BRB Nos. 00-1061 BLA
and 00-1061 BLA-A

CLOTHER W. MOORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
POWELL MOUNTAIN COAL COMPANY, INCORPORATED	)	
	)	
and	)	DATE ISSUED:
	)	
NOW COAL COMPANY	)	
	)	
and	)	
	)	
SOUTHWEST VIRGINIA MAINTENANCE, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employers/Carrier-Petitioners Cross-Respondents	)	
	)	
TWO M COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
HARTFORD UNDERWRITERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondent Cross-Petitioner	)	

BULLION HOLLOW ENTERPRISES INCORPORATED	)	
and	)	
TRAVELERS INDEMNITY COMPANY	)	
Employer/Carrier-Respondents	)	
and	)	
LARAN COAL COMPANY INCORPORATED	)	
and	)	
VIRGINIA INDEPENDENT COAL	)	
and	)	
OPERATORS GROUP SELF-INSURANCE ASSOCIATION	)	
Employers/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Donald E. Earls (Earls and Fleming), Norton, Virginia, for claimant.

Mark E. Solomons and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for Powell Mountain Coal Company, NOW Coal Company, Southwest Virginia Maintenance, and Old Republic Insurance Company.
H. Ashby Dickerson (Penn Stuart LLP), Abingdon, Virginia, for Bullion Hollow Enterprises and Travelers Indemnity Company.

Joseph W. Bowman (Street, Street, Street, Scott & Bowman), Grundy, Virginia, for Two M Coal Company and Hartford Underwriter's Insurance Company.

Sarah M. Hurley (Howard M. Radzeley, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Powell Mountain Coal Company, NOW Coal Company, Southwest Virginia Maintenance, and Old Republic Insurance Company (hereinafter referred to as NOW) appeal the Decision and Order (99-BLA-0847) of Administrative Law Judge Stuart A. Levin awarding benefits with respect to a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge considered the claim, filed on May 1, 1997, pursuant to the regulations set forth in 20 C.F.R. Part 718 (2000).[1] The administrative law judge determined that the evidence of record was sufficient to establish the existence of complicated

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

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

pneumoconiosis and, therefore, that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304 (2000). Accordingly, benefits were awarded effective April 1, 1989. The administrative law judge further determined that NOW is the operator responsible for the payment of benefits in this case. Thus, the administrative law judge dismissed Bullion Hollow Coal Company, Two M Coal Company, and Southwest Virginia Maintenance.

In its brief on appeal, NOW asserts that the administrative law judge did not weigh all of the relevant evidence in determining that the existence of complicated pneumoconiosis was established pursuant to Section 718.304 (2000). NOW also argues that the administrative law judge's findings with respect to the date from which claimant is entitled to benefits and with respect to the identity of the responsible operator cannot be affirmed. Two M and Hartford Underwriters Insurance Company have filed a cross-appeal in which they have adopted NOW's allegations of error regarding the merits of the claim. The Director, Office of Workers' Compensation Programs, has responded and urges affirmance of the administrative law judge's Decision and Order.

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 applicable 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).

In considering the x-ray evidence pursuant to Section 718.304(a) (2000), the administrative law judge determined that Drs. Fino, Navani, Aycoth, Westerfield, and Gaziano, all qualified as B readers, read multiple films as positive for large opacities while Drs. Scott and Wheeler, also qualified as B readers, interpreted films as negative for either complicated or simple pneumoconiosis. Decision and Order at 4; Director's Exhibits 18-20, 53, 54, 66, 72. The administrative law judge noted that the conflict in the evidence could not be resolved based upon the numerical superiority of the positive readings and found that inasmuch as there was no evidence in the record to support Dr. Scott's and Dr. Wheeler's attribution of the markings on the x-rays to tuberculosis, the interpretations that were positive for complicated pneumoconiosis were entitled to greater weight. *Id*. The administrative law judge further determined that the record did not contain any other relevant evidence that contradicted the x-ray findings. The administrative law judge concluded, therefore, that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis.

NOW argues on appeal that the administrative law judge did not properly weigh the x-ray evidence, as he improperly relied upon the greater number of readings in which large opacities were noted and claimant's statement denying that he ever suffered from tuberculosis. Employer also maintains that the administrative law judge should have considered the comments made by the physicians concerning the quality of the films they read and the extent to which each physician explained his interpretation. These contentions are without merit.

As indicated previously, the administrative law judge explicitly declined to base his finding upon the numerical superiority of the readings in which the presence of large opacities was detected. Decision and Order at 4. In addition, contrary to NOW's contention, the administrative law judge did not rely solely upon claimant's disavowal of ever having had tuberculosis. The administrative law judge rationally based his determination upon the fact that "there is no other medical evidence in the record to support such a diagnosis...nor are there test results which would indicate the existence of the disease either past or present." *Id*.; *see Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Moreover, the administrative law judge was not required to accord weight to the various x-ray readings based upon the quality of the film interpreted or the extent to which the reader provided narrative comments. Provided that the x-ray is designated as quality 1, 2, or 3 and is classified in accordance with the ILO/UC system, it may be treated as evidence probative of the existence of simple or complicated pneumoconiosis. 20 C.F.R. §§718.102(b), 718.202(a)(1) (2000).

Regarding the quality of the x-ray dated January 20, 1996, the administrative law judge addressed this issue, in part, inasmuch as he noted the determination made by Dr. Scott, in contrast to the ILO/UC classification proffered by Dr. Fino, and acted within his discretion in treating the latter as probative evidence regarding the existence of complicated pneumoconiosis. Decision and Order at 4; Director's Exhibits 13, 14; Employer's Exhibits 1, 3; *Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1233 (1984); *Wheatley v. Peabody Coal Co*., 6 BLR 1-1214, 1-1215-16 (1984). The administrative law judge's omission of Dr. Navani's finding that the January 20, 1996 film was unreadable also does not constitute error requiring remand. Director's Exhibit 59. Even if the administrative law judge had excluded that x-ray from the record, the administrative law judge's determination regarding the preponderance of B readers who detected the presence of large opacities and the lack of evidence supporting Drs. Scott's and Wheeler's diagnosis of tuberculosis would be

unchanged. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Finally, NOW alleges that the administrative law judge erred in determining that the record does not contain any other relevant evidence which contradicts the x-ray evidence supportive of a finding of complicated pneumoconiosis. NOW maintains that the administrative law judge should have addressed the nonqualifying objective studies of record, inasmuch as the absence of a measurable respiratory or pulmonary impairment establishes that claimant does not have complicated pneumoconiosis. We reject this argument.

In *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), a decision published subsequent to the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit acknowledged the possibility that evidence relevant to Section 718.304(b) and (c) may negate the probative value of x-ray evidence which supports a finding of complicated pneumoconiosis under Section 718.304(a) (2000).[2] The court held, therefore, that an administrative law judge must weigh the evidence at Section 718.304(a), (b), and (c) (2000) together before determining whether the irrebuttable presumption of total disability due to pneumoconiosis has been invoked.[3] *See Scarbro, supra*; *see also Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). In the present case, no physician of record opined that the pulmonary function study and blood gas test results support a finding that claimant does not have complicated pneumoconiosis. Indeed, Dr. Fino explicitly determined that claimant has complicated pneumoconiosis with no accompanying impairment. Director's

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[2]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's relevant coal mine employment occurred in the Commonwealth of Virginia. Director's Exhibits 2, 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3]The court explained:

> [T]he x-ray evidence can lose force only if the other evidence affirmatively shows that the opacities are not there or are not what they seem to be, perhaps because of an intervening pathology, some technical problem with the equipment used, or incompetence of the reader.

Eastern Associated Coal Corp. v. Director, OWCP [Scarbro], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000).

Exhibit 66. Accordingly, the administrative law judge rationally found that the record does not contain evidence demonstrating that the opacities revealed on the x-ray evidence do not represent complicated pneumoconiosis.[4] We affirm, therefore, the administrative law judge's determination that claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth in Section 718.304 and his finding that claimant is entitled to benefits. Accordingly, we also find there is no merit in Two M Coal Company's and Hartford Underwriters Insurance Company's cross-appeal.

Turning to the issue of the date on which claimant's entitlement to benefits commenced, the administrative law judge cited the Board's decision in *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979) and determined that claimant was entitled to benefits beginning April 1, 1989, as complicated pneumoconiosis was first diagnosed, by x-ray, on April 6, 1989. Decision and Order at 5; Director's Exhibits 66, 72. NOW argues that because the record does not contain any films obtained between a March 1982 x-ray read as negative for pneumoconiosis and the April 1989 x-ray read as positive for large opacities, the evidence of record does not provide a basis upon which to determine when claimant's simple pneumoconiosis progressed to complicated pneumoconiosis. Director's Exhibit 51. In light of the circumstances of this case, we disagree. Pursuant to 20 C.F.R. §725.503(b) (2000), a claimant is entitled to benefits beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment. The Board's holdings in *Truitt* and *Williams v. Director, OWCP*, 13 BLR 1-28 (1989), support the administrative law judge's reliance upon the positive reading of the April 1989 film as establishing the first month in which complicated pneumoconiosis was found to have existed and the appropriate date for the commencement of benefits. In both of these cases, the Board recognized that the date on which an uncontradicted diagnosis of complicated pneumoconiosis was made by x-ray can establish the date of onset of total disability due to pneumoconiosis pursuant to Section 725.503(b) (2000). *See Williams*, *supra*, 13 BLR at 1-30; *Truitt*, *supra*, 2 BLR at 1-204. Moreover, the administrative law judge's determination is supported by the medical opinion

[4]The administrative law judge did not explicitly address the CT scan readings of record. Inasmuch as these readings contain diagnoses of complicated pneumoconiosis and do not refute the presence of large opacities as viewed on claimant's chest x-rays, error, if any, by the administrative law judge in this regard is harmless. Director's Exhibits 61, 79, 80; *see Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

in which Dr. Fino stated that claimant's complicated pneumoconiosis arose in 1989. Director's Exhibit 61. Inasmuch as the administrative law judge's finding in this regard is rational and is supported by substantial evidence, it is affirmed.

Finally, with respect to the identification of the operator liable for benefits, the administrative law judge determined that NOW was the responsible operator, as it met the criteria set forth in 20 C.F.R. §725.492(a)(1)-(4) (2000) and was claimant's employer when complicated pneumoconiosis was first diagnosed in April 1989. Decision and Order at 5. NOW argues that the administrative law judge's determination that it is the operator responsible for the payment of benefits cannot be affirmed as it is inconsistent with the terms of 20 C.F.R. §725.493(a)(1) (2000), which provides, in relevant part, that the responsible operator is the employer with whom the miner had the most recent periods of cumulative employment of not less than one year.[5] This contention is without merit. In order for an employer to be properly designated as the responsible operator, the criteria set forth in *both* Section 725.492(a) and Section 725.493(a) must be met. Section 725.492(a)(1) (2000) provides that in order to satisfy the definition of a responsible operator, a miner's total disability must have arisen, at least in part, out of employment in a mine run by that operator. Inasmuch as the administrative law judge rationally determined that claimant developed complicated pneumoconiosis while employed by NOW, no employer subsequent to NOW could properly be designated as the responsible operator, as claimant was irrebuttably presumed to be totally disabled prior to his employment with any subsequent operator. Thus, the administrative law judge properly found that NOW is the responsible operator in the present case. *See Williams*, *supra*; *Truitt*, *supra*.

[5]The amended regulation concerning the criteria for determining a responsible operator is set forth in 20 C.F.R. §725.495 (2001). The amended regulation applies to claims filed after January 19, 2001. 20 C.F.R. §725.2(c) (2001).

Accordingly, the administrative law judge's Decision and Order awarding benefits and designating NOW as the responsible operator is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge