U.S. Department of Labor

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

BRB No. 15-0281 BLA

GORDON PRUITT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LONE MOUNTAIN PROCESSING, INCORPORATED	)	DATE ISSUED: 05/12/2016
	)	
and	)	
	)	
SELF-INSURED THROUGH ARCH COAL, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 on Modification of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

Philip Mayor (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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Modification (2012-BLA-05204) of Administrative Law Judge Joseph E. Kane, rendered on a claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with thirty-two years of underground coal mine employment based on the stipulation of the parties, and determined that claimant established the existence of complicated pneumoconiosis arising out of coal mine employment, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304.[2] The administrative law judge also determined that claimant established a basis for modification pursuant to 20 C.F.R. §725.310, and that granting claimant's request for modification rendered justice under the Act. Accordingly, the administrative law judge awarded benefits commencing in October 2007, the month in which claimant's complicated pneumoconiosis was first diagnosed by x-ray.

[1] Claimant filed a claim for benefits on September 10, 2007. Director's Exhibit 2. The district director issued a Proposed Decision and Order Awarding Benefits, and employer requested a hearing. Director's Exhibits 52-53. On March 18, 2010, Administrative Law Judge Larry S. Merck issued a Decision and Order – Denial of Benefits in an Initial Claim. Director's Exhibit 93. Judge Merck found that, although claimant established total disability at 20 C.F.R. §718.204(b)(2), he did not establish the existence of pneumoconiosis arising out of coal mine employment or that his total disability was due to pneumoconiosis. *Id.* Claimant filed a request for modification on March 9, 2011. Director's Exhibit 94.

[2] Based on his finding that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304(a), the administrative law judge determined that he did not need to consider whether claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305. Under Section 411(c)(4), a miner's total disability or death is presumed to be due to pneumoconiosis if he or she had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment.

On appeal, employer argues that the administrative law judge erred in finding complicated pneumoconiosis established without adequately considering the evidence of a non-occupational cause of the abnormal radiographic findings. In addition, employer contends that the administrative law judge erred in his determination of the date from which benefits are payable. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), contends that the administrative law judge's finding of complicated pneumoconiosis is supported by substantial evidence, but agrees with employer that the administrative law judge erred in determining the date for commencement of benefits.[3]

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.[4] 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).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310, authorizes modification of an award or denial of benefits in a miner's claim, based on a change in conditions or a mistake in a determination of fact. In considering whether a change in conditions has been established, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement[5]

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established thirty-two years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[5] In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he has a totally disabling respiratory or pulmonary impairment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

that defeated an award in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). With respect to a mistake in a determination of fact, a claimant need not allege any specific error made by the administrative law judge in order to establish a basis for modification. Rather, the administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994).

I. Existence of Complicated Pneumoconiosis – 20 C.F.R. §718.304

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers 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 yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically entitle claimant to the irrebuttable presumption. The administrative law judge must first determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether invocation of the irrebuttable presumption has been established. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 387, 21 BLR 2-616, 2-624 (6th Cir. 1999); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287, 24 BLR 2-269, 2-286 (4th Cir. 2010); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003).

In this case, the administrative law judge found that claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(a), (c) based on the x-ray, CT scan, and medical opinion evidence. Decision and Order on Modification at 21-31. The administrative law judge also determined that the negative biopsy evidence at 20 C.F.R. §718.304(b) did not rule out the possibility that claimant has pneumoconiosis. *Id*. at 27. Weighing the evidence as a whole, the administrative law judge found that claimant satisfied his burden of proof to establish that he suffers from complicated pneumoconiosis and that he is entitled to the irrebuttable presumption of total disability due to pneumoconiosis. *Id*. at 31-32.

A. X-ray Evidence

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge determined whether each of the six x-rays of record was positive or negative for complicated pneumoconiosis, taking into consideration the qualifications of the readers. Decision and Order on Modification at 6-7, 20-24. The administrative law judge stated that, "[r]eaders who are [B]oard[-]certified radiologists and/or B readers are the most qualified. The

qualifications of a certified radiologist are at least comparable to[,] if not superior to[,] a physician certified as a B reader." *Id*. at 20 (footnotes omitted).

The administrative law judge determined that the April 16, 2007 x-ray is inconclusive because Dr. Meyer, a dually qualified radiologist, read the film as positive for complicated pneumoconiosis, while Dr. Wiot read the film as negative. Decision and Order on Modification at 21; Director's Exhibits 21 at 4, 79 at 4. With respect to the August 23, 2007 x-ray, the administrative law judge determined that it is negative for complicated pneumoconiosis, as he found that the two negative readings by Dr. Wiot and Dr. Jarboe, a B reader, outweighed the single positive reading by Dr. Miller, a dually qualified radiologist. Decision and Order on Modification at 22; Director's Exhibits 18 at 15, 20 at 4, 82 at 10. The administrative law judge determined that the October 5, 2007 x-ray is positive for complicated pneumoconiosis, crediting the positive readings by Dr. Alexander, a dually qualified radiologist, and Dr. Forehand, a B reader, over the single negative reading by Dr. Wiot, also a dually qualified radiologist. Decision and Order on Modification at 21; Director's Exhibits 16, 24. The administrative law judge also found that the January 10, 2008 x-ray is inconclusive because it was read as positive for complicated pneumoconiosis by Dr. Miller, but as negative by Dr. Wheeler, also a dually qualified radiologist. Decision and Order on Modification at 22; Director's Exhibits 82 at 3-4, 89.

The administrative law judge then evaluated the physicians' readings of the two most recent x-rays of record dated March 30, 2010 and May 19, 2011. Decision and Order on Modification at 22-24. With respect to the March 30, 2010 film, the administrative law judge accorded "probative weight" to Dr. Alexander's positive reading, explaining that "even though [he] noted that post-surgical or post-infectious changes could cause similar appearances on x-ray, he definitely diagnosed a Category A opacity on the [c]laimant's x-ray." Decision and Order on Modification at 22; *see* Director's Exhibit 105. In contrast, the administrative law judge gave little weight to Dr. Meyer's negative reading of the same x-ray because he "did not make a diagnosis or an objective determination," but rather only "speculated on the various possible etiologies of the abnormalities on x-ray." Decision and Order on Modification at 23; *see* Director's Exhibit 118. Thus, the administrative law judge determined that the March 30, 2010 x-ray is positive for complicated pneumoconiosis. Decision and Order on Modification at 23.

Similarly, the administrative law judge gave "probative weight" to Dr. Alexander's positive reading for complicated pneumoconiosis, Category A, of the May 19, 2011 x-ray, but little weight to Dr. Wheeler's negative reading because "[c]laimant's treatment records do not support Dr. Wheeler's theories on alternative causes of the markings on this x-ray." Decision and Order on Modification at 23; *see* Claimant's Exhibit 3; Employer's Exhibit 1. Thus, the administrative law judge concluded that the

May 19, 2011 x-ray is positive for complicated pneumoconiosis. Decision and Order on Modification at 24. Weighing all of the x-ray evidence together, and acknowledging that "more weight may be given to the most recent evidence[,]" the administrative law judge found that claimant established the existence of complicated pneumoconiosis by a preponderance of the evidence pursuant to 20 C.F.R. §718.304(a). *Id*.

Employer argues that the administrative law judge erred in relying on "equivocal" readings by Dr. Alexander to find that claimant satisfied his burden of proof. Employer's Brief in Support of Petition for Review at 16, *citing Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). Employer points to Dr. Alexander's comments regarding the March 30, 2010 x-ray, that "post-surgical or post-infectious changes could cause a similar appearance[,]" and Dr. Alexander's recommendation that claimant undergo further evaluation. Director's Exhibit 105. The administrative law judge, however, rationally credited Dr. Alexander's interpretations of the March 30, 2010 and May 19, 2011 x-rays as diagnoses of complicated pneumoconiosis because the physician identified a "25 mm large opacity in the left upper zone" compatible with "[C]ategory A complicated [coal workers' pneumoconiosis]," specifically checking the box on the ILO forms noting its presence, and, as the administrative law judge determined, the record evidence does not support a finding that claimant had surgery or an infectious process that produced this opacity.[6] Decision and Order on Modification at 22, *quoting* Director's Exhibit 105; *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-605 (4th Cir. 1999) ("[A] reasoned medical opinion is not rendered a nullity because it acknowledges the limits of reasoned medical opinions."); *see also* 20 C.F.R. Part 718, Appendix A; Decision and Order on Modification at 22-24. We also see no error in the administrative law judge's finding that Dr. Alexander's "comments about ruling out other diseases do not suggest he was questioning the existence of large

[6] In a letter to the Board dated October 8, 2015, employer submitted supplemental legal authority in the form of a recent decision issued by the United States Court of Appeals for the Fourth Circuit in *Coastal Coal-West Virginia, LLC v. Director, OWCP* [*Miller*], No. 14-2012 (Oct. 5, 2015) (unpub.). In *Miller*, the court held that the administrative law judge erred in addressing at 20 C.F.R. §718.203, rather than 20 C.F.R. §718.304(a), comments by physicians that could "have direct bearing on whether the mass appearing on the x-ray is in fact the manifestation of chronic dust disease or is the result of some other disease process." *Id.*, slip op. at 4. In the present case, the administrative law judge's analysis was consistent with *Miller*, as he properly considered the entirety of Dr. Alexander's interpretations and comments in weighing the x-ray evidence pursuant to 20 C.F.R. §718.304(a). Decision and Order on Modification at 21-24.

opacities consistent with complicated pneumoconiosis."[7] *Id*. at 24; *see* Director's Exhibit 105; Claimant's Exhibit 3. Therefore, we affirm the administrative law judge's reliance on Dr. Alexander's positive readings in finding that claimant established the existence of complicated pneumoconiosis, based on the weight of the x-ray evidence, including the two most recent x-rays of record. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

We also reject employer's contention that the administrative law judge failed to explain the weight he accorded the x-ray evidence and erroneously conducted "a head count" of the positive and negative readings when weighing the x-rays obtained prior to 2010. Contrary to employer's contention, in weighing each of the six x-rays of record, the administrative law judge properly considered both the quantity of the positive and negative readings *and* the comparative credentials of the interpreting physicians. *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740, 25 BLR 2-675, 2-687 (6th Cir. 2014); Decision and Order on Modification at 21-22. Accordingly, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. 718.304(a). *See Woodward*, 991 F.2d at 321, 17 BLR at 2-87 (6th Cir. 1993); *Chaffin v. Peter Cave Coal Co*., 22 BLR 1-294, 1-300 (2003).

B. Biopsy Evidence

Pursuant to 20 C.F.R. §718.304(b), the administrative law judge noted that claimant underwent a bronchoscopy at the request of Dr. Slutzker on May 16, 2006, which showed "[r]ight middle lobe of lung, transbronchial biopsy: - Alveolar lung tissue with anthracotic pigment deposition; -no evidence of malignancy or granulomas."[8] Decision and Order on Modification at 27; Director's Exhibit 17. The administrative law judge observed that a finding of "anthracotic pigment, standing alone, does not constitute a finding of pneumoconiosis." Decision and Order on Modification at 27, *citing* 20 C.F.R. §718.202(a)(2).

[7] In the comments section of the ILO form that Dr. Alexander completed with respect to the May 19, 2011 x-ray, he stated: "[t]wo larger than 10mm large opacities are present in the [left] upper zone for complicated [coal workers' pneumoconiosis] but other diseases including old [tuberculosis] should be ruled out." Claimant's Exhibit 3.

[8] The record also includes gross and microscopic pathology reports from the bronchoscopy prepared by Drs. Sances and Cooper. Director's Exhibit 17. Dr. Sances wrote: "A GMS pneumocystis stain (adequate controls) is negative for pneumocystis." *Id*.

The administrative law judge also considered that claimant underwent a wedge biopsy *of the right lung* on May 19, 2006. Decision and Order on Modification at 27. In the operative report, Dr. Patil indicated that the biopsy was performed because claimant had "lesions in his right upper, middle and lower lobe." Director's Exhibit 86. The postoperative diagnoses were: inflammatory lesions of the lungs, chronic obstructive pulmonary disease, bronchiectasis of both upper lobes and pulmonary fibrosis. *Id*. The administrative law judge found that "while the biopsy evidence does not establish pneumoconiosis [simple or complicated], it does not rule out the possibility that [claimant] has pneumoconiosis" and "suggests [claimant] does not have cancer or granuloma."[9] Decision and Order on Modification at 27, *citing* 20 C.F.R. §718.106(c).

The crux of employer's arguments on appeal is that the administrative law judge erred by failing to address the relevancy of the biopsy evidence as establishing an etiology other than coal dust exposure for the radiographic abnormalities seen on claimant's x-rays and the CT scans, as discussed *infra*. According to employer, the biopsy findings of "an inflammatory process and bronchiectasis" specifically support the negative x-ray readings for complicated pneumoconiosis by Drs. Wiot, Meyer, and Wheeler. Employer's Brief in Support of Petition for Review at 23. Employer further contends that the administrative law judge did not properly explain why the biopsy evidence does not "support an inference that claimant does not have simple or complicated pneumoconiosis under the reasoning of *Marra v. Consol. Coal Co.*, 7 BLR 1-216 (1984)," in which "[t]he Board adopted a standard . . . that 'an administrative law judge may generally assume that if the physician . . . does not mention pneumoconiosis, then it is not present.'" *Id*. at 12, *quoting Marra*, 7 BLR at 1-218-19.

Employer's allegations of error have no merit. Pursuant to 20 C.F.R. §§718.202(a)(2) and 718.304(b), a claimant can establish the existence of simple or complicated pneumoconiosis by biopsy evidence. The quality standards applicable to biopsy reports, and the scope of their use, are set forth at 20 C.F.R. §718.106. When promulgating this regulation, the Department of Labor (DOL) received several comments stating that it would be inappropriate to treat negative biopsy evidence as conclusive proof that pneumoconiosis was not present, when lesions of the disease can be scattered randomly throughout the lungs. 45 Fed. Reg. 13,678, 13,684 (Feb. 29, 1980). Based on the DOL's acceptance of the premise that "lung biopsies are usually unrepresentative of

[9] In a letter to claimant dated January 22, 2007, Dr. Slutzker stated that the open biopsy showed "scattered fibrotic nodules associated with mixed dust deposition." Director's Exhibit 21. The administrative law judge gave little weight to Dr. Slutzker's letter because the "evidence upon which Dr. Slutzker relied is not [in the record.]" Decision and Order on Modification at 27.

the whole lung," subsection (c) was added, which provides that "[a] negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis." *Id.*; 20 C.F.R. §718.106(c). Thus, in view of the plain language of 20 C.F.R. §718.106(c), and the DOL's intent in promulgating the regulation, we reject employer's argument that the administrative law judge should have treated the biopsy reports as establishing that claimant had bronchiectasis and inflammatory disease rather than complicated pneumoconiosis.

Employer's reliance on *Marra* is also misplaced. In *Marra*, the Board held that "[t]he issue of whether an x-ray interpretation that contains no mention of pneumoconiosis is a negative interpretation for pneumoconiosis . . . is a question of fact to be resolved by the administrative law judge." *Marra*, 7 BLR at 1-219. The Board also stated that the administrative law judge "may properly infer" that an interpretation that does not mention pneumoconiosis is negative for the disease, as "[p]hysicians who interpret x-rays can be expected to accurately report the presence of any abnormalities that they observe." *Id.* Similar reasoning does not apply to a negative biopsy result, as the physician's interpretation pertains only to the lung tissue that was biopsied. *See Gray*, 176 F.3d at 382, 21 BLR at 2-615; *see also Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Furthermore, although the surgical report pertaining to the May 19, 2006 wedge biopsy of claimant's *right lung* does not include a diagnosis of pneumoconiosis, it also does not diagnose tuberculosis, histoplasmosis, granulomatous disease, or sarcoidosis, which are the alternative inflammatory diseases proposed by Dr. Wheeler, and in part by Drs. Wiot and Meyer, as the cause of claimant's radiographic changes. *See* Director's Exhibits 17, 86. Moreover, we agree with the Director that "it is problematic to draw broad conclusions from the negative results" of a 2006 wedge biopsy of claimant's *right lung* "taken four years earlier from the opposite side of the lung where [C]ategory A opacities have been identified" in 2010 and 2011. Director's Brief at 17. Thus, we affirm the administrative law judge's finding that the biopsy evidence does not rule out the possibility that claimant has pneumoconiosis. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; Decision and Order on Modification at 27.

C. Other Evidence

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge first weighed the CT evidence. Dr. Miller, a dually qualified radiologist, read an August 11, 2005 CT scan as positive for complicated pneumoconiosis, while Dr. Wiot, who is also dually qualified, read it as negative. Director's Exhibits 65, 82. The administrative law judge gave less weight to Dr. Wiot's interpretation because the record does not support his opinion that the fibrosis on the scan is likely due to granulomatous disease or sarcoidosis. Decision

and Order on Modification at 25. Dr. Miller read the April 17, 2006 CT scan as positive for complicated pneumoconiosis, while Drs. Wiot and Meyer, a dually qualified radiologist, interpreted it as negative. Director's Exhibits 65, 71, 82. The administrative law judge gave greater weight to Dr. Miller's positive reading because all of the physicians were equally qualified and he found there was no support in the record for the alternative diagnoses provided by Drs. Wiot and Meyer for the radiographic findings in claimant's left lung. Decision and Order on Modification at 25-26. Finally, an April 8, 2011 CT scan was read as positive for complicated pneumoconiosis by Dr. Applegate, but the administrative law judge gave less weight to his reading because he did not state that the opacity he observed would appear as greater than one-centimeter in diameter on an x-ray.[10] Decision and Order on Modification at 26; Claimant's Exhibit 2. Dr. Wheeler interpreted the same CT scan as negative for pneumoconiosis, but the administrative law judge gave less weight to his interpretation because he "did not provide any credible or reliable explanation for the masses he observed on [c]laimant's lung." Decision and Order on Modification at 26; Employer's Exhibit 2. Weighing the CT scan evidence together, the administrative law judge concluded that the CT scan evidence is consistent with the positive x-ray evidence and "weighs in favor of a finding that [claimant] has complicated pneumoconiosis." Decision and Order on Modification at 26.

Employer contends that the administrative law judge erred in rejecting Dr. Wheeler's negative CT scan readings because Dr. Wheeler's statement that claimant had "inflammatory disease" is supported by the biopsy evidence. The Director correctly points out, however, that "Dr. Wheeler's only reference to unspecified 'inflammatory disease' appears in his explanation for masses in [c]laimant's lower lungs and for linear scars in the left apex." Director's Brief at 22; *see* Employer's Exhibit 2. Dr. Wheeler's diagnosis with regard to the Category A opacities reported by Dr. Alexander in the left apex is that the masses are "compatible with conglomerate granulomatous disease; histoplasmosis or mycobacterium avium complex (MAC) more likely than TB [tuberculosis]." Employer's Exhibit 2. As discussed *supra*, the administrative law judge rationally gave less weight to Dr. Wheeler's diagnoses of histoplasmosis, granulomatous

[10] The administrative law judge erred in rejecting Dr. Applegate's positive reading of claimant's April 8, 2011 CT scan on the grounds that the doctor did not make an equivalency finding. Decision and Order on Modification at 26. The record reflects that Dr. Applegate ordered the CT scan because he was attempting to determine the etiology of "[a] 1.4 [centimeter] nodular density . . . present in the left apex" that was shown by x-ray. Director's Exhibit 110. However, because we affirm the administrative law judge's reliance on Dr. Miller's positive readings of the CT scan evidence, we consider the error to be harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984).

disease, and viral disease as being either unsupported by the record, or in conflict with the record evidence indicating that claimant did not have any of these alternative diseases. *See Cox*, 602 F.3d at 287, 24 BLR at 2-287; *see also Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325-26 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order on Modification at 26; Director's Exhibits 17, 86, 110. Similarly, the administrative law judge acted within his discretion in giving less weight to the opinions of Drs. Wiot and Meyer, who also provided speculative alternative diagnoses.[11] *See Cox*, 602 F.3d at 287, 24 BLR at 2-287; *Groves*, 277 F.3d at 836, 22 BLR at 2-325-26; Director's Exhibits 65, 71A. Therefore, we affirm the administrative law judge's finding, based on his crediting of Dr. Miller's readings, that the CT scan evidence "is consistent with the x-ray evidence, in that it shows [claimant] has large masses on his lungs." Decision and Order on Modification at 26.

With regard to the treatment records, the administrative law judge determined that, although they do not support a diagnosis of complicated pneumoconiosis, they also do not weigh against a finding that claimant has the disease. Decision and Order on Modification at 28; Director's Exhibits 21, 94; Claimant's Exhibit 2. In considering the medical opinions, the administrative law judge rejected Dr. McIntosh's opinion regarding the existence of complicated pneumoconiosis as equivocal. Decision and Order on Modification at 31; Claimant's Exhibit 2. The administrative law judge credited Dr. Forehand's diagnosis of complicated pneumoconiosis and rejected Dr. Jarboe's reasoning that, because there is no biopsy evidence of complicated pneumoconiosis, claimant does not have the disease. Decision and Order on Modification at 29; Director's Exhibit 13; Employer's Exhibit 3. The administrative law judge also gave little weight to Dr. Wiot's deposition testimony, finding that his rationale for why claimant does not have complicated pneumoconiosis was based on "generalities" and did not focus on claimant's condition. Decision and Order on Modification at 31; Director's Exhibit 71.

Employer contends that the administrative law judge erred in finding that Dr. Forehand's opinion is well-documented and well-reasoned, asserting that his diagnosis of complicated pneumoconiosis was based solely on a restatement of his reading of the October 5, 2007 x-ray. Employer also alleges that the administrative law judge erred in discrediting the opinions of Drs. Jarboe and Wiot. These arguments are without merit.

[11] Dr. Wiot stated that claimant suffers "upper lobe conglomerate fibrosis" which "is most likely either residual of a previous significant granulomatous infection or possibly sarcoidosis." Director's Exhibit 65. Dr. Meyer indicated that claimant has "biapical conglomerate fibrosis" that "is most likely secondary to granulomatous process such as tuberculosis, or noninfectious granulomatous process such as sarcoidosis." Director's Exhibit 71A.

Contrary to employer's assertion, in addition to the x-ray evidence, Dr. Forehand considered claimant's medical and employment histories and the results of the objective studies and based his finding of complicated pneumoconiosis on "34 years of coal mine employment[,] shortness of breath[,] abnormal chest findings, chest x-ray, [and] arterial blood gas abnormalities." Director's Exhibit 15. Therefore, we affirm the administrative law judge's decision to credit Dr. Forehand's opinion, as it is rational and supported by substantial evidence. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325-26.

Concerning the administrative law judge's discrediting of Dr. Jarboe's opinion, Dr. Jarboe stated that biopsies are the "gold standard" for diagnosing pneumoconiosis and indicated "the linchpin here is the fact that we have a biopsy, and that biopsy simply does not confirm that [claimant] has or had coal worker[s'] pneumoconiosis." Employer's Exhibit 3 at 22, 30. As the Director states:

> The fact that the "linchpin" of Dr. Jarboe's analysis is a test that, by regulation, may not serve as "conclusive evidence" fully justifies [the administrative law judge's] decision not to credit Dr. Jarboe. "An [administrative law judge] does not exceed his authority in discounting a medical opinion that is influenced by the physician's subjective personal opinions about pneumoconiosis which are contrary to the congressional determinations implicit in the Act's provisions." *Roberts & Schaefer Co. v. Director* [*OWCP*], 400 F.3d 992, 999[, 23 BLR 2-302, 2-318] (7th Cir. 2005).

Director's Brief at 24-25, *also citing A & E Coal Co. v. Adams*, 694 F.3d 798, 802, 25 BLR 2-203, 2-210 (6th Cir. 2012) (noting with approval an administrative law judge's finding that Dr. Jarboe offered medical opinions inconsistent with the Act); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488, 25 BLR 2-135, 2-151 (6th Cir. 2012). Therefore, we affirm the administrative law judge's discrediting of Dr. Jarboe's opinion, that claimant does not have complicated pneumoconiosis, because the negative biopsy was not conclusive evidence that claimant does not have pneumoconiosis.

In addition, we affirm, as supported by substantial evidence, the administrative law judge's decision to discredit Dr. Wiot's opinion, as his primary reason for doing so was Dr. Wiot's observation that claimant most likely has sarcoidosis, which is a "noncaseous granuloma," an alternative diagnosis that is not supported by the record. Decision and Order on Modification at 30, *quoting* Director's Exhibit 71 at 32-33; *see Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Cox*, 602 F.3d at 287, 24 BLR at 2-287. Accordingly, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304 and, therefore,

established modification at 20 C.F.R. §725.310. *See Gray*, 176 F.3d at 387, 21 BLR at 2-624; *Worrell*, 27 F.3d at 230, 18 BLR at 2-996. We further affirm the award of benefits.

II. Onset Date for Award of Benefits

In the section entitled "Findings and Conclusions Regarding Entitlement to Benefits," the administrative law judge stated, "[c]laimant has met his burden of showing *a change in an applicable condition of entitlement* under the regulations." Decision and Order on Modification at 34 (emphasis added). However, the administrative law judge then awarded benefits beginning in October 2007, the month in which the first x-ray diagnosis of complicated pneumoconiosis was made, which pre-dates the March 18, 2010 denial of benefits by Judge Merck. *Id*.

Employer argues that the administrative law judge's determination is erroneous because he granted modification and awarded benefits based on a change in conditions established by the most recent evidence of record. Employer maintains that, as a matter of law, the administrative law judge's finding supports March 2011 as the onset date at 20 C.F.R. §725.503(d)(2), as that is the month in which claimant requested modification. The Director alleges that remand is required because the administrative law judge's basis for finding that benefits should begin in October 2007 is ambiguous.

The regulation at 20 C.F.R. §725.503 provides that "[b]enefits are payable to a miner who is entitled beginning with the month of onset of totally disability due to pneumoconiosis arising out of coal mine employment." 20 C.F.R. §725.503(b). Pursuant to 20 C.F.R. §725.503(d), in a modification proceeding, an administrative law judge may award benefits that pre-date the original denial of benefits only if modification is based on a mistake in a determination of fact. To the extent that the award of benefits was based on a change in condition, benefits are payable "beginning with the month of onset of total disability due to pneumoconiosis . . . provided that no benefits shall be payable for any month prior to the effective date of the most recent denial of the claim by a district director or administrative law judge." 20 C.F.R. §725.503(d)(2).

As set forth *supra*, the administrative law judge explicitly stated that his decision regarding the date of commencement of benefits was premised on a finding of a change in conditions. Decision and Order on Modification at 34. Nevertheless, the administrative law judge also relied on Dr. Alexander's positive reading of the October 5, 2007 x-ray, which pre-dated Judge Merck's denial of benefits, to find that claimant established complicated pneumoconiosis under 20 C.F.R. §718.304(a). *Id*. at 21. The administrative law judge also expressed his disagreement with Judge Merck's prior determination that the 2005 and 2006 CT scans, and Dr. Forehand's 2007 medical

opinion weighed against a finding of complicated pneumoconiosis.[12] *Id*. at 25-26, 28-29, 34. Thus, some of the administrative law judge's findings suggest that his decision to award benefits may have been based on a mistake in a determination of fact in the earlier denial of benefits.

Because we cannot discern the basis for the granting of modification, we must vacate the administrative law judge's determination that benefits commence effective October 2007 and remand this case for the administrative law judge to clarify whether claimant has shown a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310 and to adjust his finding on the date of commencement of benefits as necessary.[13]

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

[12] Judge Merck determined that the August 11, 2005 and April 17, 2006 CT scans were inconclusive concerning the presence of complicated pneumoconiosis, based on conflicting views by equally qualified physicians. Director's Exhibit 93. Judge Merck gave less weight to Dr. Forehand's diagnosis of complicated pneumoconiosis because he found that it was based on an x-ray that Judge Merck determined was inconclusive for complicated pneumoconiosis and because Dr. Forehand did not explain how the other evidence on which he relied supported such a diagnosis. *Id*.

[13] In cases involving invocation of the irrebuttable presumption under 20 C.F.R. §718.304, the relevant date to identify is the month in which the miner's simple pneumoconiosis became complicated pneumoconiosis. *See Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989). If that date cannot be determined, the date for commencement of benefits is the date of filing of claimant's request for modification, unless the evidence affirmatively establishes that claimant had only simple pneumoconiosis for any period subsequent to the filing date, in which case benefits commence following the period of simple pneumoconiosis.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge