U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0218 BLA

JERRY WAYNE FOWLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KERR MCGEE CORPORATION	)	
	)	DATE ISSUED: 04/07/2015
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 Awarding Benefits of Stephen M. Reilly, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

Jeffrey S. Goldberg (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: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (08-BLA-5350) of Administrative Law Judge Stephen M. Reilly rendered on a claim filed pursuant to the

provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on January 16, 2007.[1]

Applying amended Section 411(c)(4),[2] the administrative law judge credited claimant with at least eighteen and a half years of qualifying coal mine employment,[3] and found that the new evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the Section 411(c)(4) presumption; he also found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the 2013 regulations are impermissibly retroactive and should not have been applied to this case. Employer also contends that the administrative law judge erred in crediting claimant with at least fifteen years of qualifying coal mine employment and, therefore, erred in determining that claimant invoked the Section 411(c)(4) presumption. Further, employer asserts that the administrative law judge erred in finding that employer failed to rebut the presumption. Finally, employer argues that the administrative law judge's determination of the benefits commencement date is erroneous. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, urging the Board to reject both employer's arguments

[1] Claimant's prior claim, filed on July 7, 1998, was finally denied on September 27, 2000, because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 1.

[2] As part of the Patient Protection and Affordable Care Act, Public Law No. 111-148, Congress enacted amendments to the Black Lung Benefits Act (the Act), which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption of total disability due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

[3] The record indicates that claimant's coal mine employment was in Illinois. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

concerning application of the 2013 regulations, and employer's assertions that the administrative law judge erred in finding that claimant had at least fifteen years of qualifying coal mine employment. Further, the Director asserts that the administrative law judge applied the proper legal standard in determining whether employer rebutted the Section 411(c)(4) presumption. Employer has filed a reply brief, reiterating its arguments on appeal.[4]

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. 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).

I. Application of the 2013 Regulations

Employer argues that the administrative law judge erred in applying the revised regulation at 20 C.F.R. §718.305, which became effective on October 25, 2013, to this claim. Employer contends that because the hearing in this claim was held on April 12, 2012, the administrative law judge erred in retroactively applying the standards set forth in the revised regulation in determining whether claimant established that his above-ground mining conditions were substantially similar to underground mining conditions, pursuant to 20 C.F.R. §718.305(b)(2). Employer also contends that the administrative law judge erred in applying the revised regulation in determining whether employer had rebutted the presumption, pursuant to 20 C.F.R. §718.305(d)(1). Employer's Brief at 9-10, 24. We disagree. The revised regulation at 20 C.F.R. §718.305 applies to all claims filed on or after June 30, 1982. *See* 20 C.F.R. §718.2(a) (2014). Because, as the Director asserts, the revised regulation does not change existing law, but merely codifies existing law and clarifies the position of the Department of Labor (DOL), it is not impermissibly retroactive and may be applied to pending claims. *See Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1341-42, 25 BLR 2-549, 2-563-64 (10th Cir. 2014); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90, 25 BLR 2-633, 2-642-43 (6th Cir. 2014); Director's Brief at 9, 11-12.

Employer also maintains that the revised regulation at 20 C.F.R. §718.305 improperly gives a miner a presumption that he or she suffers from legal

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)**.** *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

pneumoconiosis,[5] contrary to the 2001 regulations, which required that "the disease would not be presumed and the [miner] would have to prove all elements" of his or her claim. Employer's Brief at 9. However, as the Director notes, "[t]his argument is specious" because it ignores the fact that the legal landscape governing entitlement under the Act has changed since the enactment of the 2001 regulations. Director's Brief at 11. Congress changed the entitlement criteria when it amended Section 411(c)(4), as implemented by 20 C.F.R. §718.305, and reinstated a presumption of total disability due to clinical and legal pneumoconiosis for certain claims, such as this one, filed after January 1, 2005. *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 726-27, 25 BLR 2-405, 2-413 (7th Cir. 2013). Consequently, we affirm the administrative law judge's application of amended Section 411(c)(4), and its implementing regulation, to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010. *See Keene v. Consolidation Coal Co.*, 645 F.3d 844, 849-51, 24 BLR 2-385, 2-397-401 (7th Cir. 2011); *Goodin*, 743 F.3d at 1345, 25 BLR at 2-568; *Sterling*, 762 F.3d at 489-90, 25 BLR at 2-642-43.

II. Invocation of the Amended Section 411(c)(4) Presumption

Employer contends that the administrative law judge erred in finding that claimant's aboveground work was substantially similar to underground coal mine employment, and therefore erred in finding that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Employer's contention lacks merit.

In order to invoke the Section 411(c)(4) presumption, claimant must establish that he worked for at least fifteen years in underground coal mine employment, or in surface coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). The administrative law judge noted, and employer does not dispute, that all of claimant's coal mine employment took place either underground, or aboveground at the site of an underground mine. Decision and Order at 3; Hearing Tr. at 19, 21-24, 33; Director's Exhibits 4, 5. The Board has held that a surface worker at an underground mine is not required to show comparability of environmental conditions in order to take advantage of the Section 411(c)(4)

[5] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). Clinical pneumoconiosis "consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

presumption, as it is the type of mine (underground or surface), rather than the location of the particular worker (surface or below the ground), which determines whether a claimant is required to show comparability of conditions. *Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-28-29 (2011); *Alexander v. Freeman United Coal Mining Co*., 2 BLR 1-497 (1979) (Smith, Chairman, dissenting); *see Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1058, 25 BLR 2-453, 2-468 (6th Cir. 2013) (no showing of comparability of conditions is necessary for an aboveground employee at an underground coal mine). Thus, as the Director correctly asserts, claimant was not required to show comparability of environmental conditions in order to invoke the Section 411(c)(4) presumption. *See Muncy*, 25 BLR at 1-28-29; *Alexander*, 2 BLR at 1-501.

Further, even assuming claimant needed to establish that dust conditions in his aboveground work were substantially similar to those in an underground mine, claimant has satisfied this burden. The regulations provide that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there."[6] 20 C.F.R. §718.305 (b)(2). As summarized by the administrative law judge, claimant established that, during his eighteen and one-half years as an aboveground worker, he was exposed to coal and rock dust in all of his jobs

[6] The comments accompanying the Department of Labor's regulations further clarify claimant's burden in establishing substantial similarity:

> [T]he claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal mine dust, and thus that the miner's work conditions approximated those at an underground mine. The term "regularly" has been added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden. The fact-finder simply evaluates the evidence presented, and determines whether it credibly establishes that the miner's non-underground mine working conditions regularly exposed him to coal mine dust. If that fact is established to the fact-finder's satisfaction, the claimant has met his burden of showing substantial similarity.

78 Fed. Reg. at 59,105; *see also Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1341-42, 25 BLR 2-549, 2-563-64 (10th Cir. 2014) (recognizing that the provision set forth at 20 C.F.R. §718.305 (b)(2) did not change existing law); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90, 25 BLR 2-633, 2-642-43 (6th Cir. 2014) (same).

as a buggy runner, laborer, repairman, track layer and breaker station attendant.[7] Decision and Order at 3; Hearing Tr. at 19, 21-24, 33; Director's Exhibits 4, 5. Contrary to employer's argument, as set forth above, the regulation at 20 C.F.R. §718.305(b)(2) retroactively applies to this claim, despite the fact that the regulation was promulgated after the date of the hearing in this case, because the regulation does not represent a change in law, but merely codifies the DOL's longstanding position that consistently dusty working conditions are sufficiently similar to conditions in an underground mine. *See Goodin*, 743 F.3d at 1342, 25 BLR at 2-563; *Sterling*, 762 F.3d at 489-90, 25 BLR at 2-642.

Finally, we agree with the Director that claimant's uncontradicted, credited testimony regarding his working conditions satisfies the standard adopted by the United States Court of Appeals for the Seventh Circuit, that a miner can establish substantial similarity simply by establishing that he was exposed to sufficient coal dust in his surface coal mine employment. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001), *quoting Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988); Director's Brief at 8-9. As claimant's uncontradicted testimony establishes substantial similarity under both Section 718.305 and *Leachman*, we affirm the administrative law judge's finding that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(2); *see Summers*, 272 F.3d at 479, 22 BLR at 2-275; *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995); *Leachman*, 855 F.2d at 512-13; Decision and Order at 3, 4.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the rebuttable

[7] As summarized by the administrative law judge, claimant testified that running a buggy was very dusty work, because he cut the coal and dumped it into the buggy, which generated a great deal of dust. Decision and Order at 3; Hearing Tr. at 33. Claimant further testified that his work as a breaker attendant, which involved cleaning dust and coal from belt lines and walkways, greasing and oiling breaker station belts and motors, welding and repair work, as well as shoveling coal dust for four to five hours per day, exposed him to a great deal of dust and fumes. Decision and Order at 3-4; Hearing Tr. at 24, 25; Director's Exhibits 4, 5.

presumption of total disability due to pneumoconiosis at Section 411(c)(4).[8] 30 U.S.C. §921(c)(4).

III. Rebuttal of the Amended Section 411(c)(4) Presumption

Under the implementing regulations, because claimant invoked the amended Section 411(c)(4) presumption, the burden of proof shifted to employer to rebut the presumption by "establishing both that [claimant] does not have" legal or clinical pneumoconiosis or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Blakley*, 54 F.3d at 1320, 19 BLR at 2-203; *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). The administrative law judge found that employer failed to establish rebuttal by either method.

Legal Pneumoconiosis

In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Repsher, Zaldivar, Cohen, Houser, and Istanbouly. Drs. Repsher and Zaldivar opined that claimant does not have legal pneumoconiosis, but suffers from chronic obstructive airways disease (COPD) caused by emphysema due to smoking, and by asthma and morbid obesity, that are unrelated to coal mine dust exposure. Employer's Exhibits 4; 5 at 12-14, 16, 18, 24-26; 10; 19 at 11-12, 26, 28, 43-44, 46, 52-59. In contrast, Drs. Houser, Cohen, and Istanbouly opined that claimant suffers from legal pneumoconiosis, in the form of obstructive lung disease due to a combination of coal mine dust exposure and smoking. The administrative law judge discredited the opinions of Drs. Repsher and Zaldivar, and credited the opinions of Drs. Houser, Cohen,[9] and Istanbouly, to conclude that the

[8] Employer argues that the administrative law judge failed to make a threshold determination of whether claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Employer's Brief at 11-13. Contrary to employer's arguments, because claimant invoked the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4), claimant satisfied his initial burden to demonstrate a change in the applicable condition of entitlement at 20 C.F.R. §725.309. *See Consolidation Coal Co. v. Director, Office of Workers' Compensation Programs* [*Bailey*], 721 F.3d 789, 794, 25 BLR 2-285, 2-293 (7th Cir. 2013).

[9] Contrary to employer's contention, Dr. Cohen's statement that the contributions to claimant's impairment from coal dust inhalation and cigarette smoking cannot be separated does not, by itself, render unreasoned his identification of coal dust exposure as

evidence established the existence of legal pneumoconiosis and that, therefore, employer failed to disprove the existence of the disease.

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Repsher and Zaldivar in concluding that employer failed to disprove the existence of legal pneumoconiosis. This contention has merit. After summarizing their opinions, the administrative law judge concluded that "[t]he opinions of Dr. Repsher and Dr. Zaldivar are incomplete, inaccurate and based on generalities. They are inconsistent with the Act, the DOL and medical authority. They are not well reasoned, therefore, I give them little weight." Decision and Order at 14. Whether a medical opinion is reasoned and documented is within the discretion of the administrative law judge. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893-94, 13 BLR 2-348, 2-355-56 (7th Cir. 1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. U. S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 55-57. However, as employer asserts, in discrediting the opinions of Drs. Repsher and Zaldivar as not well-reasoned, the administrative law judge did not adequately explain what aspects of their opinions he found to be incomplete, inaccurate, based on generalities, or inconsistent with the Act, the regulations, or accepted medical science. Consequently, the administrative law judge's analysis does not comply with the Administrative Procedure Act (APA), which provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We, therefore, vacate the administrative law judge's finding that employer did not disprove the existence of legal pneumoconiosis. On remand the administrative law judge should fully explain the rationale for his conclusions and issue a decision in compliance with the APA.

Clinical Pneumoconiosis

Employer further asserts that the administrative law judge erred in finding that the evidence established the existence of clinical pneumoconiosis and that, therefore, employer failed to disprove the existence of the disease. Relevant to the existence of clinical pneumoconiosis, the administrative law judge initially considered four readings of an analog x-ray dated July 30, 2007, and considered the physicians' radiological qualifications. Decision and Order at 8-9. The administrative law judge noted that Dr.

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a contributing cause of claimant's pulmonary impairment. *See* 65 Fed. Reg. 79,940, 79,946 (Dec. 20, 2000); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 482, 22 BLR 2-265, 2-280 (7th Cir. 2001).

Cohen, a B reader, read the July 30, 2007 x-ray as positive for simple pneumoconiosis, and also noted the presence of emphysema and a "1 [centimeter] opacity" or "nodule" in the right upper lung.[10] Decision and Order at 9; Claimant's Exhibit 5; Director's Exhibit 29. In contrast, Drs. Whitehead and Wiot, who are dually qualified as Board-certified radiologists and B readers, read the same x-ray as negative for pneumoconiosis, but also noted the presence of emphysema and granulomas.[11] Decision and Order at 8-9; Director's Exhibit 12; Employer's Exhibit 2. Finally, Dr. Gaziano, who read the July 30, 2007 x-ray for quality purposes only, quality 1, indicated the presence of bullous emphysema, and a calcified granuloma in the right apex. Director's Exhibit 12. The administrative law judge accorded less weight to the negative readings by Drs. Whitehead and Wiot, despite their superior radiological qualifications, because the administrative law judge found their readings to be inconsistent with each other as to the location and severity of the emphysema and granulomas they observed.[12] Decision and Order at 9, 10. The administrative law judge further found that Dr. Cohen's identification of a large opacity was corroborated by hospital radiology records from

[10] On an ILO x-ray classification form, Dr. Cohen indicated that the July 30, 2007 x-ray was positive for small opacities of pneumoconiosis, 1/1, and further indicated the presence of a Category A large opacity, a reading which could support a diagnosis of complicated pneumoconiosis. *See* 20 C.F.R. §718.304(a); Director's Exhibit 29. In the narrative portion of his reading, however, Dr. Cohen clarified that while there was a "1 cm opacity noted in the [right upper lung] . . . the characteristics of this nodule [could] not be fully appreciated on this overpenetrated film." Director's Exhibit 29. Subsequently, based on his review of nearly contemporaneous CT scan images which did not show this large lesion, Dr. Cohen ruled out the presence of complicated pneumoconiosis and progressive massive fibrosis. Claimant's Exhibit 3.

[11] Dr. Whitehead identified "severe emphysematous change, greatest in the apices and more prominent on the left than right," and "[c]alcified granulomas . . . in the right hilium and right apex," but no pneumoconiosis. Director's Exhibit 12. Dr. Wiot identified "prominent bullous changes . . . in the left upper lung field" and "a calcified granuloma in the right first anterior interspace and calcified lymph nodes in the right hilium," but no coal workers' pneumoconiosis. Employer's Exhibit 2.

[12] The administrative law judge stated that while Dr. Whitehead noted severe emphysematous changes in the apices, more prominent on the left, Dr. Wiot found emphysema only in the left upper lobe. Further, while Dr. Whitehead identified calcified granuloma in the right hilum and right apex, Dr. Wiot identified just one calcified granuloma in the right first anterior interspace. Finally, only Dr. Wiot noted the presence of calcified lymph nodes in the right hilum. Decision and Order at 9; Director's Exhibit 12; Employer's Exhibit 2.

1999 and 2003 "that often noted the suspicious nodule," while Drs. Whitehead and Wiot "overlooked this abnormality." Decision and Order at 9, *citing* Employer's Exhibits 21, 25. Thus, the administrative law judge accorded greater weight to the opinion of Dr. Cohen, to conclude that the July 30, 2007 x-ray is positive for pneumoconiosis.

Employer asserts that the administrative law judge erred in discounting the x-ray readings of Drs. Whitehead and Wiot on the grounds that they were inconsistent with each other, and "overlooked" the large lesion noted by Dr. Cohen. Employer's Brief at 14-16. Employer's contention has merit. As employer asserts, while the narrative opinions of Drs. Whitehead and Wiot exhibit minor differences, the administrative law judge has not explained how their x-ray readings differ in any material way.[13] Nor has the administrative law judge explained how these slight differences undermine their consistent opinions that the July 30, 2007 x-ray is negative for pneumoconiosis. Moreover, substantial evidence does not support the administrative law judge's conclusion that Drs. Whitehead and Wiot "overlooked" the large, right upper lung "opacity" identified by Dr. Cohen. As employer asserts, both Drs. Whitehead and Wiot identified a lesion in the right upper lung. In addition, contrary to the administrative law judge's characterization, the opinions of Drs. Whitehead and Wiot appear consistent with the hospital radiology records from 1999 and 2003, which note a "small nodular density" in the right upper lung that "may be" a calcified granuloma, and a "stable old healed calcified granuloma within the right upper lung field," respectively. Employer's Exhibits 21, 25. Because the administrative law judge's evaluation of the July 30, 2007 x-ray readings is not supported by substantial evidence and is inadequately explained, we vacate the administrative law judge's determination that employer did not disprove the existence of clinical pneumoconiosis based on the analog x-ray evidence. *See Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 890-91, 22 BLR 2-514, 2-528-29 (7th Cir. 2002); *Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 670-71, 22 BLR 2-483, 2-490-91 (7th Cir. 2002).

We further find merit in employer's contention that the administrative law judge did not adequately explain his evaluation of the digital x-ray and computerized tomography (CT) scan evidence, pursuant to 20 C.F.R. §718.107.[14] Employer's Brief at

[13] Both physicians concluded that the July 30, 2007 x-ray was negative for pneumoconiosis, both indicated the presence of significant emphysema in the left lung, and both identified calcified granulomas in the right lung. Director's Exhibit 12; Employer's Exhibit 2. In addition, their readings are also consistent with the quality reading by Dr. Gaziano, who similarly identified the presence of bullous emphysema, and a calcified granuloma in the right apex. Director's Exhibit 12.

[14] Digital x-rays constitute other medical evidence, and, as noted by the administrative law judge, the admissibility of digital x-rays is governed by 20 C.F.R.

16-21. The record contains two readings of a June 18, 2007 digital x-ray. Dr. Wiot, a B reader and Board-certified radiologist, stated that there "is no evidence of pneumoconiosis," while Dr. Smith, who is also dually qualified, read the x-ray as positive for pneumoconiosis. Employer's Exhibits 7, 8; Claimant's Exhibit 1. The administrative law judge credited the positive reading by Dr. Smith, and discredited the negative reading by Dr. Wiot, in part, because Dr. Smith identified the June 18, 2007 x-ray as digital, and stated that digital x-rays are a medically acceptable procedure, while Dr. Wiot "failed to acknowledge" the digital nature of the x-ray and thus "did not appear to have an exact understanding of what he was reading." Decision and Order at 9. The administrative law judge did not explain, however, how Dr. Wiot's failure to note that the x-ray was digital undermined his conclusion that the x-ray was negative for pneumoconiosis. *See Wojtowicz*, 12 BLR at 1-165. The administrative law judge further discounted Dr. Wiot's reading because it was "not consistent with his own readings of analog x-rays," while the administrative law judge found that Dr. Smith's "independent [positive] findings are consistent with readings of other analog x-rays in the record." Decision and Order at 9. Contrary to the administrative law judge's characterization, a review of the record reveals that Dr. Wiot's interpretations of the June 18, 2007 digital x-ray and the July 30, 2007 analog x-ray are nearly identical.[15] Employer's Exhibit 2, 6. Moreover, the

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§718.107. *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-135 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1, 1-7-8 (2007) (en banc); Decision and Order at 9. Pursuant to 20 C.F.R. §718.107(b), an administrative law judge must determine, on a case-by-case basis, whether the proponent of the digital x-ray evidence has established that it is medically acceptable and relevant to entitlement. *See Webber*, 23 BLR at 1-133.

[15] Interpreting the June 18, 2007 digital x-ray, Dr. Wiot stated:

> There is no evidence of coal workers[']s pneumoconiosis. There are bullous changes present in the left upper lung field. There is a calcified granuloma in the right upper lung field. There is minimal blunting of the right costophrenic angle and some pleural disease extending along the right lateral chest wall. Pleural disease is not a manifestation of coal dust exposure. This is probably a residual of a past inflammatory process. The chest is otherwise unremarkable.

Employer's Exhibit 1.

With respect to the July 30, 2007 analog x-ray, Dr. Wiot stated:

> There is no evidence of coal workers[']s pneumoconiosis. There are prominent bullous changes present in the left upper lung field with resulting

administrative law judge has not explained his finding that, in contrast, Dr. Smith's positive readings are consistent with the other positive analog readings of record.[16] As the administrative law judge did not explain how Dr. Wiot's two interpretations materially differ, and further may have engaged in a selective analysis of the evidence, we vacate the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis based on the digital x-ray evidence pursuant to 20 C.F.R. §718.107. *See Wojtowicz*, 12 BLR at 1-165; *Justice v. Island Creek Coal Co*., 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co*., 7 BLR 1-295 (1984).

Employer also contends that the administrative law judge did not adequately explain his evaluation of the September 9, 2004, March 14, 2005 and June 18, 2007 CT scans.[17] Employer's Brief at 19-21. The September 9, 2004 and March 14, 2005 CT scans were both read as negative for pneumoconiosis by Dr. Meyer, who is a Board-certified radiologist and a B reader, and as positive for pneumoconiosis by Dr. Cohen, a B reader. The 2007 CT scan was read as negative for pneumoconiosis by Dr. Repsher, a B reader, and as positive for pneumoconiosis by Dr. Cohen.

> compression of normal markings in the left mid and lower lung fields. There is a calcified granuloma in the right first anterior interspace and calcified lymph nodes in the right hilium. There is minimal blunting of the right costophrenic angle. Pleural disease is not a manifestation of coal dust exposure. This is probably a post-inflammatory process. The chest is otherwise unremarkable.

Employer's Exhibit 2.

[16] We note that while Dr. Cohen read the July 30, 2007 analog x-ray as positive for opacities of pneumoconiosis in all six lung zones, Dr. Smith read the June 18, 2007 digital x-ray as positive for opacities of pneumoconiosis in only the four lower lung zones. Director's Exhibit 29; Claimant's Exhibit 1.

[17] The administrative law judge also considered four readings of computerized tomography (CT) scans dated September 8, 1998 and March 31, 1999, and considered the physicians' qualifications. Decision and Order at 9. Noting that Dr. Smith, a Board-certified radiologist and B reader, read both CT scans as positive for pneumoconiosis, and Dr. Meyer, who is also dually qualified, read both CT scans as negative for clinical pneumoconiosis, the administrative law judge found these CT scans to be in equipoise. Decision and Order at 9; Claimant's Exhibits 7, 8; Employer's Exhibits 17, 18.

In finding that employer did not disprove the existence of pneumoconiosis based on the 2004 and 2005 CT scans, the administrative law judge found that Dr. Meyer's negative readings were "inconsistent"[18] and were "undermined by Dr. Cohen's consistent [positive] CT findings and the x-ray results."[19] Decision and Order at 10. Regarding the 2007 CT scan, the administrative law judge credited Dr. Cohen's positive reading, finding that Dr. Cohen described the nature and location of the opacities of pneumoconiosis he observed, and that Dr. Cohen's positive interpretation was "compatible with his review of the two earlier CT scans." Decision and Order at 10. The administrative law judge found that "contrarily," while Dr. Repsher identified emphysema and healed granulomatous disease, but no pneumoconiosis, Dr. Repsher "did not indicate exactly where these abnormalities were located and failed to identify the large opacity in the right upper lobe." *Id*. The administrative law judge further discredited Dr. Repsher's negative reading because Dr. Repsher's "qualifications for interpreting a CT scan were not in the record." Decision and Order at 10.

Employer asserts that in discrediting the negative CT scan interpretations by Drs. Meyer and Repsher, the administrative law judge has mischaracterized, and selectively analyzed, the evidence. Employer's Brief at 21. Employer's contentions are not without merit. Dr. Meyer noted a "densely calcified granuloma in the right upper lobe" on the 2004 CT scan, and similarly noted "calcified granulomas in the right upper lobe" on the 2005 CT scan. The administrative law judge has not explained how Dr. Meyer's slightly different descriptions of the abnormalities he observed undermined his ultimate conclusion that the 2004 and 2005 CT scans were negative for pneumoconiosis. In addition, contrary to the administrative law judge's finding, Dr. Cohen's reading of the 2007 CT scan was not entirely "compatible with his review of the two earlier CT scans." Decision and Order at 10. Rather, Dr. Cohen specifically stated that the one centimeter nodule seen on the 2004 and 2005 CT scans, "was not identified on [the 2007] CT scan." Claimant's Exhibit 3. Further, in light of Dr. Cohen's acknowledgement that the large nodule or opacity was not visible in 2007, the administrative law judge inaccurately characterized Dr. Repsher as having "failed to identify the large opacity" identified by

[18] In finding Dr. Meyer's readings of the 2004 and 2005 CT scans to be inconsistent with each other, the administrative law judge noted that on the 2004 scan, Dr. Meyer observed a dense nodule in the right upper lobe that he described as a calcified granuloma, subpleural fibrosis in both lower lobes, and markings of old granulomatous disease in the right lung, while on the 2005 scan, he observed only the old granulomatous disease, but not the dense nodule or the fibrosis. Decision and Order at 10.

[19] The administrative law judge found that Dr. Cohen "noted that the findings are similar on both [scans]" and confirmed that the large right upper lung "opacity" he saw on x-ray was actually a granuloma. Decision and Order at 10.

Dr. Cohen. Moreover, as both Dr. Repsher and Dr. Cohen are B readers and Board-certified pulmonologists, and as neither is a radiologist, the administrative law judge has not explained his determination to credit Dr. Cohen's opinion, over that of Dr. Repsher, on the ground that there is no proof that Dr. Repsher is qualified to interpret CT scans.[20] For the foregoing reasons, we vacate the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis, based on the CT scan evidence. *See Chubb*, 312 F.3d at 890-91, 22 BLR at 2-528-29; *Goodloe*, 299 F.3d at 670-71, 22 BLR at 2-490-91; *Wojtowicz*, 12 BLR at 1-165.

On remand, in reconsidering whether employer disproved the existence of clinical pneumoconiosis based on the analog x-ray, digital x-ray, and CT scan evidence, the administrative law judge must apply equal scrutiny to the physicians' opinions and explain his determinations. Further, as noted by the employer, the administrative law judge should also consider the issue of clinical pneumoconiosis as discussed in the medical opinions and treatment records pursuant to Section 718.202(a)(4). In so doing, the administrative law judge must resolve the conflicts among the opinions in light of the physicians' relevant qualifications and the extent to which each opinion is reasoned and documented. *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 24 BLR 2-33, 2-37 (7th Cir. 2007); *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988). In rendering all of his findings on remand, the administrative law judge must set forth the bases for his credibility determinations in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

Disability Causation

Employer also asserts on appeal that the administrative law judge erred in his consideration of whether employer rebutted the presumed fact of disability causation. Employer's contention has merit. Upon finding that employer was unable to disprove the existence of pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that claimant "does not have a totally disabling respiratory impairment." Decision and Order at 15. The administrative law judge concluded that, because the evidence established that claimant has a totally disabling respiratory impairment, employer failed to rebut the presumption. Decision and Order at 15. Contrary to the administrative law judge's statement, the regulations provide that, in addition to disproving the existence of pneumoconiosis, employer may rebut the presumption by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R.

[20] Contrary to claimant's assertion, Dr. Repsher's credentials are contained in the record at Employer's Exhibit 5. Claimant's Brief at 15. Moreover, Dr. Repsher testified that he is Board-certified in Internal Medicine, Pulmonary Disease, and Critical Care Medicine, and has been recertified six times as a B reader. Employer's Exhibit 5 at 4.

§718.305(d)(1)(i), (ii); *see Blakley*, 54 F.3d at 1320, 19 BLR at 2-203; *Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. On remand, the administrative law judge must apply the proper standard.[21]

IV. Commencement Date of Benefits

Employer contends that the administrative law judge erred in awarding benefits as of October 2000. Employer's Brief at 26-27. Because we have vacated the award of benefits, we also vacate the benefits commencement date finding, and instruct the administrative law judge, on remand, to reconsider that issue if he again awards benefits.

Under 20 C.F.R. §725.503(b), once entitlement to benefits is demonstrated, the date for the commencement of those benefits is determined by the month in which claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Chubb*, 312 F.3d at 891-92, 22 BLR at 2-530; *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-04, 12 BLR 2-178, 2-184-85 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182-83 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that claimant was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). Where, as here, a claimant is awarded benefits in a subsequent claim, the date for the commencement of benefits is determined as provided under 20 C.F.R. §725.503, with the proviso that no benefits may be paid for any time period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6) (2013).

In determining the benefits commencement date, after noting that claimant's prior claim had been denied on September 27, 2000, on the ground that claimant established total disability, but not the existence of pneumoconiosis, the administrative law judge concluded that "benefits are owed from October 2000." Decision and Order at 15. However, if the administrative law judge awards benefits on remand, he must determine when claimant became totally disabled due to pneumoconiosis. If the administrative law

[21] In addition, as we have vacated the administrative law judge's evaluation of the evidence relevant to the existence of legal and clinical pneumoconiosis, we must also vacate the administrative law judge's alternative finding that, even without the benefit of the presumption, claimant established his entitlement to benefits. *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); Decision and Order at 15.

judge finds that the evidence does not establish when claimant became totally disabled due to pneumoconiosis, then claimant is entitled to benefits as of January 2007, the month during which the current claim was filed. If the administrative law judge again determines that claimant is entitled to benefits beginning at some time prior to the filing date of his current claim, he must explain the basis for his finding.[22] *See Wojtowicz*, 12 BLR at 1-165.

[22] Employer requests the Board to instruct the administrative law judge that, if benefits are again awarded on remand, employer should receive a "credit in the amount of $334.81 per month," to reflect that claimant obtained a settlement for a state workers' compensation claim. Employer's Brief at 28. The Board, however, does not have authority to calculate the amount of monthly benefits to which claimant may be entitled, and the computation of benefits will be determined by the district director. 20 C.F.R. §725.502.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur in the decision, except with respect to the standard for rebuttal. Because the regulations expounding upon rebuttal were not issued as of the time of the hearing, the terms of the self-implementing statute should be applied for purposes of determining whether rebuttal has been established, or the parties should be given an opportunity to submit evidence responsive to the rebuttal requirements now set forth in the regulation at 20 C.F.R. §718.305. Employer has suggested, but not briefed, an argument that the regulation is unconstitutional. Since it is not briefed, it is not necessary to address it. *See* 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Employer does not otherwise attack the validity of the regulations. Consequently, the administrative law judge may apply the regulation if the parties are given adequate opportunity to respond to its terms.

JUDITH S. BOGGS
Administrative Appeals Judge