U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0608 BLA

GLEN H. SIZEMORE Claimant-Petitioner v. DORCHESTER ENTERPRISES, INCORPORATED, c/o ALPHA NATURAL RESOURCES, AIG CASUALTY COMPANY/CHARTIS Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/30/2018 DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Glen H. Sizemore, Dryden, Virginia.

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order -Denying Benefits (2016-BLA-05206) of Administrative Law Judge Alan L. Bergstrom, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

After crediting claimant with at least thirty years of underground coal mine employment[2] based on the parties' stipulation, the administrative law judge found that the evidence did not establish complicated pneumoconiosis under 20 C.F.R. §718.304. He therefore found that claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The administrative law judge further found that the evidence did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Thus, he found that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] Although the administrative law judge

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

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

[3] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in

additionally found that the x-ray, CT scan, and medical opinion evidence established the existence of simple clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a), he denied benefits because claimant did not establish total disability, an essential element of entitlement.

On appeal, claimant generally challenges the denial of benefits. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the findings of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields an opacity greater than one centimeter in diameter that would be 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, would be a condition that could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 20 C.F.R. §718.304. The administrative law judge must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether claimant has invoked the irrebuttable presumption. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

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conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered eight interpretations of four x-rays. Dr. DePonte, dually-qualified as a B reader and Board-certified radiologist, interpreted each of the x-rays taken on March 3, 2014, June 25, 2014, January 13, 2015, and March 15, 2016 as positive for a Category A large opacity. Director's Exhibits 13, 14; Claimant's Exhibits 1, 2. Dr. Smith, also a dually-qualified radiologist, interpreted the same four x-rays as negative for complicated pneumoconiosis.[4] Director's Exhibits 15, 16; Employer's Exhibits 1, 2. The administrative law judge considered the radiological qualifications of the physicians who interpreted the x-rays and noted that both physicians are dually-qualified. Decision and Order at 16. He permissibly found that the x-ray evidence is in equipoise given the conflicting readings by two dually-qualified radiologists. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Decision and Order at 16. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish complicated pneumoconiosis based on the x-ray evidence pursuant to 20 C.F.R. §718.304(a).

Pursuant to 20 C.F.R. §718.304(b), the administrative law judge correctly found that the record contains no biopsy evidence. Decision and Order at 16.

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge addressed whether claimant could establish complicated pneumoconiosis by "other means." Decision and Order at 16-17. The administrative law judge summarized multiple readings of five CT scans and accurately found that none of the physicians who provided readings diagnosed complicated pneumoconiosis.[5] *Id*. at 12-13, 17. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the CT scan evidence does not establish that claimant has complicated pneumoconiosis.

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[4] Dr. Barrett reviewed the June 25, 2014 x-ray to assess its film for quality purposes only. Director's Exhibit 13.

[5] Dr. Nicholas read a May 25, 2006 CT scan as revealing multiple calcified granulomas. Director's Exhibits 15, 17. Dr. Wolfe read CT scans taken on May 23, 2007, March 2, 2015, and September 2, 2015 as revealing several calcified nodules in the lungs consistent with granulomas, with the largest being 1.2 centimeters in diameter, consistent with granulomas. Employer's Exhibits 3, 4. Dr. DePonte read the September 2, 2015 CT scan as revealing a number of small opacities consistent with coal workers' pneumoconiosis, along with calcified granulomas measuring up to 1.3 centimeter in diameter. Employer's Exhibit 7. Dr. Nicholas read a May 25, 2006 CT scan as revealing multiple calcified granuloma. Director's Exhibits 15, 17.

The record also contains the medical opinions of Drs. McSharry, Sargent, and Ajjarapu. Director's Exhibits 13, 15, 33; Employer's Exhibits 1, 7-8. Because Drs. McSharry and Sargent opined that claimant does not have complicated pneumoconiosis, their opinions do not support claimant's burden of establishing that he has the disease at 20 C.F.R. §718.304(c).

Dr. Ajjarapu initially did not diagnose complicated pneumoconiosis, based on her June 25, 2014 examination of claimant. Director's Exhibit 13 at 24 (unpaginated). However, in a supplemental report dated October 27, 2014, Dr. Ajjarapu noted that Dr. DePonte read the June 25, 2014 x-ray as positive for a Category A large opacity. *Id*. at 2. Thus, Dr. Ajjarapu opined that claimant has complicated pneumoconiosis. *Id*. As discussed above, we have affirmed the administrative law judge's finding that the x-ray and CT scan evidence, weighed together, does not establish complicated pneumoconiosis. The administrative law judge, therefore, permissibly found that Dr. Ajjarapu's opinion that claimant "suffers from complicated pneumoconiosis based on Category A opacities on chest x-ray is outweighed by the evidence of record as a whole." Decision and Order at 20; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish complicated pneumoconiosis based on the medical opinion evidence pursuant to 20 C.F.R. §718.304(c). We further affirm the administrative law judge's finding that claimant failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304.[6]

Dr. Ramakrishnan read CT scans taken on May 23, 2007 and September 2, 2009 scans as revealing a one-centimeter nodule "suggestive of benign granulomatous process." *Id*.

[6] We disagree with our dissenting colleague's position that the administrative law judge erred in resolving the conflict in the x-ray evidence. He acted within his discretion in accepting Dr. Smith's x-ray readings. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993). Dr. Smith consistently read all four x-rays as negative for complicated pneumoconiosis. Director's Exhibits 15, 16; Employer's Exhibits 1, 2. The administrative law judge acknowledged the inconsistencies in Dr. Smith's x-ray readings on the issue of simple pneumoconiosis, but he was not required to then discredit Dr. Smith's readings on the issue of complicated

Section 411(c)(4) Presumption—Total Disability

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

In considering whether the evidence establishes the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge accurately found that the three pulmonary function studies of record, dated June 25, 2014, January 13, 2015, and March 15, 2016, were non-qualifying.[7] Decision and Order at 8, 18-19; Director's

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pneumoconiosis. As trier of fact, the administrative law judge is not bound to accept the opinion or theory of any medical expert, but instead must evaluate the evidence, weigh it, and draw his own conclusions. *Va. CWP Fund v. Bender*, 782 F.3d 129, 144-45 (4th Cir. 2015) (internal quotations omitted). It is the prerogative of the administrative law judge, rather than of a reviewing court, to resolve such a battle of the experts. *Id*., *citing Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir.2013). Further, the administrative law judge's finding that claimant did not establish complicated pneumoconiosis based on this record is consistent with the CT scan evidence, including Dr. DePonte's reading of the September 2, 2015 CT scan. Employer's Exhibit 7. Dr. DePonte did not diagnose complicated pneumoconiosis on this CT scan. *Id*. Rather, she identified a large 1.3 centimeter mass consistent with calcified granulomas. *Id*.

[7] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Exhibits 13, 15; Employer's Exhibit 1.[8] Pursuant to 20 C.F.R. §718.204(b)(2)(ii), he correctly found that the three arterial blood gas studies of record, dated June 25, 2014, January 13, 2015, and March 15, 2016, were non-qualifying for total disability. *Id*. Therefore, we affirm the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(ii).[9]

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. McSharry, Sargent, and Ajjarapu. Director's Exhibits 13, 15, 33; Employer's Exhibits 1, 7-8. He accurately noted that both Drs. McSharry and Sargent opined that claimant is not totally disabled from performing his usual coal mine employment by a respiratory or pulmonary impairment. Decision and Order at 11-12, 20; Director's Exhibit 15; Employer's Exhibits 1, 7-8.

Dr. Ajjarapu initially opined that claimant is not totally disabled because his pulmonary function and arterial blood gas studies are "normal." Director's Exhibit 13 at 24. After reviewing Dr. DePonte's positive reading of the June 25, 2014 x-ray, however, Dr. Ajjarapu opined that, "based on the x-ray and the presence of large opacities," claimant "should be encouraged to find alternative" employment "away from coal dust exposure." *Id*. at 2. Dr. Ajjarapu concluded that "[b]ased on this," claimant is totally disabled. *Id*. As discussed above, the administrative law judge found that claimant failed to establish that he has complicated pneumoconiosis by the x-ray evidence. The administrative law judge therefore rationally found that Dr. Ajjarapu's opinion does not establish that claimant is totally disabled. Decision and Order at 20; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

[8] The record also contains a pulmonary function study dated October 21, 2013, from Appalachia Family Health Center, and a pulmonary function study dated March 3, 2014, from "St. Charles Resp." Director's Exhibit 14. Any error by the administrative law judge in not discussing these two studies was harmless, as both studies are non-qualifying. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[9] The administrative law judge did not make a finding pursuant to 20 C.F.R. §718.204(b)(2)(iii). However, a review of the record does not reveal any evidence of cor pulmonale with right-sided congestive heart failure. Claimant is therefore unable to establish total disability pursuant to this subsection.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence does not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). We also affirm, as supported by substantial evidence, the administrative law judge's finding that the weight of the evidence, like and unlike, fails to establish total respiratory or pulmonary disability. *See Fields*, 10 BLR at 1-21; *Shedlock*, 9 BLR at 198; Decision and Order at 20. As claimant failed to establish a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4).

Where no statutory presumptions apply, claimant must establish that he has pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). As claimant did not invoke the Section 411(c)(3) or Section 411(c)(4) presumptions, and did not establish total disability, an essential element of entitlement pursuant to 20 C.F.R. Part 718, we affirm the denial of benefits. *Id*.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

RYAN GILLIGAN
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the denial of benefits. The administrative law judge erred in weighing the x-rays and medical opinions, failed to weigh all relevant evidence regarding the presence of complicated pneumoconiosis, and misapplied the law with respect to the requirements for invoking the Section 411(c)(3) presumption. I

therefore would remand this claim for reconsideration of whether claimant established that he has complicated pneumoconiosis.

A. X-Rays

The administrative law judge considered four x-rays from March 3, 2014, June 25, 2014, January 13, 2015, and March 15, 2016. Each was read by Dr. DePonte and Dr. Smith, both of whom are dually-qualified as Board-certified radiologists and B readers. Dr. DePonte read each x-ray as revealing small and large opacities consistent with both simple and complicated coal workers' pneumoconiosis, Category A, as well as "other abnormalities" of granuloma. Director's Exhibits 13, 14; Claimant's Exhibits 1, 2. Dr. Smith, on the other hand, read the x-rays as follows: The March 3, 2014 x-ray revealed "no small or large pulmonary parenchymal opacities," "no radiographic findings to confirm the presence of occupational pneumoconiosis," and no "other abnormalities." Director's Exhibit 16. The June 25, 2014 x-ray revealed small opacities of coal workers' pneumoconiosis in the middle and lower zones of both lungs, up to three millimeters in size, with no other abnormalities. Employer's Exhibit 2. The January 13, 2015 x-ray revealed small opacities of coal workers' pneumoconiosis in only the lower zone of the right lung, up to ten millimeters in size, as well as "nodule lesions in right middle lobe" that required further evaluation "to exclude other possible diagnostic etiologies."[10] Director's Exhibit 15. Finally, the March 16, 2016 x-ray revealed "no small or large pulmonary opacities," "no radiographic findings to confirm [the] presence of occupational pneumoconiosis," and a "few small granulomas" in the right lower lung. Employer's Exhibit 1 at 30-31. He further stated that there was "no change" between this x-ray and the January 13, 2015 x-ray. *Id.*

In finding that the x-ray evidence is "equipoised" such that it does not establish complicated pneumoconiosis, the administrative law judge cited two "considerations" that influenced his decision to give Dr. DePonte's and Dr. Smith's readings equal weight: "the progressive and irreversible nature of pneumoconiosis and the consistency of the dually qualified

[10] Dr. Smith stated that the nodule lesions should be further evaluated with CT scans and "comparison with prior chest radiographs," but he did not perform such a comparison with his two prior x-ray readings. Director's Exhibit 15.

physician readings." Decision and Order 16. Neither of these explanations, however, supports his finding that the readings by Dr. DePonte and Dr. Smith are equally-credible.

The administrative law judge's purported reliance on the progressive and irreversible nature of coal workers' pneumoconiosis to give equal weight to the physicians' readings is wholly unexplained, does not comply with the Administrative Procedure Act (APA),[11] and therefore cannot be affirmed. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Moreover, that pneumoconiosis is a progressive and irreversible disease undermines, rather than supports, the administrative law judge's crediting of Dr. Smith's x-ray readings. If Dr. Smith's opinion is to be believed, coal workers' pneumoconiosis was present in the middle and lower zones of both lungs in June 2014, was found in only the lower zone of the right lung as of January 2015, and was completely gone from both lungs by March 2016. As the United States Court of Appeals for the Fourth Circuit has explained, however, because pneumoconiosis is a progressive disease, claimants who have it cannot get better. *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992).

Thus, where the evidence shows that the miner's condition has improved, it "*is impossible to reconcile the evidence*. Either the earlier or later result *must* be wrong . . . ." *Id*. at 52 (emphasis in original); *see also Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250 (4th Cir. 2000) ("the assumption of progressivity . . . underlies much of the statutory regime").[12] Because irreconcilable differences exist between Dr. Smith's earlier diagnoses of coal workers'

[11] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all 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).

[12] The holding in *Adkins* was made in the context of explaining why an administrative law judge cannot "mechanically" credit later evidence as being "a more reliable indicator of the miner's condition" than earlier evidence. *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992). Although the administrative law judge in this case did not explicitly apply the "later is better" rule, the Fourth Circuit's analysis is applicable to this case, as it explains why the administrative law judge's reliance on the progressive and irreversible nature of pneumoconiosis to credit Dr. Smith's x-ray readings is irrational.

pneumoconiosis and his later determination that claimant does not have the disease, the administrative law judge's finding that his readings are equally credible to those of Dr. DePonte, due to the progressive and irreversible nature of pneumoconiosis, is irrational and cannot be affirmed.[13] *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998).

Additionally, the administrative law judge's finding that Dr. DePonte's and Dr. Smith's x-ray readings are equally consistent, and thus entitled to equal weight, is not supported by the evidence. Although Dr. DePonte consistently identified simple and complicated pneumoconiosis and granuloma on all four x-rays,[14] Director's Exhibits 13, 14; Claimant's Exhibits 1, 2, Dr. Smith's readings contain significant and obvious variations in his identification of coal workers' pneumoconiosis specifically, and opacities generally, in both of claimant's lungs. Director's Exhibits 15, 16; Employer's Exhibits 1, 2. Most notably, as explained above, Dr. Smith's readings suggest that the opacities of coal workers' pneumoconiosis he saw in claimant's left lung disappeared between the June 2014 and January 2015 x-rays, as did the opacities of coal workers' pneumoconiosis he saw in claimant's right lung between the January 2015 and March 2016 x-rays. In giving Dr. Smith's

[13] Dr. Smith offered no explanation for the discrepancies in his x-ray readings or the apparent retraction of his opinion that claimant has coal workers' pneumoconiosis. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

[14] Dr. DePonte's identification of a 1.3 centimeter nodule of granuloma on the September 2, 2015 CT scan does not necessarily undermine her four x-ray readings that claimant has complicated pneumoconiosis. *See Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 258 (4th Cir. 2000) ("the most objective measure of the condition specified by §921(c)(3) is obtained through x-rays"). While Dr. DePonte stated that a CT scan "is beneficial in confirming or denying the presence of *simple* coal workers' pneumoconiosis," with respect to complicated pneumoconiosis she stated that a CT scan "can be beneficial . . . *when it is not evident on the routine x-rays*." Employer's Exhibit 7 (emphasis added). Dr. DePonte consistently read three x-rays preceding this CT scan, and one x-ray postdating it, as positive for complicated pneumoconiosis. Furthermore, Dr. McSharry similarly limited his assessment of the diagnostic value of CT scans, as compared to x-rays, to the "evaluat[ion] of small lesions in the lung." Employer's Exhibit 7; *see* 20 C.F.R. §718.107(b) (The party submitting a CT scan "bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits."); *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 135-136 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc).

readings equal weight to those of Dr. DePonte, the administrative law judge did not explain why, notwithstanding these discrepancies, he considered Dr. Smith's readings to be "consistent." Decision and Order at 16. Because this finding is neither explained nor supported by the evidence, it cannot be affirmed. 5 U.S.C. §557(C)(3)(A); *Addison*, 831 F.3d at 255 (remand is required where the administrative law judge improperly characterized evidence or failed to account for relevant evidence); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (explaining that substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion).

In at least one significant respect, the administrative law judge explicitly found Dr. Smith's opinion to be "entirely inconsistent." Decision and Order at 16. In his reading of the March 15, 2016 x-ray, the most recent x-ray of record, Dr. Smith identified no opacities and no coal workers' pneumoconiosis, and stated that there was "no change" between this x-ray and the x-ray taken on January 13, 2015. Employer's Exhibit 1. The administrative law judge noted, however, that Dr. Smith's x-ray reading had in fact changed significantly, as Dr. Smith specifically read the January 13, 2015 x-ray as positive for opacities of coal workers' pneumoconiosis up to 10 millimeters in size, along with nodule lesions, in claimant's right lung. Decision and Order at 16. In light of the administrative law judge's own finding that Dr. Smith's explanation for his negative reading of the March 15, 2016 x-ray is "entirely inconsistent," *i.e.*, a negative x-ray reading is not "unchanged" from an earlier positive reading, the administrative law judge has not explained why Dr. Smith's reading of that x-ray is "consistent" and entitled to the same weight as Dr. DePonte's reading.[15] *Addison*, 831 F.3d at 256-57; *Wojtowicz*, 12 BLR at 1-165.

Notably, the administrative law judge did not find that Dr. Smith's opinion on complicated pneumoconiosis is somehow separate and distinct from, and unaffected by, his "entirely inconsistent" reading of the March 15, 2016 x-ray.

[15] The administrative law judge appears to have supported his credibility determinations by adding that, "[e]ssentially Dr. Smith and Dr. DePonte reported no change [between the March 15, 2016 x-ray and] the chest x-ray reading taken two months before on January 13, 2015." Decision and Order at 16. This finding that Dr. Smith's x-ray reading is "essentially unchanged" cannot be affirmed, however, as it conflicts with the administrative law judge's own findings that Dr. Smith's x-ray readings changed significantly, and that Dr. Smith was "entirely inconsistent" when he asserted that there was "no change" between the two x-rays. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013). The administrative law judge also incorrectly stated that the two x-rays were conducted only two months apart, when they were actually conducted fourteen months apart. Decision and Order at 16. Thus,

Director, OWCP v. Rowe, 710 F.2d 251 (1983); Decision and Order at 16. Nor did the administrative law judge consider Dr. Smith's credibility on the issue of complicated pneumoconiosis in light of the irreconcilable differences between his readings of the June 25, 2014, January 13, 2015, and March 15, 2016 x-rays. *Adkins*, 958 F.2d at 52. At a minimum, by finding that claimant has at least simple pneumoconiosis, Decision and Order at 20-21, the administrative law judge implicitly rejected Dr. Smith's opinion that the March 15, 2016 x-ray is completely negative for the disease, leaving Dr. DePonte's identification of both simple and complicated pneumoconiosis as the only credible reading of that x-ray. Thus, even if the administrative law judge were to find that Dr. Smith's opinion regarding complicated pneumoconiosis is nevertheless consistent and credible, that finding could not be affirmed without an adequate explanation as to why Dr. Smith's credibility is not undermined by his otherwise irreconcilable and entirely inconsistent x-ray readings.[16] *Addison*, 831 F.3d at 253, 256-57.

B. Medical Opinions

In evaluating the medical opinions, the administrative law judge analyzed and rendered credibility determinations only with respect to Dr. Ajjarapu. The administrative law judge concluded that Dr. Ajjarapu's diagnosis of "complicated pneumoconiosis based on Category A opacities on chest x-ray is outweighed by the evidence of record as a whole" because claimant "failed to establish by a preponderance of the evidence that he suffers from a severe breathing impairment consistent with complicated pneumoconiosis by clinical testing, review of symptoms, and medical opinion." Decision and Order at 20. To the extent the administrative law judge discredited Dr. Ajjarapu's opinion as being inconsistent with, or outweighed by, the objective evidence of record, that finding cannot be affirmed in light of the administrative law judge's errors in weighing

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any suggestion that Dr. Smith's inconsistent statements do not undermine his opinion, because not enough time had elapsed for claimant's x-rays to have "changed," is unsupported by the record. *See Addison*, 831 F.3d at 256-57.

[16] The legal distinction between simple and complicated pneumoconiosis is predominantly one of size, 30 U.S.C. §921(c)(3) (defining complicated pneumoconiosis as large opacities exceeding one centimeter in diameter on x-ray); *Double B Mining v. Blankenship*, 177 F.3d 240, 244, (4th Cir. 1999), such that Dr. Smith's inability to accurately identify *any opacities* of the disease on the March 15, 2016 x-ray immediately calls into question the probative value of his opinion regarding the *size of those opacities*.

the x-ray evidence. *See Addison*, 831 F.3d at 256-57; *Owens*, 724 F.3d at 557; *Consol. Coal Co. v. Brown*, 230 F.3d 1351 (4th Cir. 2000) (unpub.).

Additionally, as explained below, because the administrative law judge erred in requiring claimant to establish a "severe respiratory impairment" to invoke the Section 411(c)(3) presumption, that finding cannot serve as a basis for rejecting Dr. Ajjarapu's opinion on the existence of complicated pneumoconiosis. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22-23 (1976); *Scarbro*, 220 F.3d at 257.

Further, the administrative law judge failed to consider portions of Dr. McSharry's opinion which tend to support, rather than undermine, Dr. Ajjarapu's and Dr. DePonte's diagnoses of complicated pneumoconiosis. Dr. McSharry authored a report dated February 5, 2015, in which he concluded that claimant does not have pneumoconiosis based on the January 13, 2015 x-ray reading by Dr. Smith and three CT scans from 2006, 2007, and 2009.[17] Director's Exhibit 15 at 2-4. Attached to that report, however, is an "Additional Record Review," in which Dr. McSharry reviewed Dr. Ajjarapu's diagnosis of complicated pneumoconiosis, as well as Dr. DePonte's June 25, 2014 x-ray reading. *Id*. 12-13. Dr. McSharry noted that although Dr. Ajjarapu initially diagnosed only simple pneumoconiosis, "A clarifying letter from Dr. Ajjarapu revises her report as to the x-ray interpretation, correctly noting that Dr. DePonte reported a large opacity [of complicated coal workers' pneumoconiosis]." *Id*. Dr. McSharry concluded, "I have reviewed the database that supported Dr. Ajjarapu's assessment and

[17] Dr. McSharry acknowledged that claimant has a lesion in his right lower lung that "meets the threshold in size for a lesion of progressive massive fibrosis," but opined that "there is no reason to conclude that this lesion developed as a result of [claimant's more than 30 years] of coal dust exposure." Director's Exhibit 15 at 4. He based his conclusion that claimant does not have coal workers' pneumoconiosis on his view that the disease "is generally a disease of the upper lung zones and tends to be symmetric[,]" while claimant's radiographic evidence reveals linear opacities in the lower lung zones. *Id*. at 3.

agree with her amended radiographic interpretation . . . ."[18] *Id*. (emphasis added). The administrative law judge's failure to address this relevant evidence requires remand.[19] *See Addison*, 831 F.3d 244, 254-55.

C. Total Disability

Finally, the administrative law judge evaluated the evidence relating to whether claimant has a totally disabling respiratory impairment. Noting that claimant's objective test results do not meet the federal guidelines for total disability and none of the physicians diagnosed a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant could not invoke the Section 411(c)(3) presumption, in part, because he did not "establish by a preponderance of the evidence that he suffers from a severe breathing impairment consistent with complicated pneumoconiosis." Decision and Order at 20.

In concluding that claimant's respiratory symptoms are not "consistent with complicated pneumoconiosis," the administrative law judge impermissibly substituted his opinion for those of the medical experts. *Hicks*, 138 F.3d at 528; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Although the physicians of record agree that claimant's impairment is "mild," none of them identified the degree of claimant's impairment as a relevant factor in determining whether he has complicated pneumoconiosis. Rather, they based their opinions on the radiographic evidence alone. Employer's Exhibits 1, 7; Director's Exhibits 15, 33.

Additionally, to invoke the Section 411(c)(3) presumption, a miner need only establish that he has complicated pneumoconiosis by x-ray, autopsy or biopsy, or "other means" that would achieve "an equivalent diagnostic result." 30

[18] Dr. McSharry also authored a reported dated October 5, 2016, in which he revised his opinion to include a diagnosis of simple pneumoconiosis based on Dr. Wolfe's readings of several CT scans, while attributing the "larger lesions in the right lung base" to "old granulomatous disease." Employer's Exhibit 7.

[19] A third physician, Dr. Sargent, based his opinion that claimant does not have coal workers' pneumoconiosis on Dr. Smith's negative reading of the March 15, 2016 x-ray. Employer's Exhibit 1.

U.S.C. §921(c)(3); *Scarbro*, 220 F.3d at 256. Once invoked, it is *presumed* that the miner has a totally disabling respiratory impairment and that the impairment is caused by pneumoconiosis. *Usery*, 428 U.S. at 22-23; *Scarbro*, 220 F.3d at 257 (holding that the Act "betrays no intent to incorporate a purely medical definition" of complicated pneumoconiosis). By requiring claimant to establish a "severe impairment consistent with complicated pneumoconiosis," the administrative law judge has imposed an extra-statutory requirement and deprived claimant of the very benefit of the Section 411(c)(3) presumption.[20] *Double B Min., Inc. v. Blankenship*, 177 F.3d 240, 241 (4th Cir. 1999) (failure to apply the statutory criteria for invocation of Section 411(c)(3) requires remand).

D. Conclusion

Because the administrative law judge erred in weighing the x-ray and medical opinion evidence, ignored relevant evidence regarding the presence of complicated pneumoconiosis, and improperly required claimant to establish a severe respiratory disability, I would remand this claim for the administrative law judge to reconsider, consistent with this opinion

[20] The administrative law judge's analysis regarding the relevance of claimant's respiratory disability, or lack thereof, is based on an incomplete reading of the law. Although he accurately quoted the Supreme Court's statement in *Usery v. Turner Elkhorn*, 428 U.S. 1, 7 (1976), that "[c]omplicated pneumoconiosis . . . usually produces significant pulmonary impairment and marked respiratory disability[,]" the administrative law judge overlooked the Court's ultimate holding that Section 411(c)(3) is constitutional despite the fact that it "erect[s] an 'irrebuttable presumption' of total disability upon a factual showing that does not necessarily satisfy the statutory definition of total disability." *Id*. at 23. The Court reasoned that because "destruction of earning capacity is not the sole legitimate basis for compulsory compensation of employees by their employers[,]" it was not irrational "for Congress to conclude that impairment of health alone warrants compensation." *Id*. The Court also noted that although complicated pneumoconiosis "usually" produces a respiratory disability, "[t]here was evidence before Congress that the complicated stage of the disease is sometimes exhibited with 'mild pulmonary function changes and little or no disability.'" *Usery*, 428 U.S. at 7 n.4, *quoting* Hearings on S. 355, before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess., pt. 2, p. 858 (1969). In this case, all physicians of record agree that claimant has at least a "mild reduction in pulmonary capacity." Director's Exhibits 13, 15, 33; Employer's Exhibit 1.

and the errors identified herein, whether claimant established that he has complicated pneumoconiosis, thus invoking the Section 411(c)(3) presumption that he is totally disabled due to pneumoconiosis.

GREG J. BUZZARD
Administrative Appeals Judge