BRB No. 99-0614 BLA

ARNOLD ELKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY 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-Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Lisa A. Warner (Shaffer & Shaffer), Madison, West Virginia, for claimant.

Richard Davis (Arter & Hadden, LLP), Washington, D.C., for employer.

Michelle S. Gerdano (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (98-BLA-0243) of Administrative Law Judge Gerald M. Tierney 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). The administrative law judge found that the weight of the x-ray readings of record established the existence of complicated pneumoconiosis and that claimant was therefore entitled to the irrebutable presumption, found at 20 C.F.R. §718.304, of total disability due to pneumoconiosis. Decision and Order at 2-4. The administrative law judge further found that, based on a length of coal mine employment determination of twenty-one and one-half years, claimant was entitled to the presumption, found at 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of coal mine employment, and that employer failed to rebut the presumption. Decision and Order at 4. Accordingly, benefits were awarded. The administrative law judge concluded that benefits were to commence as of October, 1993, the month in which complicated pneumoconiosis was first diagnosed.

On appeal, employer contends that the administrative law judge erred in failing to address all relevant evidence of complicated pneumoconiosis. Employer further asserts that the administrative law judge erred in his onset determination as benefits were deemed payable for a period of time prior to the date upon which the claim was filed. Claimant responds and urges affirmance of the award of benefits and the onset date determination. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a brief in which he makes no assertions regarding the merits of entitlement, but contends that the administrative law judge's onset date determination is consistent with applicable law.[1]

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).

[1]We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and his finding that claimant was entitled to the presumption at Section 718.203(b), and that the presumption was not rebutted. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer asserts that the administrative law judge's finding of complicated pneumoconiosis at Section 718.304 was based solely on an inadequate analysis of the x-ray evidence and that the administrative law judge erred in failing to address evidence, specifically CT scans, which did not support a finding of complicated pneumoconiosis.

Employer contends that the administrative law judge erred in concluding that Drs. Deardorff, Bassali and Leef had qualifications equal to those of Dr. Wheeler, although all four doctors are B-readers and board-certified radiologists,[2] and that, to the extent the administrative law judge relied on those qualifications in considering the x-ray evidence of record, the administrative law judge erred. In concluding that claimant established the existence of complicated pneumoconiosis and thus entitlement to the presumption of total disability due to pneumoconiosis at Section 718.304, the administrative law judge found that the weight of the x-ray interpretations by those physicians with the superior qualifications of B-reader and board-certified radiologist demonstrated the presence of complicated pneumoconiosis.[3] Contrary to employer's assertion, the administrative law judge is not obliged to accord greater weight to Dr. Wheeler's x-ray interpretation, based on the physician's extensive qualifications beyond that of B-reader and board-certified radiologist. See *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *see also Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Accordingly, inasmuch as the administrative law judge has focused on the qualitative elements of physicians' x-ray interpretations, we affirm his determination that the x-ray interpretations of record provide support for a finding of complicated pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*,

[2]A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16 , 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

[3]Section 718.304(a) states, in pertinent part, that an x-ray demonstrates complicated pneumoconiosis when it "...yields one or more large opacities (greater than one centimeter in diameter) and would be classified in Category A, B,or C...." 20 C.F.R. §718.304.

990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Adkins v. Director, OWCP*, 958 F2d 49, 16 BLR 2-61 (4th Cir. 1992).

Further, we reject employer's assertion that remand is necessary for the administrative law judge to discuss the CT scan reports because in order to establish invocation of the irrebutable presumption at Section 718.304, an administrative law judge must consider all relevant evidence found at each subsection pursuant to Section 718.304(a)-(c), and then weigh together such evidence prior to invocation of the presumption. *See Lester v. Director, OWCP,* 993 F.2d 1143, 17 BLR 2-114 (4th Cir.1993); *Melnick, supra*. We have held that, while not specifically provided for in the regulations, CT scans generally constitute relevant evidence of the presence of complicated pneumoconiosis, that are to be considered under Section 718.304(c). *See Melnick, supra*.

In the instant case, the record contains one CT scan which was performed by and reviewed by Dr Pate, Employer's Exhibit 1, and eventually reviewed by Dr. Wheeler, Employer's Exhibit 3, and Dr. Crisalli, Employer's Exhibit 1. After reviewing the CT scan, Dr. Wheeler opined that claimant had probable conglomerate tuberculosis with masses and fibrosis in both upper lung fields, but that the examination was incomplete and nonstandard and should be repeated in standard fashion. Employer's Exhibit 3. Dr. Pate concluded that there were conglomerate soft tissue densities in both upper lung lobes of the lung as well as small pulmonary nodules in the upper lung zones which were compatible with occupational pneumoconiosis. Employer's Exhibit 1. Dr. Crisalli, who reviewed the CT scan along with claimant's other medical evidence, including the x-ray interpretations of record, concluded that there was sufficient data to support a diagnosis of coal workers' pneumoconiosis with conglomerate changes. While, as employer asserts, these physicians do not diagnose the presence of complicated pneumoconiosis based on the CT scan, the physicians at the same time do not diagnose the absence of the condition based on the scan. Hence, the CT scan evidence is not probative evidence regarding the existence or nonexistence of complicated pneumoconiosis pursuant to Section 718.304. *See Lester*, *supra*; *Melnick*, *supra*. Accordingly, we affirm the administrative law judge's finding that claimant has established entitlement to invocation of the presumption of complicated pneumoconiosis at Section 718.304, based upon the x-ray evidence of record. *See Lester*, *supra*; *Melnick, supra*; *see generally Ondecko*, *supra*.

Employer further contends that the administrative law judge erred in determining that claimant's benefits were to commence as of October 1, 1993. Employer asserts that under 30 U.S.C. §924(c), benefits are not payable for any period prior to the month in which the claim was filed, which is February, 1997 in the

instant case. Hence, employer argues it was error to award benefits as of October, 1993.

In finding that benefits were to commence as of October 1, 1993, the administrative law judge relied upon the date of the first evidence of complicated pneumoconiosis. Decision and Order at 4. We reject employer's assertion, and hold that October 1, 1993 was the proper date for the commencement of benefits. Employer's reliance on Section 414(c) of the Act, *see* 30 U.S.C. 924(a) is inapposite to the instant claim inasmuch as Section 414(c) applies only to Part B claims. *See* 30 U.S.C. §940. Where the administrative law judge finds the existence of complicated pneumoconiosis demonstrated, the month in which complicated pneumoconiosis was first diagnosed generally governs the onset date. *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979). If the evidence does not reflect when claimant's simple pneumoconiosis became complicated pneumoconiosis, the onset date for payment of benefits is the month during which the claim was filed or during which claimant filed his election card, unless the evidence affirmatively establishes that claimant had only simple pneumoconiosis for any period subsequent to the date of filing or election, in which case benefits must commence following the period of simple pneumoconiosis. 20 C.F.R. §725.503(b). In the instant case, the administrative law judge has properly relied on the October 1, 1993, as it is the first day of the month in which those x-rays diagnosing complicated pneumoconiosis were taken. *See* Claimant's Exhibit 1; Employer's Exhibit 4. Accordingly, we affirm the administrative law judge's finding that benefits were to commence as of October 1, 1993. *See Truitt*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge