



BRB No. 15-0465 BLA

JAMES D. PERKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	DATE ISSUED: 08/31/2016
	)	
and	)	
	)	
SUNCOKE ENERGY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-05944) of Administrative Law Judge John P. Sellers, III,<sup>1</sup> rendered on a claim filed on May 20, 2010, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).<sup>2</sup> The administrative law judge determined that employer is the properly designated responsible operator and that claimant established twenty-three years and six months of underground coal mine employment. The administrative law judge also found that claimant established the existence of complicated pneumoconiosis arising out of coal mine employment, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding the irrebuttable presumption invoked at 20 C.F.R. §718.304, without adequately considering the evidence of a non-occupational cause of the abnormal radiographic findings. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.<sup>3</sup>

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.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated into the

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<sup>1</sup> The case was initially assigned to Administrative Law Judge Richard Stansell-Gamm, who conducted the hearing on February 27, 2014. Decision and Order at 2. Subsequently, the parties were notified that Judge Stansell-Gamm was retiring and the matter would be reassigned, to which no party had an objection. *Id.* The case was reassigned to Administrative Law Judge John P. Sellers, III (the administrative law judge), on April 13, 2015. *Id.*

<sup>2</sup> The record contains claims filed on May 7, 2001 and April 26, 2004. Because claimant withdrew these claims, his May 20, 2010 application for benefits is considered to be an initial claim. 20 C.F.R. C.F.R. §§725.306(b), 725.309.

<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding that employer is the properly designated responsible operator, and that claimant established twenty-three years and six months of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

<sup>4</sup> The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibits 3, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy yields massive lesions in the lung;<sup>5</sup> or (c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The United States Court of Appeals for the Fourth Circuit has held, “[b]ecause prong (A) sets out an entirely objective scientific standard’ - i.e., an opacity on an x-ray greater than one centimeter - x-ray evidence provides the benchmark for determining what under prong (B) is a ‘massive lesion’ and what, under prong (C), is an equivalent diagnostic result reached by other means.” *Scarbro v. E. Assoc. Coal Corp.*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000), *quoting Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999). The court has also held that a diagnosis of massive lesions, standing alone, can satisfy the “statutory ground” for invocation of the irrebuttable presumption at 20 C.F.R. §718.304(b). *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365, 23 BLR 2-374, 2-384 (4th Cir. 2006).

The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically invoke the irrebuttable presumption at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflicts, and make a finding of fact. *See Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-1143, 2-1145-46 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

## **I. X-ray Evidence**

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge weighed ten readings of five analog x-rays dated August 31, 2010, October 13, 2010, January 17, 2011, October 7, 2011, and November 7, 2011. Decision and Order at 5-6. The administrative law judge also considered two readings of a digital x-ray dated December

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<sup>5</sup> The administrative law judge noted correctly that the parties did not submit any biopsy evidence relevant to 20 C.F.R. §718.304(b). Decision and Order at 5.

13, 2012.<sup>6</sup> *Id.* at 6, 22. The administrative law judge initially observed that “greater weight may be accorded to x-ray interpretations of dually qualified physicians . . . over a physician who is only a B[ ]reader.” Decision and Order at 21, *citing Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984). The administrative law judge found that the August 31, 2010 x-ray is positive for complicated pneumoconiosis, crediting the two positive readings by Drs. DePonte and Alexander, dually qualified as Board-certified radiologists and B readers, over the one negative reading by Dr. Scott, also a dually qualified radiologist. Decision and Order at 21; Director’s Exhibits 15, 17, 21. The administrative law judge found that an October 13, 2010 x-ray, which appears in claimant’s treatment records, is positive for complicated pneumoconiosis, based on the uncontradicted positive reading of that film by Dr. DePonte.<sup>7</sup> Decision and Order at 21; Claimant’s Exhibit 11.

The administrative law judge determined that the January 17, 2011 x-ray is positive for complicated pneumoconiosis, crediting Dr. Alexander’s positive reading over the negative reading by Dr. Rosenberg, because Dr. Alexander is dually qualified and Dr. Rosenberg is a B reader. Decision and Order at 21; Claimant’s Exhibit 6; Employer’s Exhibit 2. The administrative law judge found that the October 17, 2011 x-ray is inconclusive, as it was interpreted as positive by Dr. DePonte, but as negative by Dr. Scott, each of whom is dually qualified. Decision and Order at 21; Claimant’s Exhibit 3; Employer’s Exhibit 6. Similarly, the administrative law judge found that the November 7, 2011 x-ray is inconclusive, because it was read as positive by Dr. DePonte, but as negative by Dr. Scott. Decision and Order at 21-22; Claimant’s Exhibit 5; Employer’s Exhibit 6.

The administrative law judge further determined that the sole digital x-ray, dated December 13, 2012, is positive for complicated pneumoconiosis, finding that Dr. DePonte’s positive reading outweighed the negative interpretation by Dr. Fino, because

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<sup>6</sup> The administrative law judge noted that the record also contains an interpretation by Dr. Ramakrishnan of an x-ray dated May 15, 2012, but found that it was entitled to “no probative weight” because Dr. Ramakrishnan did not use the ILO classification system, and it was unclear how he would have classified the x-ray using the system. Decision and Order at 22; Claimant’s Exhibit 11. Dr. Ramakrishnan noted “interval development of mass-like lesions, upper lobes, bilaterally. This may be the sequela of pneumoconiosis, however, [they] are clearly increased from previous CT of the chest in 2006.” Claimant’s Exhibit 11.

Dr. DePonte is dually qualified while Dr. Fino is only a B reader. Decision and Order at 22; Claimant's Exhibit 9; Employer's Exhibit 3.

In summary, the administrative law judge found that the analog x-rays dated August 31, 2010, October 13, 2010, and January 17, 2011, as well as the digital x-ray dated December 13, 2012, are positive for complicated pneumoconiosis. Decision and Order at 21-22. He further determined that the x-rays dated October 17, 2011 and November 7, 2011, are inconclusive as to the presence of the disease. *Id.* Weighing the x-ray evidence as a whole, the administrative law judge found "there is a preponderance of the evidence in favor of a finding of complicated pneumoconiosis." *Id.* at 22. The administrative law judge further stated that Dr. Scott's readings were entitled to less weight than the readings of Drs. DePonte and Alexander, as they "unequivocally diagnosed complicated pneumoconiosis[,] while Dr. Scott suggested numerous alternative causes in his interpretations." *Id.* The administrative law judge concluded, in light of "the greater number of unequivocal interpretations" by dually qualified physicians, that claimant "has satisfied his burden of proving complicated pneumoconiosis on the basis of the x-ray evidence." *Id.*

Employer contends that the administrative law judge did not give a valid reason for discrediting Dr. Scott's negative interpretations of the August 3, 2010, October 17, 2011, and November 7, 2011 x-rays. We disagree. To the extent that Dr. Scott identified opacities in claimant's lungs that measured one centimeter but attributed them to other alternative diseases, including tuberculosis, histoplasmosis, sarcoid fungal infection, Langerhans cell histiocytosis," the administrative law judge rationally found that Dr. Scott's x-ray readings were "equivocal" and entitled to less weight. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287, 24 BLR 2-269, 2-287 (4th Cir. 2010); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

We also reject employer's contention that the administrative performed only a "head count" of the positive and negative readings in concluding that claimant satisfied his burden of proof. The administrative law judge properly performed both a quantitative and qualitative analysis of the x-ray readings, taking into consideration the radiological qualifications of the interpreting physicians, and permissibly found that the preponderance of the readings by dually qualified physicians is positive for complicated pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003).

As an additional matter, we reject employer's assertion that Dr. DePonte's positive reading of the October 13, 2010 x-ray should not have been admitted into the record, based on claimant's counsel's statement at the hearing that "it doesn't appear we're offering" Dr. DePonte's interpretation as affirmative or rebuttal x-ray evidence. Hearing Transcript at 14. Because Dr. DePonte's reading of the October 13, 2010 x-ray appears

in claimant's treatment records, claimant was not required to designate that x-ray as part of his affirmative case or as rebuttal evidence under the evidentiary limitations set forth in 20 C.F.R. §725.414. 20 C.F.R. §725.414(a)(4). Moreover, any error in the administrative law judge's consideration of Dr. DePonte's reading of the October 13, 2010 x-ray is harmless, as the administrative law judge's finding of complicated pneumoconiosis is supported by substantial evidence, as discussed *infra*, even if the October 13, 2010 x-ray reading is omitted. See *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1277 (1984).

Thus, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis based on the x-ray evidence pursuant to 20 C.F.R. §718.304(a).

## II. CT Scans

After determining that "CT scans are a medically acceptable technique for diagnosing the presence or absence of complicated pneumoconiosis, the administrative law judge considered six scans dated April 29, 2006, June 12, 2008, March 9, 2011, October 20, 2011, May 16, 2012, and June 29, 2012. Decision and Order at 23. The April 29, 2006 CT scan was read by Dr. Scott as showing small calcified granulomata, 0.5 to 1 centimeter subpleural nodules, and a low profusion of small opacities in the mid-upper lungs. Dr. Scott attributed the abnormalities to several different conditions, including histoplasmosis, tuberculosis (TB), sarcoidosis, and silicosis/coal workers' pneumoconiosis (CWP). Employer's Exhibit 8. He indicated that he "favored" histoplasmosis because it is the most common cause of calcified granulomata in hilar and mediastinal nodes. *Id.* The administrative law judge stated, "I find Dr. Scott's interpretations to be equivocal as he posited four alternative etiologies for the [c]laimant's lung process but never made a definitive diagnosis. I thereby accord his interpretations less weight. His interpretation fails to support a finding of complicated pneumoconiosis." Decision and Order at 23.

Dr. Ramakrishnan, a Board-certified radiologist, read the CT scan dated June 12, 2008, and diagnosed significant nodular interstitial fibrosis, and multiple partially calcified hilar and mediastinal lymph nodes, both of which were "suggestive" of CWP. Director's Exhibit 15. He measured the fibrotic nodules as ranging from 1 millimeter to 7 millimeters in size. *Id.* The administrative law judge found, "[a]lthough Dr. Ramakrishnan made a finding of [CWP], there is nothing in his reading upon which to base a finding of complicated pneumoconiosis. I therefore find that this reading is insufficient to establish the presence or absence of complicated pneumoconiosis." Decision and Order at 24.

The March 9, 2011 CT scan was read by Dr. Mullens, a Board-certified radiologist, as revealing multiple intermediate size hilar and subcarinal lymph nodes containing calcifications. Claimant's Exhibit 1. He also identified "numerous small interstitial nodules," but "no suspicious lung masses," and summarized his findings as consistent with CWP/silicosis. *Id.* Dr. Scott also read this scan and identified: 1 centimeter nodules in each apex; subpleural nodules measuring between .05 and 1 centimeter; a low to moderate profusion of small opacities; and several 1 centimeter nodules in both lungs. Employer's Exhibit 8. Dr. Scott attributed the changes to several differential diagnoses, including TB, histoplasmosis, sarcoidosis, or silicosis/CWP, with histoplasmosis being most likely. *Id.* The administrative law judge determined that the March 9, 2011 CT scan "is not sufficient to establish the presence or absence of complicated pneumoconiosis as Dr. Scott's impression was again equivocal, and, although Dr. Mullens noted his findings were consistent with [CWP], he did not make any finding of large masses." Decision and Order at 24.

With respect to the CT scan dated October 20, 2011, Dr. Coleman, a Board-certified radiologist, viewed nodules in the right and left upper lobes, measuring up to 11 millimeters, a conglomeration of lymph nodes measuring up to 3 centimeters, and a right perihilar lymph node measuring up to 2.6 centimeters. Claimant's Exhibit 2. Dr. Coleman stated that his findings comprised a "constellation consistent with pneumoconiosis," but he could not exclude an acute inflammatory process in the right upper lobe. *Id.* Dr. Scott also reviewed the October 20, 2011 scan, and observed small opacities in the lower and upper lobes, larger nodules measuring up to slightly greater than 1 centimeter between the levels of the carina to the aortic arch, bilateral subpleural nodules up to 1 centimeter in diameter, and hilar and mediastinal nodes containing calcified granulomata. Employer's Exhibit 8. Dr. Scott identified TB, histoplasmosis, sarcoid, or silicosis/CWP as possible diagnoses and again identified histoplasmosis as the most likely etiology. *Id.* The administrative law judge stated, "I find that the reading of this scan fails to establish complicated pneumoconiosis. Even though both doctors found large masses in the Claimant's lungs they both made equivocal findings regarding the etiology of the changes." Decision and Order at 25.

The CT scan dated May 16, 2012 was read by Dr. Ramakrishnan, who stated that it revealed multiple fibrotic nodules in the upper lobes bilaterally, which were "increased" from the 2006 CT scan; an air-space mass with ground-glass attenuation measuring 4.8 centimeters in the lower left lobe; calcified hilar and mediastinal lymph nodes; and a non-calcified sub-carinal adenopathy measuring 3.9 centimeters. Claimant's Exhibit 11. Dr. Ramakrishnan opined that many of the abnormalities "may be related to underlying pneumoconiosis given the calcified hilar and mediastinal adenopathy." *Id.* He stated that the 4.8 centimeter mass "may reflect a focal infectious process," and that "considerations should include tuberculosis or fungal infection," but a malignancy could not be excluded. *Id.* Dr. Scott also reviewed the May 16, 2012 scan and identified:

small opacities in the lower and upper lobes; several larger nodules, up to slightly greater than 1 centimeter, bilaterally between the levels of the carina to the aortic arch; several bilateral subpleural nodules, up to 1 centimeter in diameter, in the upper zones; and hilar and mediastinal nodes containing calcified granulomata. Employer's Exhibit 8. Dr. Scott again stated that the changes had several possible causes, including TB, histoplasmosis, sarcoid, or silicosis/CWP, with histoplasmosis being the most likely etiology. *Id.* The administrative law judge found, "the reading of this scan fails to establish complicated pneumoconiosis. Even though both doctors found large masses in the [c]laimant's lungs[,] they both made equivocal findings regarding the etiology of the changes." Decision and Order at 25.

Dr. Mitchell J. Mendrek, a Board-certified radiologist, read the June 29, 2012 CT scan and made findings of multiple bilateral pulmonary parenchymal and pleural nodules scattered throughout both lungs. Claimant's Exhibit 11. He measured the largest nodules as "about one centimeter" and observed calcified lymph nodes in both hilar regions. *Id.* Dr. Mendrek summarized his findings as a "re-demonstration of multiple bilateral pulmonary and pleural based nodules predominantly in the upper lung fields." *Id.* He also opined that the "stability" in the lung changes since the October 20, 2011 CT scan suggested a benign inflammatory process such as pneumoconiosis. *Id.* The administrative law judge found that this reading failed to establish complicated pneumoconiosis because "[a]lthough Dr. Mendrek made a finding of [CWP] and noted the presence of nodules measuring about one centimeter, he did not make any finding of complicated pneumoconiosis or note how the nodules would appear when viewed on an x-ray." Decision and Order at 25.

Upon weighing the CT scan evidence together, the administrative law judge concluded:

[It] is clear from the CT scans that there are certain large masses in the [c]laimant's lungs, but it is unclear what these masses are or if the masses would create the equivalent of an opacity greater than [one centimeter] in diameter on a conforming chest x-ray. Overall the CT scan evidence, by itself, does not support a diagnosis of complicated pneumoconiosis. However, the CT scan evidence does not rule out the presence of complicated pneumoconiosis[] either, but is inconclusive on the issue. Moreover, the CT scan evidence supports the chest x-ray findings of large opacities [in] the [c]laimant's lungs.

Decision and Order at 25.

Employer asserts that the administrative law judge failed to properly consider evidence in the record supporting Dr. Scott's opinion that claimant's lung abnormalities



are due to an infectious or granulomatous disease process. Employer maintains that Dr. Ramakrishnan's references to a "focal infectious process," "tuberculosis," and "fungal infection," in his interpretation of the May 16, 2012 CT scan, establish an etiology other than complicated pneumoconiosis for claimant's large opacities. Employer's Brief at 8-9, *quoting* Employer's Exhibit 7. In addition, employer asserts that the administrative law judge erred in failing to credit the CT scan interpretations that make no mention of complicated pneumoconiosis as "negative" readings, based on the Board's holding in *Marra v. Consol. Coal Co.*, 7 BLR 1-216 (1984) ("[A]n administrative law judge may generally assume that if the physician . . . does not mention pneumoconiosis, then it is not present."). Employer's Brief at 11, *quoting Marra*, 7 BLR at 1-218-19. Employer's assertions of error are rejected as without merit.

We see no error in the administrative law judge's determination that Dr. Ramakrishnan's comments, that the May 16, 2012 CT scan "*may* reflect a focal infectious process" or "considerations should include tuberculosis or fungal infection," and "dominant malignancy *cannot be excluded*," do not preclude a finding of complicated pneumoconiosis, as those comments fail to definitively establish that the claimant's radiographic abnormalities are due to an infectious process, rather than complicated pneumoconiosis. Claimant's Exhibit 11 (emphasis added); *see Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); Decision and Order at 24-25. Similarly, the administrative law judge rationally found that the CT scans dated April 29, 2006, March 9, 2011, October 20, 2011, and June 29, 2012, also do not preclude a finding of complicated pneumoconiosis, insofar as Dr. Scott rendered differential diagnoses regarding the source of the abnormalities he observed in claimant's lungs, and Drs. Coleman, Ramakrishnan, Mendrek, and Scott identified masses measuring from 1 to 4.8 centimeters. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287, 24 BLR 2-269, 2-287 (4th Cir. 2010); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 23-24.

Employer's reliance on *Marra* is also unavailing. In *Marra*, the Board held that whether an x-ray interpretation that is silent as to the existence of pneumoconiosis constitutes a negative reading is an issue for the administrative law judge to decide in his or her role as fact-finder. *Marra*, 7 BLR at 1-219. As we held *supra*, the administrative law judge rationally determined that the physicians who performed CT scan readings in which they attempted to attribute the abnormalities to multiple conditions unrelated to pneumoconiosis were entitled to little weight because they were equivocal. Moreover, we affirm the administrative law judge's finding that the preponderance of the remaining CT scan interpretations did not preclude a finding of complicated pneumoconiosis because the readers identified masses that support the x-ray findings of large opacities. Accordingly, we affirm the administrative law judge's determination that the CT scan

evidence “does not rule out the presence of complicated pneumoconiosis.” Decision and Order at 25; *see Cox*, 602 F.3d at 287, 24 BLR at 2-287; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

### III. Medical Opinion Evidence

Weighing the medical opinion evidence at 20 C.F.R. §718.304(c), the administrative law judge credited the diagnoses of complicated pneumoconiosis rendered by Drs. Al-Khasawneh, Splan, and Gallai, finding that “[t]hey obtained a thorough understanding of the [c]laimant’s symptomatology and personal medical history” from their examinations of claimant, objective studies, chest x-ray interpretations of Dr. DePonte, and knowledge of claimant’s coal mine employment. Decision and Order at 26; Director’s Exhibit 21; Claimant’s Exhibits 3, 5. The administrative law judge further stated, it is “reasonable to infer that all these components factored into their diagnostic impression, and therefore I do not conclude that their diagnoses of complicated pneumoconiosis were merely restatements of the x-rays.” Decision and Order at 26-27.

In contrast, the administrative law judge accorded “little probative weight” to Dr. Rosenberg’s opinion, that claimant has simple but not complicated pneumoconiosis, because Dr. Rosenberg was equivocal as to whether the large masses observed on the CT scans represented progressive massive fibrosis (PMF) or granulomatous disease. Decision and Order at 27, *quoting* Employer’s Exhibits 4, 9, 11. The administrative law judge also rejected Dr. Fino’s opinion, that claimant does not have simple or complicated pneumoconiosis, as being “not well-reasoned and against the weight of the medical evidence of record.” Decision and Order at 28. Specifically, the administrative law judge found that Dr. Fino “offered no explanation” for concluding that there is insufficient evidence to diagnose clinical pneumoconiosis, in light of the numerous x-ray interpretations that were positive for both simple and complicated pneumoconiosis. *Id.* The administrative law judge also found that Dr. Fino “offered no support for his opinion that claimant’s lungs looked ‘a lot more like granulomatous disease’ and he failed to explain why a diagnosis of granulomatous disease necessarily precluded a diagnosis of pneumoconiosis.” *Id.* Finally, the administrative law judge concluded that Dr. Fino’s opinion was “speculative, as there is no evidence on record that [c]laimant had ever been treated for granulomatous disease.” *Id.*

The administrative law judge also considered treatment records from Dr. McSharry, claimant’s treating pulmonologist. Decision and Order at 28; Claimant’s Exhibits 1, 11. The administrative law judge stated:

When weighing Dr. McSharry’s medical opinion, I find while it does not support that the [c]laimant suffers from complicated pneumoconiosis, it does shed some helpful light on the etiology of the masses in his lungs. . . .

Dr. McSharry offered an opinion that a large mass that formed in May of 2012 was related to pneumonia; however, he continued to simultaneously conclude that the [c]laimant was suffering from pneumoconiosis.

Decision and Order at 29. Therefore, weighing all of the relevant evidence together at 20 C.F.R. §718.304(c), the administrative law judge determined that claimant established the existence of complicated pneumoconiosis, based on the medical opinion evidence. *Id.* at 30.

Employer argues that the opinions of Drs. Al-Khasawneh, Splan, and Gallai are not reasoned and documented when weighed with the contrary probative evidence of record because they did not consider evidence of an alternative disease process or explain how the other evidence supported a diagnosis of complicated pneumoconiosis. Employer also maintains that the administrative law judge did not provide a valid reason to infer that the physicians' examinations of claimant, objective studies, chest x-ray interpretations of Dr. DePonte, and knowledge of claimant's coal mine employment "factored into their diagnosis of complicated pneumoconiosis." Employer's Brief at 18, *quoting* Decision and Order at 26-27. Employer further asserts that the opinions of Drs. Rosenberg and Fino establish that claimant does not have complicated pneumoconiosis, when properly considered with the CT scans and treatment records. In addition, employer cites the absence of diagnoses of complicated pneumoconiosis by Drs. McSharry and Mahmood, claimant's treating physicians. We reject employer's arguments as without merit.

Contrary to employer's contention, the administrative law judge acted within his discretion in giving greater weight to the opinions of Drs. Al-Khasawneh, Splan, and Gallai because their diagnoses of complicated pneumoconiosis are supported by the x-ray evidence, claimant's coal mine employment history, objective studies, and their physical examinations of claimant. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; Decision and Order at 26-27; Director's Exhibit 21; Claimant's Exhibits 3, 5. Dr. Al-Khasawneh was aware of claimant's last coal mine employment, his medical and smoking histories, and his present symptoms and medications. Director's Exhibit 21. He also performed a physical examination of claimant and conducted pulmonary function and blood gas studies in reaching his conclusion that claimant has progressive massive fibrosis accompanied by a severe pulmonary impairment, which is due to his coal mine employment. *Id.* Similarly, Dr. Splan was aware of claimant's work and smoking histories, performed a physical examination, and concluded that claimant has progressive massive fibrosis and a totally disabling respiratory impairment, as revealed by his pulmonary function studies. Claimant's Exhibit 3. Dr. Gallai also examined claimant, and opined that he has progressive massive fibrosis due to coal dust exposure, based on the high concentrations of dust he was exposed to during his coal mine employment. Claimant's Exhibit 5. In addition, Dr. Gallai opined that claimant is totally disabled by

moderately severe hypoxia and a mild to moderate obstructive impairment, as demonstrated by the results of claimant's objective studies. *Id.* Accordingly, we affirm the administrative law judge's decision to credit the diagnoses of progressive massive fibrosis rendered by Drs. Al-Khasawneh, Splan, and Gallai, as rational and supported by substantial evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274.

The administrative law judge also acted within his discretion in according little weight to Dr. Rosenberg's opinion that claimant does not have complicated pneumoconiosis on the ground that it is equivocal. As the administrative law judge observed, Dr. Rosenberg stated:

[I]t is *possible* that large nodules represent the presence of progressive massive fibrosis and a granulomatous process is *possible* in view of the calcifications and ground glass changes. When all of the above information is looked at in total, [claimant] does have simple coal workers' pneumoconiosis without definite progressive massive fibrosis, *although it is a diagnostic consideration.*

Employer's Exhibit 4 (emphasis added; acronyms omitted); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577-78, 22 BLR 2-107, 2-123-24 (6th Cir. 2000); Decision and Order at 27.

With respect to Dr. Fino's opinion, the administrative law judge noted that "despite checking the box on the ILO form for the chest x-ray he reviewed [indicating] that [claimant] had parenchymal abnormalities consistent with pneumoconiosis, Dr. Fino then stated that the Claimant did not have pneumoconiosis at all but suffered from granulomatous disease." Decision and Order at 28. The administrative law judge rationally found that Dr. Fino's opinion was "against the overall weight of the x-ray evidence" which the administrative law judge found to demonstrate "that the [c]laimant had large opacities in his lungs consistent [with] complicated pneumoconiosis." *Id.* The administrative law judge also permissibly assigned less weight to Dr. Fino's opinion, finding that he offered no explanation why the numerous positive x-ray interpretations in the record were "insufficient evidence" of complicated pneumoconiosis, and rationally concluded that Dr. Fino failed to adequately explain why radiographic findings consistent with granulomatous disease would necessarily preclude claimant from also suffering from complicated pneumoconiosis. *Id.*; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Finally, the administrative law judge also permissibly concluded that Dr. Fino's opinion was "speculative" that claimant has granulomatous disease, as "there is no evidence on record that [c]laimant has ever been treated for granulomatous disease." Decision and

Order at 28; *see Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Cox*, 602 F.3d at 287, 24 BLR at 2-287.

Lastly, we reject employer's assertion that the administrative law judge erred in concluding that, while Dr. McSharry's opinion "does not support that [c]laimant suffers from complicated pneumoconiosis" because he did not specifically diagnose the disease, "it does shed some helpful light on the etiology of the masses" in claimant's lungs that have been diagnosed as complicated pneumoconiosis. Decision and Order at 29. In this regard, the administrative law judge observed correctly that while Dr. McSharry "offered an opinion that a large mass that formed in May of 2012 was related to pneumonia" he continued to report in his treatment notes that claimant had chronic lung abnormalities consistent with pneumoconiosis, which continued to be present after the mass attributable to pneumonia had resolved. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; Decision and Order at 28-29; Claimant's Exhibits 1, 11. We therefore affirm the administrative law judge's conclusion that Dr. McSharry "did not find that pneumonia was the sole cause of [c]laimant's lung masses." Decision and Order at 29.

Based on the foregoing, we affirm, as rational and supported by substantial evidence, the administrative law judge's finding that claimant established complicated pneumoconiosis, based on the medical opinion evidence at 20 C.F.R. §718.304(c). *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-1145-46.

#### **IV. The Evidence as a Whole**

Upon considering the totality of the evidence, the administrative law judge noted that the x-ray evidence is positive for complicated pneumoconiosis and further observed:

[W]hile the CT scans of record do not expressly indicate opacities or masses that would appear as greater than one centimeter if seen on x-ray, as required by *Scarbro*, many physicians interpreted CT scans as having changes consistent with coal workers' pneumoconiosis and identified nodules ranging from 1 [centimeter] up to 4.8 [centimeters] in [c]laimant's lungs, which lends credibility to the conclusion that the [c]laimant has a process in his lungs that shows up on an x-ray as an opacity of more than one centimeter in diameter, as reported by Drs. DePonte and Alexander.

Decision and Order at 30. The administrative law judge also determined that the positive x-ray evidence is further supported by the medical opinions of Drs. Al-Khasawneh, Splan, and Gallai, who offered "well-reasoned and well-documented diagnoses of complicated pneumoconiosis while Drs. Rosenberg and Fino did not diagnose complicated pneumoconiosis and instead offered speculative and equivocal impressions" concerning the cause of the abnormalities in claimant's lungs. *Id.* at 30-31. The

administrative law judge concluded that claimant satisfied his burden to establish the existence of complicated pneumoconiosis. *Id.* at 31. The administrative law judge further found that claimant was entitled to the presumption that his complicated pneumoconiosis arose out of his coal mine employment, pursuant to 20 C.F.R. §718.203(b), and that employer did not rebut the presumption. *Id.* Accordingly, the administrative law judge concluded that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *Id.*

Employer contends that the administrative improperly shifted the burden of proof to employer to rule out the presence of complicated pneumoconiosis in considering the evidence as a whole. Employer further alleges that the administrative law judge's errors in weighing the evidence at 20 C.F.R. §718.304 also affected his determination at 20 C.F.R. §718.203(b).

Employer's contention that the contrary probative evidence establishes that claimant's lung abnormalities are due to diseases other than complicated pneumoconiosis is without merit, given our holding that the administrative law judge rationally found that each category of evidence was insufficient to definitively establish an alternative etiology for the large opacities identified on x-ray. *See Cox*, 602 F.3d at 287, 24 BLR at 2-287. Consequently, we affirm the administrative law judge's determination that claimant established the existence of complicated pneumoconiosis arising out of coal mine employment by a preponderance of the evidence as a whole, and further affirm his finding that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §§718.203(b), 718.304; *see Perry*, 469 F.3d at 365, 23 BLR 2-374 at 2-384; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-1145-46; Decision and Order at 31.<sup>8</sup>

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<sup>8</sup> We also reject employer's contention that "[i]t is apparent that [the administrative law judge] shifted the burden of proof to employer to rule out complicated pneumoconiosis[.]" because employer has offered no support for this assertion. Employer's Brief at 21; *see Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge