**U.S. Department of Labor**

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

BRB No. 20-0402 BLA

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| GARY D. COLE | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| CONSOLIDATION COAL COMPANY | ) | |
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| and | ) | |
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| CONSOL ENERGY, INCORPORATED | ) | DATE ISSUED: 02/16/2022 |
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| Employer/Carrier-Petitioners | ) | |
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| 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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2019-BLA-05902) rendered on a claim filed on May 2, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 14 years and 2.4 months 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. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. He also found Claimant's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203. He set a benefits commencement date of August 2017.

On appeal, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis.[1] It also asserts he erred in determining the commencement date for benefits. It further argues Claimant failed to exhaust his administrative remedies under the Federal Employee Compensation Act (FECA), 5 U.S.C. §§8101-8193, before seeking compensation under the Act. Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[2]

The 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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

[1] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 14 years and 2.4 months of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Director's Exhibits 3, 6, 7; Decision and Order at 7.

[2] On May 3, 2021, Claimant filed his first motion for enlargement of time for filing a brief in response to Employer's Petition for Review and Brief (Motion for Extension of Time). On May 21, 2021, the Benefits Review Board granted Claimant's motion, and stated Claimant may file his response brief within ten days from receipt of the Order. Order Granting Claimant's First Mot. for Extension of Time. On October 4, 2021, Claimant filed his second motion for extension of time, contending he never received the Order granting his first motion for extension of time. However, the Order granting his first extension request was electronically served on his attorney, Heath M. Long, on May 21, 2021. No response was received within the specified time period. 20 C.F.R. §§802.212, 802.217(d). Thus, we deny Claimant's second motion for extension of time to file a response brief.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West

**Exhaustion of Administrative Remedies**

Employer contends Claimant should be required to exhaust administrative remedies under FECA prior to proceeding under the Black Lung Benefits Act, since he last worked as a federal coal mine inspector for the Department of Labor Mine Safety and Health Administration.[4] Employer's Brief at 13-16. This argument has no merit.

There is no requirement that eligible miners exhaust all other potential remedies, federal or state, for exposure to coal mine dust before pursuing a claim under the Act.[5] *See Roberson v. Norfolk & Western Railway Co.*, 918 F.2d 1144 (4th Cir. 1990), *cert. denied* 500 U.S. 916 (1991) (railroad worker who satisfies the definition of miner is entitled to benefits under the Black Lung Benefits Act despite existence of separate federal compensation program for railroad workers); *Sammons v. Wolf Creek Collieries*, 19 BLR 1-24 (1994) (miner may be entitled to benefits under the Black Lung Benefits Act despite previous award under FECA as the purposes of the two programs are different); *see also* 20 C.F.R. §§722.3, 722.4 (Secretary has approved no state workers' compensation law as providing adequate coverage for pneumoconiosis), 725.402 (if a federal black lung benefits claim "is one subject to adjudication under a workers' compensation law approved under [P]art 722," then the district director will notify the claimant and dismiss the claim for lack

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Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 4.

[4] The ALJ found Claimant's employment as a federal mine inspector does not constitute coal mine employment. Decision and Order at 7.

[5] Employer vaguely asserts it should not be held liable because Claimant's complicated pneumoconiosis "might have arisen [from] exposures that occurred" during his work as a federal coal mine inspector. Employer's Brief at 15. But Employer has not identified any evidence or set forth any argument undermining the ALJ's finding that "the record does not contain any evidence" rebutting the presumption Claimant's complicated pneumoconiosis "arose at least in part" out of his fourteen years of coal mine employment. 20 C.F.R. § 718.203(a), (b); Decision and Order at 27. Nor has Employer challenged that it was properly designated the responsible operator. *See* 20 C.F.R. 20 C.F.R. §§725.494 (criteria for identifying potentially liable operators includes a rebuttable presumption that the miner's pneumoconiosis arose "at least in part out of employment in or around a mine or other facility during a period when the mine or facility was operated by such operator"), 725.495 (the responsible operator is "the potentially liable operator, as determined in accordance with §725.494, that most recently employed the miner").

of jurisdiction).[6] Thus, contrary to Employer's contention, Claimant was not required to file a claim under FECA prior to filing a claim under the Act.

**Section 411(c)(3) Presumption – Complicated Pneumoconiosis**

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers 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 ALJ must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis. *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 United States Court of Appeals for the Fourth Circuit holds that because prong (a) sets out an entirely objective scientific standard for diagnosing complicated pneumoconiosis (an x-ray opacity greater than one centimeter in diameter) the ALJ must determine whether a condition which is diagnosed by biopsy or autopsy under prong (b) or by any other means under prong (c) would show as an opacity greater than one centimeter if it were seen on a chest x-ray. *See Scarbro*, 220 F.3d at 256; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999).

The ALJ found the computed tomography (CT) scans establish complicated pneumoconiosis, 20 C.F.R. §718.304(c); Decision and Order at 17-26, while the x-rays, treatment records, and medical opinions do not. 20 C.F.R. §718.304(a), (c); Decision and Order at 14-16, 21-26. Weighing all the evidence together, he found the contrary evidence

[6] The offset provisions of the Act contemplate a reduction or offset of federal black lung benefits by any other state or federal award made on the basis of the miner's "death or partial or total disability due to pneumoconiosis." 20 C.F.R. §725.533(a)(1), (2). Employer does not allege Claimant obtained another state or federal award on the basis of partial or total disability due to pneumoconiosis. Further, in *Sammons*, the Board held that an award of benefits under FECA does not require an offset of a claimant's federal black lung benefits where the claimant's award under FECA was not based on total disability due to pneumoconiosis.

of record does not undermine the CT scan evidence of complicated pneumoconiosis.[7] Decision and Order at 26.

Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis based on the CT scan evidence. Employer's Brief at 5-11.

The ALJ considered six interpretations of five CT scans dated August 22, 2017, November 24, 2017, August 23, 2018, November 21, 2018, and March 18, 2019. Decision and Order at 17-26; Claimant's Exhibits 1, 3. Dr. Tarver interpreted each CT scan as "consistent with complicated coal worker's pneumoconiosis." Claimant's Exhibit 3. Dr. DePonte interpreted the March 18, 2019 CT scan as revealing a "large opacity of coal workers' pneumoconiosis in the form of progressive massive fibrosis . . . in the posterior segment of the right upper lobe approximately 3.7 by 2.2 centimeters on the axial images, extending vertically at least 5 centimeters." Claimant's Exhibit 1 at 1. She opined the opacity "would measure similar in size and greater than one centimeter on a standard chest radiograph (x-ray)." *Id.*[8]

The ALJ found the five CT scan readings by Dr. Tarver and the single CT scan reading by Dr. DePonte credible because the doctors "are highly qualified [Board-certified radiologists and B readers] and both clearly diagnosed the presence of complicated pneumoconiosis." Decision and Order at 20, 26. Based on Dr. DePonte's credible equivalency finding, he further found the mass seen on CT scan would show as an opacity greater than one centimeter if it were seen on a chest x-ray. *Id*. at 20. Employer does not challenge any of these findings on appeal. Thus, we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

In challenging the award of benefits, Employer raises an evidentiary limitations argument. It asserts the regulations limit Claimant to only one reading of each CT scan. Employer's Brief at 8-11. Because Claimant submitted readings of the March 18, 2019 CT scan from both Dr. Tarver and Dr. DePonte, it contends the ALJ impermissibly considered evidence in excess of the evidentiary limitations. *Id.*; *see* Claimant's Exhibits 1, 3. Employer further contends the ALJ's error requires that we vacate his finding the CT

[7] The ALJ found the record contains no biopsy evidence. 20 C.F.R. §718.304(b); Decision and Order at 17.

[8] Dr. DePonte also noted a two-and-one-half centimeter large opacity in the "left lower lobe that may represent a large opacity of complicated pneumoconiosis." Claimant's Exhibit 1.

scan evidence establishes complicated pneumoconiosis and remand this case for further consideration of this issue. Employer's Brief at 11.

Employer is correct that the parties are limited to "one reading or interpretation of each medical test or procedure to be submitted as affirmative evidence," including CT scans under 20 C.F.R. §718.304. *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-135 (2006) (en banc); *see* 20 C.F.R. §718.107. Claimant designated, as affirmative evidence, Drs. DePonte's and Tarver's interpretations of the March 18, 2019 CT scan. *See* Claimant's Evidence Form. Thus, the ALJ erred by allowing Claimant to submit two readings of the same CT scan. *Webber*, 23 BLR at 1-135; *Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004) (the evidentiary limitations set forth in the regulations are mandatory and, as such, are not subject to waiver).

Notwithstanding this error, we decline to remand this case for further consideration. As discussed above, Dr. DePonte's credible interpretation of the March 18, 2019 CT scan establishes both that 1) this CT scan is positive for complicated pneumoconiosis, and 2) the mass present on the scan would measure greater than one centimeter if seen on a chest x-ray. The record in this case includes no conflicting interpretations of this CT scan. Nor does the record contain *any* conflicting CT scan evidence – all five CT scans were read as positive for complicated pneumoconiosis and Dr. DePonte's reading of the March 18, 2019 CT scan, standing alone, is sufficient to establish complicated pneumoconiosis based on the CT scan evidence at 20 C.F.R. §718.304(c).

It is not necessary for us to remand this case to the ALJ so Claimant can clarify whether to designate Dr. DePonte's interpretation of the March 18, 2019 CT scan, which clearly meets his burden to establish entitlement to benefits, or Dr. Tarver's reading of the same scan, which lacks an equivalency statement.[9] We have little doubt Claimant would simply select the CT scan reading that would allow him to establish entitlement to benefits. Therefore, we decline to remand this case for the parties to redesignate their evidence and for the ALJ to reconsider the CT scan evidence, as the outcome on remand is foreordained. *See Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249 (6th Cir. 1995) ("If the

[9] Although Employer contends the ALJ should have excluded Dr. DePonte's CT scan reading, it concedes that Claimant designated both Dr. DePonte's and Dr. Tarver's readings of the March 18, 2019 CT scan as part of his affirmative evidence. Employer's Brief at 8. Employer has not explained why exclusion of Dr. DePonte's CT scan reading is mandated in this case.

outcome of a remand is foreordained, we need not order one."); *Sahara Coal Co. v. Director, OWCP* [*McNew*], 946 F.2d 554, 558 (7th Cir. 1991).

In light of the foregoing, we affirm the ALJ's finding that the CT scan evidence establishes complicated pneumoconiosis. 20 C.F.R. §718.304(c); Decision and Order at 20, 27. Moreover, we affirm, as unchallenged, the ALJ's determination that the contrary evidence of record does not undermine the CT scan evidence. *Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 256; *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.304; Decision and Order at 26. Thus, we affirm the ALJ's conclusion that Claimant established complicated pneumoconiosis. As it is also unchallenged, we affirm the ALJ's conclusion that Claimant's complicated pneumoconiosis arose out of coal mine employment. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.203.

**Commencement Date for Benefits**

The date for the commencement of benefits is the month in which Claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date is not ascertainable, benefits commence the month the claim was filed, unless evidence the ALJ credits establishes 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, 1119 n.4 (4th Cir. 1986); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). If the ALJ finds Claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304, the ALJ must determine whether the evidence establishes the onset date of complicated pneumoconiosis. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979).

The ALJ found the earliest credible evidence establishing the onset of Claimant's complicated pneumoconiosis is Dr. Tarver's August 22, 2017 CT scan, which the doctor read as positive for complicated pneumoconiosis. Decision and Order at 27; Claimant's Exhibit 3. Employer challenges this finding, arguing there is no statement from Dr. Tarver or any other physician specifically opining the mass Dr. Tarver identified on the August 22, 2017 CT scan would show as an opacity greater than one centimeter if it were seen on a chest x-ray. Employer's Brief at 12-13. Employer ignores, however, that the administrative law judge considered Dr. Tarver's readings in conjunction with Dr. DePonte's to find that both physicians' readings support "the presence of complicated pneumoconiosis," as Dr. DePonte specifically made an equivalency determination stating that the "[t]he large opacity would measure similar in size and greater than one centimeter on a standard chest radiograph (x-ray)" and "her findings and measurement of the large opacity were similar to, and consistent with, those of Dr. Tarver." Decision and Order at 20.

Dr. Tarver read the August 22, 2017 CT scan as revealing an opacity in the right upper lung measuring two and one-half centimeters that was consistent with complicated pneumoconiosis. Claimant's Exhibit 3. Dr. DePonte opined the March 18, 2019 CT scan revealed a large opacity in the right upper lung consistent with complicated pneumoconiosis. Claimant's Exhibit 1. Thus, substantial evidence supports a conclusion both doctors were discussing the same mass in the right upper lung. *Id*. As discussed above, the ALJ found Dr. DePonte's credible opinion establishes the right upper lung mass would show as an opacity greater than one centimeter if it were seen on a chest x-ray. Decision and Order a 20, 26. Contrary to Employer's argument, the ALJ permissibly found Dr. Tarver's August 22, 2017 CT scan reading establishes the onset of complicated pneumoconiosis because his diagnosis "was confirmed by his readings of subsequent CT scans, as well as the interpretation of Dr. DePonte." Decision and Order at 26; *see Scarbro*, 220 F.3d at 258; *Truitt*, 2 BLR at 1-204.

We therefore affirm the ALJ's determination that the date of commencement of benefits is August 2017. 20 C.F.R. §725.503(b); *Truitt*, 2 BLR at 1-204.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge