumoconiosis, Employer's Exhibits 3-4, 7, 10, 13; Director's Exhibit 27.[5]

The administrative law judge found that all of the x-ray readings indicate an abnormality in claimant's right lung, but disagree as to whether it should be identified as a Category A opacity or attributed to some etiology other than complicated pneumoconiosis, such as old granulomatous disease, tuberculosis or cancer, with most physicians suggesting comparing x-rays for further analysis, Decision and Order at 9-10. The administrative law judge gave greatest weight to the readings of Dr. Deponte, Director's Exhibit 19, as supported by other B-readers, that claimant's x-rays revealed a Category A large opacity, as she was the only physician to have done simultaneous, comparative readings of x-rays taken over time and ruled out that the abnormality was due to cancer, but "likely" represented complicated pneumoconiosis. Although the administrative law judge noted that Dr. Deponte's opinion, that claimant's x-ray findings "likely" represented complicated pneumoconiosis, could be characterized as equivocal, the administrative law judge found that an equivocal opinion is not necessarily entitled to no weight whatsoever and the administrative law judge did not consider Dr. Deponte's opinion any more equivocal than the opinions of the physicians submitted by employer who only suggested that the abnormality or opacity could have various etiologies other than complicated pneumoconiosis.

In addition, the administrative law judge found the x-ray readings submitted by

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Exhibit 27, although the administrative law judge noted that they all found evidence of an abnormality in claimant's right lung. Specifically, Dr. Wheeler described a 2-2.5 centimeter mass, Employer's Exhibit 9. The administrative law judge also noted that Dr. Wheeler testified that the 1999 x-rays revealed a 2.5 centimeter mass, Employer's Exhibit 12 at 22.

[5] Specifically, Drs. Fino, Employer's Exhibit 4, and Dahhan, Employer's Exhibit 13; Director's Exhibit 27, found that claimant did not have complicated pneumoconiosis based, in part, on the fact that he did not have a respiratory or pulmonary impairment.

employer from Drs. Dahhan, Castle and Wiot were inconsistent, as they had read x-rays dating from claimant's original claim as positive for pneumoconiosis. Moreover, the administrative law judge found that the readings submitted by employer from Dr. Wheeler did not specifically diagnose the cause or etiology of the opacity he diagnosed in claimant's right lung. Although Dr. Wheeler did opine that it was not complicated pneumoconiosis, because it was only found in claimant's right upper lobe, the administrative law judge found that his explanation was contradicted by Dr. Wiot's opinion, that such a finding is not always necessarily the case, *see* Employer's Exhibit 12. Finally, while the administrative law judge found that the evidence of record would be insufficient to establish total disability pursuant to 20 C.F.R. §718.204 independent of the Section 718.304 presumption, the administrative law judge found that such evidence was not relevant to determining whether the existence of complicated pneumoconiosis was established, as it would in effect turn the Section 718.304 presumption into a rebuttable presumption.

Initially, employer contends that Dr. Deponte's opinion, that claimant's x-ray findings "likely" or "may" have represented complicated pneumoconiosis, was speculative and, therefore, should not have been credited by the administrative law judge. However, the Fourth Circuit has held that the irrebuttable presumption at Section 411(c)(3) of the Act is triggered not by the medical definition of "complicated pneumoconiosis," but by the application of the congressionally defined criteria, *see Scarbro*, *supra*. Thus, regardless of Dr. Deponte's opinion as to whether or not claimant's x-ray findings met the medical definition of complicated pneumoconiosis, Dr. Deponte's finding that claimant's x-rays revealed a Category A large opacity is sufficient to trigger the irrebuttable presumption at Section 411(c)(3) of the Act, *see Scarbro*, *supra*; *Blankenship*, *supra*.[6]

However, employer properly contends that the administrative law judge did not adequately resolve the conflict between the x-ray readings submitted by claimant, such as those from Dr. Deponte finding a Category A large opacity, and those submitted by employer

[6] Moreover, contrary to employer's contention, the administrative law judge properly found that Dr. Deponte personally reviewed x-rays dating from January, 1996, and December, 1997, and found them to be consistent with the May, 1999, x-ray, *see* Director's Exhibit 19; Decision and Order at 9. Although employer contends that Dr. Deponte's opinion is not adequately documented and reasoned because she relied on the January, 1996, and December, 1997, x-rays, as they were not classified in accordance with the International Labour Organization classification system, Dr. Deponte found that the January, 1996, and December, 1997, x-rays were consistent with the May, 1999, x-ray, which Dr. Deponte read as indicating a Category A large opacity in accordance with the International Labour Organization system, as required pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c), as implemented by 20 C.F.R. §718.304.

from other physicians who were similarly qualified as both board-certified radiologists and B-readers, such as Drs. Scott, Kim, Spitz, Shipley, Binns, Gogineni and Baek, who found no Category A, B, or C large opacities and attributed the abnormality they found to old granulomatous disease, tuberculosis and/or cancer, but not complicated pneumoconiosis. *See* Employer's Exhibits 5-6, 9-11; Director's Exhibits 23, 25, 27-28. Employer contends that the administrative law judge's finding is contrary to the "preponderance" of the x-ray evidence, which was read as revealing no Category A, B, or C large opacities.

The administrative law judge gave greater weight to the readings of Dr. Deponte, Director's Exhibit 19, as supported by other B-readers, that claimant's x-rays revealed a Category A large opacity, because she was the only physician to have done a simultaneous, comparative reading of x-rays, while finding that the x-ray readings submitted by employer from Drs. Dahhan, Castle and Wiot were inconsistent. However, as employer contends, the administrative law judge did not adequately explain why the opportunity to read different x-rays simultaneously provided Dr. Deponte's x-ray readings additional probative value or weight over other contrary x-ray readings submitted by employer from Drs. Scott and Kim, who were similarly qualified board-certified radiologists and B-readers. *See Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984). Dr. Scott consistently read five x-rays, including all four of the 1999 x-rays, and Dr. Kim consistently read three of the 1999 x-rays, albeit not simultaneously, as revealing no Category A, B, or C large opacities. *See* Employer's Exhibits 5-6, 9-10; Director's Exhibits 23, 25, 27-28.

While the Fourth Circuit held that x-ray evidence which displays opacities exceeding one centimeter does not lose its probative force if other evidence is inconclusive or less vivid, the court explicitly recognized that x-ray evidence can lose its force if other evidence affirmatively shows that the opacities are not there or are not what they seem to be, perhaps because of an intervening pathology, *see Scarbro*, 220 F.3d at 256, 22 BLR at 2-101.[7] Thus,

[7] A finding of one or more large opacities greater than one centimeter in diameter is not sufficient, alone, to trigger the irrebuttable presumption at Section 411(c)(3) of the Act, but the one centimeter opacity must also be one which would be classified in Category A, B, or C, *see* Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented at 20 C.F.R. §718.304(a)(When diagnosed by chest X-ray ... yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C). While the x-ray readings submitted by employer all found evidence of an abnormality, which some of them noted was an opacity or mass from two centimeters up to four centimeters in size, all of the readings submitted by employer in this case specifically opined that the abnormality, opacity or mass, whatever its size, was not one which would be classified as a Category A, B, or C opacity, which is necessary in order to trigger the irrebuttable presumption at Section 411(c)(3) of the Act.

inasmuch as the administrative law judge's function is to resolve the conflicts in the medical evidence, *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989), the administrative law judge's weighing of the relevant x-ray evidence under Section 718.304(a) is vacated and the case is remanded for the administrative law judge to more fully explain the specific bases for his decision, the weight assigned to the evidence and the relationship he finds between the evidence and his legal and factual conclusions, *see Tenney, supra*, and to assess the quality of the physicians' reasoning and documentation in support of their conclusions, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997).

Employer also contends that the administrative law judge did not consider relevant medical opinion evidence regarding the existence of complicated pneumoconiosis. Specifically, medical opinions submitted by employer from Drs. Fino, Employer's Exhibit 4, and Dahhan, Employer's Exhibit 13; Director's Exhibit 27, opined that claimant did not have complicated pneumoconiosis based, in part, on the fact that claimant did not have a respiratory or pulmonary impairment. The administrative law judge found that such evidence was not relevant in determining whether the existence of complicated pneumoconiosis was established pursuant to Section 718.304.

All relevant evidence pursuant to Section 718.304(a)-(c) must be considered and weighed together, *see Compton, supra*; *Lester, supra*; *Melnick, supra*. The administrative law judge correctly concluded that a claimant is not required to prove the existence of a totally disabling respiratory impairment in order to invoke the irrebuttable presumption under Section 718.304 by evidence of complicated pneumoconiosis. The administrative law judge, however, improperly concluded that medical opinions finding that claimant did not have a respiratory or pulmonary impairment were not relevant to determining whether the existence of complicated pneumoconiosis was established. In the instant case, employer submitted medical opinions from Drs. Fino, *see* Employer's Exhibit 4, and Dahhan, *see* Employer's Exhibit 13; Director's Exhibit 27, that specifically opined that claimant did not have complicated pneumoconiosis based, in part, on the fact that he did not have a respiratory or pulmonary impairment. In refusing to consider these opinions, the administrative law judge appears to have substituted his own medical opinion for that of the experts, which is not a proper exercise of his discretion. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Consequently, the administrative law judge's findings pursuant to Section 718.304 and 725.309(d) (2000) are vacated and the case is remanded for the administrative law judge to reconsider all of the relevant evidence of record in accordance with the holdings of the Fourth Circuit enunciated in *Lester, supra, Blankenship, supra*, and *Scarbro, supra*.

Employer also contends that the administrative law judge erred by taking judicial

notice of physicians' radiological qualifications as B-readers without following the proper procedure and/or allowing employer an opportunity to question the date the physicians became B-readers. We reject employer's contention. The administrative law judge noted that, "[b]y official notice of the List of B-Readers issued by the National Institute of Occupational Safety and Health (NIOSH)," Drs. Cappiello, Deponte and Ranavaya were listed as B-readers on the NIOSH list, Decision and Order at 3-4. An administrative law judge may take judicial notice of a fact, by reference in the administrative law judge's decision, *see* 29 C.F.R. §18.45, if substantial prejudice will not result and the parties are given an adequate opportunity to show the contrary, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990). Inasmuch as the administrative law judge identified the List of B-Readers issued by NIOSH, employer was apprised of the source of the noticed fact, *see Maddaleni*, *supra*. Although employer first became aware of the administrative law judge's use of judicial notice upon receipt of the administrative law judge's Decision and Order, employer had an opportunity to contest the administrative law judge's finding before the Decision and Order became final by filing a motion for reconsideration with the administrative law judge, *see* 20 C.F.R. §725.480, but did not do so and, therefore, did not avail itself of the opportunity to contest the administrative law judge's finding before it became final, *id*.[8]

Finally, employer contends that the administrative law judge erred in determining the date of onset of claimant's disability due to complicated pneumoconiosis from which to award benefits. In order to avoid any possible repetition of error on remand, we address employer's contentions. Where entitlement is established pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, in determining whether the evidence establishes an onset date of total disability due to pneumoconiosis, the

[8] Moreover, Dr. Cappiello's and Dr. Deponte's qualifications as B-readers also appear in the record in representations on the x-ray classification forms that each physician signed, *see* Director's Exhibit 19; Claimant's Exhibit 1, and the administrative law judge did not specifically rely on the status of Dr. Ranavaya as a B-reader to find the existence of complicated pneumoconiosis established, but credited other B-readers interpretations as well. Thus, any potential error by the administrative law judge in this regard would be harmless, *see Larioni v. Director, OWCP*, 12 BLR 1-1276 (1984).

fact-finder must determine whether credible, probative evidence of record, if fully credited, establishes an onset date of the miner's complicated pneumoconiosis, *see Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980). If the evidence of record does not reflect when claimant's simple pneumoconiosis became complicated pneumoconiosis, the onset date for payment of benefits is, as the administrative law judge noted, the month during which the claim was filed, *see* 20 C.F.R. §725.503(b); *Williams*, *supra*; *Truitt*, *supra*.

The only evidence of record diagnosing complicated pneumoconiosis was developed subsequent to the filing of the instant, duplicate claim and the administrative law judge held that the miner's total disability due to complicated pneumoconiosis was shown by the first x-ray following the filing of his duplicate claim. However, as the administrative law judge properly noted, the date of onset is not established by the first medical evidence diagnosing complicated pneumoconiosis and/or indicating total disability due to pneumoconiosis, but, rather, such medical evidence merely indicates that claimant's simple pneumoconiosis progressed to complicated pneumoconiosis, and/or that claimant became totally disabled due to pneumoconiosis, at some time prior to the date of that medical evidence, *see Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984). Thus, the administrative law judge awarded benefits payable from the month of the date of filing of his duplicate claim. Decision and Order at 10-11.

Initially, employer asserts that the provision of Section 725.503(b) which allows an administrative law judge to utilize the filing date of a claim to establish the onset date of disability when there is no medical proof submitted by claimant that he had complicated coal workers' pneumoconiosis or a disabling respiratory impairment caused by pneumoconiosis at the time the claim was filed, violates Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), as claimant bears the burden of establishing the date of onset under Section 7(c) in light of the holding in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

The regulations generally provide that "[e]xcept as otherwise provided by this part, all hearings shall be conducted in accordance with the provisions of 5 U.S.C. §554 *et seq*." 20 C.F.R. §725.452(a). Further, the APA provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). Since 20 C.F.R. §725.503(b) specifically provides that the onset date of disability is to be determined by the date that the claim is filed when the record does not contain evidence which can establish the onset date of disability, 20 C.F.R. §725.503(b), the APA is inapplicable to 20 C.F.R. §725.503(b), 5 U.S.C. §556(d). Moreover, the Fourth Circuit has

not enunciated any standard other than, if a date of the onset of the miner's disability is not ascertainable from the evidence of record, that benefits commence as of the month the claim was filed pursuant to Section 725.503, *see Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986). Thus, we reject employer's assertion that the provision of 20 C.F.R. §725.503(b), which allows an administrative law judge to utilize the filing date of a claim to establish the onset date of disability when there is no medical proof submitted by claimant that he had complicated coal workers' pneumoconiosis or a disabling respiratory impairment caused by pneumoconiosis at the time the claim was filed, violates Section 7(c) of the APA.

However, inasmuch as the administrative law judge's finding that the existence of complicated pneumoconiosis was established pursuant to Section 718.304 is vacated, the evidence may potentially establish on remand that the claimant had only simple pneumoconiosis and/or was not totally disabled for a period subsequent to the filing date of his duplicate claim or prior to the first evidence establishing that claimant had complicated pneumoconiosis following the filing of his duplicate claim. Thus, the administrative law judge's determination of the onset date for the payment of benefits is vacated and the case is remanded for reconsideration, if necessary, pursuant to Section 725.503(b), *see Williams, supra*; *Truitt, supra*.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the administrative law

judge's decision awarding benefits. A careful reading of the administrative law judge's opinion shows that he has fully discussed the evidence and has explained his analysis of it. Since his decision is supported by substantial evidence it should be affirmed.

As I shall demonstrate, the majority's allegations of error are without merit. The majority holds that the administrative law judge erred in the following ways: (1) he did not adequately explain his rationale for crediting Dr. Deponte's x-ray interpretation over the interpretations of other doctors; (2) he did not adequately explain his decision to credit the findings of large opacities over contrary opinions; and (3) the administrative law judge substituted his own opinion for that of physicians when he found irrelevant opinions of no complicated pneumoconiosis based upon a finding of no disabling respiratory impairment.

First, the administrative law judge fully explained his decision to credit the x-ray interpretations of Dr. Deponte over the interpretations of other physicians, based upon that physician's reading of old films together with more recent films (x-rays taken in 1996, 1997 and 1999) which would give her a "distinct advantage" over all other physicians in the instant case, according to Dr. Wiot, a B-reader, Board certified radiologist and professor of radiology. Decision and Order at 6, 7, 9. Likewise, Dr. Shipley recommended a comparison of old and new films to arrive at a diagnosis. Decision and Order at 5. Dr. Deponte's comparison enabled her to observe the stability of the abnormality "consistent with a benign process and likely represents a conglomerate mass of pneumoconiosis." Decision and Order at 5; Director's Exhibit 19. The administrative law judge made plain that he "place[d] greatest weight on the comparative reading of Dr. Deponte which is supported by other B-readers and conclude[d] that the existence of an A category complicated pneumoconiosis is established by the x-ray evidence in this case." Decision and Order at 10. Because Drs. Scott and Kim read only x-rays taken in 1999, the administrative law judge properly gave greater weight to Dr. Deponte's interpretation, even though their credentials equaled hers. Because the administrative law judge's analysis of the evidence is rational and supported by substantial evidence it should be affirmed.

Second, the administrative law judge fully explained his decision to credit Dr. Deponte's finding of large opacities over the diagnoses of other, similarly qualified physicians. It was the comparison with old films which enabled Dr. Deponte to recognize that the abnormality in the upper right lobe was an opacity of complicated pneumoconiosis, as opposed to cancer or scarring. Decision and Order at 5. The administrative law judge observed that claimant has had an abnormality in his upper right lobe since 1986 which doctors have diagnosed variously as complicated pneumoconiosis, "healed or active granulomatous disease, tuberculosis or possibly even cancer ... [and] have suggested further studies ...." Decision and Order at 9. The administrative law judge reasonably credited Dr. Deponte's diagnosis over others because of her superior knowledge of claimant's condition

as it was manifested over several years. The administrative law judge also observed that Dr. Wheeler's diagnosis of tuberculosis was undermined by claimant's lack of any history of tuberculosis and the doctor's elimination of complicated pneumoconiosis as a diagnosis on the ground that complicated pneumoconiosis is always symmetrical, an opinion which Dr. Wiot disputes. Decision and Order at 10. Hence, the record reflects that the administrative law judge fully considered the alternative diagnoses in the medical opinion evidence and properly rejected them.

Third, the administrative law judge properly rejected those medical opinions, that claimant did not have complicated pneumoconiosis, which were based upon a finding that claimant does not have a totally disabling respiratory impairment. The majority asserts that in rejecting these opinions the administrative law judge "appears to have substituted his own medical opinion for that of the experts." Decision and Order at 9. To the contrary, the administrative law judge's analysis accords with the teaching of the United States Court of Appeals for the Fourth Circuit in *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 258, 22 BLR 2-93, 2-103 (4th Cir. 2000), that the issue for the administrative law judge is whether the evidence establishes "'complicated pneumoconiosis', in the statutory sense, [which] is established by the application of congressionally defined criteria, and as we have been careful to note, that most objective measure of the condition specified by Section 921(c)(3) is obtained through x-rays" (citation omitted). In finding irrelevant those medical opinions of no complicated pneumoconiosis which were based on claimant's lack of a respiratory impairment, the administrative law judge demonstrated his understanding of the Fourth Circuit's analysis in *Scarbro*, in which the court rejected employer's argument that the autopsy evidence conflicted with the x-ray evidence. The court held that the argument was based on two "flawed premises[:] [f]irst, that the statutory definition of complicated pneumoconiosis must be congruent with a medical or pathological definition [and] [s]econd, ... that the reports of [d]octors ... who gave opinions that the autopsy slides did not meet this pathological definition undermine the administrative law judge's finding of statutory complicated pneumoconiosis." 220 F.3d at 257, 22 BLR 2-102-103. Similarly, in the case at bar, medical opinions which require a finding of a respiratory impairment to diagnose complicated pneumoconiosis must be rejected as irrelevant because they have no support in the statute. The Fourth Circuit made clear: "to the extent there is a divergence between the medical and legal standards for complicated pneumoconiosis, we must apply the standard established by Congress." *Id*. That is what the administrative law judge did in the instant case.

As I have demonstrated, the majority's three allegations of error in the administrative law judge's decision are devoid of merit. Indeed, review of his decision reveals his thoughtful analysis of the evidence in light of the Fourth Circuit's teaching. Accordingly, his Decision and Order awarding benefits should be affirmed.

REGINA C. McGRANERY
Administrative Appeals Judge