

U.S. Department of Labor

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



BRB No. 21-0443 BLA

ROY KINDER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JAMIE MARCUS COAL COMPANY,	)	
INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 7/28/2022
LIBERTY MUTUAL INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer and its Carrier.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Timothy J. McGrath's Decision and Order Awarding Benefits (2018-BLA-05651) rendered on a subsequent claim<sup>1</sup> filed on September 8, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with twenty-four years of coal mine employment and found he established complicated pneumoconiosis. Thus, he found Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act and established a change in an applicable condition of entitlement.<sup>2</sup> 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §§718.304, 725.309. He also found Claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203, and awarded benefits, to commence on September 2015.

On appeal, Employer argues the ALJ erred in determining the commencement date for benefits.<sup>3</sup> Neither Claimant, nor the Director, Office of Workers' Compensation Programs, have filed a response brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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<sup>1</sup> Claimant filed one previous claim. Director's Exhibit 1. The district director denied it on November 15, 2012, because Claimant failed to establish any element of entitlement. *Id.*

<sup>2</sup> When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *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)(3). Therefore, Claimant had to submit new evidence establishing at least one element of entitlement to have the claim reviewed on the merits. 20 C.F.R. §725.309(c).

<sup>3</sup> We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established entitlement to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 24.

<sup>4</sup> The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe*

The commencement date for benefits is the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-184 (1989). When a miner suffers from complicated pneumoconiosis, the fact-finder must consider whether the evidence establishes the date of onset of the disease. *See Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989). If not, the commencement date is the month in which the claim was filed, unless the evidence establishes the miner had only simple pneumoconiosis for any period subsequent to the date of filing. In that case, the date for the commencement of benefits follows the period when the miner had only simple pneumoconiosis. *Williams*, 13 BLR at 1-30.

The ALJ found there is “no evidence of record establishing when [Claimant’s] simple pneumoconiosis became complicated pneumoconiosis[,]” and “no evidence demonstrating that Claimant did not have complicated pneumoconiosis at any point after he filed this claim.” Decision and Order at 24. The ALJ therefore set the commencement date for benefits as September 2015, the month in which the claim was filed. *Id.*

We agree with Employer that the ALJ erred in finding there is “no evidence demonstrating that Claimant did not have complicated pneumoconiosis at any point after he filed this claim.” Decision and Order at 24; *see Employer’s Brief* at 3-7.

In finding Claimant established complicated pneumoconiosis, the ALJ determined the x-ray and medical opinion evidence establishes the existence of the disease. 20 C.F.R. §718.304(a), (c); Decision and Order at 7-23. With respect to the x-ray evidence, the ALJ weighed conflicting readings of three x-rays dated October 8, 2015, August 10, 2018, and July 10, 2019. *Id.* at 8-12. After resolving the conflicting readings of these x-rays, the ALJ concluded the October 8, 2015 x-ray is negative for complicated pneumoconiosis, the August 10, 2018 x-ray is inconclusive, and the July 10, 2019 x-ray is positive for the disease. *Id.* Because the regulations deem pneumoconiosis a progressive and irreversible disease, the ALJ assigned controlling weight to the positive July 10, 2019 x-ray and thus found Claimant has complicated pneumoconiosis.<sup>5</sup> *Id.*; 20 C.F.R. §718.304(a).

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*v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Hearing Tr. at 18.

<sup>5</sup> The ALJ also found the medical opinions of Drs. Everhart and Nader that Claimant has complicated pneumoconiosis well-reasoned and documented and outweigh the opinions of Drs. McSharry and Sargent that Claimant does not have the disease. Decision and Order at 15-22. The ALJ acknowledged Dr. Everhart diagnosed complicated pneumoconiosis based on an incorrect assumption that the October 8, 2015 x-ray is positive for the disease, but found this did not detract from the credibility of the doctor’s opinion

As Employer correctly argues, however, because the ALJ found the October 8, 2015 x-ray negative for complicated pneumoconiosis, the record establishes Claimant had only simple pneumoconiosis<sup>6</sup> subsequent to the September 2015 date of filing.<sup>7</sup> Employer's Brief at 3-7. Because Claimant did not have complicated pneumoconiosis as of October 2015, the earliest the ALJ could set a commencement date in this case is November 2015. *Williams*, 13 BLR at 1-30; 20 C.F.R. §725.503(b).

Notwithstanding the ALJ's error, the facts of this case do not mandate a remand for further consideration of this issue because the ALJ rendered dispositive findings. *See Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187 (4th Cir. 2014). As discussed above, the ALJ found no basis in the record to find the date of onset for Claimant's complicated pneumoconiosis. Further, review of the record reflects there is no other evidence the ALJ credited establishing Claimant had only simple pneumoconiosis subsequent to November 2015. Thus, we conclude November 2015 is the correct commencement date for benefits in this case.<sup>8</sup> *Williams*, 13 BLR at 1-30; 20 C.F.R. §725.503(b). Consequently, we modify the ALJ's commencement date determination to November 2015.

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because the overall weight of the x-ray evidence establishes Claimant has complicated pneumoconiosis. *Id.* at 17.

<sup>6</sup> Every radiologist who read the October 8, 2015 x-ray read it as positive for simple pneumoconiosis. Director's Exhibits 13, 18; Employer's Exhibits 1, 2; Claimant's Exhibits 4, 7.

<sup>7</sup> In setting the commencement date for benefits, the ALJ stated "Claimant's complicated pneumoconiosis was first diagnosed by x-ray in 2015." Decision and Order at 24. As noted above, however, the ALJ found the October 8, 2015 x-ray negative for the disease. *Id.* at 8-12.

<sup>8</sup> We reject Employer's argument that the ALJ should have set the commencement date for benefits as either August 2018 or July 2019 based on his finding that the August 10, 2018 x-ray is inconclusive for complicated pneumoconiosis and the July 10, 2019 x-ray is positive for the disease. Employer's Brief at 6. When x-ray readings are in equipoise, their weight neither confirms nor disproves pneumoconiosis and thus the August 10, 2018 x-ray does not establish that Claimant did not have complicated pneumoconiosis at that time. *See Dixie Fuel Co. v. Director, OWCP [Hensley]*, 820 F.3d 833, 843 (6th Cir. 2016), *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014). Further, medical evidence establishing complicated pneumoconiosis, i.e., the July 10, 2019 x-ray, also does not establish the onset of the disease, and instead only indicates Claimant had complicated

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed, as modified to reflect a commencement date of November 2015 for the payment of benefits.

SO ORDERED.

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

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at some point prior to that date. *See Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990).