BRB Nos. 08-0500 BLA
and 09-0401 BLA

D.A. (Widow of and on behalf of M.L.)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 10/26/2009
BRIDGER COAL COMPANY	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Living Miner and Survivor Benefits on Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

D.A., LeMars, Iowa, *pro se*.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant appeals, without the assistance of legal counsel, the Decision and Order Denying Living Miner and Survivor Benefits on Remand (2004-BLA-93 and 2004-BLA-5960) of Administrative Law Judge Thomas M. Burke rendered on claims 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] This case is before the Board for the second

[1] Claimant is the widow of the miner, who died on January 31, 2002. This appeal involves both the miner's claim, filed on March 19, 1998, and the survivor's claim filed

time. In his initial decision, dated February 9, 2005, the administrative law judge found that claimant established that the miner had a coal mine employment history of twenty years, as conceded by employer, and adjudicated the consolidated miner's and survivor's claims pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that, while the chest x-ray evidence failed to establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the autopsy and medical opinion evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4). The administrative law judge further found, after reviewing all the relevant evidence, that the CT scan evidence supported the autopsy prosector's diagnosis of complicated pneumoconiosis. Based on this finding, the administrative law judge concluded that claimant was entitled to the irrebuttable presumption of total disability and death due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits on the miner's claim commencing as of March 1998, the month in which the miner filed his claim, through December 2001, the month preceding the miner's death, and on the survivor's claim from January 2002, the month of the miner's death.

Employer appealed, contending that the Board should reverse the award of benefits because the administrative law judge erred in finding the existence of complicated pneumoconiosis and thereby erred in finding claimant entitled to the irrebuttable presumption of total disability and death due to pneumoconiosis contained in 20 C.F.R. §718.304. Employer alternatively argued that the administrative law judge erred in failing to make specific findings as to whether the evidence established total disability due to pneumoconiosis and death due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(c)(2000) and 718.205(c).[2] In addition, employer alleged that the administrative law judge erred in determining the onset date of benefits in the miner's claim. Employer requested that the case be remanded for reconsideration of all of the relevant evidence with respect to causation and death due to pneumoconiosis, as well as a determination on the onset date, if reached.

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on March 19, 2002. We have consolidated, for decision, claimant's appeals of the denials of benefits in the miner's claim and the survivor's claim.

[2] 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.

The Director, Office of Workers' Compensation Programs (the Director), responded to employer's appeal, but took no position on whether the administrative law judge's finding of complicated pneumoconiosis was correct. The Director maintained, however, that if the Board did not affirm the award of benefits pursuant to 20 C.F.R. §718.304, it must remand the case for the administrative law judge to determine whether the miner was totally disabled due to pneumoconiosis and whether his death was due to pneumoconiosis, as the administrative law judge did not make findings on these issues. Regarding the onset date of entitlement, the Director stated that, if the finding of entitlement is affirmed, the administrative law judge's onset date determination of March 1998 for the commencement of benefits is correct.

Upon consideration of the merits of employer's appeal, the Board affirmed, as unchallenged by the parties, the administrative law judge's finding that the existence of simple pneumoconiosis arising out of coal mine employment was established under 20 C.F.R. §§718.202(a)(2), (4) and 718.203(b). [*D.L.A.*] *v. Bridger Coal Co.*, BRB No. 05-0455 BLA, slip op. at 3 n.2. (Mar. 16, 2006) (unpub.). Regarding the evidence relevant to the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, the Board noted that the United States Court of Appeals for the Fourth Circuit had held that an equivalency determination is required when assessing whether evidence other than an x-ray was sufficient to establish the existence of complicated pneumoconiosis. [*D.L.A.*], BRB No 05-0455 BLA, slip op. at 4, *citing Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999). Although the administrative law judge had found that the CT scan and autopsy evidence were sufficient to establish the existence of complicated pneumoconiosis, the Board observed that "[t]he administrative law judge did not determine that the medical evidence established that the node seen on CT scan, or the lesion seen on autopsy, would be seen on x-ray as an opacity greater than one centimeter, and there is no evidence in the record which would support such a determination." *Id*. at 5. The Board vacated the administrative law judge's finding of complicated pneumoconiosis, and the award of benefits based thereon, and remanded the case for the administrative law judge to determine whether the evidence established total disability due to pneumoconiosis in the miner's claim and death due to pneumoconiosis in the survivor's claim. *Id*. at 5. The Board subsequently summarily denied employer's motion for reconsideration. [*D.L.A.*], BRB No. 05-0455 BLA (Oct. 31, 2006) (unpub. Order).

On remand, in his Decision and Order dated February 26, 2008, the administrative law judge found that the evidence was sufficient to establish that the miner was suffering from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), but insufficient to establish disability causation at 20 C.F.R. §718.204(c) or death due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in both claims.

In the current appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director filed a letter indicating that he would not submit a substantive response brief, unless requested to do so by the Board.

In 2006, the Board was aware that this case arose within the jurisdiction of the United States Court of Appeals for the Tenth Circuit, which had not set forth a standard for establishing the existence of complicated pneumoconiosis by autopsy evidence pursuant to 20 C.F.R. §718.304(b). Hence, the Board turned to the teaching of the Fourth Circuit on the evidentiary requirements for establishing complicated pneumoconiosis with autopsy and biopsy evidence.[3] The Fourth Circuit had held in *Blankenship* that an equivalency determination is to be made when assessing whether evidence identified as massive lesions is sufficient to meet the objective standard of complicated pneumoconiosis diagnosed by x-ray pursuant to 20 C.F.R. §718.304(a), *i.e.*, whether the massive lesions when viewed on x-ray would produce an opacity greater than one centimeter, and thus establish invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304.[4] *Blankenship*, 177 F.3d at 244, 22 BLR at 2-561; see *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *see also Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Clites v. J & L Steel Corp.*, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981).

Subsequent to our 2006 decision, the United States Court of Appeals for the Eleventh Circuit confronted the issue of establishing complicated pneumoconiosis with autopsy evidence pursuant to 20 C.F.R. §718.304(b). *Pittsburg & Midway Coal Mining Co. v. Director, OWCP*, [*Cornelius*], 508 F.3d 975, 24 BLR 2-72 (11th Cir. 2007). The court considered the Fourth Circuit's case law, but declined to impose an equivalency determination requirement, holding that to do so is inconsistent with the Act and the relevant regulations. By Order dated June 30, 2009 in this case, the Board acknowledged

[3] The Board will apply the law of the United States Court of Appeals for the Tenth Circuit as the miner's last coal mine employment was in Wyoming. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); 2005 Decision and Order at 1; Director's Exhibit 2. In the absence of relevant circuit law the Board has been encouraged to apply the law of a sister circuit. *See Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

[4] The Board's decision was issued on March 16, 2006, prior to the United States Court of Appeals for the Fourth Circuit's decision in *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365, 23 BLR 2-374, 2-384 (4th Cir. 2006), issued on November 20, 2006, stating that, in addition to evidence of an equivalency determination that provided a ground for invocation of the statutory presumption, the autopsy prosector's finding of massive lesions provided a statutory ground for invocation of the presumption.

that the Eleventh Circuit's decision in *Cornelius* created a split among the circuit courts on the issue of whether an equivalency determination is necessary to establish the existence of complicated pneumoconiosis under subsection (b) of 20 C.F.R. §718.304. Consequently, the Board requested that claimant, employer and the Director submit supplemental briefs addressing the standard the Board should apply in reviewing the administrative law judge's determination that complicated pneumoconiosis had been established by autopsy evidence at 20 C.F.R. §718.304(b), since the instant case arises within the jurisdiction of one of the circuit courts that has not addressed the issue. The Board also invited the parties to consider, in the event that the Board decided to adopt the Eleventh Circuit's analysis in *Cornelius* and to reinstate the administrative law judge's 2005 Decision and Order awarding benefits in both claims, whether the Board should affirm that decision as supported by substantial evidence and in accordance with law.

Claimant did not respond to the Board's Order. Employer responded, asserting that the Board should consider only the merits of claimant's appeal of the administrative law judge's 2008 Decision and Order on Remand and affirm the denial of benefits. Employer asserted that there has not been any controlling intervening Tenth Circuit case law to merit reconsideration of the complicated pneumoconiosis issue and that case law from the Eleventh Circuit has no bearing on this case. Employer's Supplemental Brief at 3. Employer also suggests, however, that if the Board reconsiders this issue, the Board should continue to apply the standard it previously applied. *Id*. at 4.

The Director responded to the Board's Order, urging the Board to reinstate and affirm the administrative law judge's 2005 Decision and Order Awarding Benefits, asserting that the opinion of Dr. Dobersen, the autopsy prosector, is sufficient to establish invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 and that the decision both accords with the statute and is supported by substantial evidence. Director's Supplemental Brief at 15, *citing Cornelius*.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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).

Having considered the arguments by employer and the Director, and the conflicting circuit court law regarding the application of an equivalency determination at 20 C.F.R. §718.304(b), we are persuaded by the Eleventh Circuit's decision in *Cornelius*

rejecting the application of an equivalency determination. The *Cornelius* court set forth an exhaustive analysis of Section 411(c)(3) of the Black Lung Benefits Act,[5] its

[5] Section 411(c)(3) provides:

> If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconiosis by the International Labor Organizations, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. . . .

30 U.S.C. §921(c)(3).

The Secretary of Labor incorporated Section 411(c)(3)'s "irrebuttable presumption" into the Black Lung regulations at 20 C.F.R. §718.304, which provides in relevant part:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, that a miner's death was due to pneumoconiosis or that a miner was totally disabled due to pneumoconiosis or that a miner was totally disabled due to pneumoconiosis at the time of death, if such miner is suffering or suffered from a chronic dust disease of the lung which:
>
> (a) When diagnosed by chest x-ray (see §718.202 concerning the standards for x-rays and the effect of interpretations of x-rays by physicians) yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C in:
>
> (1) The ILO-U/C International Classification of Radiographs of the Pneumoconioses, 1971, or subsequent revisions thereto. . . .
>
> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or

legislative and regulatory history and understanding in Supreme Court case law. The Eleventh Circuit concluded that Section 411(c)(3)(B) refers to the medical criteria for diagnosing complicated pneumoconiosis on autopsy; the court held therefore that "until the Secretary provides further guidance on this matter, §411(c)(3)(B) and §718.304(b) are met if a preponderance of the evidence establishes that the miner's autopsy reveals lesions that support a diagnosis of complicated pneumoconiosis." *Cornelius*, 508 F.3d at 987, 24 BLR at 2-94. The Eleventh Circuit expressed agreement with the Sixth Circuit's decision in *Gray v. SLC Coal Co.*, 176 F.3d 352, 21 BLR 2-615 (6th Cir. 1999), insofar as that court held that autopsy evidence could establish complicated pneumoconiosis if the medical evidence showed the nodule to be a massive lesion.[6] *Cornelius*, 508 F.3d at 987 n.7, 24 BLR at 2-94 n.7.

Accordingly, we vacate our 2006 Decision and Order vacating the administrative law judge's award of benefits and remanding the case to the administrative law judge. We will reconsider the administrative law judge's 2005 Decision and Order to determine whether the administrative law judge's finding that complicated pneumoconiosis had been established by autopsy evidence at 20 C.F.R. §718.304(b) is supported by substantial evidence and in accordance with the applicable law. We will address employer's contentions raised on appeal of the 2005 decision which, we note, employer reiterated in its supplemental brief in the present appeal.

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

20 C.F.R. §718.304.

[6] Although our dissenting colleague observes that in *Gray*, the United States Court of Appeals for the Sixth Circuit cited with approval the Fourth Circuit's equivalency determination analysis, he overlooks that in providing alternative holdings, the *Gray* court refrained from imposing an equivalency determination requirement. The court held that a nodule seen on autopsy could justify invocation of the irrebuttable presumption if a physician opined that the nodule was a massive lesion or if a physician opined that the nodule would produce an opacity grater than one centimeter if seen on x-ray. *Gray v. SLC Coal Co.*, 176 F.3d 352, 390, 21 BLR 2-615, 2-630 (6th Cir. 1999).

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of entitlement, unless claimant is able to establish the existence of complicated pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §923(c)(3). That section and its implementing regulation, 20 C.F.R. §718.304, set forth an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if: (a) an x-ray of the miner's lungs show at least one opacity greater than one centimeter in diameter; (b) a biopsy or autopsy reveals "massive lesions" in the lungs; or (c) a diagnosis by other means reveals a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically entitle a claimant to invocation of the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North Am. Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

In order to establish entitlement to benefits in a survivor's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205. Failure to establish any of these elements precludes a finding of entitlement, unless the survivor establishes complicated pneumoconiosis or it has been established in the miner's claim. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). In that event, claimant gets the benefit of the irrebuttable presumption that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(c)(3); *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006).

In his 2005 Decision and Order, the administrative law judge considered whether the evidence was sufficient to establish invocation of the irrebuttable presumption of total disability and death due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge weighed the autopsy report authored by Dr. Dobersen, the autopsy prosector,[7] and the reviews of the autopsy report and tissue slides conducted by Drs. Crouch and Tomashefski, as well as the CT scan evidence. 2005 Decision and

[7] The 2005 Decision and Order contains some misspellings of Dr. Dobersen's name.

Order at 8-11. In his autopsy report, Dr. Dobersen "attributed [the miner's death] to complications of complicated coal workers' pneumoconiosis (progressive massive fibrosis)." Director's Exhibit 65 at 1. He stated that the miner's complicated pneumoconiosis was characterized by centrilobular emphysema and extensive anthracosis, focally dense, including anthracotic scarring measuring up to two and one-half inches in diameter. *Id*. at 7-8.

Drs. Crouch and Tomashefski conducted a review of the autopsy slides and report, as well as certain other medical records, and issued opinions dated December 3, 2002, and May 22, 2003, respectively. Both doctors diagnosed simple pneumoconiosis, but concluded that there was no complicated pneumoconiosis. Employer's Exhibits 2-3.

In weighing these opinions, the administrative law judge stated:

> All of the pathologists agree that the autopsy tissue supports a finding that the miner suffered from simple coal workers' pneumoconiosis. Dr. Dobers[e]n, the prosector, also found the presence of complicated coal workers' pneumoconiosis and he specifically described areas of anthracotic scarring measuring "up to [two and one-half] inches in greatest diameter." Drs. Crouch and Tomashefski, on the other hand, conclude that tissue on the autopsy slides did not yield evidence of complicated pneumoconiosis. Dr. Tomashefski concluded that the "largest coalescent, pneumoconiotic lesion seen on the autopsy slides measured less than two centimeters in diameter and was below the minimum required for a diagnosis of complicated pneumoconiosis." Dr. Crouch found the tissue slide lesions to be "relatively small in size and number."

2005 Decision and Order at 10, *citing Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 20 BLR 2-334 (10th Cir. 1996). The administrative law judge noted that while the opinion of the prosector may be accorded greater weight than the opinions of reviewing pathologists, he did not accord greater weight to Dr. Dobersen's report simply because he was the prosector. The administrative law judge provided additional reasons for the enhanced weight he gave to Dr. Dobersen's opinion, observing that:

> Rather, given the (1) very specific measurements and detailed findings provided by Dr. Dober[sen] in his autopsy report, including observing a 2.5 inch lesion in the miner's lung that was related to coal dust exposure, (2) Dr. Dober[sen]'s understanding of the concepts of simple and complicated pneumoconiosis as evidenced by the content of his report, and (3) Dr. Dober[sen]'s superior qualifications, i.e., [B]oard-certification in all three areas of pathology — clinical, anatomical, and forensic — as opposed to the more limited [B]oard-certifications of Drs. Crouch and Tomashefski, it

> is determined that Dr. Dober[sen]'s autopsy findings and report is [sic] persuasive that the miner suffered from complicated pneumoconiosis.

2005 Decision and Order at 10-11. In summary, the administrative law judge found that, after weighing the relevant evidence at 20 C.F.R. §718.304(a)-(c), Dr. Dobersen's autopsy report was entitled to the greatest weight and established complicated pneumoconiosis at 20 C.F.R. §718.304. *Id*. at 19. Accordingly, the administrative law judge found claimant entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis and death due to pneumoconiosis pursuant to 20 C.F.R. §718.304, and awarded benefits in both claims.

Employer initially challenged the administrative law judge's findings at 20 C.F.R. §718.304, essentially arguing that the administrative law judge erred in relying on Dr. Dobersen's opinion to find that the miner suffered from complicated pneumoconiosis. Employer's 2005 Brief at 36-44. Employer also asserted that the administrative law judge improperly shifted the burden of proof to employer to establish the absence of complicated pneumoconiosis and that, in failing to specify the particular subsection of 20 C.F.R. §718.304 under which complicated pneumoconiosis was established, the administrative law judge's Decision and Order failed to comply with the Administrative Procedure Act, which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Contrary to employer's arguments, in his decision, the administrative law judge did not put the burden on employer to prove that the miner did not have complicated pneumoconiosis. Instead, he properly credited Dr. Dobersen's conclusions in light of the "very specific measurements and detailed findings," the content of his report indicating an "understanding of the concepts of simple and complicated pneumoconiosis" and his "superior qualifications."[8] 2005 Decision and Order at 11. As the administrative law

[8] The administrative law judge noted that: Dr. Dobersen is Board-certified in anatomic, clinical and forensic pathology and serves as a coroner and medical examiner; Dr. Crouch is a Professor of Pathology and Immunology at the Washington University of St. Louis School of Medicine and is Board-certified in anatomic pathology; Dr. Tomashefski is Chair of the Pathology Department at the Case Western Reserve University School of Medicine and is Board-certified in clinical and anatomical pathology; and Dr. Tuteur is an Associate Professor of Medicine and "specializes in internal medicine." 2005 Decision and Order at 8-10, 18; *see* Director's Exhibit 65; Employer's Exhibits 1-3.

judge observed, it was reasonable to credit the opinion of the autopsy prosector over the opinions of reviewing pathologists. *Pickup*, 100 F.3d at 874, 20 BLR at 2-341; *accord*, *Perry v. Mynu Coals, Inc*., 469 F.3d 360, 366, 23 BLR 2-374, 2-385 (4th Cir. 2006); 2005 Decision and Order at 11. Following the teaching of the Tenth Circuit, we must defer to credibility determinations of the administrative law judge. As that court recently declared in *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 24 BLR 2-155 (10th Cir. 2009), "[w]e are especially mindful that 'the task of weighing conflicting medical evidence is within the sole province of the [administrative law judge],' *Hansen* [*v. Director, OWCP*], 984 F.2d [364], [] 368, [17 BLR 2-48, 2-54 (10th Cir. 1993)], and that 'where medical professionals are in disagreement, the trier of fact is in a unique position to determine credibility and weigh the evidence,' *id*. at 370, [17 BLR at 2-59]." *Oliver*, 555 F.3d at 1217, 24 BLR at 2-164. Moreover, as Dr. Dobersen's autopsy report is clearly relevant to 20 C.F.R. §718.304(b), it was unnecessary for the administrative law judge to specifically mention the subsection of 20 C.F.R. §718.304 under which the autopsy evidence established the existence of complicated pneumoconiosis. Thus, because the administrative law judge rationally found the opinion of Dr. Dobersen to be reasoned and documented, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984), we reject employer's assertion that the administrative law judge erred in relying on Dr. Dobersen's opinion to find complicated pneumoconiosis established. *Oliver*, 555 F.3d at 1211, 24 BLR at 2-155; *Pickup*, 100 F.3d at 871, 20 BLR at 2-334; *Hansen*, 984 F.2d at 364, 17 BLR at 2-48.

Additionally, employer chooses to overlook Dr. Dobersen's explicit diagnosis of complicated coal workers' pneumoconiosis, in the form of progressive massive fibrosis, to argue that the doctor's findings do not support the administrative law judge's determination. *See* Director's Exhibit 65 at 2. The doctor reported, *inter alia*, "extensive anthracosis with focal irregular areas of anthracotic scaring [*sic*], some of which measure up [to two and one-half] inches in greatest dimension, [together with a] pattern of centrilobular emphysema . . . ." *Id*. at 7. Employer contends that the administrative law judge erred in interpreting Dr. Dobersen's reference to scarring as a lesion. Employer's argument is without foundation. A lesion is defined as "any pathological or traumatic discontinuity of tissue . . . ." *Dorland's Illustrated Medical Dictionary* at 726 (26th ed. 1981). As the Director correctly argues: Dr. Dobersen's "finding of complicated pneumoconiosis, based on the presence of extensive anthracosis and scarring - with lesions measuring up to [two and one-half] inches (6.35 centimeters) in diameter - along with evidence of extensive centrilobular emphysema and severe cor pulmonale, comports with the accepted medical definition of complicated pneumoconiosis." Director's Supplemental Brief at 4; *see Gruller v. BethEnergy Mines, Inc*., 16 BLR 1 3, 1-5 (1991) (diagnosis of complicated pneumoconiosis with lesion "up to 1.0 cm in diameter" sufficient to establish presence of "massive lesion"); *see also Perry*, 469 F.3d at 365 n.4, 23 BLR at 2-385 n.4 (autopsy report diagnosing "[c]oal worker type pneumoconiosis,

complicated type, with progressive massive fibrosis" sufficient to invoke the presumption pursuant to 20 C.F.R. §718.304(b)).

In this case, the administrative law judge rationally concluded that Dr. Dobersen's findings satisfied the statutory and regulatory requirements to establish the presence of complicated pneumoconiosis. *See Gruller*, 16 BLR at 1-5. Further, contrary to employer's argument, the administrative law judge thoroughly considered the relative qualifications of each physician and he permissibly found Dr. Dobersen to have "superior" qualifications in the field of pathology, especially since he is Board-certified in the areas of anatomic, clinical and forensic pathology. 2005 Decision and Order at 8, 10. The administrative law judge's rational choice among conflicting medical evidence must be affirmed. *Oliver*, 555 F.3d at 1211, 24 BLR at 2-155; *Hansen*, 984 F.2d at 364, 17 BLR at 2-48.

Employer also contends that the administrative law judge erred in failing to make an equivalency determination prior to finding complicated pneumoconiosis established, citing the Fourth Circuit's decision in *Blankenship*. Employer's 2005 Brief at 36. We disagree. The equivalency determination is not well-founded in reason or in law. As the Eleventh Circuit observed, "[i]t would be anomalous indeed to accord paramount importance to the perceived objectivity of x-rays, even though autopsies are more accurate." *Cornelius*, 508 F.3d at 987, 24 BLR at 2-95; *accord Gray*, 176 F.3d at 389-90, 21 BLR at 2-629; *see Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7, 3 BLR 2-36, 2-38. Moreover, analysis of the statutory language does not support application of an equivalency determination. *Cornelius*, 508 F.3d 987 n.7, 24 BLR at 2-94 n.7. The regulations state that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if: (a) an x-ray of the miner's lungs show at least one opacity greater than one centimeter in diameter; (b) a biopsy or autopsy reveals massive lesions in the lungs; or (c) a diagnosis by other means reveals a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The Board agrees with the Director that the statute and regulation contain no language indicating that an equivalency determination is required pursuant to prong (b). *See* 20 C.F.R. §718.304(b); Director's Supplemental Brief at 9. In contrast to prong (b), an equivalency determination is clearly required under prong (c). 20 C.F.R. §718.304(c). Congress separated the prongs in the statute with the disjunctive "or," indicating that alternatives were intended. 30 U.S.C. §921(c)(3)(B). A finding of massive lesions on autopsy, therefore, when based on acceptable medical criteria, should suffice to invoke the irrebuttable presumption pursuant to 20 C.F.R. §718.304(b), *Cornelius*, 508 F.3d at 987, 24 BLR at 2-94, even if it is not accompanied by an equivalency determination, as is the case herein. Thus, we find no merit in employer's argument that the Fourth Circuit's standard requiring an equivalency determination at 20 C.F.R. §718.304(b) is applicable in this case arising within the Tenth Circuit. Accordingly, we affirm the administrative law judge's finding in his 2005 Decision and Order that claimant established the presence of complicated pneumoconiosis and

entitlement to invocation of the irrebuttable presumption thereunder, and therefore entitlement to benefits in both the miner's claim and the survivor's claim.

Finally, although the Director and employer disagree about the correct date for commencement of payment of benefits in the miner's claim, they agree that the administrative law judge erred in his analysis. The administrative law judge held that because the medical evidence established that the miner was totally disabled since March 1998, the month in which he filed his claim, that date is the onset date for commencement of benefits. 2005 Decision and Order at 19-20. The Director contends that the administrative law judge considered the applicable regulation, 20 C.F.R. §725.503(b), and selected the correct date for commencement of benefits, the filing date, but for the wrong reason. The Director explains that the administrative law judge failed to give claimant the benefit of the irrebuttable presumption, that the miner is presumed to have been totally disabled by pneumoconiosis, hence, total disability did not have to be proven. Since a miner who has complicated pneumoconiosis is irrebuttably presumed to be totally disabled, the relevant date is the month when the miner's simple pneumoconiosis became complicated pneumoconiosis.[9] *Williams v. Director, OWCP*, 13 BLR 1-28 (1989). The Board explained in *Williams* that:

> [i]f the evidence does not reflect when claimant's simple pneumoconiosis became complicated pneumoconiosis, the onset date for payment of benefits is the month during which the claim was filed . . . ., unless the evidence affirmatively establishes that claimant had only simple pneumoconiosis for any period subsequent to the date of filing . . . .

Id. at 1-30 (citation omitted).

As the Director persuasively argues, because the definitive evidence of complicated pneumoconiosis was provided by the autopsy, evidence on x-rays, CT scans and biopsies obtained during the miner's life are insufficient to disprove the existence of

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[9] 20 C.F.R. §725.503(b) states in relevant part:

> Benefits 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. Where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed.

20 C.F.R. §725.503(b).

complicated pneumoconiosis at the time he filed for benefits in March 1998 or thereafter. Accordingly, the Director requests the Board to affirm the administrative law judge's determination that payment of benefits in the miner's claim should commence as of March 1998.

Employer contends that even if the Board affirms the administrative law judge's award of benefits in the miner's claim, no payment is owed because the onset date for commencement of benefits is no earlier than the date of the miner's death. In support of this contention, employer offers three alternative arguments, none of which has merit. First, quoting *Truitt v. North American Coal Corp.*, 2 BLR 1-199, 1-203-04 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.* [*Truitt*], 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980), employer asserts:

> Where entitlement to benefits is based on the finding that the miner suffered from complicated pneumoconiosis under Section 411(c)(3), the onset date of disability is deemed the month during which complicated pneumoconiosis was first diagnosed.

Employer's 2005 Brief at 46. As the Director observes, employer's quotation from *Truitt* is misleading because the issue in *Truitt* was the date of onset of complicated pneumoconiosis to determine liability for benefits, not the commencement date for the payment of benefits. Hence, the quotation from *Truitt* is irrelevant to the case at bar. Director's 2005 Response Letter at 4.

Second, employer argues that the administrative law judge erred in relying on Dr. Guichetau's medical opinion to find that the miner was totally disabled in March 1998, and in holding that this evidence established the onset date for payment of benefits. Employer's 2005 Brief at 47-48. In particular, employer points to evidence that the miner continued in coal mine employment until June 1998. *Id*. at 47. Employer is, in part, correct that the administrative law judge erred in relying on evidence of total disability to determine the onset date. As discussed, *supra*, where complicated pneumoconiosis is established, the onset date is the date on which the miner's simple pneumoconiosis became complicated pneumoconiosis. *Williams*, 13 BLR at 1-30. Furthermore, evidence of the miner's continued employment cannot defeat application of the irrebuttable presumption that the miner was totally disabled due to pneumoconiosis. 20 C.F.R. §718.304; *Usery*, 428 U.S. at 22, 3 BLR at 2-48.

Third, employer argues that the miner's claim was before the administrative law judge on a petition for modification filed by the claimant; therefore, the onset date should be determined in accordance with whether the award of benefits was premised on a finding of a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Employer's 2005 Brief at 48-49. As the Director correctly

argues, the premise of employer's argument is entirely false. The record contains no petition for modification filed by claimant, nor does employer attempt to identify any such petition. Furthermore, the only petition for modification that employer recounts in its history of the miner's claim is that filed by employer. Employer's 2005 Brief at 2; *see* Director's Exhibit 52. Accordingly, employer's contention is baseless.

Employer's various objections to the payment of benefits in the miner's claim commencing as of March 1998 are all devoid of merit. We are persuaded by the Director's analysis of the relevant law and evidence. Because the evidence is insufficient to affirmatively establish that the miner did not have complicated pneumoconiosis at some time after the filing date, we affirm the administrative law judge's determination to commence benefits as of March 1998. 20 C.F.R. §725.503(b); *Williams*, 13 BLR at 1-30.

Accordingly, the administrative law judge's 2005 Decision and Order Awarding Living Miner's and Survivor's Benefits is reinstated and affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the administrative law judge's 2008 Decision and Order Denying Living Miner and Survivor Benefits on Remand and the Board's 2006 Decision and Order and to reinstate the administrative law judge's 2005 Decision and Order Awarding Living Miner's and Survivor's Benefits.

The Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act), authorizes, and indeed obligates, the Secretary of Labor to administer all functions of the Act, including the promulgation of regulations that prescribe the standards for determining whether a miner is totally disabled due to pneumoconiosis or whether the death of a miner was due to pneumoconiosis. 30 U.S.C. §921(b); *see Director, OWCP v. National Mines Corp.*, 554 F.2d 1267 (4th Cir. 1977). In turn, the Secretary has delegated this regulatory responsibility to the Director, Office of Workers' Compensation Programs (the Director). 30 U.S.C. §§902(f)(1), 932(a); *see Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, 869, 23 BLR 1-24 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001); *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). To date, the Director has failed to execute this responsibility by prescribing a clear and rational definition of "massive lesions," as set forth in Section 411 (c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Section 718.304 merely repeats verbatim the statutory language without any further regulatory guidance.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction a substantial number of Black Lung cases arise, recognized this deficiency and reasonably held that in applying the standard set forth in each subsection of Section 718.304, an equivalency determination must be performed to make certain that, regardless of which diagnostic technique is used, the same underlying condition triggers invocation of the irrebuttable presumption. Because subsection (a) sets out an entirely objective scientific standard, *i.e.*, an opacity on x-ray greater than on centimeter, x-ray evidences provides the benchmark for determining what, under prong (b), is a "massive lesion" and what, under subsection (c) is an equivalent diagnostic result reached by other means. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999).

With the exception of the United States Court of Appeals for the Eleventh Circuit in *Pittsburg & Midway Coal Mining Co. v. Director, OWCP*, [*Cornelius*], 508 F.3d 975, 24 BLR 2-72 (11th Cir. 2007), no other circuit has rejected the approach as articulately set forth in *Blankenship* and *Scarbro*. Moreover, in *Gray v. SLC Coal Co.*, 176 F.3d 382,

21 BLR 2-615 (6th Cir. 1999), the United States Court of Appeals for the Sixth Circuit cited this method with approval.

Besides the rational equivalency determination scheme adopted by the Fourth Circuit, there has been no other suggestion, to date, of how to ensure a fair application of the Section 411(c) *irrebuttable* presumption. The term "massive lesions," standing alone, can mean whatever any medical expert wants it to mean, with or without a rational basis. Diagnostic evidence such as X-rays, pulmonary function studies and blood gas studies all have regulatory standards promulgated by the Director. Until the Director satisfies his obligation to develop a regulatory standard that defines "massive lesions" for purposes of invocation of the irrebuttable presumption, we are left with the fair and rational approach developed by the Fourth Circuit, which I would apply to this case.

Consequently, I would not reinstate the administrative law judge's 2005 Decision and Order Awarding Living Miner's and Survivor's Benefits. Furthermore, I would review the administrative law judge's 2008 Decision and Order Denying Living Miner and Survivor Benefits on Remand to determine whether it is supported by substantial evidence.

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ROY P. SMITH
Administrative Appeals Judge