



BRB No. 20-0191 BLA
and 20-0192 BLA

LILLIAN KATHLEEN BENNETT)
(Widow of LEONARD BENNETT))

Claimant-Respondent)

v.)

SLAB FORK COAL COMPANY)

and)

WEST VIRGINIA COAL WORKERS')
PNEUMOCONIOSIS FUND)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 06/30/2021

DECISION and ORDER

Appeal of the Decision and Order on Remand - Awarding Benefits and Decision and Order – Awarding Benefits of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge Dana Rosen's Decision and Order on Remand – Awarding Benefits (2014-BLA-05875) and Decision and Order – Awarding Benefits (2018-BLA-05392) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a third request for modification of a subsequent miner's claim that is before the Benefits Review Board for the second time, as well as a survivor's claim.¹ The Board has consolidated the appeals of both claims for purposes of decision only.

In a June 27, 2017 Decision and Order issued in the miner's claim, Administrative Law Judge Daniel F. Solomon credited the Miner with twenty-five years of coal mine employment. He accepted the parties' stipulation that the Miner had simple clinical pneumoconiosis as supported by the x-ray, biopsy, and autopsy evidence. He further found the Miner had complicated pneumoconiosis. Thus, Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Alternatively, Judge Solomon found the Miner was totally disabled by a respiratory or pulmonary impairment due to clinical pneumoconiosis. 20 C.F.R. §718.204(b)(2), (c). Based on these findings, he awarded benefits in the miner's claim.

Pursuant to Employer's appeal, the Board held Judge Solomon erred in weighing the evidence on the issue of complicated pneumoconiosis and thus vacated his finding that Claimant invoked the Section 411(c)(3) presumption. *Bennett v. Slab Fork Coal Co.*, BRB No. 17-0552 BLA, slip op. at 5-13 (Sept. 20, 2018) (unpub); 20 C.F.R. §718.304. It also held he erred in finding total disability and thus vacated the award of benefits. *Bennett*, BRB No. 17-0552 BLA, slip op. at 13-16; 20 C.F.R. §718.204(b)(2). It instructed him to

¹ The Miner filed the subsequent claim on March 24, 2004. The amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the claim based on its filing date. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305. The Miner died on February 6, 2010, while the subsequent claim was pending before the Office of Administrative Law Judges. Director's Exhibit 93; Claimant's Exhibit 4. Claimant, the Miner's widow, is pursuing the miner's claim on his behalf. Decision and Order at 2; Director's Exhibit 93. She also filed a survivor's claim on September 27, 2017. The procedural history of the miner's subsequent claim is set forth in the Board's prior decision. See *Bennett v. Slab Fork Coal Co.*, BRB No. 17-0552 BLA (Sept. 20, 2018) (unpub.).

reconsider these issues on remand and render a finding on whether granting modification would render justice under the Act if the issue is reached. *Bennett*, BRB No. 17-0552 BLA, slip op. at 16-17.

After the Board remanded the miner's subsequent claim, the Office of Administrative Law Judges consolidated it with the survivor's claim and reassigned both claims to Judge Rosen (the administrative law judge) due to Judge Solomon's retirement. In her Decisions and Orders that are the subject of this appeal, the administrative law judge found Claimant established complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. She also found the complicated pneumoconiosis arose out of the Miner's coal mine employment. 20 C.F.R. §718.203(b). Thus, she found Claimant established a mistake in a determination of fact. 20 C.F.R. §725.310. She also determined granting modification would render justice under the Act and awarded benefits in the miner's claim. In the survivor's claim, the administrative law judge found Claimant automatically entitled to benefits under Section 422(l) of the Act, 30 U.S.C. §932(l) (2018).

On appeal, Employer argues that the administrative law judge erred in finding complicated pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.² 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).

Miner's Claim - Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner was totally disabled due to pneumoconiosis if he suffered from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities 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 yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. In determining whether Claimant has invoked the irrebuttable presumption, the administrative law judge

² This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 9, 10.

must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. 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).

The administrative law judge found the x-ray evidence on its own establishes complicated pneumoconiosis. 20 C.F.R. §718.304(a). She further found the biopsy, computed tomography (CT) scans, and treatment records, weighed alone, individually do not establish complicated pneumoconiosis, but when considered alongside the other evidence support the x-ray findings of both the existence of a large mass and its etiology as pneumoconiosis. 20 C.F.R. §718.304(b), (c); Decision and Order on Remand at 12-23. Meanwhile, she found the autopsy diagnosis of simple pneumoconiosis does not undermine the x-ray findings, and the physicians who opined Claimant does not have complicated pneumoconiosis were not credible. Thus, weighing all the evidence together, she concluded the biopsy, CT scans, and treatment records support the x-rays and combine to establish the Miner had complicated pneumoconiosis. Decision and Order on Remand at 23. Finding no error, we affirm.

X-Rays

Employer argues the administrative law judge erred in finding the x-rays establish complicated pneumoconiosis. Employer's Brief at 7-18. We disagree.

The administrative law judge weighed eleven interpretations of two x-rays taken on April 14, 2004 and June 8, 2005.³ Decision and Order on Remand at 7-11. Dr. Navani read the April 14, 2004 x-ray as positive for simple and complicated pneumoconiosis, Category A. Director's Exhibit 107 at 23-24. Drs. Patel, Binns, and Alexander read it as positive for simple pneumoconiosis, but negative for complicated pneumoconiosis. Director's Exhibits 16 at 3, 31 at 2-4, 107 at 14-15. Dr. Wiot read this x-ray as negative for simple and complicated pneumoconiosis. Director's Exhibit 71 at 4. All the physicians who read this x-ray are dually-qualified B readers and Board-certified radiologists. Director's Exhibits 16, 31, 107.

Drs. Aycoth and Cappiello each read the June 8, 2005 x-ray as positive for simple and complicated pneumoconiosis, Category A. Director's Exhibits 30 at 3, 11. Drs. Wiot, Scatarige, Wheeler, and Scott read this x-ray as negative for simple and complicated pneumoconiosis. Director's Exhibit 71 at 4, 18, 37, 89. All the physicians who read this

³ The record also includes Dr. Zaldivar's negative interpretation of a December 15, 2004 x-ray. Director's Exhibit 31. The Board previously affirmed Judge Solomon's finding that this x-ray reading is not credible. *Bennett*, BRB No. 17-0552 BLA, slip op. at 6. Thus the administrative law judge did not evaluate this evidence on remand.

x-ray are dually-qualified radiologists with the exception of Dr. Aycoth, who is a B reader. Director's Exhibits 30, 71.

April 14, 2004 X-ray

The administrative law judge found Dr. Patel's and Dr. Alexander's readings of the April 14, 2004 x-ray equivocal because, while both physicians checked the box indicating the x-ray was negative for large opacities of pneumoconiosis, neither provided a clear diagnosis for the large mass they identified in the right lung. Decision and Order on Remand at 8-9. Dr. Alexander stated the 1.5 x 0.5 centimeter mass he identified in the right lung "could represent" either a pulmonary nodule, complicated pneumoconiosis, or fluid in a fissure, while Dr. Patel stated the 1.2 x 0.7 centimeter mass he identified could either be a "hyperdense" nodule or granuloma. Director's Exhibits 107 at 14-15; 16 at 3. Employer does not specifically challenge her finding that the contrary readings by Drs. Patel and Alexander are equivocal. Thus we affirm it. *Cox*, 602 F.3d at 285-87 (physicians' "equivocal and speculative" diagnoses for masses on x-ray do not "constitute affirmative evidence . . . that the opacities were not due to pneumoconiosis"); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Instead, Employer argues the administrative law judge erred by similarly finding Dr. Binns's negative reading equivocal. Decision and Order on Remand at 8-9. Employer's Brief at 13. To the contrary, the administrative law judge permissibly found Dr. Binns' reading equivocal because, while he too checked the box indicating the x-ray was negative for large opacities of pneumoconiosis, he did not provide a clear diagnosis for the "density" he observed in the right lung, stating only that it "may be" granuloma or localized thickening of a fissure. Director's Exhibit 31 at 2-4. Moreover, the administrative law judge permissibly found his reading undermined by his failure to identify the size of the density, as the record contains "extensive" evidence, including Dr. Lintala's credible CT reading, measuring the mass as being greater than one centimeter, i.e., of sufficient size to meet the definition of complicated pneumoconiosis (if also attributable to coal dust exposure). Decision and Order at 18, 20. *Cox*, 602 F.3d at 285; *Justice*, 11 BLR at 1-94; Decision and Order on Remand at 8-9.

We also reject Employer's argument that since the administrative law judge found Drs. Patel, Alexander, and Binns equivocal, she should have also found Dr. Navani's positive reading equivocal because he too identified more than one possible etiology for

the mass he observed.⁴ Employer’s Brief at 12-13. Dr. Navani specifically identified a Category A large opacity of pneumoconiosis on the ILO form. Director’s Exhibit 107 at 23-24. In the narrative section of his reading, he stated the mass in the Miner’s right lung is “likely to be a large pneumoconiotic nodule” due to the “presence of adequate exposure to . . . coal dust.” *Id.* Thus, while the administrative law judge found Dr. Navani’s reading partially undermined by his identification of other possible diagnoses that “should be considered and excluded,” she nevertheless permissibly found it “more detailed” than the other physicians’ readings because he is the only one who identified and explained a specific, “likely” etiology for the mass. *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006) (“refusal to express a diagnosis in categorical terms is candor, not equivocation”).

Finally, Employer argues the administrative law judge irrationally discredited Dr. Wiot’s negative reading of the April 14, 2004 x-ray based on his failure to identify simple pneumoconiosis.⁵ Decision and Order on Remand at 8-11; Employer’s Brief at 8-13. It contends it only stipulated the autopsy evidence is consistent with simple pneumoconiosis, and it submitted credible medical opinions establishing a miner can have simple pneumoconiosis based on autopsy results that would not appear on x-ray. Employer’s Brief at 8-13. We disagree.

When the case was before Judge Solomon, Employer explicitly stipulated the Miner had at least simple clinical pneumoconiosis. August 25, 2016 Hearing Transcript at 13-14. While Employer now suggests it intended to only stipulate that the autopsy evidence confirms simple pneumoconiosis – thus preserving its argument that Dr. Wiot could have credibly *not diagnosed* the disease on x-ray – the record belies its assertion. Employer responded in the affirmative when asked by Judge Solomon whether “both sides agree that there is pneumoconiosis.” *Id.* at 13. While Employer stated it was “relying primarily” on Dr. Oesterling’s autopsy report in reaching that conclusion, it did not limit its stipulation *solely* to the autopsy evidence or indicate it was attempting to preserve a challenge to the existence of simple pneumoconiosis on x-ray. *Id.* Rather, counsel referenced reviewing “the records” generally and stated, broadly, “[W]e do not argue against the existence of simple pneumoconiosis.” *Id.* at 13-14.

⁴ Dr. Navani indicated alternative diagnoses such as trapped fluid in the fissure, granuloma, and carcinoma should also be considered and excluded. Director’s Exhibit 107 at 23-24.

⁵ Employer asserts the administrative law judge erred in finding the readings of Drs. Wiot, Scatarige, Scott, and Wheeler are equivocal, but she rendered no such finding. Employer’s Brief at 9-10.

Moreover, in its prior decision, the Board specifically declined to consider Employer's argument "that the x-ray evidence is negative for simple pneumoconiosis" because it "is bound by its stipulation" that the Miner had the disease. *Bennett*, BRB No. 17-0552 BLA, slip op. at 6 n.8. In this second appeal, Employer neither acknowledges that holding nor attempts to identify any exception to it being the law of the case; Employer simply attempts, unpersuasively, to resurrect a previously rejected argument. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Finally, Employer does not contest the administrative law judge's finding that, in addition to the autopsy evidence, the biopsy evidence also establishes at least simple pneumoconiosis. *Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 8-11. We therefore decline to disturb the administrative law judge's permissible finding that Dr. Wiot's failure to recognize even simple pneumoconiosis – a disease stipulated by Employer and confirmed by the autopsy and biopsy evidence – undermined his opinion there is no complicated pneumoconiosis on the same x-rays. See *Cox*, 602 F.3d at 283; *Milburn Colliery Co. v. Hicks* 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order on Remand at 10.

In conclusion, we affirm the administrative law judge's finding that Drs. Patel's Alexander's, and Binns' readings are equivocal as to the presence or absence of complicated pneumoconiosis; Dr. Wiot's negative reading is not credible; and Dr. Navani's "opinion that the nodule [seen on x-ray] was likely a large pneumoconiotic nodule given the Miner's adequate exposure to coal dust [is] the most probative and persuasive of the reports on the April 14, 2004 x-ray film." Decision and Order on Remand at 9.

June 8, 2005 X-ray

The administrative law judge next considered the readings by Dr. Aycoth and Dr. Cappiello of the June 8, 2005 x-ray. Decision and Order on Remand at 11-12. Both doctors identified a one and one-half centimeter mass in the mid-portion of the Miner's right lung consistent with Category A complicated pneumoconiosis, while acknowledging the presence of other potential conditions on the x-ray.⁶ Director's Exhibit 30 at 3, 11. Dr. Aycoth stated other "diseases or significant abnormalities" are present on the x-ray, noting he could not rule out the presence of neoplasm and recommending the Miner follow-up with his family physician. Director's Exhibit 30 at 11. Dr. Cappiello similarly opined he could not rule out neoplasm and stated that if clinically warranted, further evaluation of the

⁶ Drs. Aycoth and Cappiello also diagnosed scattered opacities in the right and left lung measuring one and one-half millimeters consistent with simple pneumoconiosis. Director's Exhibit 30 at 3, 11.

one and one-half centimeter mass should be done through CT scan testing and evaluation by the Miner's physician. Director's Exhibit 30 at 3.

In considering these statements, the administrative law judge noted the Miner's treatment records reflect that additional testing was done on the right-lung mass Drs. Aycoth and Cappiello identified on the x-ray. Decision and Order on Remand at 11-14, 19-20. Dr. Imbing interpreted the results of a CT guided needle biopsy of the mass and stated it revealed fibrosis and anthracotic pigment deposits consistent with coal workers' pneumoconiosis. Director's Exhibits 17, 70 at 137. He also opined it was not consistent with malignancy. Director's Exhibit 17. Dr. Caffrey interpreted slides from the same biopsy as revealing a moderate to heavy amount of anthracotic pigment with a moderate amount of collagen. Director's Exhibit 71 at 56. While he opined the biopsy is not consistent with complicated pneumoconiosis, it does confirm the presence of "micro or macronodular" simple coal workers' pneumoconiosis. *Id.*

The administrative law judge found the biopsy reports of Drs. Imbing and Caffrey do not establish complicated pneumoconiosis, standing alone, at 20 C.F.R. §718.304(b) because neither doctor indicated the mass from the biopsy sample would appear on x-ray measuring at least one centimeter in diameter. Decision and Order on Remand at 13-14; *see Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999). Nonetheless, she found the needle biopsy was taken from the same mass in the Miner's right lung that both Drs. Aycoth and Cappiello stated measured as one and one-half centimeters on the June 8, 2005 x-ray. *Id.* Because the biopsy was consistent with the presence of coal workers' pneumoconiosis and the mass from which it was extracted measured greater than one centimeter on x-ray, the administrative law judge found "the biopsy reports support the initial findings of Drs. Aycoth and Cappiello that the nodule represented a large opacity A of complicated pneumoconiosis." Decision and Order on Remand at 13-14.

The administrative law judge also noted Dr. Lintala read an August 1, 2008 CT scan as revealing a "[s]piculated collection of soft tissue" in the right lung measuring "5.2 x 1.5" centimeters. Director's Exhibit 70 at 13. He indicated it was unchanged from prior CT scans and opined it "may" represent pulmonary fibrosis. *Id.* The administrative law judge found Dr. Lintala's CT scan does not establish complicated pneumoconiosis standing alone at 20 C.F.R. §718.304(c) because he also did not render an equivalency determination and his "exact findings" were equivocal.⁷ Decision and Order on Remand at 19-20. But she

⁷ The Board previously held the administrative law judge "permissibly assigned diminished weight to Dr. Wiot's [June 15, 2004] CT scan interpretation based on its age." *See Bennett*, BRB No. 17-0552 BLA, slip op. at 6, *citing Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992).

found his identification of a “5.2 x 1.5”⁸ centimeter mass in the right lung that “may” represent pulmonary fibrosis also “lends strong support to the chest x-ray readings by Drs. Aycoth and Cappiello of the presence of a large opacity of complicated pneumoconiosis.” *Id.*

Finally the administrative law judge found that Drs. Aycoth’s and Cappiello’s identification of large opacities of complicated pneumoconiosis was not undermined by their statements the Miner should follow-up with his family physician to address the possibility of neoplasm. Decision and Order on Remand at 11, 23. She found the “extensive” treatment records establish “the density or pulmonary nodule was not due to neoplasm since the nodule was stable over time.” *Id.* at 23. Specifically, in a July 6, 2004 letter, Dr. Mullins stated the Miner should undergo x-ray and CT scan testing over the following two years in order to track the stability of the mass in his right lung. Director’s Exhibit 70 at 146. She indicated if the mass “does not change in [two] years-time, then we can be quite confident that it is benign.” *Id.* Dr. Patel read x-rays taken on January 11, 2005, March 3, 2005, June 21, 2005, September 21, 2005, January 11, 2006, April 12, 2006, and repeatedly stated he saw no change in size with respect to a density in the right lung from the first in time x-ray to the last in time x-ray. *Id.* at 128-135.

As it is supported by substantial evidence, we affirm the administrative law judge’s finding Dr. Aycoth’s and Dr. Cappiello’s readings of the June 8, 2005 x-ray credibly establish complicated pneumoconiosis when considered in conjunction with the biopsy, the CT scan evidence, and the totality of the Miner’s treatment records.⁹ *Cox*, 602 F.3d at 284-

⁸ The administrative law judge acknowledged that in the summary portion of his report, Dr. Lintala set out a conflicting measurement for the mass of two by one and one-half centimeters. Decision and Order on Remand at 20; Director’s Exhibit 70 at 14. Contrary to Employer’s argument, the administrative law judge permissibly found this was a “typographical error” and thus does not reduce the probative weight of the CT scan reading. Decision and Order at 20; *see Milburn Colliery Co. v. Hicks* 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). Moreover, she rationally found that even if Dr. Lintala was inconsistent in discussing the measurements of the mass, his CT scan reading still supports Dr. Aycoth’s and Dr. Cappiello’s x-ray readings because he identified a large mass in the right lung. *Id.*

⁹ We reject Employer’s argument that the administrative law judge erred in failing to consider Dr. Hippensteel’s deposition testimony when crediting Dr. Aycoth’s and Dr. Cappiello’s x-ray readings. Employer’s Brief at 19-20. Although Dr. Hippensteel disputed that the biopsy evidence supports the conclusion the Miner had complicated pneumoconiosis, he conceded the biopsy was consistent with simple pneumoconiosis. Director’s Exhibit 106 at 39. As discussed above, the administrative law judge did not find the biopsy evidence established complicated pneumoconiosis standing alone at 20 C.F.R.

85 (administrative law judge properly found that the x-ray evidence, when considered in light of the other evidence, including CT scan and biopsy evidence, was sufficient to establish complicated pneumoconiosis); *Scarbro*, 220 F.3d at 256; *Hicks* 138 F.3d at 533; Decision and Order on Remand at 11-14, 19-20. For the reasons previously identified with respect to Dr. Wiot's negative reading of the April 14, 2004 x-ray, we also affirm her finding Drs. Wiot's, Scatarige's, Scott's, and Wheeler's negative readings of the June 8, 2005 x-ray not credible due to their failure to identify even simple pneumoconiosis. *Cox*, 602 F.3d at 283; *Hicks* 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order on Remand at 10.

Treatment Record X-rays

Pursuant to the Board's instructions, the administrative law judge considered Dr. Patel's reading of a February 20, 2007 x-ray and Dr. Goodwin's reading of a September 30, 2008 x-ray contained in the Miner's treatment records. *See Bennett*, BRB No. 17-0552 BLA, slip op. at 7; Decision and Order on Remand at 11-12; Director's Exhibit 70 at 10, 128. Dr. Patel identified no acute cardiopulmonary disease, but noted changes associated with chronic obstructive pulmonary disease along with granulomatous disease. Director's Exhibit 70 at 128. Dr. Goodwin indicated he could no longer see a nodular density in the middle of the Miner's right lung that was present on prior x-rays. Director's Exhibit 70 at 10. He identified linear markings that could be fibrosis. *Id.*

The administrative law judge rejected these readings because she found the record does not include the credentials of Drs. Patel and Goodwin and thus it is not clear if they were dually-qualified radiologists at the time of the respective readings. *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Decision and Order on Remand at 11-12. Employer does not challenge this credibility finding and thus we affirm it. *Skrack*, 6 BLR at 1-711.

Employer asserts the administrative law judge erred by not weighing Dr. Patel's readings of x-rays taken on June 21, 2005, September 21, 2005, January 11, 2006, and April 12, 2006. Employer's Brief at 14-15; Director's Exhibit 70 at 129-132. Employer concedes Dr. Patel identified a large mass on these x-rays. Employer's Brief at 14-15. Other than identifying a separate hilar node on the June 21, 2005 x-ray that "could"

§718.304(b). Rather she found the presence of simple pneumoconiosis from the needle biopsy of the mass supported Dr. Aycoth's and Dr. Cappiello's x-ray readings that the large mass they observed is consistent with pneumoconiosis at 20 C.F.R. §718.304(a). Decision and Order on Remand at 13-14. Thus, Dr. Hippensteel's concession that the biopsy is consistent with simple pneumoconiosis does not undermine the administrative law judge's conclusion.

represent lung cancer, Employer acknowledges Dr. Patel “offered no opinion concerning the etiology” of the mass. Employer’s Brief at 14-15. In light of the fact that Dr. Patel did not affirmatively opine that the mass he identified on the x-rays is not one of complicated pneumoconiosis, and the administrative law judge’s unchallenged finding that his other x-ray readings merit no weight because his credentials are not in the record, Employer has not explained why remand is necessary for the administrative law judge to weigh these x-rays. *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the “error to which [it] points could have made any difference”); *Scarbro*, 220 F.3d at 256 (x-ray evidence of complicated pneumoconiosis can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be).

Because it is supported by substantial evidence, we affirm the administrative law judge’s conclusion that the April 14, 2004 and June 8, 2005 x-rays are positive for complicated pneumoconiosis as well as her finding that the x-ray evidence as a whole establishes complicated pneumoconiosis. 20 C.F.R. §718.304(a); *see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); Decision and Order on Remand at 12.

Autopsy Evidence

Employer asserts the administrative law judge erred in discrediting the contrary autopsy evidence of record. Employer’s Brief at 20-22. We disagree. Dr. Bush opined the Miner’s autopsy revealed black dust pigment consistent with coal dust that “occasionally forms” fibrotic nodules measuring up to 0.8 by 0.5 centimeters. Director’s Exhibit 106 at 96. Thus he diagnosed mild to moderate clinical pneumoconiosis. *Id.* He explained the autopsy results are not consistent with progressive massive fibrosis because the dust pigment is not associated with fibrous reaction and the formation of nodules measuring at least one centimeter in diameter. *Id.* Dr. Oesterling opined the Miner had moderate micronodular and macular pneumoconiosis, but opined none of the areas of fibrosis were large enough to constitute complicated pneumoconiosis. *Id.* at 64-69. Contrary to Employer’s argument, the administrative law judge permissibly found the opinions of Drs. Bush and Oesterling do not undermine the x-ray evidence of complicated pneumoconiosis because they do not affirmatively show that the opacities present on x-ray “were not present” or were due to an intervening pathology.¹⁰ Decision and Order on Remand at 18-19; *see Scarbro*, 220 F.3d at 256-58 (probative force of x-ray evidence not

¹⁰ The administrative law judge also weighed Dr. Dennis’s diagnosis of complicated pneumoconiosis based on the autopsy results. Decision and Order on Remand at 18-19; Director’s Exhibit 107 at 32. She discredited his autopsy report because it lacked a clinical summary. *Id.*

reduced because pathologist identified large lesions of simple pneumoconiosis on autopsy but excluded complicated pneumoconiosis); *Compton*, 211 F.3d at 208-09.

Medical Opinions

Employer argues the administrative law judge erred in according no weight to the medical opinions of Drs. Zaldivar, Rosenberg, Hippensteel, and Castle that the Miner did not have complicated pneumoconiosis. Employer's Brief at 23-27. We disagree.

The administrative law judge discredited the opinions of Drs. Zaldivar and Rosenberg because they incorrectly assumed the biopsy evidence was negative for simple pneumoconiosis. Decision and Order on Remand at 22; Director's Exhibit 106 at 146-49, 162-68. Employer does not challenge this finding. We therefore affirm it. *Hicks* 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Skrack*, 6 BLR at 1-711. Further, she noted Dr. Hippensteel cited Dr. Patel's February 20, 2007 treatment record x-ray to support his opinion the Miner does not have complicated pneumoconiosis but has granulomatous disease. Decision and Order on Remand at 22; Director's Exhibit 106 (internal deposition pages 10-11, 15-16). The administrative law judge reiterated that this treatment record x-ray is entitled to no weight, and thus found Dr. Hippensteel's opinion unpersuasive. Decision and Order on Remand at 22. As Employer does not challenge this finding, it is also affirmed. *Hicks* 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Skrack*, 6 BLR at 1-711. Moreover, the administrative law judge permissibly discredited the opinions of Drs. Zaldivar, Rosenberg, Hippensteel, and Castle on the issue of complicated pneumoconiosis because they assumed the x-ray evidence is negative for the disease, contrary to her finding that the x-rays establish complicated pneumoconiosis. *Scarbro*, 220 F.3d at 256; *Hicks* 138 F.3d at 533; *Akers*, 131 F.3d at 441.

We conclude the administrative law judge properly weighed all of the relevant evidence in the record in determining the Miner had complicated pneumoconiosis and did not, as Employer alleges, improperly shift the burden of proof. *Melnick*, 16 BLR at 1-33-34; Employer's Brief at 33. Because it is supported by substantial evidence, we affirm the administrative law judge's finding the Miner had complicated pneumoconiosis and Claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. See *Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 256. We also affirm, as unchallenged on appeal, the administrative law judge's finding that the Miner's complicated pneumoconiosis arose out of his coal mine employment and granting modification renders justice under the Act. See *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.203(b); Decision and Order on Remand at 23-25. Thus, we affirm the administrative law judge's award of benefits in the miner's claim.

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer

raises no specific challenge to the survivor's claim, we affirm the administrative law judge's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(l); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order – Awarding Benefits at 4.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits and Decision and Order – Awarding Benefits are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring:

I concur with the majority decision in result only. Claimant may invoke the irrebuttable presumption that the miner was totally disabled due to pneumoconiosis if he suffered from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities 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 yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.

As the United States Court of Appeals for the Fourth Circuit has explained,

“[p]rongs (a), (b), and (c) are stated in the disjunctive; therefore, a finding of statutory complicated pneumoconiosis may be based on evidence presented under a single prong. But the [administrative law judge] must in every case review the evidence under each prong . . . for which relevant evidence is presented to determine whether complicated pneumoconiosis is present.” See *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010), quoting *E. Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255-56 (4th Cir. 2000).

Prior to coming to her conclusion that Claimant established complicated pneumoconiosis, the administrative law judge weighed the items from the different statutory categories of evidence relevant to complicated pneumoconiosis in a manner consistent with the analyses in *Cox* and *Scarbro*. Thus her analysis is consistent with the mandate that “all relevant evidence shall be considered” as understood under those cases. *Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 255-56. Consequently, I concur that we should affirm the award of benefits.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge