BRB Nos. 09-0838 BLA
and 09-0838 BLA-A

JAMES EVANS	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
FRANK BRANCH MINING, INCOPRORTATED	)	
	)	
and	)	
	)	
WEST VIRGINIA CWP FUND	)	DATE ISSUED: 09/21/2010
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Ann Marie Scarpino (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Granting Benefits (06-BLA-6012) of Administrative Law Judge Pamela Lakes Wood rendered on a claim filed pursuant to the provisions of 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). The administrative law judge credited claimant with at least seventeen years of coal mine employment,[1] and found that the evidence established the existence of complicated pneumoconiosis, and that claimant was therefore entitled to the irrebuttable presumption that he is totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.304. The administrative law judge further found that the complicated pneumoconiosis arose out of coal mine employment. Accordingly, the administrative law judge awarded benefits, commencing as of November 2005.

On appeal, employer asserts that the administrative law judge erred in finding complicated pneumoconiosis established pursuant to 20 C.F.R. §718.304(a). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a response to employer's appeal. On cross-appeal, claimant argues that the administrative law judge erred in determining that the date for the commencement of benefits is November 2005, the month in which claimant was first diagnosed with complicated pneumoconiosis, rather than August 2005, the month in which he filed his claim. Claimant additionally asserts that, if the Board remands this case to the administrative law judge for further consideration of whether claimant is entitled to benefits, the administrative law judge should reconsider her finding that a ten-millimeter opacity seen on x-ray was not a "large opacity" under 20 C.F.R. §718.304(a), and she should address whether claimant established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Employer responds, urging the Board to reject claimant's assertions on cross-appeal. The Director filed a Response to Claimant's Cross-Petition for Review, in which he declines to address the administrative law judge's findings on the merits of entitlement. Instead, the Director states that, if the Board does not affirm the administrative law judge's decision awarding benefits, the Board should

[1] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

remand this case for the administrative law judge to consider the claim under a recent amendment to the Act.

By Order dated June 29, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556, Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), which amended the Act with respect to the entitlement criteria for certain claims. The parties have responded.

By letter dated July 29, 2010, the Director advised the Board that he had addressed the impact of Section 1556 in his response brief to Claimant's Cross-Petition for Review. In that brief, the Director contends that Section 1556 potentially affects this case. The Director states that, because claimant filed his claim after January 1, 2005, and it was still pending on March 23, 2010, the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), applies to this claim.[2] The Director requests that, if the award of benefits is not affirmed, this case should be remanded for the administrative law judge to consider whether claimant has established entitlement pursuant to the Section 411(c)(4) presumption. The Director further states that, because the presumption alters the required findings of fact and the allocation of the burden of proof, the administrative law judge must allow the parties the opportunity to submit additional, relevant evidence, consistent with the evidentiary limitations at 20 C.F.R. §725.414.

In response to the Board's Order, claimant and employer filed supplemental briefs, agreeing with the Director that Section 1556 is applicable and could affect this case. Claimant's Brief at 2; Employer's Supplemental Brief at 4. If this case is remanded for the administrative law judge to consider whether claimant is entitled to the Section 411(c)(4) presumption, claimant and employer state that they should be allowed to submit new evidence addressing the new standards. Employer also argues that the retroactive application of Section 411(c)(4) to this claim is unconstitutional. Employer's Supplemental Brief at 7-14.

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. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30

[2] Section 411(c)(4) provides that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the existence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis and/or that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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 entitlement. *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).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), implemented by Section 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 C.F.R. §718.304. The United States Court of Appeals for the Fourth Circuit has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-1143, 1145-46 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

Relevant to 20 C.F.R. §718.304(a), the administrative law judge considered eight interpretations of two x-rays dated November 7, 2005[3] and July 12, 2006.[4] The

[3] Dr. Rasmussen, a B reader, read the November 7, 2005 x-ray as positive for simple pneumoconiosis and Category B large opacities, while Dr. Scatarige, a Board-certified radiologist and B reader, read this x-ray as completely negative for pneumoconiosis. Director's Exhibit 12; Employer's Exhibit 3. Drs. Spitz, Alexander, and Miller, all Board-certified radiologists and B readers, read this x-ray as positive for

administrative law judge stated that "[t]he November 17, 2005 x-ray was found to be positive for pneumoconiosis by all five readers; however, one B-reader (Dr. Rasmussen) found complicated pneumoconiosis," and that "one of the dually-qualified readers, Dr. Alexander, noted the presence of a questionable large opacity in the right upper zone." Decision and Order at 14. Without further addressing the individual x-ray readings, the administrative law judge determined that the November 7, 2005 x-ray was positive for simple pneumoconiosis. *Id*. at 16.

With respect to the July 12, 2006 x-ray, the administrative law judge stated that it "was read by B-reader Dr. Zaldivar and dually qualified reader Dr. Alexander as showing both simple and complicated pneumoconiosis; by one dually qualified reader, Dr. Scott, as showing only simple pneumoconiosis; and by another dually qualified reader, Dr. Wiot, as being negative for pneumoconiosis." Decision and Order at 15. The administrative law judge, however, found that Dr. Wiot's x-ray reading was entitled to no weight because it was inconsistent with the regulations:

> Dr. Wiot's reading is aberrant as he failed to acknowledge opacities consistent with pneumoconiosis that were found by all of the other readers. His reading only makes sense when read along with his report, which indicates that he has only marked opacities consistent with *coal worker's pneumoconiosis* as opposed to any form of pneumoconiosis or dust disease of the lungs.
>
> By confining his interpretation to the presence of [*sic*] absence of "coal workers' pneumoconiosis" as opposed to pneumoconiosis in general, Dr. Wiot has applied criteria that are not included in the regulations, which define clinical or medical pneumoconiosis as those disease recognized by the medical community as pneumoconiosis . . . . There is no requirement that the fibrosis be due to "coal dust" (as opposed to coal mine dust) and

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simple pneumoconiosis and as "O," or negative, for large opacities. Claimant's Exhibits 3, 4; Employer's Exhibit 8.

[4] Dr. Alexander, and Dr. Zaldivar, a B reader, read the July 12, 2006 x-ray as positive for both simple pneumoconiosis and Category A large opacities. Claimant's Exhibits 1, 2. Dr. Scott, a Board-certified radiologist and B reader, interpreted this x-ray as positive for simple pneumoconiosis, and as "O," or negative, for large opacities. Employer's Exhibit 11. Dr. Wiot, a Board-certified radiologist and B reader, interpreted this x-ray as completely negative for pneumoconiosis. Employer's Exhibit 6.

> . . . . Dr. Wiot's consideration of CWP alone as pneumoconiosis is contrary to the regulations.

Id. The administrative law judge, therefore, determined that the "preponderance of valid readings" for the July 12, 2006 x-ray "establishes both simple and complicated pneumoconiosis." *Id*. at 15-16. Further, "[i]n view of the acknowledged progressive nature of pneumoconiosis and the coalescence of opacities noted by most of the readers, and specifically considering Dr. Alexander's interpretations" of both the 2005 and 2006 x-rays, the administrative law judge concluded that "the x-ray evidence is consistent with a process by which the [c]laimant's simple pneumoconiosis has developed into complicated pneumoconiosis." *Id*. at 16.

Employer initially contends that the administrative law judge failed to properly weigh the conflicting x-ray evidence and explain her finding that it establishes complicated pneumoconiosis under to 20 C.F.R. §718.304(a). Employer's Brief at 20. We agree. In finding the November 7, 2005 x-ray to be positive for simple pneumoconiosis, which, the administrative law judge determined, later advanced to complicated pneumoconiosis, the administrative law judge did not explain the weight she accorded to Dr. Scatarige's opinion that the November 7, 2005 x-ray was negative for simple pneumoconiosis. Employer's Exhibit 3. Further, in finding that Dr. Alexander noted the presence of a "questionable large opacity" in the right upper zone of the November 7, 2005 x-ray, which, the administrative law judge determined, was later demonstrated to be a large opacity of complicated pneumoconiosis on the 2006 x-ray, the administrative law judge did not explain her determination to credit Dr. Alexander's observations over those of Drs. Miller, Spitz, and Scatarige, on the November 7, 2005 x-ray.[5] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); Claimant's Exhibit 4; Employer's Exhibits 3, 8. Similarly, with regard to the July 12, 2006 x-ray, the administrative law judge did not explain why she found Dr. Alexander's positive reading to be the most credible, or indicate what weight, if any, she assigned to the negative reading of Dr. Scott.[6] *Hicks*, 138 F.3d at 528, 21 BLR at 2-326;

[5] Dr. Scatarige specifically noted that the right upper zone contained a "possible 1.8 cm cavitary nodule" of either "TB, histoplasmosis, sarcoid, [or] other fungal disease." Employer's Exhibit 3. Dr. Scatarige advised a CT scan and a lung biopsy "to establish diagnosis." *Id*. Additionally, Dr. Scatarige noted that the November 7, 2005 x-ray had "[n]o central, symmetrical upper lung nodules to suggest CWP/silicosis." *Id.*

[6] The administrative law judge noted that "[Dr. Scott's] comments reflect that he may be referencing coal worker's [*sic*] pneumoconiosis as opposed to pneumoconiosis in general." Decision and Order at 15 n. 14. The administrative law judge, however, did not explain how she arrived at such an inference, or specify whether she was discounting

Underwood, 105 F.3d at 949, 21 BLR at 2-28. Thus, the administrative law judge did not properly resolve the conflicts in the x-ray evidence, or render a decision that comports with the Administrative Procedure Act (APA). *See* 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); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

We additionally find merit in employer's assertion that the administrative law judge did not state a valid reason for discrediting Dr. Wiot's negative reading of the July 12, 2006 x-ray. Given that the administrative law judge did not properly determine that the x-ray evidence established simple pneumoconiosis at 20 C.F.R. §718.202(a)(1), she erred in finding that Dr. Wiot's failure to diagnose simple pneumoconiosis undermined his negative reading for complicated pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336. Moreover, in finding Dr. Wiot's negative x-ray reading to be "inconsistent with the regulations," the administrative law judge failed to explain how Dr. Wiot's statement, that "there is no evidence of coal workers' pneumoconiosis," indicated that Dr. Wiot improperly confined his x-ray reading to fibrosis due to "coal dust" only, as opposed to "coal mine dust," in light of the fact that Dr. Wiot stated, on the face of his ILO x-ray classification form, that there were no abnormalities consistent with pneumoconiosis. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; Decision and Order at 15; Employer's Exhibit 6. Further, although the record reflects that Drs. Spitz, Scatarige, Alexander, and Zaldivar also referred to "coal workers' pneumoconiosis" or "CWP" in their x-ray reports, the administrative law judge did not indicate that the doctors' use of that terminology similarly undermined the credibility of their readings. Claimant's Exhibits 1, 3; Employer's Exhibits 3, 8.

In light of the above, we vacate the administrative law judge's finding at 20 C.F.R. §718.304(a), and remand this case for further consideration. On remand, the administrative law judge must determine whether the November 7, 2005 and July 12, 2006 x-rays individually support a finding of complicated pneumoconiosis, and whether the x-ray evidence as a whole supports a finding of complicated pneumoconiosis under 20 C.F.R. §718.304(a).[7] In so doing, the administrative law judge must consider the

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Dr. Scott's opinion, that the July 12, 2006 x-ray was negative for large opacities, on this basis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998).

[7] Claimant argues on cross-appeal that the administrative law judge erred in stating that an additional, ten-millimeter opacity that Dr. Alexander noted on the July 12, 2006 x-ray was not large enough to constitute a large opacity. Claimant's Cross-Petition for

qualifications of the physicians and explain her credibility determinations in accordance with the APA. *See Compton*, 211 F.3d at 207-208, 22 BLR at 2-168; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *see also Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992). The administrative law judge must bear in mind that claimant has the burden of persuasion, and she must apply the same critical analysis to the evidence favorable to claimant as she does to the evidence favorable to employer.[8] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139 (1999)(*en banc*). If the administrative law judge, on remand, again seeks to credit or discredit x-ray readings based on whether a physician diagnosed simple pneumoconiosis, the administrative law judge must first address whether claimant has established the existence of simple pneumoconiosis under 20 C.F.R. §718.202(a).

Relevant to 20 C.F.R. §718.304(c), the administrative law judge considered four medical opinions[9] and two computerized tomography (CT) scan interpretations.[10] With

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Review at 12, 20; Claimant's Exhibit 2. We disagree. The Act and its implementing regulation specifically define a large opacity as one that is "greater than one centimeter in diameter," and is classified as Category A, B, or C. 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §718.304(a); *see also Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-99 (4th Cir. 2000).

[8] We reject employer's assertion that the administrative law judge erred in failing to consider Dr. Zaldivar's medical opinion under 20 C.F.R. §718.304(a). Medical evidence, other than x-ray, biopsy, or autopsy evidence, relevant to a diagnosis of complicated pneumoconiosis, is to be considered under 20 C.F.R. §718.304(c). Moreover, substantial evidence supports the administrative law judge's finding that Dr. Zaldivar interpreted claimant's July 12, 2006 x-ray as showing Cateogry A complicated pneumoconiosis. Claimant's Exhibit 1.

[9] Drs. Rasmussen and Zaldivar diagnosed complicated pneumoconiosis, while Drs. Repsher and Hippensteel opined that claimant does not have complicated pneumoconiosis. Director's Exhibit 12; Claimant's Exhibit 1; Employer's Exhibits 1, 2.

[10] Dr. Payne, a Board-certified radiologist, read an October 18, 2006 computerized tomography (CT) scan as showing "multiple nodular densities, the largest about 1.5 cm or so in diameter." Claimant's Exhibit 5. Dr. Payne stated that the "distortions of lung architecture correlate well with chest radiograph findings," and that all of the nodules "could be . . . consequences of silicosis, [but t]he possibility that any one of these [nodules] is a malignant process cannot yet be excluded." *Id.* A Tumor Imaging PET/CT scan was performed on October 26, 2006, and was interpreted by Erik Fraley, M.D.

respect to the medical opinion evidence, the administrative law judge discounted the opinions of Drs. Repsher and Hippensteel because they did not examine claimant, their opinions were inconsistent with her x-ray findings, the physicians did not review all the evidence of record, and Dr. Repsher reviewed two inadmissible x-ray readings. Decision and Order at 17. By contrast, the administrative law judge found that the opinions of Drs. Rasmussen and Zaldivar are entitled to probative weight, despite being premised on an incomplete set of records, because the physicians examined claimant, and because their opinions were consistent with her x-ray findings. *Id*. The administrative law judge therefore concluded that the medical opinion evidence supports a finding of complicated pneumoconiosis. *Id*.

Employer asserts that the administrative law judge erred in her consideration of the medical opinion evidence. We agree. Because the administrative law judge's credibility determinations are based, in part, on x-ray findings that we have vacated, we cannot affirm her findings under 20 C.F.R. §718.304(c). Further, the administrative law judge did not explain how the absence of a physical examination, and Dr. Repsher's review of two inadmissible x-ray readings, rendered the opinions of Drs. Repsher and Hippensteel less persuasive than the opinions of Drs. Rasmussen and Zaldivar. *See Compton*, 211 F.3d at 207-208, 22 BLR at 2-168; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336. In light of the foregoing, we vacate the administrative law judge's findings under 20 C.F.R. §718.304(c), and remand this case for further consideration of the medical opinion evidence. On remand, the administrative law judge must consider the opinions of Drs. Repsher, Hippensteel, Rasmussen, and Zaldivar in their entirety, including the opinions stating that claimant does not suffer from a pulmonary impairment, and assess their probative value in light of the physicians' supporting documentation and reasoning, and the record as a whole.[11] *See Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Hicks*, 138

Claimant's Exhibit 6. Dr. Fraley noted the presence of "multiple pulmonary nodules bilaterally," and that "[t]he largest single area measures up to approximately 1.8 cm." *Id*. Dr. Fraley concluded, "[m]ajor differential considerations are pneumoconioses, granulomatous process, or other inflammatory etiology. Neoplasm is possible, however felt less likely." *Id*.

[11] With respect to the CT scan evidence, the administrative law judge found that "both the CT scan and PET scan identified large opacities consistent with pneumoconiosis, and the opacities seen on the CT scan were noted to correlate with the x-ray findings." Decision and Order at 18. The administrative law judge concluded, "[t]hus, the CT scan and PET scan also support a finding of complicated pneumoconiosis." *Id*. Because we have vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.304(c), in the interest of judicial economy, we direct the administrative law judge, on remand, to explain her finding that Drs. Payne and Fraley

F.3d at 533, 21 BLR at 2-336; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *see also Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18.

In summary, on remand, the administrative law judge must first determine whether the relevant evidence in each category under 20 C.F.R. §718.304(a), (c) tends to establish the existence of complicated pneumoconiosis, and then must weigh the evidence at subsections (a) and (c) together, before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145, 17 BLR at 2-117; *Melnick*, 16 BLR at 1-33. In weighing the evidence together, the administrative law judge should interrelate the evidence, considering whether evidence from one category supports or undercuts evidence from other categories. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Compton*, 211 F.3d at 211, 22 BLR at 2-175. Further, the administrative law judge must determine whether claimant's pneumoconiosis, if established, arose out of his coal mine employment. *See* 20 C.F.R. §718.203; *Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007); *Lester*, 993 F.2d at 1145, 17 BLR at 2-117.

On cross-appeal, claimant asserts that the administrative law judge erred in finding that he was entitled to benefits as of November 2005, the month in which Dr. Rasmussen diagnosed claimant with complicated pneumoconiosis. Cross-Petition for Review at 18-19. Claimant contends that he should be found entitled to benefits as of the filing date of his claim. Because we have vacated the administrative law judge's finding that claimant is entitled to benefits, we vacate the administrative law judge's finding as to the date for the commencement of benefits, and instruct her to reconsider that issue, if reached. Benefits are payable to an eligible miner beginning with the month of the onset of his total disability due to pneumoconiosis, unless that date is not ascertainable, in which case "benefits shall be payable to such miner beginning with the month during which the claim was filed." 20 C.F.R. §725.503(b). In the case of a miner whose entitlement is established pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), the date from which benefits commence is the month during which complicated pneumoconiosis was first found to be established. *Truitt v. North Am. Coal Corp.*, 2 BLR 1-199, 1-203-04 (1979). If the evidence does not reflect when claimant's simple pneumoconiosis became complicated pneumoconiosis, the date from which benefits commence is the month during which the claim was filed, unless credited evidence establishes that claimant had only simple pneumoconiosis for any period subsequent to the date of filing, in which

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credibly diagnosed complicated pneumoconiosis, in light of the physicians' differential diagnoses on the CT scans. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; Claimant's Exhibits 5, 6.

case, benefits must commence following the period of simple pneumoconiosis. *Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989).

Impact of the Recent Amendments

Finally, after review of the parties' responses, we are persuaded that Section 1556 potentially affects this case. Because this case was filed after January 1, 2005, and claimant was credited with at least seventeen years of coal mine employment, if the administrative law judge, on remand, does not find claimant entitled to invocation of the irrebuttable presumption at Section 411(c)(3), she must consider whether claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). In view of the change in law, if the administrative law judge determines that the presumption is applicable to this claim, she must allow all parties the opportunity to submit evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414. *See Harlan Bell Coal Co. v. Lemar*, 904 F. 2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1). Further, because the administrative law judge has not yet considered this claim under the amendment to Section 411(c)(4) of the Act, we decline to address, as premature, employer's argument that the retroactive application of that amendment to this claim is unconstitutional. Employer's Supplemental Brief at 7-14.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge