U.S. Department of Labor

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

BRB No. 20-0175 BLA

JACKIE POTTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
D & D MINING COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 06/25/2021
	)	
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 Larry W. Price, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus and Michael Pusateri (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Sarah M. Hurley (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Larry W. Price's[1] Decision and Order Awarding Benefits (2018-BLA-05775) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on March 8, 2016.[2] Director's Exhibit 3.

The administrative law judge credited Claimant with eleven years and two months of coal mine employment, found the x-ray evidence established complicated pneumoconiosis, and found the complicated pneumoconiosis arose out of coal mine employment. He therefore 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), and awarded benefits.

On appeal, Employer argues the administrative law judge lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution.[3] It also argues the removal

[1] This claim was first assigned to Administrative Law Judge Loranzo Fleming, who presided at the hearing. Hearing Transcript. He later left the Department of Labor and the case was reassigned to Administrative Law Judge Larry W. Price (the administrative law judge). Decision and Order at 2.

[2] This is Claimant's second claim for benefits. Claimant's first claim, filed on August 20, 1986, was administratively closed. Director's Exhibits 1, 86. The Federal Records Center subsequently destroyed the file of Claimant's first claim. *See id.*

[3] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment

provisions applicable to Department of Labor (DOL) administrative law judges violate the separation of powers doctrine and render his appointment unconstitutional. Employer further contends the DOL's destruction of Claimant's prior claim file violates its due process rights. On the merits, Employer argues the administrative law judge failed to adequately explain how he weighed the x-ray evidence to find Claimant met his burden to establish complicated pneumoconiosis and further failed to consider relevant evidence.

The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging rejection of Employer's constitutional challenges to the administrative law judge's appointment and removal protections and its argument that destruction of the prior claim file violated its due process rights. Employer filed a reply brief to the Director's response, reiterating its arguments on the issues the Director addressed. Claimant filed a response brief, urging affirmance of the administrative law judge's award of benefits. Employer also filed a reply brief to address Claimant's response.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

Appointments Clause Challenge

Employer urges the Board to vacate the award and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018), "if one exists."[5] Employer's Brief at 9, 24. It

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of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6, 58; Hearing Transcript at 35-37.

[5] *Lucia* involved a challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC administrative law

acknowledges the Secretary of Labor ratified the prior appointments of all sitting DOL administrative law judges on December 21, 2017,[6] but maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment. *Id.* at 10.

The Director responds that the administrative law judge had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Response at 2-3. He also maintains Employer failed to demonstrate the Secretary's actions ratifying the appointment were improper. *Id.* at 3. We agree with the Director's position.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." *Marbury v. Madison*, 5 U.S. 137, 157 (1803). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with "the

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judges are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

[6] The Secretary of Labor issued a letter to the administrative law judge on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to Administrative Law Judge Price.

burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

Congress has authorized the Secretary to appoint administrative law judges to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Thus, at the time of the ratification of the administrative law judge's appointment, the Secretary had the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603.

Under the presumption of regularity, it is presumed the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all administrative law judges in a single letter but rather specifically identified Judge Price and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Price. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Price "as an Administrative Law Judge." *Id*. Having put forth no contrary evidence, Employer has not overcome the presumption of regularity.[7] *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340.

Based on the foregoing, we hold the Secretary's action constituted a valid ratification of the administrative law judge's appointment.[8] *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive

[7] While Employer notes the Secretary signed the ratification letter "with an autopen," Employer's Brief at 12, this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act").

[8] While Employer correctly states Executive Order 13843 applied only to future appointments, Employer's Brief at 14-15, the Executive Order does not state that the Secretary's 2017 ratification of the administrative law judge was impermissible or invalid. Employer has not explained how the Executive Order undermines the Secretary's ratification of the administrative law judge's appointment, which we have held constituted a valid exercise of his authority that brought the administrative law judge's appointment into compliance with the Appointments Clause.

ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" all its earlier actions was proper).

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded administrative law judges, generally asserting the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, relying on Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 14; Employer's Reply to Director at 6-8. Employer also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020). Employer's Brief at 13-14; Employer's Reply to Director at 4-5, 8.

In *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. As the Director notes, the Supreme Court expressly stated its holding did not address administrative law judges. *Free Enter. Fund*, 561 U.S. at 507 n.10; Director's Response at 4. Further, the majority in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S. Ct. at 2050 n.1. Finally, in *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch, where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[9] 140 S. Ct. at 2201.

Although Employer generally summarizes these cases, it has not explained how or why these legal holdings should apply to administrative law judges or otherwise undermine the administrative law judge's ability to hear and decide this case. Without explanation, Employer assumes that because limitations on removal are unconstitutional for certain executive branch officials performing executive functions, the same must be true for administrative law judges.[10] A reviewing court, however, should not "consider far-

[9] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

[10] In other cases Employer did not address, the Supreme Court has distinguished between officials performing executive functions and those performing purely adjudicatory

reaching constitutional contentions presented in [an off-hand] manner." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (refusing to consider argument that the Federal Trade Commission is unconstitutional because its members exercise executive powers, yet can be removed by the President only for cause). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional.

Due Process - Destruction of the Prior Claim Record

Employer argues its due process rights were violated because it did not have access to Claimant's initial claim file after the Federal Records Center destroyed it. Employer argues the DOL has the duty to preserve the record and failure to do so barred a determination of whether Claimant established a change in an applicable condition of entitlement in this subsequent claim and deprived it "of a host of potential defenses." Employer's Brief at 21-24. Thus, Employer asserts any liability for benefits must transfer to the Black Lung Disability Trust Fund (Trust Fund).[11] Employer's Brief at 24. We disagree.

In the absence of deliberate misconduct, "the mere failure to preserve evidence – evidence that may be helpful to one or the other party in some hypothetical future proceeding – does not violate [a party's right to due process]." *Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (rejecting coal mine operator's argument that due process is violated whenever the DOL loses or destroys evidence from a miner's prior claim). Instead, Employer must demonstrate it was deprived of a fair opportunity to mount

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functions. In *Wiener v. United States*, 357 U.S. 349 (1958), for example, the Court upheld limitations on removal for members of the War Claims Commission, which "receive[d] and adjudicate[d] according to law" personal injury and property damage claims arising from World War II. Similarly, in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court upheld removal limitations for members of the Federal Trade Commission, whose duties were "neither political nor executive, but predominantly quasi judicial and quasi legislative." *See Seila Law*, 140 S. Ct. at 2199 (comparing permissible removal protections for "multimember bodies" performing "quasi-judicial" or "quasi-legislative" functions with the President's "unrestrictable power . . . to remove purely executive officers").

[11] While Employer argues this claim should be transferred to the Black Lung Disability Trust Fund if benefits are awarded, it does not argue it was incorrectly identified as the responsible operator. Employer's Brief; Employer's Reply to Director; Employer's Reply to Claimant. Thus, we affirm, as unchallenged on appeal, the administrative law judge's finding that Employer is the responsible operator. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

a meaningful defense against the claim. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *Consol. Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999). As the United States Court of Appeals for the Tenth Circuit explained in *Oliver*, Employer must "demonstrate that the contents of [the] lost claim file were so vital to its case that it would be fundamentally unfair to make the company live with the outcome of this proceeding without access to those records." *Oliver*, 555 F.3d at 1219. Employer has not met this burden.

Employer first argues the destruction of the evidence from Claimant's prior claim deprived it of the opportunity to adequately evaluate whether Claimant established a change in an applicable condition of entitlement. Employer's Brief at 22. To obtain review of the merits of a subsequent claim, a claimant bears the burden of first establishing through new evidence that one of the applicable elements of entitlement that defeated entitlement in the prior claim has changed since that denial. 20 C.F.R. §725.309(c); *Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-59 (6th Cir. 2013); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

The administrative law judge found that by establishing complicated pneumoconiosis and invoking the Section 411(c)(3) irrebuttable presumption, Claimant established he is entitled to benefits and thus a change in an applicable condition of entitlement since the denial of his prior claim. Decision and Order at 2 n.3. He further indicated that given Claimant's prior claim file was "at least 30 years old" and the "Act recognizes that pneumoconiosis is a latent and progressive disease," Employer's "due process has not been deprived by the absence of [the prior claim] records . . . ." *Id.* Employer has not explained how the record from Claimant's prior claim, filed in 1986, is relevant to this current inquiry. *Oliver*, 555 F.3d at 1222-23.

Employer also alleges it was deprived of various potential defenses given it is unknown what was in the prior claim file. Employer's Brief at 22-24; Employer's Reply to Director at 11-13. There is no indication, however, that Employer was unable to develop evidence or obtain testimony regarding these issues. *Holdman*, 202 F.3d 873 at 883-84.

Therefore, we agree with the Director's position that Employer's due process argument is unpersuasive.[12] Employer has failed to demonstrate any specific prejudice

[12] Employer's reliance on *Island Creek Coal Co. v. Holdman*, 202 F.3d 873 (6th Cir. 2000) is misplaced. Employer's Brief at 22-23; Employer's Reply to Director at 11-13. In distinguishing *Holdman*, the United States Court of Appeals for the Tenth Circuit explained the district director "lost a critical part of the record (the transcript of the claimant's testimony) during an ongoing adjudication, making it impossible to evaluate the [administrative law judge's] findings on appeal." *Energy W. Mining Co. v. Oliver*, 555

resulting from the destruction of Claimant's prior claim file in this case. As the Director points out, Employer was timely notified of this subsequent claim as well as the existence of the prior claim, developed evidence, and participated in every stage of the adjudication. Director's Brief at 6. Accordingly, we reject Employer's assertion that its due process rights were violated and that liability for benefits should transfer to the Trust Fund.

Invocation of the Section 411(c)(3) Presumption

Section 411(c)(3) of the Act 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 an opacity 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 reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The administrative law judge must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis before finding Claimant has invoked the presumption. *Gray v. SLC Corp.*, 176 F.3d 382, 389-90 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge considered eight interpretations of four x-rays dated May 21, 2016, August 14, 2017, August 17, 2018, and March 19, 2019. 20 C.F.R. §718.304(a); Decision and Order at 20-21. As the administrative law judge summarized, all the physicians who read the x-rays were dually-qualified as Board-certified radiologists and B readers.

Dr. DePonte read the May 21, 2016 x-ray as positive for simple pneumoconiosis but negative for large opacities; Dr. Crum read the x-ray as positive for simple pneumoconiosis and a Category A large opacity, which he indicated "suggest[ed] complicated pneumoconiosis;" and Dr. Meyer read the x-ray as negative for both simple and complicated pneumoconiosis. Director's Exhibits 24, 31-32; Decision and Order at 20. The administrative law judge found all three doctors had similar radiological qualifications, as well as similar educational and professional backgrounds. Decision and Order at 20.

F.3d 1211, 1221 (10th Cir. 2009) (internal quotations omitted). The Board instructed the administrative law judge to reconstruct the record because it could not conduct meaningful review because of the deficiency; moreover, the administrative law judge concluded the missing evidence "was critical to the resolution of the claim" and "the case could not fairly be resolved without it." *Id.* In contrast, the loss of a prior denied claim remote in time "cannot be said to be similarly critical to [the] adjudication" of a subsequent claim. *Oliver*, 555 F.3d at 1221.

He then stated that "[a]s discussed below, the undersigned finds that this chest x-ray is positive for complicated and simple pneumoconiosis." *Id.* The discussion to which the administrative law judge referred was his analysis of the final two x-rays. We will therefore return to this finding after discussing his analysis of the remaining x-rays.

Dr. Meyer read the August 14, 2017 x-ray as negative for simple and complicated pneumoconiosis. Employer's Exhibit 1. Because Dr. Meyer's reading was uncontradicted, the administrative law judge found the August 14, 2017 x-ray negative for simple and complicated pneumoconiosis. Decision and Order at 20.

Drs. Crum and Meyer provided conflicting readings of the two most recent x-rays. Dr. Crum read the August 17, 2018 and March 19, 2019 x-rays as positive for simple pneumoconiosis and Category B large opacities, while Dr. Meyer read the same two x-rays as negative for both simple and complicated pneumoconiosis. In a narrative report accompanying his reading of the August 17, 2018 x-ray, Dr. Meyer noted a "[b]and-like airspace opacity in the right upper zone is new compared with 2016 and stable compared with 2017," and most likely represented post-inflammatory scarring. Employer's Exhibit 2. He also noted "a new focus of airspace opacity in the left mid zone compared with the 2017 chest radiograph." *Id.* In a narrative report accompanying his reading of the March 19, 2019 x-ray, Dr. Meyer commented that "[t]he previously noted left mid zone airspace opacity has cleared with parenchymal bands." Employer's Exhibit 11.

The administrative law judge discredited Dr. Meyer's negative readings of the August 17, 2018 and March 19, 2019 x-rays because he found them inconsistent. He noted Dr. Meyer's observation that on the August 17, 2018 x-ray "there was a '[b]and-like airspace opacity in the ***right upper zone*** [that was] new compared with 2016 and stable compared with 2017, likely post-inflammatory scarring.'" Decision and Order at 21 (quoting Employer's Exhibit 2 at 2, emphasis by administrative law judge). The administrative law judge further noted, "[h]owever, in his later interpretation of the March 19, 2019 chest x-ray, Dr. Meyer opined that 'the ***previously noted left mid zone*** airspace opacity has cleared . . . ." Decision and Order at 21 (quoting Employer's Exhibit 11 at 1, emphasis by administrative law judge). Because of "Dr. Meyer's inconsistent radiographic reports," the administrative law judge gave his readings "little weight" and found the August 17, 2018 and March 19, 2019 x-rays "should not be interpreted to be negative . . . based on Dr. Meyer's unpersuasive interpretations." Decision and Order at 21. The administrative law judge further found Dr. Crum's positive interpretations of the May 21, 2016 x-ray (Category A large opacities) and the August 17, 2018 and March 19, 2019 x-rays (Category B large opacities) were "consistent with the Preamble that pneumoconiosis is a progressive and irreversible disease." *Id.*

Finding three positive x-rays and one negative x-ray, the administrative law judge found the preponderance of the x-ray evidence established complicated pneumoconiosis. He reiterated that he gave Dr. Meyer's interpretations little weight because his opinion on the location of the airspace opacity was "unreliable." Decision and Order at 22. In contrast, he found Dr. Crum's readings consistent, "lend[ing] support to the conclusion he correctly reported large opacities." *Id*. The administrative law judge found the x-ray evidence was determinative regarding the existence of complicated pneumoconiosis because there was no autopsy, biopsy, or evidence by "other means." Decision and Order at 20. He therefore found Claimant established complicated pneumoconiosis. *Id.* at 22.

Employer asserts the administrative law judge did not adequately explain how he weighed the x-ray evidence to find it established complicated pneumoconiosis and mischaracterized certain readings by Dr. Meyer. Employer's Brief at 17-20; Employer's Reply to Claimant at 3. Employer further argues the administrative law judge failed to consider and weigh the medical opinion evidence when making his findings. Employer's Brief at 20-21; Employer's Reply to Claimant at 4. We agree.

Employer's argument that the administrative law judge did not adequately explain why he credited Dr. Crum's reading of the May 21, 2016 x-ray over those of Drs. DePonte and Meyer has merit. Employer's Brief at 19-20. While the administrative law judge found Dr. Meyer's readings of the 2018 and 2019 x-rays undermined, he provided no reason for also finding Dr. Meyer's negative reading of the May 2016 x-ray undermined. *See* Decision and Order at 20-22. Similarly, the administrative law judge provided no reason for discrediting Dr. DePonte's reading finding only simple, but not complicated, pneumoconiosis on the May 2016 x-ray. *Id.* In addition, while the administrative law judge found Dr. Crum's overall readings to be consistent with the principle that pneumoconiosis is a progressive disease, this is not an adequate basis to credit his reading over the conflicting readings of the same x-ray, which is also the oldest x-ray of record.[13] *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (appropriate to provide more weight to more recent, positive x-ray evidence given pneumoconiosis is a latent and progressive disease). Further, to the extent the administrative law judge gave Dr. Crum's readings greater overall weight than Dr. Meyer's readings because he found Dr. Meyer's

[13] Contrary to Employer's argument that the administrative law judge is not permitted to consult the preamble to the revised regulations in making credibility determinations in general, the courts have held an administrative law judge may evaluate expert opinions in conjunction with the DOL's discussion of the prevailing medical science set forth in the preamble. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801 (6th Cir. 2012); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012).

readings inconsistent, as we discuss below, the administrative law judge failed to consider Dr. Meyer's readings in their entirety before finding them inconsistent.

Because the administrative law judge found all three physicians to be similarly qualified,[14] yet provided no valid basis for finding Dr. Crum's reading of the May 2016 x-ray outweighed the two conflicting readings regarding complicated pneumoconiosis, and failed to explain how the readings for simple pneumoconiosis warranted more weight than the negative reading, he failed to make adequate findings in determining this x-ray was positive for both simple and complicated pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305-06 (6th Cir. 2005) (an administrative law judge must adequately explain the reason for crediting certain evidence over other evidence); *Peabody Coal Co. v. Hill*, 123 F.3d 412, 415 (6th Cir. 1997) (same). Thus, we vacate the administrative law judge's finding that the May 21, 2016 x-ray is positive for simple and complicated pneumoconiosis.

We also agree with Employer's argument that the administrative law judge erred in finding Dr. Meyer's interpretations of the August 2018 and March 2019 x-rays are inconsistent. The administrative law judge relied on Dr. Meyer's reference to an airspace opacity in the right upper zone in the 2018 x-ray and a reference to a different location—the left mid zone—in the 2019 x-ray to find his readings inconsistent. As we summarized above, however, Dr. Meyer's interpretation of the 2018 x-ray noted not only an airspace opacity in the right upper zone, as the administrative law judge indicates, but also an airspace opacity in the left mid zone:

> Band-like airspace opacity in the right upper zone is new compared with 2016 and stable compared with 2017, likely post-inflammatory scarring. There is **a new focus of airspace opacity in the left mid zone** compared with the 2017 chest radiograph.

Employer's Exhibit 2 (emphasis added). Because the administrative law judge did not consider the entirety of Dr. Meyer's opinion in finding his readings of the 2018 and 2019 x-rays inconsistent, his sole basis for discrediting Dr. Meyer's readings, we vacate his

[14] Employer also submits that Dr. Meyer's opinion warrants more weight than Dr. Crum's given his status as a "published professor of radiology." Employer's Brief at 17. However, review of the record reflects Employer did not raise this issue below. Moreover, while the administrative law judge may give greater weight to an expert with "superior" qualifications, such as a professorship in radiology, he is not required to do so. *See Melnick v. Consol. Coal Co.*16 BLR 1-31, 1-36-37 (1991) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-154 (1989) (en banc).

determination that Dr. Meyer's readings of these x-rays are undermined.[15] *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985) (if the administrative law judge misconstrues relevant evidence, the case must be remanded for reevaluation of the issue to which the evidence is relevant); *see also Wright v. Director, OWCP*, 7 BLR 1-475, 1-477 (1984) (an administrative law judge must not selectively analyze the evidence). Thus, we also vacate the administrative law judge's determination that the 2018 and 2019 x-rays are positive for both simple and complicated pneumoconiosis.

In weighing the x-ray evidence together, the administrative law judge found "three positive chest x-rays in the record and one negative chest x-ray," and found this evidence established complicated pneumoconiosis by a preponderance of the evidence. Decision and Order at 22. We must vacate this finding given our holdings regarding the 2016, 2018, and 2019 x-ray readings.

Finally, as Employer correctly asserts, the administrative law judge did not consider the medical opinion evidence[16] in finding complicated pneumoconiosis established. Employer's Brief at 4, 21; Decision and Order at 20; Director's Exhibit 24; Employer's Exhibits 7-8, 12-13. Because the administrative law judge failed to weigh all the relevant evidence, we must vacate his finding that a preponderance of the evidence establishes simple and complicated pneumoconiosis and that Claimant invoked the irrebuttable presumption. *See* 30 U.S.C. §923(b); *Gray*, 176 F.3d at 389-90; *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (failure to discuss relevant evidence requires remand); 20 C.F.R. §§718.202, 718.304; Decision and Order at 22. We therefore

[15] Claimant argues that even if the administrative law judge erred in repeating the locations of the airspace opacities noted in Dr. Meyer's x-ray reports, "there is no denying that the stable 'band-like airspace opacity in the right upper zone' that he saw in the August 17, 2018 x-ray is not mentioned in his reading of the March 19, 2019 x-ray" and "[p]erhaps the [administrative law judge's] doubts centered around the nearly magical 2019 disappearance of the right upper lobe airspace opacity." Claimant's Brief at 6. The administrative law judge, however, did not indicate the absence of the right upper zone opacity in Dr. Meyer's interpretation of the 2019 x-ray was the basis for his finding his interpretations inconsistent. We cannot fill in the gaps of the administrative law judge's decision. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

[16] Dr. Raj diagnosed Claimant with simple pneumoconiosis only. Director's Exhibit 24. Dr. Rosenberg opined that Claimant does not have simple or complicated pneumoconiosis. Employer's Exhibits 7 at 4-11; 13 at 2. Dr. Vuskovich opined that Claimant has simple but not complicated pneumoconiosis. Employer's Exhibits 8 at 19; 12 at 5.

also vacate his finding that Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

On remand, the administrative law judge must reconsider the interpretations of the 2016, 2018, and 2019 x-rays, then weigh all the x-ray evidence together to determine if it establishes complicated pneumoconiosis, providing valid bases for his determinations. 20 C.F.R. §718.304(a); *Staton v. Norfolk & W. Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995). The administrative law judge must also consider the medical opinion evidence. *See* 20 C.F.R. §718.304(c). He should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). The administrative law judge must weigh together all the relevant evidence before determining whether Claimant invoked the Section 411(c)(3) presumption. 20 C.F.R. §718.304; *see Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33. The administrative law judge must further adequately explain his bases for resolving the conflicts in the evidence. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

If the administrative law judge finds Claimant has met his burden to establish complicated pneumoconiosis, Claimant will have invoked the irrebuttable presumption of total disability due to pneumoconiosis and established his entitlement to benefits. If, however, the administrative law judge finds Claimant cannot invoke the irrebuttable presumption, he must consider whether Claimant can establish entitlement to benefits absent the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge