

BRB No. 00-0883 BLA

RICHARD D. BARNHART)		
)		
Claimant-Respondent)		
)		
v.)		
)		
CLINCHFIELD COAL COMPANY)	DATE	ISSUED:
)		
Employer-Petitioner)		
)		
DIRECTOR, OFFICE OF WORKERS')		
COMPENSATION PROGRAMS, UNITED)		
STATES DEPARTMENT OF LABOR)		
)		
Party-in-Interest)	DECISION and ORDER	

Appeal of the Decision and Order On Remand Changing Effective Date of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Richard D. Barnhart, Lebanon, Virginia, *pro se*.

Timothy W. Gresham and H. Ashby Dickerson (Penn Stuart & Eskridge), Abingdon, Virginia, for employer.

Sarah M. Hurley (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the aid of counsel,¹ the Decision and Order On Remand

Changing Effective Date (97-BLA-1074) of Administrative Law Judge Pamela Lakes Wood awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).² This case is before the Board for the second time. Originally, in a Decision and Order issued on September 1, 1998, the administrative law judge found the evidence sufficient to establish the existence of complicated pneumoconiosis, entitling claimant to the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Accordingly, benefits were awarded commencing as of February 1, 1990, which was the date of the first evidence of record, *i.e.*, x-ray readings, diagnosing complicated pneumoconiosis.

Employer appealed, contending that the administrative law judge erred in finding that the date of onset of claimant's total disability due to pneumoconiosis was established by the date of the first evidence of record diagnosing complicated pneumoconiosis. Initially, the Board affirmed the administrative law judge's findings that claimant invoked the irrebuttable presumption pursuant to Section 718.304 and was entitled to benefits as unchallenged on appeal. *Barnhart v. Clinchfield Coal Co.*, BRB No. 98-1622 BLA (Dec. 28, 1999)(unpub.). The Board held, however, that the administrative law judge's reliance on the mere existence of two readings of an x-ray dated February 8, 1990, that were positive for complicated pneumoconiosis to establish the date of onset, appeared to conflict with the administrative law judge's weighing of all of the conflicting readings of the x-ray dated February 8, 1990, which the administrative law judge had concluded did no more than establish "at least the presence of simple pneumoconiosis." Board's Decision and Order at 3. Thus, the Board vacated the administrative law judge's finding as to the date of onset of total disability due to pneumoconiosis and remanded the case for reconsideration.

On remand, the administrative law judge found that the readings of the x-ray dated February 8, 1990, were equivocal as to whether the x-ray indicated the existence of complicated pneumoconiosis. Moreover, the administrative law judge found that it was not possible to determine the exact date of onset of claimant's complicated pneumoconiosis from the evidence of record and, therefore, awarded benefits commencing from October 1, 1996, which was the month in which the claim was filed. 20 C.F.R. §725.503(b).

On appeal, claimant challenges the administrative law judge's change in the onset date. Employer responds, urging that the administrative law judge's Decision and Order On Remand Changing Effective Date be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has not responded to this appeal.

In an appeal filed by a claimant without the aid of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial

evidence, *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1985). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Where entitlement is established pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, in determining whether the evidence establishes an onset date of total disability due to pneumoconiosis, the fact-finder must determine whether credible, probative evidence of record, if fully credited, establishes an onset date of the miner’s complicated pneumoconiosis, *see Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *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). If the evidence of record does not reflect when claimant’s simple pneumoconiosis became complicated pneumoconiosis, the onset date for payment of benefits is the month during which the claim was filed, *see* 20 C.F.R. §725.503(b); *Williams, supra*; *Truitt, supra*.

Claimant contends that there was sufficient evidence to show that he had complicated pneumoconiosis in February, 1990. The administrative law judge found that the first diagnosis of complicated pneumoconiosis in the record (which is also the only evidence of record that diagnosed complicated pneumoconiosis dated prior to the filing of the instant claim in 1996) were the readings of the x-ray dated February 8, 1990, from Dr. Aycoth, Director’s Exhibits 26, 35, and Dr. Cappiello, Director’s Exhibits 27, 34, who were both board-certified radiologists and B-readers.³ However, the administrative law judge further found that the February 8, 1990, x-ray was also read as not indicating complicated pneumoconiosis by Drs. Fisher, Director’s Exhibit 25, and Drs. Spitz, Abramowitz, Wheeler and Scott, Director’s Exhibit 49, who were equally qualified radiologists. Thus, the administrative law judge found that the evidence of complicated pneumoconiosis based on the February 8, 1990, x-ray was equivocal. Decision and Order On Remand at 2.

We affirm the administrative law judge’s finding that the conflicting readings of the February 8, 1990, x-ray by equally qualified radiologists were equivocal, *i.e.*, they neither precluded nor established the existence of complicated pneumoconiosis, and, therefore, failed to establish the existence of complicated pneumoconiosis by a preponderance of the evidence pursuant to the standard enunciated in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff’g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), as supported by substantial evidence. In *Ondecko*, the Supreme Court held that the reference to the “burden of proof” in Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), refers to the burden of persuasion, and therefore held that when the evidence is evenly balanced, the claimant must lose pursuant

to Section 7(c), *see Ondecho, supra*. Moreover, although claimant notes that the initial award of benefits by the district director awarded benefits dating from February, 1990, the administrative law judge is not bound by any findings made by the district director, as the administrative law judge's review of the contested issues and the evidence is *de novo*, *see Dingess v. Director, OWCP*, 12 BLR 1-141 (1989); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

The only other evidence of record diagnosing complicated pneumoconiosis was developed subsequent to the filing of the instant claim in 1996. The administrative law judge considered the only relevant evidence of record, also developed subsequent to the filing of the instant claim in 1996, addressing when claimant's simple pneumoconiosis became complicated pneumoconiosis from Dr. Sargent, who reviewed the relevant x-ray and CT scan evidence of record and examined claimant, *see Director's Exhibit 49; Claimant's Exhibit 1*. In a 1997 opinion, Dr. Sargent stated that claimant suffered only from simple pneumoconiosis in 1990 which progressed to complicated pneumoconiosis over the last seven years, *i.e.*, between 1990 and 1997, Claimant's Exhibit 1. The administrative law judge found that it was not possible to determine the exact date that claimant's simple pneumoconiosis progressed to complicated pneumoconiosis from the evidence of record and/or Dr. Sargent's opinion. Decision and Order On Remand at 3.

The date of onset is not established by the first medical evidence diagnosing complicated pneumoconiosis and/or indicating total disability due to pneumoconiosis, but, rather, such medical evidence merely indicates that claimant's simple pneumoconiosis progressed to complicated pneumoconiosis, and/or that claimant became totally disabled due to pneumoconiosis, at some time prior to the date of that medical evidence, *see Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984). Thus, we affirm the administrative law judge's finding that it was not possible to determine the exact date that claimant's simple pneumoconiosis progressed to complicated pneumoconiosis from the evidence of record as it is supported by substantial evidence. Consequently, we affirm the administrative law judge's determination that the onset date for payment of benefits was October 1, 1996, the month during which the claim was filed, *see 20 C.F.R. §725.503(b); Williams, supra; Truitt, supra*.⁴

Accordingly, the administrative law judge's Decision and Order On Remand Changing Effective Date is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge