BRB No. 11-0147 BLA

JOE MORRIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BENCO MINING, INCORPORATED	)	DATE ISSUED: 10/27/2011
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Living Miner's Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Rita Roppolo (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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

Employer appeals the Decision and Order Awarding Living Miner's Benefits (2007-BLA-5740) of Associate Chief Administrative Law Judge William S. Colwell, rendered on a miner's claim filed on August 21, 2006, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). In a Decision and Order dated September 30, 2010, the administrative law judge credited

claimant with seven years of coal mine employment, as stipulated by the parties, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that the evidence was sufficient to establish that claimant suffers from simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(3), 718.304(a), (c). Based on his finding of complicated pneumoconiosis, the administrative law judge concluded that claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in failing to address the issue of whether claimant's application for benefits, filed on August 21, 2006, was timely filed pursuant to 20 C.F.R. §725.308. Employer also argues that the administrative law judge improperly shifted the burden to employer to disprove that claimant has complicated pneumoconiosis, and erred in his consideration of the evidence at 20 C.F.R. §718.304(a), (c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, asserting that, while the administrative law judge failed to consider the issue of timeliness, this error is harmless because the evidence of record is insufficient, as a matter of law, to rebut the presumption at 20 C.F.R. §725.308, that claimant's August 21, 2006 claim was timely filed. The Director further contends that the administrative law judge properly found that claimant is entitled to invocation of the irrebuttable presumption at 20 C.F.R. §718.304.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law.[1] 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, 363 (1965).

I. Timeliness of the Claim

Section 422(f), 30 U.S.C. §932(f), and its implementing regulation at 20 C.F.R. §725.308(a), provide that a claim for benefits must be filed within three years of a medical determination of total disability due to pneumoconiosis, which has been communicated to the miner. The regulation at 20 C.F.R. §725.308(c) provides a rebuttable presumption that every claim for benefits filed under the Act is timely filed.

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

20 C.F.R. §725.308(c). The United States Court of Appeals for the Sixth Circuit, wherein jurisdiction for this cases arises, stated in *Tennessee Consol. Coal Co. v .Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), that it is "employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [the claimant]" more than three years prior to the filing of the claim. *Kirk*, 264 F.3d at 607*,* 22 BLR at 2-296.

Employer correctly asserts in this appeal that the administrative law judge did not address the contested issue of whether claimant timely filed his claim.[2] However, we agree with the Director, that the administrative law judge's error is harmless, because the evidence of record is insufficient, as a matter of law, to satisfy employer's burden to rebut the presumption at 20 C.F.R. §725.308(c).

Employer maintains that the evidence establishes that claimant received a medical determination of total disability due to pneumoconiosis in 1999, more than three years prior to the filing of his claim, on August 21, 2006. Employer relies on claimant's testimony at the hearing that he was informed "as early as 1999" that he suffered from the effects of "black lung disease" and should "get out of the mines" and "file a claim for black lung benefits."[3] Employer's Brief in Support of Petition for Review at 11; *see* Hearing Transcript at 17, 32-34, 34-35.

Contrary to employer's arguments, claimant's hearing testimony is insufficient to rebut the presumption of timeliness. In defining what constitutes a medical determination that is sufficient to start the running of the statute of limitations, the Sixth Circuit has stated that the statute relies on the "trigger of the reasoned opinion of a medical professional." *Kirk*, 264 F.3d at 607, 22 BLR at 2-298. Applying this standard, the Board has held that, under the language set forth in *Kirk*, a miner's mere statement that he

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[2] The Form CM-1025, completed by the district director when the case was transferred for hearing, listed timeliness as a contested issue. Director's Exhibit 38. At the hearing held on March 13, 2008, employer's counsel also specifically advised the administrative law judge that it continued to contest whether claimant timely filed his claim. Hearing Transcript at 6-7. Employer also set forth its arguments in a post-hearing brief. *See* October 27, 2009 Brief of Employer at 1-2, 9-10. The administrative law judge, however, did not identify timeliness as an issue in his Decision and Order and did not make a finding pursuant to 20 C.F.R. §725.308(c).

[3] Employer also relies on an October 2006 report by Dr. Kramer, wherein Dr. Kramer relates claimant's medical history and indicates that claimant was first diagnosed with pneumoconiosis in 1998, by Dr. Jarboe, and was told at that time to stop working in the mines. Director's Exhibit 12.

was told by a physician that he was totally disabled by black lung is insufficient to trigger the running of the statute of limitations. *See Brigance v. Peabody Coal Co.*, 23 BLR 1-170 (2006) (*en banc*); *Furgerson v. Jericol Mining Co.*, 22 BLR 1-216 (2002) (*en banc*). Moreover, Dr. Jarboe's recommendation, that claimant stop working in the mines and file a claim for black lung benefits, is not a diagnosis of total disability within the meaning of the Act. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989).

In the absence of a reasoned medical determination of total disability due to pneumoconiosis, employer has not satisfied the requirements of *Kirk*. *See Kirk*, 264 F.3d at 607, 22 BLR at 2-298; *Zimmerman*, 871 F.2d at 567, 12 BLR at 2-258; *Brigance,* 23 BLR at 1-170; *Furgerson*, 22 BLR at 1-216. Because employer is unable to rebut the presumption of timeliness, based on the record evidence, we conclude that the administrative law judge's error in failing to render a specific finding at 20 C.F.R. §725.308(c) is harmless. S*ee Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We, therefore, reject employer's argument that remand is necessary for resolution of the contested timeliness issue.

II. Complicated Pneumoconiosis

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement.[4] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Section 411(c)(3) of the Act, implemented by 20 C.F.R. §718.304 of the regulations, provides that there is 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 or autopsy, 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

[4] We affirm, as unchallenged by employer on appeal, the administrative law judge's finding that claimant established seven years of coal mine employment and the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for 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 that pneumoconiosis is not present, resolve any conflicts and make a finding of fact. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31 (1991) (*en banc*).

A. The Administrative Law Judge's Findings

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered eleven readings of five x-rays dated June 24, 1999, August 7, 2006, October 5, 2006, January 24, 2007 and June 2, 2007. The June 24, 1999 x-ray has one reading by Dr. Datu, a Board-certified radiologist, indicating that the film was "normal." Director's Exhibit 11. The administrative law judge found that this x-ray does not support a finding of complicated pneumoconiosis. Decision and Order at 8.

The August 7, 2006 x-ray has one reading by Dr. Kraman, whose radiological qualifications are not in the record. Director's Exhibit 12. Dr. Kraman read the film as showing advanced simple pneumoconiosis, along with an early conglomeration of masses, measuring one and one-half centimeters, that "is not yet diagnostic of progressive massive fibrosis." *Id*. The administrative law judge found that the August 7, 2006 x-ray supported a finding of "advanced simple coal workers' pneumoconiosis." Decision and Order at 8.

The October 5, 2006 x-ray was read by Dr. Averion-Mahloch, a Board-certified radiologist, as showing multiple nodular densities consistent with silicosis, by Dr. DePonte, a dually qualified Board-certified radiologist and B reader, as positive for simple and complicated pneumoconiosis, 3/2, q/q, Category A, and by Dr. Wheeler, also a dually qualified Board-certified radiologist and B reader, as negative for simple and complicated pneumoconiosis.[5] Director's Exhibits 9, 13; Claimant's Exhibit 5. In the "Comments" section of the ILO form, Dr. Wheeler noted a "4 x 2" centimeter mass in the right lung, compatible with "conglomerate granulomatous disease." Director's Exhibit 13. Dr. Wheeler further stated that claimant "is quite young to have [coal workers' pneumoconiosis] with [a] large opacity. Complex [coal workers' pneumoconiosis] was seen mainly in miners working unprotected during and before WW2." *Id*.

The October 5, 2006 x-ray was also read by Dr. Jarboe, a B reader, as positive for simple and complicated pneumoconiosis, 2/3, q/q, Category A. Director's Exhibit 9.

[5] Dr. Barrett also read the October 5, 2006 x-ray for quality purposes only. Director's Exhibit 10.

However, in a subsequent report, dated April 23, 2007, Dr. Jarboe indicated that he received a copy of Dr. Wheeler's interpretation of the October 5, 2006 x-ray and Dr. Kraman's interpretation of the August 7, 2006 x-ray. Employer's Exhibit 1. He noted that the October 5, 2006 x-ray showed an "over penetration," which was not present in the August 7, 2006 x-ray, and that the latter x-ray "allows the reader to identify distinct separation between the apical nodules." *Id.* Dr. Jarboe stated that he agreed with Dr. Kraman that "there is a suggestion of early conglomeration of nodules in the right upper lobe measuring 1.5 [centimeters] in diameter that is not yet diagnostic of massive fibrosis." *Id.*

In weighing the conflicting readings of the October 5, 2006 x-ray, the administrative law judge found that, "given their superior qualifications," the readings by Drs. Wheeler and DePonte are more probative and establish that the mass is not 'distinct nodules' as posited by Dr. Jarboe." Decision and Order at 9. The administrative law judge credited Dr. DePonte's positive reading over Dr. Wheeler's negative reading, finding that Dr. Wheeler's rationale for excluding complicated pneumoconiosis was "not adequately reasoned." *Id.* Thus, the administrative law judge determined that the October 5, 2006 x-ray is positive for complicated pneumoconiosis. *Id.*

The January 24, 2007 x-ray was read by Dr. Dahhan, a B reader, as positive for simple pneumoconiosis, 2/3, q/q, but negative for complicated pneumoconiosis, while Dr. DePonte read this same x-ray as positive for simple and complicated pneumoconiosis, 3/2, q/q, Category A. Claimant's Exhibit 7; Employer's Exhibit 2. Based on "Dr. DePonte's superior radiological qualifications," the administrative law judge determined that the January 24, 2007 x-ray is positive for complicated pneumoconiosis. Decision and Order at 10-11.

The June 2, 2007 x-ray was read by Dr. DePonte as positive for simple and complicated pneumoconiosis, 3/2, q/q, Category A, but as negative for simple and complicated pneumoconiosis by Dr. Wheeler. Claimant's Exhibit 1; Employer's Exhibit 4. Dr. Wheeler again noted an ill-defined 2-3 centimeter mass in the right upper lung compatible with conglomerate granulomatous disease.[6] Employer's Exhibit 4. The administrative law judge considered Dr. DePonte's reading to be the "most persuasive" and found that the June 2, 2007 x-ray was positive for complicated pneumoconiosis. Decision and Order at 11.

[6] Dr. Wheeler repeated his opinion in the "Comments" section of the ILO form that claimant is "quite young" to have a large opacity for complicated pneumoconiosis and that "proven cases [of complicated pneumoconiosis] have been rare in recent decades." Employer's Exhibit 4.

In summary, the administrative law judge determined that the June 24, 1999 x-ray was normal, the August 7, 2006 x-ray showed advanced simple pneumoconiosis, and that the remaining three x-rays, dated October 5, 2006, January 24, 2007, and June 2, 2007 were positive for complicated pneumoconiosis. Decision and Order at 11. The administrative law judge, therefore, found that claimant satisfied his burden to establish the existence of complicated pneumoconiosis, based on a preponderance of the x-ray evidence at 20 C.F.R. §718.304(a).[7] *Id.*

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge also considered whether claimant established the existence of complicated pneumoconiosis by other means. The administrative law judge credited a positive reading for complicated pneumoconiosis by Dr. DePonte of a digital x-ray dated August 28, 2006, over contrary readings of that scan by Dr. Datu, indicating "no active disease" and by Dr. Jarboe, who found no evidence of complicated pneumoconiosis. Decision and Order at 13; Director's Exhibit 11; Claimant's Exhibit 6; Employer's Exhibit 5. The administrative law judge gave controlling weight to Dr. DePonte's positive reading, based on her superior qualifications as a dually qualified radiologist, and found that the August 28, 2006 digital x-ray was supportive of claimant's burden of proof. Decision and Order at 14.

The administrative law judge also considered three readings of a CT scan dated October 17, 2007. Drs. Carr and Bassignani read the CT scan as being "compatible with complicated silicosis or coal-workers['] pneumoconiosis given evidence of developing progressive massive fibrosis." Claimant's Exhibit 1. Dr. Wheeler read the CT scan as showing "moderate irregular fibrosis or infiltrate upper lobes with few 2-3 [centimeter] masses" in the left upper lung and a "2-3 [centimeter] mass" in the right upper lung "surrounded by mixed linear fibrosis extending to pleura and apices and tiny nodules compatible with conglomerate granulomatous disease, histoplasmosis more likely than [tuberculosis]." Employer's Exhibit 4. Dr. Wheeler indicated that some of the nodules "could be" coal workers' pneumoconiosis but opined that "granulomatous disease is more likely [as] it involves apices, periphery upper lobes and pleura while [coal workers' pneumoconiosis] typically involves central mid and upper lungs." *Id.* Dr. Wheeler further noted that the "background nodules are mainly P-Q rather than Q-R and there are small S-T small opacities in about equal profusion," and that claimant is "quite young" to have complicated pneumoconiosis. *Id.*

In a separate narrative report dated May 2, 2008, pertaining to his reading of the June 2, 2007 CT scan, Dr. Wheeler criticized the readings of Drs. Carr and Bassignani because they "apparently looked at the history and decided that any lung pattern and

[7] The record in this case does not contain any biopsy evidence relevant to 20 C.F.R. §718.304(b).

calcification had to be due to silicosis or coal workers' pneumoconiosis." Employer's Exhibit 4. Dr. Wheeler stressed that granulomatous disease is "more common than pneumoconiosis" and that claimant was "quite young" to have developed complicated coal workers' pneumoconiosis. *Id*. Dr. Wheeler stressed that a biopsy was required for a definitive diagnosis in this case. *Id*.

In weighing the conflicting CT scan evidence, the administrative law judge determined that Dr. Wheeler's opinion was less persuasive, based on his comments regarding claimant's age. The administrative law judge concluded that "this rationale is based on generalities, rather than the specifics of this claim, and is, therefore, less probative." Decision and Order at 16. The administrative law judge also found that Dr. Wheeler did not adequately explain the relevance of the location of the nodules and the pattern of calcification in distinguishing between coal workers' pneumoconiosis and histoplasmosis. *Id*. The administrative law judge indicated that he was "unable to discern the reasonableness or relevance of [Dr. Wheeler's] rationale." *Id*. Thus, based on the readings by Drs. Carr and Bassignani, the administrative law judge concluded that the CT scan supported the presence of complicated pneumoconiosis. *Id*. at 17.

In considering the medical opinion evidence, the administrative law judge noted that Dr. Jarboe examined claimant on October 5, 2006, at the request of the Department of Labor, and diagnosed complicated pneumoconiosis, based on his x-ray interpretation and claimant's history of coal dust exposure. Decision and Order at 18; Director's Exhibit 9. He found that Dr. Kraman also examined the miner and issued reports on October 19, 2006 and December 14, 2006, indicating that claimant's x-ray findings had not yet advanced to the stage of complicated pneumoconiosis. Decision and Order at 19; Director's Exhibit 12. He further considered that Dr. Dahhan examined claimant on January 24, 2007 and opined that claimant does not suffer from either clinical or legal pneumoconiosis, while Dr. Koenig examined claimant on November 26, 2007 and opined that he suffers from both simple and complicated pneumoconiosis.[8] Decision and Order at 19-22; Claimant's Exhibit 2; Employer's Exhibit 2.

The administrative law judge found Dr. Dahhan's opinion to be unpersuasive and considered the opinion of Dr. Koenig, that claimant has both simple and complicated pneumoconiosis, to be "better documented by the miner's history of coal dust exposure and preponderantly positive findings on analog x-rays[,] as supported by preponderantly positive findings on the miner's CT scan and digital x-ray study." Decision and Order at 22. The administrative law judge, therefore, found that claimant established the existence

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[8] Dr. Boedefeld, claimant's treating physician, indicated that claimant had coal workers' pneumoconiosis and that a CT scan revealed "massive fibrosis" in the upper lung lobe. Claimant's Exhibit 1.

of complicated pneumoconiosis based on the digital x-ray, CT scan and medical opinion of Dr. Koenig, pursuant to 20 C.F.R §718.304(c). Decision and Order at 22. The administrative law judge, therefore, found that claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis.

B. Arguments on Appeal

Employer argues that the administrative law judge erred in giving less weight to Dr. Wheeler's opinion, that claimant does not have complicated pneumoconiosis, and that he misstated the evidence when he concluded that Dr. Wheeler's opinion was outweighed by the "contrary" opinions of Drs. DePonte and Jarboe, as Dr. Jarboe concluded that claimant does not have complicated pneumoconiosis in his final report. Employer asserts that the administrative law judge improperly shifted the burden to employer to disprove that claimant has complicated pneumoconiosis, rather than requiring claimant to meet his burden of proof by a preponderance of the evidence. Employer's arguments are without merit.

In weighing the conflicting x-ray evidence at 20 C.F.R. §718.304(a), the administrative law judge set forth a valid basis for assigning less weight to Dr. Wheeler's negative readings. As noted by the administrative law judge, in interpreting both the x-rays and CT scans in this case, Dr. Wheeler acknowledged that coal workers' pneumoconiosis "could account for some of the nodules" he identified, but excluded a diagnosis of complicated pneumoconiosis, based on his belief that claimant is "too young" to have developed the disease. Decision and Order at 16. The administrative law judge correctly found that Dr. Wheeler "failed to explain why [claimant] could not be one of those 'rare' young miners, with coal dust exposure in the mines after World War II, who developed complicated pneumoconiosis." *Id.*, *quoting* Employer's Exhibit 4; *see 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). The administrative law judge has broad discretion in assessing the credibility of the medical experts and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We affirm the administrative law judge's permissible finding that Dr. Wheeler's x-ray interpretations are "insufficiently reasoned and premised more on generalized views than the specifics of this claim."[9] Decision and Order at 10, 16.

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[9] Employer argues that the administrative law judge erred in "making specific reference to the details of Dr. DePonte's qualifications," while not similarly discussing

We also reject employer's assertion that the administrative law judge failed to properly weigh Dr. Jarboe's x-ray reading as negative for complicated pneumoconiosis. The administrative law judge specifically noted that Dr. Jarboe "declines to diagnose complicated pneumoconiosis because he is able to discern distinct coalescing nodules as opposed to a single conglomeration." Decision and Order at 9. As discussed, *supra*, the administrative law judge reasonably found that Dr. Jarboe's negative reading for complicated pneumoconiosis was less persuasive, given that both Dr. Wheeler and Dr. Anderson, who are more qualified than Dr. Jarboe, acknowledged the presence of a large mass on claimant's October 5, 2006 x-ray. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129.

Because the administrative law judge properly explained how he resolved the conflict in the x-ray evidence, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), based on the positive readings for complicated pneumoconiosis by Dr. DePonte, a dually-qualified radiologist, of the three most recent x-rays dated October 5, 2006, January 24, 2007 and June 2, 2007. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); Decision and Order at 11.

Pursuant to 20 C.F.R. §718.304(c), employer also challenges the weight accorded to Dr. Wheeler's negative reading of the October 17, 2007 CT scan. Contrary to employer's assertion, the administrative law judge permissibly found Dr. Wheeler's opinion, that the pattern of conglomerate masses and the location of the opacities were inconsistent with complicated pneumoconiosis, was inadequately explained. *See Crisp*,

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Dr. Wheeler's qualifications. Employer's Brief in Support of Petition for Review at 13-14. However, because the administrative law judge properly found that Dr. Wheeler's opinion, on the issue of the existence of complicated pneumoconiosis, is not sufficiently reasoned, he was not required to further discuss Dr. Wheeler's qualifications. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). Moreover, the Director correctly notes that "the only time the [administrative law judge] elaborated on Dr. DePonte's credentials" was when he weighed the conflicting readings of the digital x-ray. . . . The administrative law judge did not elaborate on Dr. Wheeler's credentials for the simple reason that [Dr. Wheeler] did not read the digital [x]-ray under consideration." Director's Letter Brief at 3. We also note that the administrative law judge set forth Dr. Wheeler's qualifications in his chart of the x-ray evidence. Decision and Order at 5-7.

866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010). The administrative law judge explained:

> Dr. Wheeler also states that, because the pattern [of opacities] involves the upper lobes and pleura, and pleura have no alveoli, the opacities are not pneumoconiosis. This is a cursory statement and Dr. Wheeler does not explain its relevance. Notably, what is the importance of the fact that the pleura have no alveoli where the opacities were also in the upper lobes? Dr. Wheeler does not posit that the upper lobes are without alveoli. Moreover, he does not explain why the presence or absence of alveoli [is] determinative of the existence of pneumoconiosis. This tribunal is unable to discern the reasonableness or relevance of this rationale.

Decision and Order at 16. Because the administrative law judge acted within his discretion in rejecting Dr. Wheeler's opinion, we affirm his finding that the CT scan evidence, consisting of the positive readings by Drs. Carr and Bassignani, further supports a conclusion that claimant has complicated pneumoconiosis. We, therefore, affirm the administrative law judge's overall finding that the digital x-ray, CT scan and medical opinion of Dr. Koenig establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order at 22.

Finally, we reject employer's argument that the administrative law judge improperly shifted the burden of proof, as the instances cited by employer constitute permissible credibility determinations, rather than a shift in burden, as employer suggests.[10] *See Gray*, 176 F.3d at 382, 21 BLR at 2-615; *Melnick*, 16 BLR at 1-33-34. As it is supported by substantial evidence, we affirm the administrative law judge's

[10] Employer also asserts that the administrative law judge erred in failing to address "the fact that none of the arterial blood gas testing values, spirometry values or other diagnostic testing revealed a pulmonary impairment that would establish entitlement to benefits." Employer's Brief in Support of Petition for Review at 16-17. Contrary to employer's assertion, however, a totally disabling respiratory or pulmonary impairment is not a prerequisite for invocation of the irrebuttable presumption. *See* 20 C.F.R. §718.304(a)-(c). Moreover, we note that Dr. Dahhan was the only physician to discuss the relevancy of respiratory testing in determining the existence of complicated pneumoconiosis. Employer's Exhibit 3. The administrative law judge specifically considered Dr. Dahhan's opinion and found that it was not persuasive. Decision and Order at 22.

finding that claimant established the existence of complicated pneumoconiosis, based on a preponderance of the evidence at 20 C.F.R. §718.304. We also affirm, as unchallenged, the administrative law judge's finding that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 22. We, therefore, affirm the administrative law judge's finding that claimant is entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis and the award of benefits in this claim.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge