U.S. Department of Labor

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

BRB No. 14-0435 BLA

GRAT M. SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FRONTIER-KEMPER CONSTRUCTORS, INCORPORATED	)	DATE ISSUED: 05/31/2016
	)	
	)	
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 T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

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

Mary Lou Smith (Howe, Anderson & Smith, P.C.), Washington, D.C., for employer.

Sarah M. Hurley (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, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order – Award of Benefits (2012-BLA-5178) of Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge), rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with twelve years and two months of coal mine employment, determined that employer is the properly designated responsible operator, and adjudicated this claim, filed on August 26, 2008, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.304, 718.203(b), thereby entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's determination that employer is a successor operator and that claimant's combined employment was for at least one year. Employer also contends that the administrative law judge erred in finding that the biopsy and medical evidence as a whole establishes complicated pneumoconiosis at Section 718.304. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to affirm the administrative law judge's finding that employer is the properly designated responsible operator. Employer has filed a reply brief in support of its position.

Upon consideration of employer's appeal and the pleadings filed by the parties, the Board directed the parties to provide further briefing on the issue of whether employer may properly be considered a successor operator.[1] *Smith v. Frontier-Kemper*

[1] The Board noted that at issue in this case, among other things, is the miner's coal mine construction work for Frontier-Kemper Constructors (the Partnership) in 1973-1974, before Congress amended Chapter I of the Federal Mine Safety and Health Act (FMSHA) to expand the definition of coal mine operator to include "any independent contractor performing services or construction at [a] mine." *See Joy Technologies v. Sec'y of Labor*, 99 F.3d 991, 993 (10th Cir. 1996). The amendment became effective 120 days after its November 9, 1977 enactment. Subsequently, in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), noting a presumption against retroactive legislation, the Supreme Court devised a two-prong test for courts to determine whether legislation is impermissibly retroactive: 1) determine whether Congress expressly prescribed the legislation's proper reach; and 2) if not, "determine whether the new statute would have a retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280; *see also Eastern Enterprises*

Constructors, Inc., BRB No. 14-0435 BLA (Sept. 18, 2015) (Order) (unpub.). All parties submitted supplemental briefs in response to the Board's Order.

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).

Initially, employer, Frontier-Kemper Constructors, Incorporated (FKCI or employer), contends that the administrative law judge erred in finding it to be the properly designated responsible operator. Employer argues that the administrative law judge erred in finding it to be in a successor relationship with Frontier-Kemper Constructors (the Partnership), and in finding that claimant's employment with both companies may be combined to establish at least one year of coal mine employment. Employer maintains that the Partnership did not meet the definition of a coal mine "operator" that was applicable during the period of claimant's employment in 1973-1974 and, therefore, employer cannot be a "successor operator" as currently defined under the Act. Employer maintains that the Act contains no explicit statement that the status of coal mine construction companies, which were not operators prior to the 1977 amendments, would be retroactively changed after the amendments. Consequently, employer asserts that it should be dismissed as a party to this claim. Employer's Brief at 8-10; Reply Brief at 2-4; Employer's Supplemental Brief at 2-6.

The record reflects that, prior to the 1977 amendments[3] expanding the definitions of "operator" and "miner" to include those who participated in the construction of coal

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v. Apfel, 524 U.S. 498 (1998); *Lindh v. Murphy*, 521 U.S. 320 (1997); *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939 (1997).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[3] The Black Lung Benefits Act incorporates the definition of "operator" from the FMSHA. *See* 62 Fed. Reg. 3363 (Jan. 22, 1997). At the time of claimant's employment with the Partnership, the FMSHA defined "operator" as "any owner, lessee, or other person who operates, controls or supervises a coal mine." 30 U.S.C. §802(d) (1969). In 1977, Congress amended the FMSHA, expanding the definition of operator to include "any independent contractor performing services *or construction at such mine*." 30

mines, claimant worked for the Partnership during portions of 1973 and 1974, building an airshaft at a coal mine. Director's Exhibit 17; Hearing Transcript at 38-39. On December 31, 1982, the Partnership transferred 100% of its partnership interests to FKCI for tax purposes. Director's Exhibit 39. Claimant worked for FKCI for a portion of 2005. Director's Exhibits 3, 10, 17.

A "successor operator" is defined as "[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). Additionally, Section 725.492(b) states that a successor operator is created when an operator ceases to exist by reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3). In any case in which an operator is a successor operator, any employment with a prior operator shall also be deemed to be employment with the successor operator. 20 C.F.R. §725.493(b)(1).

Employer argues that the Partnership cannot be considered a prior coal mine operator because it did not meet the definition of "operator" that was applicable during the period claimant worked for the Partnership in 1973-1974. Employer asserts that because the Partnership did not meet the definition of a coal mine "operator," employer cannot be a "successor operator" as currently defined under the Act. Employer maintains that, without explicit congressional authorization, the Department of Labor cannot turn the Partnership into an operator retroactively through its regulations. We disagree with employer's characterization of the Department's regulations.

The Director, noting that the definition of "operator" was expanded in 1977 to include companies that performed construction services at coal mines, asserts that there is no prohibition against applying the amended definition of "operator" to this claim. The Director notes that the Partnership was an operator under the amended definition at the time of its reorganization into FKCI in 1982; that claimant was employed by FKCI in 2005; and that the instant claim was filed in 2008, long after the 1977 amendments to the

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U.S.C. 802(d) (emphasis added). The 1977 amendments became effective on March 9, 1978, 120 days after their November 9, 1977 enactment.

The Black Lung Benefits Reform Act of 1977 became effective on March 1, 1978 and expanded the definition of "miner" to include "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal," as well as "an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent that such individual was exposed to coal dust as a result of such employment." *See* 30 U.S.C. §902(d).

Act became effective. The Director maintains that, because FKCI employed claimant as a miner in 2005, it was on notice, as a coal mine construction contractor, that it could be held liable as a successor operator for any black lung benefits awarded to the miner, and could have protected its interests by securing commercial insurance, qualifying as a self-insurer, or by declining to hire claimant. The Director asserts that, because the conduct giving rise to employer's liability was not complete at the time the definition of "operator" was amended, the law does not have impermissible retroactive effect here. Director's Brief at 5-7; Director's Supplemental Brief at 8-16.

We agree with the Director that the filing date of the miner's claim controls the definition of "operator" to be applied in this case, as the regulations at 20 C.F.R. Part 725 apply to "all claims filed after January 2001." 20 C.F.R. §725.2. We perceive no retroactive effect under a *Landgraf* analysis, *see Landgraf v. USI Film Products*, 511 U.S. 244 (1994), as the expanded definition of "operator" in the 1977 amendments, which included contractors performing construction at a mine, became effective 120 days after enactment and only applied to prospective claims based on their filing date. As the Director notes, FKCI had ample opportunity to protect its interests under these circumstances. *See Landgraf*, 511 U.S. at 270 ("The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact."); *Tasios v. Reno,* 204 F.3d 544, 549 (4th Cir. 2000) ("Fairness dictates that people have an opportunity to know what the law is and conform their conduct accordingly; settled expectations should not be lightly disrupted.") (citation omitted); 2 *Sutherland Statutory Construction* § 41:4 (7th ed. 2014) ("Retrospective application of a law occurs only if the new or revised law was not yet in effect on the date that the relevant events underlying its application occurred."). Accordingly, we hold that FKCI is a successor in interest to the Partnership, and that claimant's construction work with both entities may be combined to determine whether claimant was employed for at least one year pursuant to 20 C.F.R. §725.494.[4]

Employer next challenges the administrative law judge's determination that claimant established at least one calendar year of combined employment with the Partnership and FKCI. Employer asserts that the administrative law judge's calculations are mathematically inaccurate, misrepresent the record, and are not supported by substantial evidence. Employer's Brief at 10-13. We disagree.

A coal mine operator is a "potentially liable operator" if it employed the miner "for a cumulative period of not less than one year," 20 C.F.R. §725.494(c), and meets the

[4] To be liable for the payment of benefits as the responsible operator, employer must be the last viable coal mine operator to have employed the miner for a period of at least one year. 20 C.F.R. §725.494(c).

other criteria of a potentially liable operator.[5] A "year" is defined as "one calendar year or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'"[6] 20 C.F.R. §725.101(a)(32). The administrative law judge may apply any reasonable method of calculation in determining the length of the miner's coal mine employment. *See Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-281 (2003); *Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72-73 (1996) (en banc) (McGranery, J., concurring and dissenting); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-13 (1988) (en banc); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988).

In finding that claimant established at least one year of employment with employer, the administrative law judge found that claimant worked for the Partnership for the last three weeks in 1973 and for eight months in 1974, and worked for FKCI for three months and two weeks in 2005, for a cumulative employment relationship of more than one year.[7] Decision and Order at 9, 11. In finding three weeks of employment established in 1973, the administrative law judge utilized claimant's earnings in 1974 to find an average weekly wage of "about $280," and divided claimant's 1973 fourth quarter earnings of $758.11[8] by his average weekly wage to find that claimant worked "no less

[5] In addition to establishing that the miner worked for the operator for at least one year, the Director, Office of Workers' Compensation Programs, must also establish that the miner's disability or death arose out of employment with that operator; that the entity was an operator after June 30, 1973; that the miner's employment included at least one working day after December 31, 1969; and that the operator is financially capable of assuming liability for the claim. 20 C.F.R. §725.494(a)-(e). The above issues are not in dispute in this case.

[6] Where the evidence establishes that the miner's employment lasted for at least one year, "it shall be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment." 20 C.F.R. §725.101(a)(32)(ii). Employer does not argue that claimant spent less than 125 working days in its employ.

[7] We note that the administrative law judge credited claimant with three months and two weeks of employment for his work with FKCI from August 16, 2005 to November 30, 2005. Decision and Order at 9. When totaling his findings, however, he mistakenly added three months and three weeks. Decision and Order at 11.

[8] The administrative law judge determined that this value may understate what claimant actually earned in 1973 due to the potential lag between completion of the workweek and the receipt of the pay check. Decision and Order at 6, n.11.

than the last three weeks of December 1973 for [the Partnership]."[9] Decision and Order at 6-7. The administrative law judge further credited claimant's uncontradicted testimony that, when his wife's uncle died in a mine accident on December 17, 1973, he had been working for the Partnership for a week. Decision and Order at 6-7; Director's Exhibit 16; Hearing Transcript at 62-63. In finding that claimant worked eight months in 1974 for the Partnership, the administrative law judge determined that claimant continued working from January 1, 1974 through the end of August 1974, based on: claimant's credible testimony that he started working for Centennial Constructions, Inc. (Centennial) right after he left the Partnership; Centennial's employment records, showing that claimant returned to work for Centennial on September 1, 1974; and claimant's Social Security Administration (SSA) records, indicating that he earned $2,247 with the Partnership in the third quarter of 1974 (July to September), "which represents about 2/3 of his average quarterly earnings of $3,638 with [the Partnership] in 1974, and equates to two out of three months in the third calendar quarter, that is, July and August."[10] Decision and Order at 7 n.14; Director's Exhibits 9, 17. In finding that claimant worked for employer for three months and two weeks in 2005, the administrative law judge credited claimant's SSA records and a statement from employer's human resources director, that claimant worked from August 16, 2005 to November 30, 2005.[11] Decision and Order at 9; Director's Exhibits 10, 17. The administrative law judge credited claimant's testimony that he was regularly exposed to coal mine dust in his job sinking coal mine air shafts to find that all of claimant's work with the Partnership and FKCI was that of a coal miner. Decision and Order at 6. Thus, the administrative law judge found that claimant's

[9] Claimant's Social Security Administration (SSA) records indicate that claimant earned $758.11 in the fourth quarter of 1973, and in 1974 earned as follows: $4,730.85 in the first quarter; $3,939.16 in the second quarter; and $2,247.89 in the third quarter, for a total of $10,917.90 in 1974. Director's Exhibit 17. The administrative law judge added claimant's earnings for 1974 and divided by 3 quarters to get the average quarterly earnings of $3,638. The administrative law judge then divided $3,638 by 13 weeks to get "an average weekly wage of about $280." Decision and Order at 7. ($3,638/13 = $279.85). Dividing claimant's 1973 earnings of $758.11 by 280 equals 2.71 weeks. Decision and Order at 7.

[10] The SSA records indicate that, in 1974, claimant earned $4,730.85 in the first quarter; $3,939.16 in the second quarter; and $2,247.89 in the third quarter, for a total of $10,917.90. Director's Exhibit 17. ($4,730.85 + $3,939.16 + $2,247.89) / 3 quarters = $3,638. $3,638 x 2/3 = $2,425.33. Decision and Order at 7 n.14.

[11] Claimant worked at the Laurel Fork Mine Project from August 16, 2005 until October 5, 2005, when he was transferred to the Consol Buchanan Production Shaft Repair Project. Claimant continued working until November 30, 2005, when the project ended. Director's Exhibit 10.

cumulative employment with the Partnership and FKCI totaled more than one year. Decision and Order at 11 n.17.

Employer contends that the administrative law judge's calculations erroneously exaggerate the length of claimant's employment by misrepresenting the record, and that even under the administrative law judge's own methodology, the resulting total is less than one year of employment. Employer challenges the administrative law judge's assumption that four weeks is equal to one month, and asserts that the administrative law judge's finding of three weeks of employment in 1973 was not reasonable, as it conflicts with his own calculation of less than three weeks and is not supported by claimant's unreliable testimony. Arguing that claimant was equivocal at the hearing and in conversations with the district director, employer maintains that "the unsworn 'I left one job for the other' statement . . . [in the record], standing alone, does not support the administrative law judge's conclusion [that claimant worked through August 31, 1974] in light of the numerous sworn statements by claimant that he did not recall what happened back in 1974." Employer's Brief at 12. Employer also asserts that claimant's vague recollection about engaging only in "shaft-sinking" is not credible testimony of the work he performed for FKCI in 2005, which included repair work at a mine that had been idle for a month. Thus, employer maintains that it has rebutted the presumption that claimant was exposed to coal dust while working on the Buchanan repair project at an idle mine. Employer's Brief at 10-13; Reply Brief at 4-6.

Contrary to employer's contentions, the administrative law judge reasonably found that claimant worked for employer for at least one year. An administrative law judge is granted broad discretion in evaluating the credibility of the evidence of record, including witness testimony. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchawara v. Director, OWCP*, 7 BLR 1-167 (1984). The administrative law judge permissibly found that claimant's testimony was credible and sufficient to support the finding that claimant worked for the Partnership and FKCI for at least one year. Decision and Order at 6-12; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Specifically, the administrative law judge credited claimant's testimony that he remembered working at the Partnership for one week prior to learning of the untimely death of his wife's uncle on December 17, 1973, as supported by claimant's SSA records reflecting earnings of $758.11 in the last quarter, which the administrative law judge calculated to be approximately three weeks' salary. Moreover, the administrative law judge determined that the earnings "may understate what claimant actually earned in 1973 due to the potential lag between completion of the workweek and the receipt of the pay check." Decision and Order at 6 n.11. In finding that claimant worked eight months in 1974, the administrative law judge permissibly credited claimant's testimony that he "left one job for the other," and claimant's SSA record earnings in the first three quarters, concluding that claimant worked two out of three months in the third calendar quarter, *i.e.*, July and the full month of August. Director's Exhibit 15; Decision and Order at 7

n.14. Lastly, in finding that claimant worked three months and two weeks in 2005, the administrative law judge rationally credited all employment time as reported by the human resources director of FKCI, as claimant is entitled to the rebuttable presumption that he was exposed to coal mine dust during his work pursuant to 20 C.F.R. §725.202(a), (b).[12] Decision and Order at 9; Director's Exhibit 10. We note employer's argument that it has rebutted the presumption that claimant was exposed to coal mine dust during all periods of employment in 2005, as it has presented evidence that a portion of claimant's employment for FKCI was that of repair work at an idle mine. We decline, however, to address employer's contention because employer failed to raise this issue before the administrative law judge, and may not raise it for the first time on appeal. *See generally Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986); *Taylor v. 3D Coal Co.*, 3 BLR 1-350, 1-355 (1981). We affirm, therefore, the administrative law judge's finding that claimant has established cumulative employment of at least one year with employer.[13]

Turning to the merits, employer challenges the administrative law judge's finding that the evidence of record as a whole is sufficient to establish complicated pneumoconiosis at Section 718.304. Employer contends that the administrative law judge erred: in crediting Dr. Mayes's biopsy findings as a diagnosis of pneumoconiosis; in crediting the medical opinion of Dr. Robinette over that of Dr. Fino; and in mischaracterizing Dr. Dorsey's opinion. Employer's Brief at 13-16.

[12] Construction workers are considered to be "miners" under the Act if they are exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility, and if their work is integral to the building of a coal or underground mine. 20 C.F.R. §725.202(b). Such workers are entitled to a rebuttable presumption that they were exposed to coal mine dust during all periods of such employment. 20 C.F.R. §725.202(b)(1). The presumption may be rebutted: 1) by evidence which demonstrates that the individual was not regularly exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility; or 2) by evidence which demonstrates that the individual did not work regularly in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b)(2)(i), (ii).

[13] While employer is correct that the administrative law judge credited claimant with one month of employment for only four weeks of work, rather than five weeks, any error is harmless, as claimant's employment would equal one year based on the administrative law judge's findings. 1973 – 3 weeks + 1974 – 8 months + 2005 – 3 months and 2 weeks = 11 months and 5 weeks = 1 year. Decision and Order at 11 n.17; *see Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The United States Court of Appeals for the Fourth Circuit has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by any other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray." *E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999).

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. Thus, in determining whether the evidence establishes complicated pneumoconiosis, the administrative law judge must examine all of the evidence on the issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, and resolve any conflicts in the evidence. *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

In finding the weight of the evidence sufficient to establish the existence of complicated pneumoconiosis at Section 718.304, the administrative law judge initially considered the x-ray evidence of record. At Section 718.304(a), the administrative law judge considered nineteen interpretations of thirteen x-rays, and found the May 24, 2007 treatment x-ray to be negative for a large opacity consistent with pneumoconiosis. He further found the treatment x-rays dated July 10, 2007, July 11, 2007, July 12, 2007, July 13, 2007, July 16, 2007, February 13, 2008, and February 11, 2011 to be either insufficient to establish, or inconclusive for, the presence of pneumoconiosis. Decision and Order at 16-20; Director's Exhibits 23, 23a. The administrative law judge found the x-rays dated October 16, 2008,[14] March 12, 2012, and May 4, 2012[15] to be positive for a

[14] Interpreting the x-ray dated October 16, 2008, Drs. DePonte and Alexander, both dually qualified as B readers and Board-certified radiologists, diagnosed simple pneumoconiosis and complicated pneumoconiosis, Category B, while Dr. Wheeler, also dually qualified, found no pneumoconiosis but noted emphysema and masses

large pulmonary opacity consistent with pneumoconiosis, and the x-ray dated May 31, 2012[16] to be negative for a large opacity consistent with pneumoconiosis. The administrative law judge noted that the three x-rays he credited as positive were based on a preponderance of interpretations by dually qualified physicians, whereas Drs. Brecher[17] and Fino, who interpreted their respective x-rays as negative, are not dually qualified. According greater weight to the readings by physicians with superior credentials, the administrative law judge permissibly concluded that claimant established, through a preponderance of the more probative x-rays, the presence of a large pulmonary opacity consistent with pneumoconiosis. Decision and Order at 20; *see Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-65 (2004)(en banc); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004).

At Section 718.304(b), the administrative law judge considered the biopsy report of Dr. Mayes, who obtained needle biopsy specimens from the right apical mass,

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"compatible with conglomerate granulomatous disease, histoplasmosis, or mycobacterium avium complex that were more likely than tuberculosis." Noting that the three doctors are similarly well-qualified, the administrative law judge credited the positive findings of pneumoconiosis as representing the preponderance of the probative interpretations. Decision and Order at 17, 19, 20; Director's Exhibits 25, 27, 28; Claimant's Exhibit 2.

[15] Dr. DePonte read the March 12, 2012 and the May 4, 2012 x-rays as positive for simple pneumoconiosis and complicated pneumoconiosis, Category B, while Dr. Fino, a B reader, read these x-rays as negative for both simple and complicated pneumoconiosis, and commented that old granulomatous disease was noted. Claimant's Exhibits 3, 4, 5; Employer's Exhibits 8, 9. Crediting Dr. DePonte's superior qualifications, the administrative law judge found the two x-rays to be positive for a large pulmonary opacity consistent with pneumoconiosis. Decision and Order at 17-18, 19-20.

[16] Interpreting the x-ray dated May 31, 2012, Dr. Ebeo, who has no particular radiological qualifications, diagnosed emphysema and noted lung masses consistent with a history of pneumoconiosis, while Dr. Fino read the x-ray as negative for both simple and complicated pneumoconiosis, and commented that old granulomatous disease was noted. Claimant's Exhibit 7; Employer's Exhibit 10. Crediting Dr. Fino's superior qualifications, the administrative law judge found the x-ray to be negative for a large pulmonary opacity consistent with pneumoconiosis. Decision and Order at 18, 20.

[17] The administrative law judge took judicial notice that Dr. Brecher, who administered the May 24, 2007 x-ray, is not qualified as a B reader. Decision and Order at 16 n.26; Director's Exhibit 23a.

consisting of "five black-gray anthracotic, cylindrical soft tissue fragments." Director's Exhibit 23 at 108. Upon microscopic examination, Dr. Mayes observed lung tissue replaced by fibrosis, a histocytic proliferation, and anthracotic material. He noted that polarized light revealed histocytes filled with silicotic material and that calcification was prominent. Dr. Mayes provided an interpretation of a "calcified anthrosilicotic nodule." *Id.* In considering Dr. Mayes's opinion, the administrative law judge determined that because Dr. Mayes neither diagnosed massive lung lesions, nor opined that his pathologic diagnosis would support a finding that the mass would be equivalent to x-ray evidence of a large opacity consistent with pneumoconiosis, his pathology findings were insufficient to establish the presence of a large mass consistent with pneumoconiosis at Section 718.304(b). The administrative law judge found, however, that the pathologic diagnosis of a calcified anthrosilicotic nodule establishes the presence of clinical pneumoconiosis in the right lung mass, as defined at 20 C.F.R. §718.201(a)(1). Decision and Order at 20.

Employer maintains that Dr. Mayes's description of an anthrosilicotic nodule in the lung is not a diagnosis of anthrosilicosis *per se*, and that the doctor did not link it to claimant's coal mine employment. Employer's Brief at 13. The regulations, however, provide that clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1). Furthermore, the administrative law judge found that claimant established more than ten years of coal mine employment, entitling him to the presumption that his pneumoconiosis arose out of coal mine employment.[18] Decision and Order at 41; *see Hapney v. Peabody Coal Co.*, 22 BLR 1-104, 1-115 (2001) (en banc) (Smith & Dolder, J.J., concurring and dissenting); 20 C.F.R. §718.203(b). We, therefore, reject employer's arguments.

At Section 718.304(c), the administrative law judge considered the digital x-ray, positron emission tomography (PET) scan, computed tomography (CT) scan, and medical opinion evidence of record.[19] The administrative law judge determined that the digital x-

[18] Employer makes no specific challenge to the administrative law judge's finding of at least ten years of coal mine employment and entitlement to the presumption at 20 C.F.R. §718.203(b).

[19] The administrative law judge also determined that the results from the pulmonary function studies and arterial blood gas studies did not establish total respiratory disability at 20 C.F.R. §718.204(b). Decision and Order at 27-28.

ray was positive for a large opacity consistent with pneumoconiosis,[20] while the PET scan was inconclusive.[21] Decision and Order at 21-22. Considering the CT scan evidence, the administrative law judge determined that the CT scans dated September 14, 2007, February 4, 2008, August 14, 2008, February 1, 2010, and August 26, 2011 were inconclusive for the presence of a large opacity of pneumoconiosis; the April 6, 2006 CT scan was positive;[22] and the CT scans dated May 29, 2007[23] and February 16, 2009[24]

[20] Dr. Alexander read the December 16, 2010 digital x-ray as positive for simple pneumoconiosis and complicated pneumoconiosis, Category B. Claimant's Exhibits 1, 2. Dr. Fino initially read the x-ray as consistent with simple pneumoconiosis and complicated pneumoconiosis, Category A, but upon reviewing it in conjunction with the computed tomography (CT) scans, concluded that the changes were old granulomatous disease and did not represent simple or complicated pneumoconiosis. Dr. Fino noted that the "large opacity" he saw in the right upper lung is extensively calcified, and that there is extensive calcification in the left upper lung with a 1.4 centimeter calcified opacity. Considering these findings and claimant's normal blood gas studies and spirometry findings, he diagnosed old granulomatous disease, based on the significant calcification. Director's Exhibit 23. Crediting Dr. Alexander's superior qualifications, the administrative law judge found the digital x-ray to be positive for a large opacity consistent with pneumoconiosis. Decision and Order at 21.

[21] On June 13, 2007, a positron emission tomography (PET) scan conducted by Dr. Marinus Ndikum revealed intense uptake in bilateral, spiculated masses in the upper lung lobes, which raised concern for lung cancer. Small hypermetabolic lymph nodes in the mediastinum and perihilar regions were notes. Emphysema was also present. Dr. Ndikum recommended a lung biopsy. The administrative law judge determined that, since the radiologist did not definitively determine the etiology of the bilateral masses, and instead recommended a lung biopsy, the PET scan is inconclusive for a large pulmonary opacity consistent with pneumoconiosis. Decision and Order at 22.

[22] On April 6, 2006, Dr. Maxwell performed a CT scan at Johnston Memorial Hospital and noted advanced pneumoconiosis and chronic obstructive pulmonary disease (COPD) with conglomerate masses in both upper lobes, with the right lung lesion measuring 5x3 centimeters and the left lung lesion measuring 4x2 centimeters, both containing dense calcification. He diagnosed "advanced pneumoconiosis of coal miner's disease or silicosis with associated COPD." Director's Exhibit 23 at 79. Based on the sizes of the two pulmonary masses, the administrative law judge considered Dr. Maxwell's interpretation sufficient to establish that the CT scan was positive for the presence of a large pulmonary opacity consistent with pneumoconiosis. Decision and Order at 22.

[23] Regarding a CT scan dated May 29, 2007, Dr. Barnes at Carilion Crystal Spring Imaging found large emphysematous areas in both lung apices. The right upper lobe

were negative. Decision and Order at 22-25. Weighing the positive and negative scans, the administrative law judge found that the preponderance of the probative CT scan evidence was negative for the presence of a large opacity consistent with pneumoconiosis. Decision and Order at 25. Noting "the critical conflict among the diagnostic evidence," the administrative law judge reasoned:

> [T]he conflict relates not to the presence of large pulmonary masses but the possible cause(s) of the upper lobe masses, which ranged from lung cancer, to granulomatous disease, to pneumoconiosis. To resolve that dispute, particularly after the PET scan showed uptake in the large calcified masses, and while recognizing that a finding of silicosis with calcification would be "rare," Dr. Dorsey had Mr. Smith undergo a CT guided lung biopsy of the right upper lobe mass. When Dr. Mayes microscopically examined the five core samples obtained from the large right upper lobe mass, he found the lung tissue replaced by fibrosis and anthracotic and silicotic material with calcification, and diagnosed a calcified anthrosilicotic nodule.

Decision and Order at 25-26.

While acknowledging that CT scans have more radiographic detail than chest x-rays, the administrative law judge noted,

> [T]he tissue obtained during Mr. Smith's lung biopsy directly from the large apical calcified mass in the right upper lobe provided actual physical evidence that the mass contained pneumoconiosis, which supports the etiology determination in the preponderance of the probative film chest x-

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mass measured 4 x 2.5 x 5.5 centimeters and was suspicious for neoplasm. Calcification was seen, raising a secondary consideration for granulomatous change and fibrocalcific scarring. The left upper lung contained a spiculated mass with calcifications, measuring 10.7 x 2 x 3.2 centimeters. Dr. Barnes concluded that the large masses contained coarse calcifications, suggesting possible fibrocalcific scarring related to granulomatous disease. Neoplasm was not excluded, but thought less likely. Director's Exhibit 23a at 8.

[24] Regarding a CT scan dated February 16, 2009, Dr. Wooldridge at Johnston City Medical Center noted that there were numerous calcified hilar and mediastinal lymph nodes. The extensive amount of emphysematous lung disease changes, left greater than right, biapical pleural/parenchymal scarring, and partially calcified soft tissue at the level of the bilateral hila were without change. Dr. Wooldridge's overall impression was that the lung abnormalities represented a combination of COPD, emphysema, and prior granulomatous lung disease. Director's Exhibits 23 at 24; 23a.

> ray evidence, rendering that radiographic evidence in this particular case more probative than the negative CT scan evidence.

Decision and Order at 26. Accordingly, the administrative law judge found that claimant established the presence of a large pulmonary opacity consistent with pneumoconiosis through the preponderance of the probative chest x-ray evidence under 20 C.F.R. §718.304(a).[25] *Id.*

The administrative law judge also reviewed the medical opinions or treatment notes of Drs. Bishop,[26] S. Melton,[27] H. Melton,[28] Dorsey,[29] Sherigar,[30] Patel,[31] Robinette,

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[25] Employer does not challenge the administrative law judge's assumptions that the masses seen on x-ray are identical in composition to the anthrosilicotic nodule.

[26] Dr. Bishop, with Carilion Health, saw claimant on January 14, 2006, January 23, 2006, and April 5, 2006, treating him for hypertension and noting an abnormal x-ray with a pulmonary nodule in the right lung. The administrative law judge determined that the doctor's treatment notes only mentioned the presence of a pulmonary nodule in April 2006. Decision and Order at 38; Director's Exhibit 23 at 69.

[27] Dr. S. Melton, with Carilion Health, saw claimant in 2007 and 2008 for lung masses, hypertension and pain. The administrative law judge noted that, while Dr. Melton was aware of the lung biopsy, his treatment notes never mention the biopsy findings. Decision and Order at 38; Director's Exhibit 23 at 46.

[28] Dr. H. Melton, with Carilion Health, saw claimant six times, beginning on November 13, 2009 and ending on January 20, 2011, for chronic pain and hypertension. The administrative law judge noted that the doctor's treatment notes do not address claimant's pulmonary condition. Decision and Order at 38; Director's Exhibit 23 at 4.

[29] Beginning on June 6, 2007, Dr. Dorsey, with Pulmonary Medicine Associates, treated claimant for shortness of breath and an abnormal CT scan. He noted in his assessment "pulmonary nodules with calcification consider malignancy versus [tuberculosis] versus granulomatous such as old fungal disease," and history of coal mine employment and hard rock mining with consideration of silicosis/pulmonary massive fibrosis (PMF) but calcification would be very rare." Dr. Dorsey ordered a PET scan. On July 6, 2007 he noted "pulmonary nodules - PET scan was positive with concern regarding malignancy." He then ordered a needle biopsy. The administrative law judge observed that Dr. Dorsey's treatment notes end with claimant's July 2007 post-biopsy hospitalization and, therefore, the record only contains the doctor's differential diagnoses of lung cancer, granulomatous disease, and pneumoconiosis. Decision and Order at 38; Director's Exhibit 23 at 23, 119, 121.

Ebeo, Argarwal, Gallai, Klayton, and Fino. Noting that Drs. Robinette, Ebeo, Argarwal, Gallai, and Klayton diagnosed complicated pneumoconiosis, while Dr. Fino diagnosed granulomatous disease, but not complicated pneumoconiosis, the administrative law judge accorded diminished weight to the opinions of Drs. Ebeo and Fino, because both physicians rendered opinions without reviewing the pathology findings from the lung biopsy. Decision and Order at 39. The administrative law judge observed that, as a treating physician, Dr. Ebeo[32] was well positioned to render a probative opinion that claimant had complicated pneumoconiosis. The administrative law judge found, however, that Dr. Ebeo's failure to review the pathology findings from claimant's lung biopsy, his reliance on claimant's recollection of the biopsy results, and his reliance on CT scan evidence indicative of complicated pneumoconiosis, contrary to the administrative law judge's determination, diminished the probative value of his opinion. Decision and Order at 39-40. Similarly, the administrative law judge determined that Dr. Fino[33] provided a documented and detailed analysis regarding the basis for his ultimate

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[30] Dr. Sherigar performed the February 10, 2007 biopsy. The administrative law judge noted that the doctor's operation notes did not contain a diagnosis for the confluent mass he biopsied. Decision and Order at 38; Director's Exhibit 23a.

[31] The administrative law judge noted that Dr. Patel did not render a specific determination concerning complicated pneumoconiosis, and that, at the conclusion of claimant's 2007 hospitalization, Dr. Patel reported in his discharge summary that the lung biopsy diagnosis was a benign calcified anthrosilicotic nodule. Decision and Order at 38; Director's Exhibit 23 at 141.

[32] Dr. Ebeo, with Pulmonary Associates of East Tennessee, saw claimant from 2008 to 2011. On January 30, 2008, he diagnosed "bilateral upper lobe nodular lesions, most likely secondary to pneumoconiosis and/or possible malignancy . . . due to significant history of tobacco abuse;" COPD secondary to continued smoking; and tobacco abuse for more than 45 pack-years. Dr. Ebeo noted "according to the patient, he had a biopsy of the right upper lung mass which came back negative for malignancy. The official report is not available at this time." Director's Exhibits 23 at 10, 130. On February 12, 2008, Dr. Ebeo found "upper lung nodules, more consistent with pneumoconiosis than malignancy," and COPD related to tobacco abuse and most likely worsened by previous coal dust exposure. Director's Exhibit 23 at 133. On August 29, 2008, he diagnosed complicated coal workers' pneumoconiosis and noted that he doubted a malignancy, since the nodules had been stable for the past six months. Director's Exhibit 23 at 160. *See* Director's Exhibit 23 at 1, 3, 130, 131, 133, 158-160, 167, 171.

[33] Dr. Fino examined claimant on December 16, 2010 and initially diagnosed simple and complicated pneumoconiosis, Category A, based on his x-ray of the same

conclusion that claimant does not have complicated pneumoconiosis. The administrative law judge found, however, that Dr. Fino's opinion was entitled to less weight because "[he] failed to integrate, reconcile, or even mention, the lung biopsy evidence of anthracosilicosis [sic] in the large right upper lobe calcified mass reported in Dr. Patel's July 2007 hospitalization notes and Dr. Robinette's September 2007 treatment note, which Dr. Fino indicated that he reviewed as part of his December 2011 pulmonary examination." Decision and Order at 40. The administrative law judge determined that Dr. Fino's failure to integrate the biopsy evidence of anthrosilicosis into his opinion was significant because Dr. Fino's opinion focused on the calcified nature of the pulmonary masses without acknowledging that the biopsy established the presence of pneumoconiosis within the large right calcified lesion. *Id.* The administrative law judge also accorded the opinion less weight because Dr. Fino seemed to require, contrary to the Act and the regulations, the presence of a disabling pulmonary or respiratory impairment in order to diagnose complicated pneumoconiosis, as he "emphasized that [claimant's] pulmonary function tests and arterial blood gas studies were normal." *Id.*

In contrast, the administrative law judge determined that that the opinions of Drs. Agarwal,[34] Gallai,[35] Klayton,[36] and Robinette[37] were "documented, reasoned, probative,

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date, although he also noted numerous calcified granulomata that could represent old granulomatous disease. After reviewing other x-rays and CT scans, he noted extensive calcification and calcified opacities in the right and left upper lobes. He revised his opinion, explaining that the changes he saw on the x-ray were old granulomatous disease, based on the significant calcification present and on claimant's normal oxygen transfer and normal spirometry. He diagnosed significant bilateral upper lobe granulomatous disease with large opacities due to granulomatous disease in both upper lung zones, representing old, healed histoplasmosis or tuberculosis. Director's Exhibit 23. Dr. Fino provided a supplemental opinion after reviewing additional medical evidence. He opined that the CT scans are key and that they show calcified granulomatous disease rather than simple and complicated coal workers' pneumoconiosis. He further stated that claimant has no objective lung disease that would result in an impairment or disability and no impairment in oxygen transfer. Employer's Exhibit 7.

[34] Dr. Agarwal performed the Department of Labor examination on October 16, 2008, and diagnosed clinical pneumoconiosis with progressive massive fibrosis (PMF) and legal pneumoconiosis due to smoking and coal dust. His diagnosis of clinical pneumoconiosis was based on Dr. DePonte's x-ray interpretation of the same date. Director's Exhibit 28.

[35] Dr. Gallai examined claimant on March 12, 2012, and diagnosed clinical pneumoconiosis, PMF and legal pneumoconiosis due to smoking and coal dust. His

and support, rather than contradict, a finding of complicated pneumoconiosis based on the preponderance of the probative x-ray evidence." Decision and Order at 40. The administrative law judge found that Dr. Robinette's opinion was entitled to the greatest probative weight because "he is the only physician to consider all the conflicting diagnostic evidence, consisting of x-rays, a PET scan, CT scans, pulmonary function tests, arterial blood gas studies, and a lung biopsy to reach an exceptionally well-reasoned and integrated determination that [claimant] has complicated pneumoconiosis." Decision and Order at 40-41. Thus, upon analysis of the diverse medical evidence in the record, including pulmonary function tests, arterial blood gas studies, and medical opinions, the administrative law judge found insufficient contrary probative evidence to outweigh the x-ray evidence he determined was supportive of a finding of complicated pneumoconiosis. Decision and Order at 41.

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diagnosis of clinical pneumoconiosis was based on Dr. De Ponte's x-ray interpretation of the same date. Claimant's Exhibit 3.

[36] Dr. Klayton examined claimant on May 4, 2012, and diagnosed clinical pneumoconiosis, PMF and legal pneumoconiosis due to smoking and coal dust. His diagnosis of clinical pneumoconiosis was based on Dr. De Ponte's x-ray interpretation of the same date. Claimant's Exhibit 5.

[37] Dr. Robinette is a Board-certified pulmonologist at Abingdon Internal Medicine who met with claimant for an assessment of claimant's abnormal CT scan. On August 10, 2007, Dr. Robinette reviewed a CT scan of the thorax that was performed at Johnston Memorial Hospital, and diagnosed COPD with evidence of multiple pulmonary masses consistent with probable complicated coal workers' pneumoconiosis versus old granulomatous disease, and emphysema. He indicated that he requested copies of the reports from Johnston Memorial and Roanoke Memorial Hospital. Director's Exhibit 23 at 89. On September 18, 2007, after reviewing claimant's medical records from Roanoke Memorial Hospital, Dr. Robinette noted that the lung biopsy showed evidence of calcification and an apparent anthrosilicotic nodule, without overt malignancy. The follow-up pulmonary function study results were normal, and a CT scan of the thorax was repeated at Johnston Memorial, which he compared to the prior CT from 2006. Dr. Robinette noted that the CT scan showed nodular densities in both upper lung zones with calcifications and fibrotic changes that are consistent with underlying silicosis and pneumoconiosis. He diagnosed "pneumoconiosis with pulmonary fibrosis (coal workers' pneumoconiosis with PMF)." Director's Exhibit 23 at 122. Employer does not raise any specific challenge related to Dr. Robinette's consideration of the CT scans.

We reject employer's argument that "the administrative law judge erroneously assessed the medical opinion evidence based on the unsupported conclusion that the biopsy results constitute a finding of pneumoconiosis." Employer's Brief at 13-16. Because the biopsy results are consistent with a diagnosis of clinical pneumoconiosis, we conclude that the administrative law judge's review and analysis represents a proper exercise of his duty as finder-of-fact to identify and resolve inconsistencies in the medical evidence. We therefore reject employer's specific challenges to the administrative law judge's evaluation and weighing of the medical opinion of Dr. Fino. The administrative law judge acted within his discretion in according Dr. Fino's opinion diminished weight because the physician did not discuss how his diagnosis of calcified granulomatous disease was supported by the underlying objective data, particularly when he failed to discuss the biopsy report indicating the presence of anthrosilicosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), *citing Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark*, 12 BLR at 1-155; Decision and Order at 40; Director's Exhibit 23; Employer's Exhibit 7. While employer asserts that Dr. Fino's opinion is consistent with Dr. Dorsey's opinion, the administrative law judge correctly noted that Dr. Dorsey's differential diagnosis was made at the time he ordered the needle biopsy, and similarly, did not include a review of the biopsy results. Decision and Order at 38; Director's Exhibit 23 at 23, 119, 121. Furthermore, as invocation of the irrebuttable presumption at Section 718.304 does not require a showing of a respiratory impairment, the administrative law judge permissibly discounted Dr. Fino's opinion due to his reliance on the absence of a respiratory impairment. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 7 n.4, 3 BLR 2-36, 2-38 n.4 (1976). Thus, the administrative law judge acted within his discretion in finding that the weight of the medical opinion evidence did not provide sufficient contrary evidence to outweigh a finding of complicated pneumoconiosis based on the x-ray evidence at Section 718.304(a). *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365-6, 23 BLR 2-374, 2-385-6 (4th Cir. 2006); *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100. As substantial evidence supports the administrative law judge's finding that the weight of the evidence of record is sufficient to establish complicated pneumoconiosis arising out of coal mine employment pursuant to Sections 718.304 and 718.203(b), it is affirmed.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's decision to affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.304, 718.203(b),[38] and to affirm the award of benefits. However, I respectfully dissent from the majority's holding that claimant's construction work for the Partnership in 1973 and 1974 may be combined with claimant's 2005 construction work for employer, FKCI, to establish at least one year of coal mine employment. Hence, I would release employer from liability as the responsible operator, and would transfer liability to the Black Lung Disability Trust Fund.

[38] Employer makes no specific challenge to the administrative law judge's finding of at least ten years of coal mine employment and entitlement to the presumption at 20 C.F.R. §718.203(b). Decision and Order at 41; Employer's Brief at 16.

I agree with the majority that FKCI is a successor in interest to the Partnership, because the Partnership met the definition of "operator" under the Act in 1982, when it reorganized into FKCI. *See* 20 C.F.R. §725.492(a), (b). However, FKCI is a successor operator only to the extent that the Partnership was an operator, which did not occur until the 1977 amendments to the Federal Mine Safety and Health Act and the Black Lung Benefits Act (the amendments to the Act) became effective. 30 U.S.C. §802(d); Pub.L. 95-164, Title I, § 102(b), 91 Stat. 1290 (1977); 30 U.S.C. §902(d); Pub.L. 95-239, § 2, 92 Stat. 95 (1978). Therefore, I do not agree that claimant's employment by the Partnership in 1973 and 1974 may be combined with his later employment by FKCI to establish the requisite one year of coal mine employment under 20 C.F.R. §725.494(c).

More specifically, construction work was not covered under the Act until 1977, and Congress did not make that coverage retroactive. Consequently, claimant was not a miner, and his employer was not an operator in 1973 and 1974. *See Creek Coal Co., Inc. v. Bates*, 134 F.3d 734, 737 (6th Cir. 1997) (an express command or clear directive from Congress is necessary to authorize the retroactive application of a statute), *citing Lindh v. Murphy*, 521 U.S. 320, 323-325 (1997), *citing Landgraf v. USI Film Products, Inc.*, 511 U.S. 244, 263, 272-73, 286 (1994). As a result, in 1973 and 1974 the Partnership had no liability or duties under the Act.

Under *Landgraf*, the essential inquiry in determining whether application of the statute is impermissible is "whether the new provision attaches new legal consequences to events which occurred before its enactment." *Vartelas v. Holder*, 132 S. Ct. 1479, 1491, *citing Landgraf*, 511 U.S. at 269-270. When the *Landgraf* test is applied to the facts of this case it is evident that application of the Act to count claimant's 1973 and 1974 Partnership employment as coal mine employment is impermissible, because doing so would impose liability on employer for conduct which was not subject to liability when it occurred, and impose new duties with respect to acts (his employment for periods in 1973 and 1974) already completed.[39] *See Landgraf*, 511 U.S. at 280. That claimant, some thirty-one years later, worked for FKCI, does not change the facts that 1) his employment by the Partnership began and ended during a period when the Act did not apply to that employment, and 2) Congress did not choose to make the amendments to the Act expressly retroactive, so that the Act could apply to that employment. Because Congress prescribed a specific effective date for the statutory amendment at issue, it is not necessary to proceed further with any retroactivity analysis. *See Bates*, 134 F.3d at 738. Consequently, claimant's 1973 and 1974 Partnership employment was not and is

[39] Employer would be subject to liability to pay benefits under the Act and would have the duties of a responsible operator only because of employment that occurred during the period when the Act did not apply to it or its predecessor, the Partnership.

not subject to the Act, and cannot, by dint of his employment for a separate period in 2005, be transmuted into employment under the Act, as the majority suggests.

Because I would find the application of the Act to claimant's 1973 and 1974 employment is impermissible, and therefore the administrative law judge's determination that FKCI is the responsible operator is based on an impermissible application of the Act, I would reverse on that issue. Therefore, there is no need to address employer's arguments relating to the administrative law judge's errors in calculating the one-year period.[40]

JUDITH S. BOGGS
Administrative Appeals Judge

[40] However, I would note that there is merit in employer's contention that there are flaws in the methodology and calculations of the administrative law judge.