BRB No. 02-0214 BLA

FERRELL L. PRATER (Deceased) PAULINE PRATER (Widow of FERRELL L. PRATER) Claimant-Respondent v. KNOX CREEK COAL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

W. Andrew Delph, Jr. (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd), Washington, D.C., for employer.

Helen H. Cox (Eugene Scalia, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (00-BLA-0762) of Administrative Law Judge Mollie W. Neal awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et*

seq. (the Act).[1] Claimant, Ferrell L. Prater,[2] originally filed a claim on August 1, 1994. In a Decision and Order issued on June 11, 1996, Administrative Law Judge Pamela Lakes Wood found at least twenty-four years of coal mine employment established and that the claim was timely filed. Considering the evidence before her, Judge Wood found that the existence of complicated pneumoconiosis was not established and that claimant was not, therefore, entitled to the irrebuttable presumption of totally disabling pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304; but found that claimant had established the existence of simple pneumoconiosis, that pneumoconiosis arose out of coal mine employment, that the miner was totally disabled, and that the total disability was due to pneumoconiosis. Accordingly, benefits were awarded.

The Board affirmed Judge Wood's finding that the existence of complicated pneumoconiosis was not established and that claimant was not, therefore, entitled to the irrebuttable presumption of totally disabling pneumoconiosis, but affirmed Judge Wood's findings as to the existence of simple pneumoconiosis, that pneumoconiosis arose out of coal mine employment, and that claimant was totally disabled. The Board, however, vacated Judge Wood's finding that total disability due to pneumoconiosis was established, and remanded the case for reconsideration of that issue. Pursuant to the Board's remand, Judge Wood first remanded the case to the district director for the development of additional evidence and then denied benefits because consideration of all the evidence failed to establish that claimant was totally disabled due to pneumoconiosis. However, because some of the new evidence developed by the district director tended to show that her prior finding of no complicated pneumoconiosis might be wrong, Judge Wood remanded the case to the district director for modification proceedings in light of this new evidence.

Claimant, however, filed a motion for reconsideration, arguing for the development of additional evidence before the administrative law judge, in lieu of remanding the case to the district director for modification proceedings. Employer responded contending that

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant's widow, Pauline Prater, is pursuing his claim.

claimant's request for post-decision development of evidence was akin to a petition for modification, not a motion for reconsideration, and that claimant's request for reconsideration should, therefore, be denied, and the case remanded to the district director for the initiation of modification proceedings. Director's Exhibit 74. The Director responded that an exception to the "law of the case" doctrine permitted the administrative law judge to reconsider the issue of complicated pneumoconiosis based on newly developed evidence without first remanding the case to the district director. Judge Wood declined, however, to consider the new evidence on modification because it would be in the interest of justice for modification to be initiated at the district director level. Accordingly, Judge Wood denied the motion for reconsideration and remanded the case for modification proceedings to be initiated before the district director. Order dated August 18, 1999. (Director's Exhibit 74).

Claimant filed a protective appeal to the Board, notifying the Board that a petition for modification was pending and requesting that the Board remand the case to the district director for modification proceedings. The Board dismissed claimant's appeal, without prejudice, and remanded the case to the district director for "consideration of claimant's petition for modification." *Prater v. Knox Creek Coal Corp.*, BRB No. 99- 1243 BLA (Sep. 14, 1999)(unpub. order)(Director's Exhibit 76). After considering the new evidence in support of claimant's request for modification, and receiving employer's evidence and argument, the district director awarded benefits from October 1, 1999, based on a finding of change in condition since Judge Wood's prior denial. Thereafter, employer requested a formal hearing which was held by Administrative Law Judge Mollie W. Neal.

Judge Neal (the administrative law judge) weighed the evidence of record[3] and found that it established that claimant had "silicotuberculosis, which falls under the statutory definition of pneumoconiosis" and that it was "a major component" in causing the miner's pulmonary disability. She, therefore, found total disability due to pneumoconiosis

[3] The administrative law judge stated that all the evidence submitted since April 1999, the date of the prior denial, would be reviewed to determine whether claimant has demonstrated a change in condition by proving one of the elements previously adjudicated against him, and that all of the evidence would be reviewed to determine whether the denial of the claim by the prior administrative law judge was based on a mistake in a determination of fact. Decision and Order at 5.

established. Alternatively, the administrative law judge found that, even in the absence of evidence establishing silicotuberculosis, because the evidence established the existence of complicated pneumoconiosis, claimant was entitled to the irrebuttable presumption of totally disabling pneumoconiosis. The administrative law judge, therefore, awarded benefits, "commencing August 1, 1994" based on medical evidence showing that claimant was totally disabled at the time he filed his original claim on August 1, 1994.

On appeal, employer contends that the administrative law judge erred in finding that a valid petition for modification had been filed by claimant. Employer also contends that the administrative law judge erred in finding that claimant established a basis for modification, because she erred in finding total disability due to pneumoconiosis established and, alternatively, erred in finding claimant entitled to the irrebuttable presumption of totally disabling pneumoconiosis based on her finding of complicated pneumoconiosis. Likewise, employer contends that the administrative law judge erred in failing to determine whether modification of the prior decision would "render justice" in this case. Additionally, employer contends that the administrative law judge erred in her onset date determination. Claimant responds, contending that any error by the administrative law judge in finding total disability due to pneumoconiosis is harmless, because alternatively, the administrative law judge properly found claimant entitled to the irrebuttable presumption of totally disabling pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), also responds, as a party-in-interest, urging that the Board reject employer's contentions that the administrative law judge erred in finding that a valid petition for modification had been filed and, alternatively, that she erred in failing to determine whether modification would render justice in this case.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first contends that modification was not properly initiated in this case because no valid request for modification was filed by claimant before the district director and that Judge Wood acted *ultra vires* by remanding *sua sponte* the case for modification proceedings.[4] In response, the Director contends that although Judge Wood "attempted" to

[4] Employer's contention on appeal however, is in direct conflict with its response to claimant's motion for reconsideration, requesting the development of additional evidence before Judge Wood, in lieu of remand to the district director for modification proceedings. Employer had contended that claimant's request amounted to a petition for modification, and employer urged that the case be remanded to the district director for modification

initiate modification, claimant, in fact, ultimately requested modification when he filed a protective appeal to the Board, requesting that the Board remand the case to the district director for modification proceedings. Director's Exhibit 76. Thus, the Director contends that claimant's September 1, 1999 written request that the Board remand the case to the district director for modification proceedings, which was filed within one year of Judge Wood's April 1999 denial of the claim and September 1999 denial of reconsideration, constituted a valid request for modification. In addition, the Director contends that claimant made clear, in his objection to the district director's proposed award of benefits, that his request for modification was based on a mistake in a determination of fact. Director's Exhibits 86, 90.

Section 22 of the Longshore Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a), and as implemented by 20 C.F.R. §725.310 (2000) provides that on his own initiative, or on the request of any party on the ground of a change in conditions or because of a mistake in a determination of fact, the fact-finder may, at any time prior to one year after the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits in accordance with Section 19 of the Longshore Act, 33 U.S.C. §922 (1972). While Section 22 provides that the "deputy commissioner" [district director] may modify a prior order, in accordance with Section 19 of the Longshore Act, the Board has held that the reference in Section 19 to "deputy commissioner" should be read as also including "administrative law judge." *See Grissom v. Freeman United Coal Mining Co.*, 10 BLR 1-96 (1987).

Moreover, a party seeking modification is not required to use any specific language in doing so and need not meet formal criteria. Rather, the content and context of a claimant's expression of an intention to further pursue compensation under the Act (for instance, as in this case, making reference to additional evidence) has been deemed adequate to initiate the modification process. *See Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999); *Madrid v. Coast Marine Construction Co.*, 22 BRBS 148, 152 (1989); *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-162-3 (1988); *see also Garcia v. Director, OWCP*, 12 BLR 1-24 (1988).[5] Thus, modification may be initiated on the request of any

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proceedings. Director's Exhibit 72.

[5] In addition, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that if a claimant avers generally or simply alleges that the administrative law judge improperly found or mistakenly decided the ultimate fact and thus erroneously denied the claim, the [district director] (including his administrative law judge incarnation) has the authority, without more (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"), to modify the final order on the claim. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

party or by the fact-finder on his or her own initiative, whether the district director or the administrative law judge, but, in this case arising within the jurisdiction of the Fourth Circuit, must initially be filed with or initiated before the district director. *See Lee v. Consolidation Coal Co.*, 843 F.2d 159, 11 BLR 2-106 (4th Cir. 1988).[6]

In this case, claimant's request of Judge Wood that additional evidence be developed regarding the issue of complicated pneumoconiosis, which was made within one year of the prior denial of his claim, constituted a timely request for modification, *see Borda*, *supra*; *Madrid*, *supra*; *Searls*, *supra*; *Garcia*, *supra*, and, in any event, the Board granted claimant's request for modification when it remanded the case to the district director for "consideration of claimant's petition for modification." Director's Exhibit 76. *See generally Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(2-1 opinion: with Brown, J., dissenting). Consequently, it does not matter whether the request for modification in this case was first made by Judge Wood or claimant because both Judge Wood and claimant properly and timely requested modification and Judge Wood properly remanded the case to the district director to initiate modification proceedings in accordance with the Fourth Circuit's holding in *Lee*, *supra*.

[6] Because the miner's most recent coal mine employment was performed in Virginia, the instant case arises within the jurisdiction of the Fourth Circuit, *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989).

Next, employer contends that the administrative law judge erred in finding total disability due to pneumoconiosis established based on her finding that the evidence shows that the granulomatous process, herein found to be silicotuberculosis, is a major component in causing claimant's pulmonary disability. Decision and Order at 31. Employer contends, however, that the evidence of record does not support a finding of causation because no physician in this case actually made a diagnosis of silicotuberculosis or found claimant totally disabled due to silicotuberculosis.[7]

[7] Employer concedes that the existence of simple pneumoconiosis has been established. Employer's Brief at 19.

In determining that total disability due to pneumoconiosis, *i.e.*, silicotuberculosis, was established, the administrative law judge accorded little weight to the opinions of Drs. Abernathy, Michos, Fino and Castle that claimant was not totally disabled due to pneumoconiosis because she found that they did not accept silicotuberculosis as a condition included in the definition of coal workers' pneumoconiosis [8] and because they avoided a discussion of silicotuberculosis in their opinions. The administrative law judge, therefore, found Dr. Robinette's diagnosis of silicotuberculosis more persuasive than the contrary evidence of record, and found that it, along with the opinion of Dr. Wheeler, established that the miner had silicotuberculosis, which was a major component in causing his pulmonary disability.[9] Decision and Order at 30-31.

[8] "Clinical" pneumoconiosis as defined under 20 C.F.R. §718.201(a)(1) includes "silicosis or silicotuberculosis...."

[9] Section 718.204(c)(1) provides that a miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1).

As employer contends, however, Dr. Robinette did not diagnose silicotuberculosis or silicosis and did not address whether the miner had tuberculosis or granulomatous disease "significantly related to" the miner's dust exposure in his coal mine employment. *See* 20 C.F.R. §718.201(b).[10] Rather, as employer contends, Dr. Robinette stated only that the miner had a superimposed tuberculosis process with progressive loss of lung function and that medical literature has in some cases suggested a relationship between the development of superimposed infections or other granulomatous disease process and emphysema and coal and rock dust exposure. *See* Claimant's Exhibit 7.[11] In addition, as employer contends, while Dr. Wheeler read the 1986 x-ray as compatible with granulomatous disease which he stated "could" be tuberculosis, silicosis or silicotuberculosis, Dr. Wheeler concluded that the x-ray findings were best explained by tuberculosis and were not due to coal mine dust. Dr. Wheeler ultimately concluded that claimant was not totally disabled by pneumoconiosis and did not have complicated pneumoconiosis. Director's Exhibits 27, 64; Employer's Exhibit 8.[12]

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[10] "Legal" pneumoconiosis as defined in 20 C.F.R. §718.201(a)(2) "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." Arising out of coal mine employment is explained in 20 C.F.R. §718.201(b): "For purposes of this section, a disease arising out of coal mine employment includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."

[11] Dr. Robinette opined that miners who do roof bolting, which was claimant's last coal mine job, are exposed to rock dust and "may" develop silicosis in addition to pneumoconiosis. He noted that claimant had a "positive PPD test suggesting concomitant tuberculosis" and that "[a]lthough the lung biopsy suggest evidence of granulomatous disease infection, the literature that I have reviewed clearly correlates the relationship between coal dust, rock dust exposure, the development of superimposed tuberculosis infections or other granulomatous disease process and emphysema." He concluded that there was evidence of bullous emphysema which correlates loss of lung function, that claimant "most likely suffers from complicated coal workers'" [*sic*] "and has a superimposed tuberculosis process with progressive loss of lung function" and that claimant is totally disabled. Claimant's Exhibit 7.

[12] Dr. Wheeler read a 1986 x-ray as compatible with granulomatous disease, which could be silicosis or silicotuberculosis, but which he believed was best explained by tuberculosis, as opposed to silicosis or silicotuberculosis, which he stated do not involve the areas affected. Director's Exhibits 27, 64. Dr. Wheeler noted that calcified granulomata were also found in claimant's liver and that, while silicosis may involve the lymph nodes, it does not involve the liver or pleura or cause calcified granulomata, seen in this case. Director's Exhibit 64; Employer's Exhibit 8. Thus, Dr. Wheeler concluded that while silicotuberculosis was a possibility, it was very unlikely, and that no masses found on x-ray

Likewise, the administrative law judge erred in according little weight to the opinions of Drs. Abernathy, Michos, Fino and Castle on the ground that they did not accept silicotuberculosis as a condition included in the definition of coal workers' pneumoconiosis. The doctors did not state that silicotuberculosis did not meet the regulatory definition of pneumoconiosis and the record does not contain evidence of "silicotuberculosis." *See* Decision and Order at 30.

Regarding the other opinions of record, the administrative law judge found that although Dr. Kleinerman recognized the condition of silicotuberculosis, when he diagnosed claimant's x-rays as consistent with granulomatous disease, he gave no reason for not diagnosing it in claimant. As employer contends, however, this does not discredit Dr. Kleinerman's opinion because it does nothing to refute his opinion that claimant is not totally disabled due to pneumoconiosis and does not suffer from complicated pneumoconiosis.[13]

Similarly, Dr. Castle also diagnosed granulomatous disease consistent with

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were due to coal mine dust or coal workers' pneumoconiosis. Employer's Exhibits 8, 64.

[13] The administrative law judge also found that the opinions from Drs. Endres-Bercher, Iosif and Modi, as well as the Buchanon General Hospital, did not address the issue of silicotuberculosis. Although Dr. Iosif found that claimant was totally disabled due to simple and complicated pneumoconiosis, neither he nor Dr. Endres-Bercher, Dr. Modi or the Buchanon General Hospital addressed, as the administrative law judge noted, the cause of claimant's granulomatous disease or tuberculosis, or whether claimant's coal mine employment, granulomatous disease or tuberculosis contributed to his disability, Director's Exhibits 11, 19, 22, 27, 50; Claimant's Exhibits 5-6, 9. Likewise, Dr. Abernathy guessed that claimant had tuberculosis without, as the administrative law judge noted, opining as to its etiology. Director's Exhibit 27.

tuberculosis, but stated that the miner did not have legal pneumoconiosis and that his disability did not arise out of his simple coal workers' pneumoconiosis, coal mine employment or coal dust exposure. Director's Exhibits 27, 30, 62; Employer's Exhibits 4, 10. Likewise, Dr. Fino diagnosed non-occupational granulomatous disease or tuberculosis, but stated that the miner's disability did not arise out of his coal mine employment. Director's Exhibit 92; Employer's Exhibits 6, 11. While Dr. Michos diagnosed possible tuberculosis or probable granulomatous disease, he ultimately concluded that it was not due to claimant's prior coal mine employment. Director's Exhibit 49. Hence, contrary to the administrative law judge's characterization, Drs. Kleinerman, Castle, Fino and Michos specifically addressed whether the miner's tuberculosis or granulomatous disease arose from his coal mine employment, and found that they did not cause his disability.

Likewise, as employer contends, the administrative law judge erred in apparently discrediting the opinion of Dr. Branscomb because he concluded that claimant did not have silicotuberculosis based on Dr. Kleinerman's biopsy finding of minimal pneumoconiosis. Director's Exhibit 65. Dr. Branscomb, found, however, that while the miner's x-ray changes were consistent with granulomatous disease or tuberculosis, the cause of the miner's disability was non-occupational granulomatous disease and not his dust exposure, coal dust exposure, coal mine dust exposure, coal workers' pneumoconiosis or coal mine employment. Director's Exhibits 27, 28, 61; Employer's Exhibits 1-2, 9. Thus, while Dr. Branscomb recognized the condition of silicotuberculosis, he concluded that the miner's tuberculosis or granulomatous disease did not arise from his coal mine employment, or cause the miner's disability. Consequently, because Dr. Branscomb concluded that the miner did not have silicotuberculosis, the administrative law judge's apparent discrediting of Dr. Branscomb's opinion is, as employer contends, illogical or, at least, not adequately explained.

Finally, Dr. Hutchins found fibrotic changes typical for a granulomatous reaction due to tuberculosis. Dr. Hutchins concluded, however, that because there is "no known relationship between coal dust exposure and tuberculosis," the miner's disability was not due to his coal dust exposure, Director's Exhibit 27. The administrative law judge found that Dr. Hutchins's opinion that "there is no known relationship between coal dust exposure and pulmonary tuberculosis" to be hostile to the statutory definition of pneumoconiosis because she relied on evidence of record, from Dr. Castle, indicating that silica, not coal dust, predisposes one to tuberculosis, *see* Director's Exhibit 62, and pneumoconiosis is defined as a chronic "dust" disease of the lung and its sequelae arising out of "coal mine employment," *see* 30 U.S.C. §902(b); 20 C.F.R. §718.201(a)(1)-(2). Dr. Hutchins's opinion that there is no known relationship between "coal" dust exposure and tuberculosis does not, however, preclude the possibility that dust exposure from the miner's coal mine employment, albeit from silica, as opposed to coal, can cause tuberculosis. Thus, Dr. Hutchins's opinion is not, as the administrative law judge found, necessarily contrary or hostile to the statutory definition of pneumoconiosis.

The administrative law judge has, therefore, misconstrued the medical opinion evidence and has erred in acting as a medical expert and substituting her opinion for those of the physicians when she determined that the medical opinion evidence established the existence of silicotuberculosis and that claimant was totally disabled thereby. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *see also Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Castle v. Eastern Associated Coal Co.*, 12 BLR 1-105 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Wright v. Director, OWCP*, 7 BLR 1-475 (1984); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). Consequently, the administrative law judge's finding on causation must be vacated and the case remanded to her to determine whether there is evidence which establishes that claimant's total disability is due to pneumoconiosis.[14] Moreover, as employer contends because it has conceded the existence of simple pneumoconiosis, the question before the administrative law judge is not whether claimant has pneumoconiosis, *e.g.*, silicotuberculosis, but whether claimant's pneumoconiosis as defined by the Act, 20 C.F.R. §718.201(a)-(c), is a substantially contributing cause of claimant's total disability. 20 C.F.R. §718.204(c)(1).

On remand, the administrative law judge must provide a full, detailed opinion which complies with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(a), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), and which fully explains the specific bases for her decision, the weight assigned to the evidence, and the relationship she finds between the evidence and her legal and factual conclusions. *See Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984).

Employer also contends that the administrative law judge erred in finding that the existence of complicated pneumoconiosis was established and that claimant was, therefore, entitled to the irrebuttable presumption of totally disabling pneumoconiosis. Employer contends that the administrative law judge did not adequately explain why she found the evidence supporting a finding of complicated pneumoconiosis outweighed the contrary evidence.

The administrative law judge found that the evidence showing the presence of

[14] On remand, the administrative law judge must consider whether Dr. Iosif's opinion that claimant was "totally disabled due to complicated pneumoconiosis," establishes causation and whether Dr. Robinette's opinion regarding tuberculosis and its relation to coal mine employment is sufficient to establish causation.

complicated pneumoconiosis included the opinions of Drs. Iosif and Paranthaman, and x-ray changes consistent with simple and complicated pneumoconiosis, which when combined with the finding that pneumoconiosis arose out of coal mine employment, favored a finding of complicated pneumoconiosis. The administrative law judge found that Dr. Kucera opined that because there was no evidence of progressive massive pulmonary fibrosis or granulomatous disease, claimant more likely had complicated pneumoconiosis. Director's Exhibit 88. Weighing this evidence, the administrative law judge concluded that even in the absence of silicotuberculosis, claimant established entitlement based on evidence establishing the existence of complicated pneumoconiosis. The administrative law judge rejected the opinions of Drs. Branscomb, Kleinerman, Wheeler, Castle and Fino, which, while indicating that claimant had a granulomatous process, not complicated pneumoconiosis, did not give a "definite alternative diagnosis." Decision and Order at 31; Director's Exhibits 11, 27, 28, 30, 50, 60-65, 78, 92; Employer's Exhibits 1-2, 4, 6, 8-11.

Although the administrative law judge found that Drs. Branscomb, Kleinerman, Wheeler, Castle and Fino did not give a definite alternative diagnosis, they all found that claimant had a granulomatous disease indicative of tuberculosis and definitively found that claimant did not have complicated pneumoconiosis. Thus, because claimant bears the burden of proving the elements of entitlement, which under Section 718.304 is the existence of complicated pneumoconiosis, *see Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988), the opinions Drs. Branscomb, Kleinerman, Wheeler, Castle and Fino that claimant did not have complicated pneumoconiosis are, as employer contends, relevant evidence under Section 718.304. In addition, although the administrative law judge noted that there were x-ray readings of complicated pneumoconiosis, each of the x-rays submitted on modification which were read as positive for complicated pneumoconiosis were also read as not revealing complicated pneumoconiosis by an equally qualified radiologist. Director's Exhibits 64, 87, 92; Employer's Exhibits 2, 4. Further, the administrative law judge did not specifically discuss the conflicting CT scan or biopsy evidence of record relevant to the existence of complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd* 865 F.2d 916 (7th Cir. 1989)(administrative law judge must resolve conflicts in the medical evidence). Nor did the administrative law judge make the requisite equivalency determinations in considering the evidence. *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, BLR (4th Cir. 2000); *Double B. Mining Inc. v. Blankenship*, 177 F.3d 240, BLR (4th Cir. 1999).[15]

[15] The irrebuttable presumption under Section 411(c)(3) of the Act does not refer to the triggering condition for invocation of the presumption as "complicated pneumoconiosis," nor incorporate a purely medical definition of "complicated pneumoconiosis," but rather the presumption is triggered by the application of congressionally defined criteria, *see Eastern*

Associated Coal Corp. v. Director, OWCP [Scarbro], 220 F.3d 250, BLR (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, BLR (4th Cir. 1999). The Fourth Circuit has held that the irrebuttable presumption at Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §718.304 provides three different ways of establishing the triggering condition:

> (a) When diagnosed by chest X-ray ... yields one or more large opacities (greater than 1 centimeter in diameter) ...; or
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> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
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> (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results

Consequently, the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to Section 718.304 is also vacated and the case is remanded to the administrative law judge to reconsider all of the relevant evidence pursuant to *Scarbro, supra*; *Blankenship, supra*; *Lester, supra*; *Melnick, supra*. Of course, if the administrative law judge finds the existence of complicated pneumoconiosis established, on remand, claimant is entitled to the irrebuttable presumption that his pneumoconiosis is totally disabling and the administrative law judge need not determine whether claimant has affirmatively established causation.

Next, employer contends that the administrative law judge erred in her determination regarding the onset date. The administrative law judge awarded benefits on modification "commencing August 1, 1994," the filing date of the original claim, because she determined that the pulmonary function study and medical opinion evidence showed that claimant was totally disabled at the time he filed his original claim on August 1, 1994. Decision and Order at 31. In determining the date of onset, however, an administrative law judge must determine the date on which claimant became totally disabled due to pneumoconiosis, not merely the date on which he became totally disabled. *See Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Carney v. Director, OWCP*, 11 BLR 1-32 (1987). In addition, where entitlement is established based on a finding of complicated pneumoconiosis, the fact-finder must

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> described in paragraph (a) or (b) of this section had diagnosis been made as therein described: Provided, however, That any diagnosis made under this paragraph shall accord with acceptable medical procedures

and requires that the administrative law judge make an equivalency determination to make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the presumption, *e.g.*, if a diagnosis is by biopsy or autopsy, a miner must have "massive lesions" which would, if x-rayed, show as opacities greater than one centimeter in diameter, *see Blankenship, supra*.

determine whether credible, probative evidence of record, establishes the onset date of the miner's complicated pneumoconiosis. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980). The administrative law judge did not provide an adequate analysis of when claimant became totally disabled due to pneumoconiosis, because the administrative law judge's finding that claimant was "totally disabled" does not address whether claimant's total disability was due to pneumoconiosis. Accordingly, this case must be remanded for the administrative law judge to make this determination or if she finds the existence of complicated pneumoconiosis to determine when claimant was first diagnosed with complicated pneumoconiosis. *See Williams, supra*.

We reject employer's contention that the administrative law judge is bound by the district director's initial finding of onset as of October 1, 1999, because the issue of onset date was not raised before the administrative law judge, however. The administrative law judge is not bound by findings made by the district director, as the administrative law judge's review of the evidence is *de novo*. *See Dingess v. Director, OWCP*, 12 BLR 1-141 (1989); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

Further, as employer contends, the regulation at 20 C.F.R. §725.503, governing the determination of the onset date has been revised to provide specific guidelines for determining the onset date when benefits are awarded based on a modification petition. 20 C.F.R. §725.503. Pursuant to the new regulation: if benefits are awarded based on a mistake in fact, they are payable beginning with the month of onset of total disability due to pneumoconiosis. If the evidence does not establish the month of onset, benefits are payable beginning with the month during which the claim was filed. In contrast, if benefits are awarded based on a change in conditions, they 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), but if the evidence does not establish the month of onset, benefits are payable from the month in which the claimant requested modification. 20 C.F.R. §725.503(a), (d)(2).

On remand, therefore, the administrative law judge must determine whether the newly submitted evidence establishes a change in conditions, *i.e.*, at some point subsequent to the filing of the original claim, claimant became disabled due to pneumoconiosis or developed complicated pneumoconiosis, or whether the evidence of record, including the newly submitted evidence, establishes that a mistake in fact had been made, *i.e.*, whether claimant was totally disabled due to pneumoconiosis or had complicated pneumoconiosis prior to issuance of the previous decision and therefore, should not have been denied benefits

previously. Consequently, the administrative law judge's finding of the onset date is vacated and the case is remanded for the administrative law judge to reconsider when claimant became totally disabled due to pneumoconiosis or was first diagnosed with complicated pneumoconiosis.

Finally, employer contends that the administrative law judge erred in failing to determine whether reopening the claim on modification would render justice under the Act. The Director contends that in the absence of evidence that claimant, as the moving party, deliberately engaged in conduct which evinces contempt for the adjudicative process or egregious and recalcitrant conduct in the initial claim proceeding, it is implicit in the administrative law judge's decision to modify the prior denial to an award, that she considered whether reopening the case on modification would render justice under the Act. In this case, however, because the administrative law judge's findings on causation and complicated pneumoconiosis, which formed the basis for her award on modification, are vacated and the case remanded for reconsideration of those issues, the administrative law judge should also consider, on remand, whether reopening the claim in this case would render justice under the Act. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 546-547, BLR (7th Cir. 2002); *Branham v. Bethenergy Mines Inc.*, 20 BLR 1-27 (1996).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge