BRB Nos. 13-0043 BLA
and 13-0043 BLA-A

RANDALL LEO HALSEY	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 11/26/2013
	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Granting Benefits (2011-BLA-05367) of Administrative Law Judge Thomas M. Burke, rendered on a subsequent claim filed on March 18, 2010, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] Adjudicating this claim

[1] Claimant filed his initial claim on September 28, 1992. Director's Exhibit 1. In a Proposed Decision and Order issued on March 24, 1993, the district director denied

pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with 23.5 years of coal mine employment. The administrative law judge found that, because the newly submitted evidence was sufficient to establish the existence of complicated pneumoconiosis, claimant demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309. The administrative law judge then reviewed all of the evidence of record, accorded greatest weight to the most recent medical evidence, and concluded that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis, set forth in 20 C.F.R. §718.304. Based on his finding that claimant established at least ten years of coal mine employment, the administrative law judge determined that claimant was entitled to the presumption, at 20 C.F.R. §718.203(b), that his complicated pneumoconiosis arose out of coal mine employment, and that employer did not rebut it. Accordingly, the administrative law judge awarded benefits, as of March 1, 2010.[2]

On appeal, employer argues that the administrative law judge erred in finding that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Claimant responds, urging affirmance of the award of benefits. In claimant's cross-appeal, he contends that the administrative law judge erred in designating March 1, 2010 as the date from which he is entitled to benefits. Employer responds, urging the Board to reject claimant's argument on cross-appeal. The Director, Office of Workers' Compensation Programs, has not responded to either appeal.[3]

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benefits, finding that claimant failed to establish total disability. Claimant took no further action until filing the present subsequent claim.

[2] Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, and made it applicable to claims filed after January 1, 2005, that were pending on, or after, March 23, 2010. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305). Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. In the present case, the administrative law judge did not consider the applicability of the amended Section 411(c)(4) presumption in light of his award of benefits under 20 C.F.R. §718.304.

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding of 23.5 years of coal mine employment. *Skrack v. Director, OWCP,* 6 BLR 1-710 (1983); Decision and Order at 3.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final."[5] 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013) (to be codified at 20 C.F.R. §725.309(c)); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(4); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Claimant's prior claim was denied for failure to establish total disability. Director's Exhibit 1. Consequently, in order to obtain review of the merits of his current subsequent claim, claimant had to submit new evidence establishing that element of entitlement. *See White*, 23 BLR at 1-3.

I. Employer's Appeal

Employer challenges the administrative law judge's determination that claimant established a change in an applicable condition of entitlement by proving that he has complicated pneumoconiosis under 20 C.F.R. §718.304. Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis, if claimant 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 which would yield results equivalent to (a) or (b).[6] 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

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

[5] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The language set forth in 20 C.F.R. §725.309(d) is now set forth in 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

[6] There is no biopsy evidence in the record for consideration pursuant to 20 C.F.R. §718.304(b). *See* Decision and Order at 12.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, 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 absent, resolve any conflicts, and make a finding of fact. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (en banc); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980). In addition, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, 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 appear 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 (4th Cir. 1999).

Employer argues that the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis and, therefore, invocation of the irrebuttable presumption of total disability due to pneumoconiosis cannot be affirmed, as the administrative law judge did not properly weigh the analog and digital x-ray evidence, the CT scan evidence and the medical opinion evidence. After reviewing the administrative law judge's findings, the relevant evidence and employer's allegations of error, we affirm the administrative law judge's determination that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304, as it is rational and supported by substantial evidence. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 170, 21 BLR 2-34, 2-47 (4th Cir. 1997).

Upon weighing all of the evidence relevant to the existence of complicated pneumoconiosis, together, as is required under 20 C.F.R. §718.304, the administrative law judge rationally found that the positive readings for complicated pneumoconiosis of the May 18, 2010 analog x-ray by Drs. Miller and Rasmussen, as corroborated by Dr. Miller's positive reading for complicated pneumoconiosis of the February 1, 2011 digital x-ray, and Dr. Miller's medical report, outweighed the contrary evidence. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561. Employer initially argues that the administrative law judge erred in finding that the May 18, 2010 analog x-ray is positive for complicated pneumoconiosis. Employer offered negative interpretations for complicated pneumoconiosis by Drs. Wheeler, Scott and

Alexander.[7] Employer's Exhibits 2, 3, 8. The administrative law judge noted that each of these physicians is a dually-qualified Board-certified radiologists and B reader, while Drs. Wheeler and Scott were also associate professors of radiology. Decision and Order at 13. The administrative law judge acknowledged the strength of these credentials but, nevertheless, acted rationally in giving greater weight to the positive readings by Drs. Miller and Rasmussen, as they explained on deposition how their knowledge of additional evidence, particularly the 2011 digital x-ray showing a large opacity of complicated pneumoconiosis, supported their positive reading of the May 18, 2010 analog x-ray. *See Cox*, 602 F.3d at 283, 24 BLR at 2-280-81; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; Decision and Order at 14-15; Director's Exhibit 15; Claimant's Exhibit 2.

The administrative law judge provided additional reasons for discrediting the x-ray readings by Drs. Wheeler and Scott. Contrary to employer's argument, the administrative law judge permissibly found that Dr. Wheeler's reading, finding a low profusion of background nodules, which he also opined militated against a diagnosis of coal workers' pneumoconiosis in any form, was entitled to very little weight, as it was "out of step with [all] other interpretations, even by experts who didn't find complicated pneumoconiosis." Decision and Order at 13; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); Employer's Exhibit 2. Similarly, the administrative law judge acted within his discretion as fact-finder in concluding that the probative weight of Dr. Scott's negative reading was diminished by the fact that Dr. Scott was the only physician who did not detect a large opacity or coalescence on the May 18, 2010 analog x-ray. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; Decision and Order at 13; Director's Exhibit 15; Claimant's Exhibits 2, 4 at 21, 5 at 12 and 17; Employer's Exhibit 4.

With respect to the two readings of the February 1, 2011 digital x-ray, we reject employer's contention that the administrative law judge erred in crediting Dr. Miller's

[7] Dr. Wheeler, dually-qualified as a Board-certified radiologist and a B reader, read the May 18, 2010 analog x-ray as negative for simple and complicated pneumoconiosis. Employer's Exhibit 2. Drs. Scott and Alexander, both dually-qualified radiologists, read the x-ray as positive for simple pneumoconiosis, but negative for complicated pneumoconiosis. Employer's Exhibits 3, 8. Claimant relied upon readings by Dr. Miller, a dually-qualified radiologist, and Dr. Rasmussen, a B reader, both of whom interpreted this x-ray as positive for simple and complicated pneumoconiosis. Director's Exhibit 15; Claimant's Exhibit 2.

positive reading for complicated pneumoconiosis over Dr. Repsher's negative reading.[8] The administrative law judge rationally determined that Dr. Miller's interpretation was entitled to greater weight, based upon his superior radiological qualifications, explaining that "[a]t the time that Dr. Repsher read [c]laimant's digital x-ray he was neither a B reader (having let his readership lapse) nor a Board-certified radiologist . . . Dr. Miller . . . on the other hand . . . was dually qualified." *See* 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-63 (4th Cir. 1992); Decision and Order at 15; Claimant's Exhibit 3; Employer's Exhibit 1.

Regarding the administrative law judge's finding that the CT scan dated June 26, 2006, was "not inconsistent with the x-ray findings of complicated pneumoconiosis," we hold that there is no merit in employer's argument that the administrative law judge was required to address Dr. Rasmussen's statement that the nine-millimeter nodule observed on the 2006 scan does not satisfy the one-centimeter size requirement at 20 C.F.R. §718.304(a).[9] As the administrative law judge noted, Dr. Miller testified that the nine-millimeter mass discovered on the 2006 CT scan could have grown to be larger than one-centimeter in diameter in 2010. Decision and Order at 9; Claimant's Exhibit 5 at 26-27. The administrative law judge acted within his discretion, therefore, in finding that the nine-millimeter nodule "discovered in the June 26, 2006 CT scan is consistent with later findings of a large opacity in the same area of [c]laimant's lungs." Decision and Order at 17; *see Cox*, 602 F.3d at 283, 24 BLR at 2-280-81; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; Director's Exhibit 15; Claimant's Exhibit 3; Employer's Exhibit 5.

With respect to the administrative law judge's consideration of the medical opinion evidence, we reject employer's argument that the administrative law judge erred in discrediting the opinion in which Dr. Repsher ruled out the presence of complicated pneumoconiosis. The administrative law judge permissibly found that Dr. Repsher based his opinion, that claimant does not have complicated pneumoconiosis, almost entirely on

[8] Dr. Repsher reported that the February 1, 2011 digital x-ray showed simple pneumoconiosis, but did not contain "any evidence of complicated radiographic CWP." Employer's Exhibit 1. Dr. Miller stated that this x-ray showed simple pneumoconiosis and a large opacity of complicated pneumoconiosis. Claimant's Exhibit 3.

[9] Dr. Muto, a Board-certified radiologist, interpreted the CT scan dated June 26, 2006, as including areas of conglomeration, but did not indicate whether they constituted complicated pneumoconiosis. Employer's Exhibits 5, 6. Dr. Rasmussen reviewed the report of this CT scan and testified that, although the nine millimeter nodule observed by Dr. Muto could not be classified as complicated pneumoconiosis, it was in the same area as the large opacity that he observed on the May 18, 2010 analog x-ray that he believes is complicated pneumoconiosis. Claimant's Exhibit 4 at 13-16.

his reading of the February 1, 2011 digital x-ray, which the administrative law judge rationally determined was positive for complicated pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 15-16; Claimant's Exhibit 3; Employer's Exhibit 1.

We also hold that there is no merit in employer's contention that the administrative law judge improperly credited Dr. Miller's medical opinion, without adequately addressing the physician's conflicting statements regarding whether the mass observed on claimant's x-rays represented conglomeration or coalescence. At his deposition, Dr. Miller explained how he determined that the opacity on the May 18, 2010 analog x-ray was greater than one centimeter, stating, "[i]t's not always [] straightforward because the edges can be literally round and sharp and there is coalescence of the small opacities surrounding the large opacity and so it can be difficult to determine the exact size." Employer's Exhibit 9 at 9. He concluded that the opacity was "larger than one centimeter and smaller than five-centimeters, which is the definition of a large opacity, Category A." *Id*. When asked to identify the difference between the terms "conglomeration" and "coalescence," Dr. Miller replied that they are "just different terms for the same process." *Id*. at 25. The administrative law judge acknowledged the ambiguities in Dr. Miller's testimony, but found that he conclusively diagnosed complicated pneumoconiosis, stating:

> When asked, "[d]o you attribute that large opacity [in the 5/18/10 chest x-ray] to development of a small opacity or is that due to conglomeration or to coalescence?[,]" he responded, "[c]oalescence." He also said later that "the question of whether there's complicated pneumoconiosis or whether there's merely coalescence of small opacities is subjective." Clearly, he knows that there is a difference between a conglomeration and coalescence, and that a coalescence of small opacities falls short of complicated pneumoconiosis. In light of this context, it would appear that this dually qualified physician was pointing out that the *process* of coalescence is the same as the *process* of conglomeration, rather than implying that a coalescence is the same thing as a conglomeration.

Decision and Order at 14 n.8, quoting Employer's Exhibit 9 at 25. The administrative law judge acted within his discretion as fact-finder in determining that Dr. Miller's testimony revealed that his diagnosis of complicated pneumoconiosis was based on his observation of a nodule measuring at least one centimeter in diameter on the analog x-ray dated May 18, 2010. *See Lane v. Union Carbide Corp*., 105 F.3d 166, 170, 21 BLR 2-34, 2-47 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993); Employer's Exhibit 9 at 25. Consequently, we affirm the administrative law judge's determination that Dr. Miller's opinion on the issue of the existence of complicated pneumoconiosis was well-reasoned.

In sum, the administrative law judge reasonably weighed all the relevant evidence and credited the positive readings for complicated pneumoconiosis of both the 2010 analog x-ray and the 2011 digital x-ray, in addition to the well-reasoned opinions of Drs. Miller and Rasmussen. *See Lane*, 105 F.3d at 170, 21 BLR at 2-47; Decision and Order at 16-17. Accordingly, we affirm, a supported by substantial evidence the administrative law judge's finding that the evidence of record, as a whole, is sufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. We also affirm the administrative law judge's finding that, because "there is no evidence in the record which points to any cause other than [c]laimant's 23.5 years of coal dust exposure," employer failed to rebut the presumption, set forth at 20 C.F.R. §718.203(b), that claimant's complicated pneumoconiosis arose out of coal mine employment. Decision and Order at 18; *see Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007). Accordingly, we further affirm the administrative law judge's determination that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, and his determination that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). The administrative law judge's award of benefits is, therefore, affirmed.

II. Claimant's Cross-Appeal

On cross-appeal, claimant challenges the administrative law judge's determination regarding the commencement date for the payment of benefits. The administrative law judge found that, because the evidence does not clearly establish the date of onset of total disability due to pneumoconiosis, and does not affirmatively establish that claimant had only simple pneumoconiosis for any period after March 18, 2010, the filing date of his subsequent claim, claimant was entitled to benefits as of March 1, 2010. Decision and Order at 18-19.

Claimant argues that the diagnosis of complicated pneumoconiosis in Dr. Ramas's narrative report of the March 17, 2005 x-ray established that he was totally disabled due to pneumoconiosis as of that date. *See* Claimant's Exhibit 1. Claimant further argues that the only medical evidence obtained between Dr. Ramas's reading of the March 17, 2005 x-ray and the May 18, 2010 analog x-ray that the administrative law judge found was positive for complicated pneumoconiosis, is the June 26, 2006 CT scan which the administrative law judge determined was not inconsistent with a diagnosis of complicated pneumoconiosis. Claimant argues, therefore, that the CT scan does not contradict Dr. Ramas's finding of complicated pneumoconiosis on the March 17, 2005 x-ray.

Claimant's contentions are without merit, as the administrative law judge rationally determined that Dr. Ramas's x-ray diagnosis of complicated pneumoconiosis was entitled to diminished weight because of "incautious phrasing," which "made it difficult to determine whether he saw one or multiple conglomerate masses, as well as the

lack of detail concerning the character and size of the masses he described and why they appeared to be complicated pneumoconiosis rather than granulomatous disease." Decision and Order at 12; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Claimant's Exhibit 1. The administrative law judge permissibly determined, therefore, that the record does not contain evidence clearly establishing that claimant was totally disabled due to pneumoconiosis prior to the filing date of his subsequent claim, nor is there evidence clearly establishing an onset date of total disability due to pneumoconiosis. *See* 20 C.F.R. §725.503; *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182-83 (1989); Decision and Order at 18-19. Thus, we affirm the administrative law judge's designation of March 1, 2010 – the first day of the month in which claimant filed his subsequent claim – as the date from which benefits commence in this case. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989); Decision and Order at 19.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge