BRB No. 04-0812 BLA

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<tr><td>JAMES E. HARRIS

Claimant-Respondent

v.

OLD BEN COAL COMPANY

Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest</td><td>)
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DECISION and ORDER
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Appeal of the Decision and Order – Awarding Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

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

Mark Solomons and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Michelle S. Gerdano and Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH, McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order – Awarding Benefits (02-BLA-5251) of Administrative Law Judge Edward Terhune Miller (the administrative law judge) with respect to a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The

administrative law judge accepted the parties' stipulation to twenty-nine years of coal mine employment and noted that the claim before him, filed on May 23, 2001, was a subsequent claim pursuant to 20 C.F.R. §725.309(d).[1] The administrative law judge determined that claimant established a change in an applicable condition of entitlement, as the newly submitted evidence supported a finding of total disability under 20 C.F.R. §718.204(b). On the merits of entitlement, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment and that he is totally disabled due to pneumoconiosis. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in his consideration of medical opinions that referred to evidence exceeding the limitations set forth in 20 C.F.R. §725.414. Employer also contends that the administrative law judge erred in finding a change in an applicable condition of entitlement established under 20 C.F.R. §725.309(d) and in finding in claimant's favor on the merits pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), and 718.204(c). Finally, employer challenges the administrative law judge's finding regarding the date of onset. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, requesting that the Board find merit in employer's argument that the administrative law judge did not adequately explain his decision to give little weight to Dr. Wiot's negative reading of a digital x-ray. Oral argument was held on this case in Chicago, Illinois, on September 23, 2005.[2] Employer and the Director submitted oral argument briefs in support of their positions. Following oral argument, employer submitted a supplemental brief.

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[1] Claimant filed his first application for benefits on August 20, 1985. In a letter dated December 16, 1985, the district director denied the claim because claimant did not establish any of the elements of entitlement. Director's Exhibit 1. Claimant took no further action until filing a second application for benefits on May 23, 2001. Director's Exhibit 2.

[2] The issues set for oral argument were: (1) Where the administrative law judge excludes medical evidence as exceeding the evidentiary limitations set forth in 20 C.F.R. §725.414, what action should the administrative law judge take when the parties submit medical reports that refer to evidence that was excluded under 20 C.F.R. §725.414? (2) Where the regulations are silent regarding the treatment of digital x-rays, should the administrative law judge address the readings of digital x-rays under 20 C.F.R. §718.202(a)(1), or under 20 C.F.R. §718.107, which provides for the submission of other medical evidence? *Harris v. Old Ben Coal Co.*, BRB No. 04-0812 BLA (Aug. 18, 2005)(unpub. Order).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We will first address the issues discussed at oral argument. The first question concerned the appropriate action for an administrative law judge to take when a physician refers to inadmissible evidence in an otherwise admissible medical report. At the hearing in this case, employer acknowledged that Employer's Exhibits 2-7 included x-ray interpretations that exceeded the limitations established by Section 725.414[3] and that Drs. Renn and Repsher referred to these readings in the reports in which they stated that claimant does not have pneumoconiosis and is not totally disabled by pneumoconiosis. Claimant objected to the admission of the x-ray readings but noted that one of his experts, Dr. Cohen, who diagnosed pneumoconiosis, viewed one of the inadmissible x-ray interpretations. Hearing Transcript at 65-67, 71.

The applicable regulation provides that each x-ray mentioned in a medical report must be admissible under Section 725.414(a), or 725.414(a)(4), which provides for the admission of hospital and treatment records.[4] 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i). The regulations are silent as to what an administrative law judge should do when evidence that exceeds the limitations is referenced in an otherwise admissible medical opinion.

The administrative law judge initially suggested that both the medical reports and x-ray readings be admitted under the "good cause" exception. The administrative law judge asserted that attempting to sort out the inadmissible documentation would be too onerous and that because both parties were in the same position, no prejudice would result from admitting all of the opinions and crediting them in full. *Id*. at 67. Claimant's

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[3] Pursuant to revised 20 C.F.R. §725.414, a claimant and the responsible operator are each permitted to submit two x-ray readings in support of their affirmative case and one reading in rebuttal of each reading submitted in the opposing party's affirmative case. 20 C.F.R. §§725.414(a)(2)(i),(a)(3)(i), 725.414(a)(2)(ii),(a)(3)(ii). If rebuttal evidence is submitted, the party that proffered the affirmative evidence may submit, as rehabilitative evidence, an additional statement from the physician who originally interpreted the x-ray. *Id*.

[4] Evidence in excess of the numerical limits may be admitted upon a showing of good cause. 20 C.F.R. §725.456(b)(1). None of the parties in this appeal argues that the excess x-ray readings or the entirety of the reports of Drs. Cohen, Renn, and Repsher should be admitted and accorded full weight under the "good cause" exception.

attorney noted that Section 725.414(a)(2)(i) requires that a medical report be based upon admissible evidence. *Id*. at 68. The parties discussed excluding the reports, redacting the portions in which the inadmissible x-rays were discussed, or asking the physicians to submit new reports. The administrative law judge decided to exclude the x-ray readings based upon claimant's objection and admit the medical reports of Drs. Cohen, Renn, and Repsher. *Id*. at 73.

In his Decision and Order, the administrative law judge found that Dr. Cohen's reference to a single inadmissible x-ray interpretation was "inconsequential, because he did not rely on the negative x-ray reading, finding that claimant had pneumoconiosis." Decision and Order at 3-4. The administrative law judge explicitly rejected employer's request to redact the reports of Drs. Renn and Repsher, indicating that employer's request was "untimely and without justification." *Id*. at 4. The administrative law judge further found that:

> The reviews of the excluded x-ray readings by Dr. Renn and Dr. Repsher are also in violation of §725.414, but because those doctors relied on the negative x-ray readings in opining that Claimant did not have pneumoconiosis, **their opinions will be deemed tainted and given less weight, rather than excluded**, because no sanction is specified for such violations and, in this instance the opinions are deemed to retain some probative value. . . . This tribunal has declined [the option of excluding all three reports], having concluded that each report can be weighed with due regard to the breach of regulatory limitations and impairment of the report's credibility by the doctor's impermissible consideration of certain evidence in this instance.

Id. (emphasis supplied). The administrative law judge relied upon this finding in determining that the medical opinion evidence supported a finding of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 18.

Employer argues on appeal that the administrative law judge's determination that the opinions of Drs. Renn and Repsher were tainted and entitled to less weight is irrational, as the administrative law judge discredited the opinions that are actually supported by a greater quantum of evidence. Employer further alleges that, pursuant to the decision of the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. Durbin*, 165 F.3d 1126, 21 BLR 2-538 (7th Cir. 1999), the administrative law judge was required to fully credit the opinions of Drs. Renn and Repsher.[5] Employer also

[5] The record indicates that claimant's coal mine employment occurred in Illinois. Director's Exhibits 1, 2. Accordingly, this case arises within the jurisdiction of the

contends that the administrative law judge erred in finding that Drs. Renn and Repsher relied upon the excluded x-ray evidence in finding that claimant does not have pneumoconiosis. Finally, employer maintains that because the limitations apply equally to both parties, the administrative law judge should have discredited Dr. Cohen's opinion, excluded all three reports, or asked the doctors for an opinion in which they do not refer to the excess x-ray readings. Claimant argues that the administrative law judge acted appropriately. The Director maintains that the administrative law judge's findings were within his discretion.

Employer contends that the decision of the United States Court of Appeals for the Seventh Circuit in *Durbin* required the administrative law judge to fully credit the opinions of Drs. Renn and Repsher despite their reliance upon evidence that exceeded the evidentiary limitations. In *Durbin*, the court held that, consistent with Federal Rule of Evidence 703, a medical opinion can be fully credited, even if the physician refers to items that are not in the record, "provided that they are the sort of thing on which a responsible expert draws in formulating a professional opinion." 165 F.3d at 1128, 21 BLR at 2-543. The court also indicated that there was "[n]othing in the statutes or regulations applicable to such cases" that supported the administrative law judge's decision to "impose tighter limits on expert witnesses in black lung cases than the Federal Rules of Evidence impose in ordinary civil and criminal trials." *Id*.

The adoption of the evidentiary limitations set forth in Section 725.414 materially altered the context within which the Seventh Circuit decided *Durbin*, however, as the Department of Labor (DOL) has now explicitly set forth regulations designed to promote fairness and administrative efficiency by restricting the amount of evidence that the parties can submit. 20 C.F.R. §725.414. Within this new regulatory framework, requiring an administrative law judge to fully credit an expert opinion based upon inadmissible evidence could allow the parties to evade both the letter and the spirit of the new regulations by submitting medical reports in which the physicians have reviewed evidence in excess of the evidentiary limitations. We reject, therefore, employer's argument that the Seventh Circuit's decision in *Durbin* constitutes controlling precedent with respect to the issue of whether the administrative law judge acted properly in weighing the opinions of Drs. Cohen, Renn, and Repsher in this case arising under the amended regulations.

As the adjudication officer empowered to conduct formal hearings and render decisions under the Act, an administrative law judge is granted broad discretion in

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United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

resolving procedural issues, particularly where the statute and the regulations do not provide explicit guidance as to the sanction that should result when the requirements of a regulation are not satisfied. *See Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002); *Freeman United Coal Mining Co. v. Benefits Review Board*, [*Whited*], 909 F.2d 193, 14 BLR 2-32 (7th Cir. 1990); *Clark v. Karst-Robbins Coal Co*, 12 BLR 1-149 (1989)(*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). In accordance with this principle, a party seeking to overturn an administrative law judge's disposition of an evidentiary issue must prove that the administrative law judge's action represented an abuse of his or her discretion.

Upon consideration of the circumstances of this case, we hold that employer has not met this burden. The administrative law judge properly determined that because the amended regulations do not contain a provision regarding the appropriate treatment of admissible evidence which contains references to evidence excluded because it exceeds the limitations set forth in Section 725.414, the disposition of this issue was committed to his discretion. The administrative law judge correctly identified the options available for addressing the opinions of Drs. Cohen, Renn, and Repsher, which consisted of excluding the reports, redacting the objectionable content, asking the physicians to submit new reports, or factoring in the physicians' reliance upon the inadmissible evidence when deciding the weight to which their opinions are entitled. The administrative law judge also appropriately indicated that exclusion is not a favored option, as it would result in the loss of probative evidence developed in compliance with the evidentiary limitations. Decision and Order at 3-4.

The administrative law judge acted within his discretion in determining that Drs. Renn and Repsher relied upon the excess negative x-ray readings in opining that claimant does not have pneumoconiosis. Dr. Renn appended a chart to his medical report which included the inadmissible x-ray readings and indicated that he reviewed these interpretations in reaching his conclusion regarding the absence of pneumoconiosis. Employer's Exhibit 1. Dr. Repsher identified the x-ray readings that he reviewed, which included the excluded readings, and stated that claimant "has no chest x-ray evidence of coal workers' pneumoconiosis." Employer's Exhibit 9. Based upon this determination, the administrative law judge rationally found that the opinions of Drs. Renn and Repsher were entitled to diminished weight. Decision and Order at 4; *Stein*, 294 F.3d at 885, 22 BLR at 2-423; *Whited*, 909 F.2d at 196, 20 BLR at 2-35; *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004)(*en banc*)(holding that an administrative law judge acted within his discretion in discrediting a physician's opinion regarding the existence of pneumoconiosis because the doctor's opinion was "inextricably tied" to an inadmissible x-ray reading).

Contrary to employer's argument, the fact that the "sanction" that the administrative law judge imposed fell on employer's experts' opinions, but not on Dr.

Cohen's opinion, does not establish an abuse of the administrative law judge's discretion. As noted, the administrative law judge found that unlike Drs. Renn and Repsher, Dr. Cohen did not rely on the single inadmissible, negative x-ray reading he saw, inasmuch as he diagnosed pneumoconiosis. Decision and Order at 4. We affirm, therefore, the administrative law judge's decision to accord less weight to the medical opinions of Drs. Renn and Repsher because they relied upon excluded x-ray readings in forming their opinions regarding the existence of pneumoconiosis.

We now turn to the question of whether an administrative law judge should address the admissibility of digital x-rays under Section 718.202(a)(1) or Section 718.107. Pursuant to Section 725.414(a)(3)(i), employer submitted, as part of its affirmative case, a reading performed by Dr. Wiot of an x-ray dated February 19, 2002. Dr. Wiot indicated on the standard DOL interpretation form that the x-ray contained no parenchymal or pleural abnormalities consistent with pneumoconiosis. Employer's Exhibit 19. Claimant asked Dr. Ahmed to reread this x-ray. In a letter dated April 17, 2003, Dr. Ahmed declined claimant's request on the ground that the National Institute for Occupational Safety and Health (NIOSH) has indicated that the ILO system does not permit the classification of digital x-rays for pneumoconiosis.[6] Claimant's Exhibit 3. When considering the x-ray evidence pursuant to Section 718.202(a)(1), the administrative law judge gave Dr. Wiot's negative reading "little weight" based upon Dr. Ahmed's statement. Decision and Order at 17.

Employer maintains that the administrative law judge erred in declining to consider Dr. Wiot's negative reading of a digital x-ray dated February 19, 2002, as he is

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[6] Dr. Ahmed attached a statement appearing under the NIOSH, ALOSH Receiving Center, Morgantown, West Virginia, letterhead and dated June 14, 2002, to his letter. The statement indicates that:

> The ILO system does not at this time permit the classification of digital films for pneumoconiosis. However, NIOSH is aware that digital systems are increasingly utilized for medical imaging and patient information. We are, therefore, also soliciting input and experience related to digital chest imaging for dust-related changes.

Staff at NIOSH has noted that conventional film screen radiography "is being replaced by digital radiography systems," but recommended that B readers using the ILO system for detecting the presence of pneumoconiosis by x-ray continue to use traditional film screen radiographs and standards. Ntl. Inst. Occup. Safety and Health, *The NIOSH B Reader Certification Program*, available at http://www.cdc.gov/niosh/topics/chestradiography/breader.html.

required to consider all relevant evidence of record. Claimant argues that digital x-rays should be addressed under Section 718.202(a)(1) and because there are no standards for interpreting these films for pneumoconiosis, claimant asserts that they should be excluded from the record. With respect to the precise facts of this case, claimant maintains that the administrative law judge acted within his discretion in giving little weight to Dr. Wiot's negative interpretation. The Director initially declined to take a position as to whether a digital x-ray should be treated as a conventional x-ray under Section 718.202(a)(1) or as "other evidence" under Section 718.107, arguing that remand is required because the administrative law judge did not provide an explanation "for preferring Dr. Ahmed's view" over that of Dr. Wiot. Dir.'s Response Br. at 2. In his Supplemental Brief and at oral argument, the Director asserted that the language of the applicable regulations mandates that an administrative law judge address digital x-rays at Section 718.107.

In resolving this issue on appeal, we are guided by the principle that an agency's interpretation of its own statutes or regulations is generally entitled to deference. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 541 n.8, 22 BLR 2-429, 2-445 n.8 (7th Cir. 2002); *Cadle v. Director, OWCP*, 19 BLR 1-55, 1-62 (1994). Accordingly, the Director's view that Sections 718.102, 718.202(a)(1), and 718.107 require consideration of digital x-rays pursuant to Section 718.107 "is controlling unless it is plainly erroneous or inconsistent with the regulation." *Freeman United Coal Mining Co. v. Director, OWCP* [*Tasky*], 94 F.3d 384, 387, 20 BLR 2-350, 2-355 (7th Cir. 1996), citing *Peabody Coal Co. v. Director, OWCP* [*Railey*], 972 F.2d 178, 183, 16 BLR 2-121, 2-1 (7th Cir. 1992).

Consideration of whether the Director's position meets this standard begins with an examination of the regulations in question. Section 718.202(a)(1) provides that "a chest x-ray conducted and classified in accordance with 20 C.F.R. §718.102 may form the basis for a finding of the existence of pneumoconiosis." 20 C.F.R. §718.202(a)(1). Section 718.102 requires that a physician submit his or her interpretation "along with the film," that the x-ray report must specify the name of the person who took "the film" and the name of the physician who read "the film," and that "the original film" be supplied to the Office of Workers' Compensation Programs. 20 C.F.R. §718.102(c), (d). Section 718.102 also provides that "a chest roentgenogram (x-ray) . . . shall conform to the standards for administration and interpretation of chest x-rays as described in Appendix A." 20 C.F.R. §718.102(a); *see also* 20 C.F.R. §718.102(e). Appendix A to 20 C.F.R. Part 718 sets forth detailed technical instructions for obtaining a chest x-ray and explicitly prescribes film size, exposure times, and appropriate methods for processing the film. *See* Sections (1), (7), (8)(ii)-(viii) and (9) of Appendix A to 20 C.F.R. Part 718. Thus, the plain language of Sections 718.102, 718.202(a)(1), and Appendix A indicates that these regulations apply to chest x-rays recorded on film.

In the preamble to amended Section 718.107, DOL indicated that tests or procedures that do not appear in 20 C.F.R. Part 718 should be addressed under Section 718.107. DOL stated that "this regulation permits flexibility in accommodating the use of developing or future medical diagnostic techniques beyond the traditional tests specifically covered by the quality standards." 62 Fed. Reg. 3343 (Jan. 22, 1997). DOL also noted that "[p]roposed paragraph (b) emphasizes the requirement that the party proffering the evidence must establish both that the evidence is based on medically acceptable tests or procedures and that the evidence is relevant to determining the medical issues in a benefits claim." *Id.*

Determining which of these provisions applies to digital x-rays requires some understanding of what a digital x-ray is. Although published references suggest that a standard definition of a digital x-ray has yet to be developed, the various descriptions of digital x-rays are consistent in stating that recording the image does not involve the use of film. The Director noted in his Supplemental Brief that the American College of Radiology describes digital x-rays as an "alternative to film-screen radiology." American College of Radiology, *ACR Guidelines for the Performance of Pediatric and Adult Chest Radiology* 135 (Jan. 1, 2002); Dir.'s Suppl. Br. at 9. Elsewhere, the process of obtaining a digital x-ray has been described as follows:

> [A]n X-ray beam passes through a patient's body and projects the X-ray onto a scintillating screen which, in turn, converts the X-ray into visible radiation. A high-resolution lens system is positioned behind the screen, reproducing the information on a chip, which has millions of tiny, light-sensitive fields that absorb the X-ray information. The light produces electric charges in the chip, and those charges are transmitted into electrical signals. An analog-to-digital converter turns those signals into digital data and stores them in a computer for display and processing.

Peter Panepento, *X-Ray Vision*, Computer World, Oct. 23, 2000, available at http://www.computerworld.com/printthis/2000/0,4814,52686,00.html. Each of these references specifies that digital x-rays represent the application of new technology and that the images captured are not recorded on film, but rather are stored in electronic form on computer-readable media.

Because Sections 718.102, 718.202(a)(1), and Appendix A contain numerous explicit references to "film" and set forth technical standards that apply only to x-rays recorded on film, we agree with the Director's position that digital x-rays do not fall within the terms of Section 718.202(a). *Chevron*, 467 U.S. at 843, 845; *Hilliard*, 292 F.3d at 541 n.8, 22 BLR at 2-445 n.8; *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1006, 21 BLR 2-113, 2-122 (7th Cir. 1997)(*en banc*). For the same reason, we also agree that the admissibility of digital x-rays is not governed by 20 C.F.R. §718.101(b), which

provides that evidence meets the applicable quality standards if it is in "substantial compliance" with those standards. 20 C.F.R. §718.101(b). In addition, because the plain language of Section 718.107 establishes that it was promulgated to allow for the use of new technologies, we agree with the Director's view that digital x-rays constitute "other medical evidence" pursuant to Section 718.107(a). *Id.* Thus, when a party seeks to admit a digital x-ray, the issue for an administrative law judge to consider, on a case-by-case basis, is whether that party has established, as required by Section 718.107(b), that the digital x-ray is "medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(b).

In this case, the administrative law judge did not apply Section 718.107 to Dr. Wiot's reading of the digital x-ray. Rather, he addressed it under Section 718.202(a)(1) and found that it was entitled to little weight based upon Dr. Ahmed's statement that NIOSH prohibits using the ILO system to interpret digital x-rays for pneumoconiosis. Decision and Order at 17. In light of our holding that the consideration of digital x-rays is governed by Section 718.107, we vacate the administrative law judge's finding regarding Dr. Wiot's interpretation of the digital x-ray dated February 19, 2002. On remand, the administrative law judge must reconsider his assessment of the digital x-ray by applying the provisions set forth in Section 718.107. The administrative law judge must also give the parties the opportunity to develop and submit evidence on remand relevant to the requirements set forth in Section 718.107(b).

We will now address the other issues raised in employer's appeal of the award of benefits.[7] Employer argues that the administrative law judge erred in finding that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d). Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.,* 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, claimant's prior claim was denied because he did not establish any of the elements of entitlement.[8] Director's Exhibit 1.

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[7] We affirm the administrative law judge's length of coal mine employment finding, his exclusion of the six x-ray readings appearing at Employer's Exhibits 2-7, and his finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2), (a)(3), as these rulings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[8] In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the

Consequently, claimant had to submit new evidence establishing at least one of these elements to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3); *see also Spese*, 117 F.3d at 1008-09, 21 BLR at 2-127 (holding under former provision that claimant must establish "that something capable of making a difference has changed since the record closed on the first application"). The administrative law judge determined that claimant met his burden by submitting new evidence which proves that he is now totally disabled pursuant to Section 718.204(b)(2).

Employer contends that the administrative law judge's finding must be vacated, as the administrative law judge erred in failing to address the opinions of Drs. Tuteur, Repsher, and Renn regarding the significance of the blood gas study evidence. Employer also argues that the administrative law judge erred in failing to address evidence in claimant's hearing testimony and in Dr. Pramote's reports that contradicts a finding of total respiratory disability. These arguments are without merit.

Contrary to employer's allegation, Drs. Renn and Tuteur found that claimant was suffering from a totally disabling respiratory impairment pursuant to Section 718.204(b)(2). Director's Exhibit 28; Employer's Exhibits 1, 18 at 21. In addition, Dr. Repsher acknowledged that claimant's blood gas studies produced qualifying values. Employer's Exhibit 9. Although employer is correct in asserting that the administrative law judge did not discuss claimant's hearing testimony or the 1999 and 2001 treatment notes in which Dr. Pramote indicated that claimant was "very active" and could walk two miles, this omission does not constitute error requiring remand. Hearing Transcript at 39-40; Employer's Exhibit 16.

Claimant stated at the hearing that he could walk a mile, but indicated that he had to do so at a slow pace. Hearing Transcript at 36. Claimant also testified that he could not mow his lawn or carry groceries due to shortness of breath. *Id*. Regarding Dr. Pramote's treatment notes, these were recorded between two and four years prior to the hearing in this case, rather than at the time of the hearing, which is the relevant point in time for assessing claimant's ability to perform his usual coal mine employment. *See Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982). On appeal, employer does not explain how this evidence could undermine the administrative law judge's finding that current

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pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

medical evidence – blood gas studies and medical opinions – establishes that claimant is totally disabled. Because the administrative law judge's determination, that the newly submitted medical evidence of record, as a whole, supports a finding of total disability, is rational and supported by substantial evidence, it is affirmed. *See Shelton v. Old Ben Coal Co.,* 933 F.2d 504, 15 BLR 2-116 (7th Cir. 1991). We also affirm, therefore, the administrative law judge's determination that claimant has established a change in an applicable condition of entitlement, based upon a weighing of all relevant newly submitted evidence. 20 C.F.R. §725.309(d); *White,* 23 BLR at 1-3.

We will now turn to a consideration of the administrative law judge's findings with respect to the merits of entitlement. As an initial matter, because we have vacated the administrative law judge's discrediting of Dr. Wiot's negative interpretation of a digital x-ray under Section 718.202(a)(1) and held that digital x-rays must be addressed under Section 718.107, we must also vacate the administrative law judge's determination that the x-ray evidence supports a finding of pneumoconiosis pursuant to Section 718.202(a)(1). With respect to employer's specific arguments regarding the administrative law judge's findings under Section 718.202(a)(1), employer alleges that the administrative law judge erred in treating Dr. Wiot's film interpretations as supportive of a finding of pneumoconiosis and in failing to accord greatest weight to Dr. Wiot's readings because he reviewed a series of x-rays films and because he is a professor of radiology who assisted in the development of the B reader program. These contentions have merit, in part.

Although the administrative law judge could have given greater weight to Dr. Wiot's readings based upon his academic qualifications and his involvement in the B reader program, the administrative law judge was not required to do so. *See Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Employer is correct, however, in asserting that the administrative law judge relied upon his own medical conclusions when characterizing Dr. Wiot's x-ray interpretations. The administrative law judge referred to Dr. Wiot's findings of bullae and emphysematous changes in the upper lung fields, and his finding of interstitial fibrosis, and determined that they were "not necessarily wholly inconsistent with" the positive readings for pneumoconiosis. Decision and Order at 17. Absent medical evidence in the record that the items described by Dr. Wiot are consistent with pneumoconiosis, the administrative law judge relied upon his own understanding of the significance of these findings to determine that Dr. Wiot's negative readings supported a finding of pneumoconiosis. This is beyond the scope of the administrative law judge's role as fact-finder. *See Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).

We vacate, therefore, the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The

administrative law judge must reconsider the x-ray evidence of record on remand. If the administrative law judge determines that Dr. Wiot's interpretation of the digital film is entitled to probative weight, he must include this evidence in his reconsideration of whether the x-ray evidence – be it in traditional or digital form – is sufficient to prove the existence of pneumoconiosis.

Employer further contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis under Section 718.202(a)(4) based upon the medical opinions and CT scans of record. As an initial matter, we note that the fact that we have vacated the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1) requires us to instruct the administrative law judge to reconsider some of his findings under Section 718.202(a)(4).

We have held that the administrative law judge acted within his discretion in finding the opinions of Drs. Renn and Repsher regarding the existence of pneumoconiosis tainted and entitled to little weight because Drs. Renn and Repsher viewed inadmissible negative x-ray readings. The administrative law judge also determined that their opinions retained some weight under Section 718.202(a)(4), but were not well reasoned because their determination that there was no x-ray evidence of pneumoconiosis conflicted with the administrative law judge's finding of pneumoconiosis under Section 718.202(a)(1). Decision and Order at 18. Because we have vacated the administrative law judge's finding at Section 718.202(a)(1), however, we must vacate this aspect of the administrative consideration of the opinions of Drs. Renn and Repsher.

On remand, the administrative law judge must reconsider their medical opinions along with the medical opinions of Drs. Tuteur, Houser, and Cohen. When addressing this evidence, the administrative law judge should consider whether claimant has established the existence of either clinical or legal pneumoconiosis. *See* 20 C.F.R. §§718.201, 718.202(a). In so doing, the administrative law judge should reconsider his decision to credit Dr. Sanjabi's treatment notes as a medical opinion supportive of Dr. Cohen's diagnosis of pneumoconiosis. As employer has noted, Dr. Sanjabi did not identify all of the objective data upon which he relied. Similarly, the administrative law judge should reassess the probative value of Dr. Houser's opinion, and the extent to which it supports Dr. Cohen's findings, in light of Dr. Houser's reference to a CT scan that is not in the record. *See Livermore v. Amax Coal Co.*, 297 F.3d 668, 22 BLR 2-399 (7th Cir. 2002).

With respect to the CT scan evidence, the administrative law judge discredited the negative scan readings submitted by Drs. Wiot and Spitz, despite his determination that they "might be better qualified to review CT scans," because they failed "to note

opacities in the upper lobes that were observed by three physicians in the x-ray readings and five physicians in CT scan readings[.]" Decision and Order at 18. The administrative law judge then stated that:

> [B]ecause Dr. Cohen opined that Claimant had pneumoconiosis, which is supported by Dr. Sagel's finding, and is not inconsistent with the findings of Drs. Gatla, Marmo, and Tuteur, and because the opinions of Drs. Spitz and Wiot are questionable, Claimant has proved by a preponderance of the CT scan evidence that Claimant has pneumoconiosis.

Id. Employer argues that the administrative law judge substituted his opinion for that of a medical expert in finding that the readings by Drs. Sagel, Gatla, Marmo, and Tuteur supported Dr. Cohen's finding of pneumoconiosis.

Employer's allegation of error has merit. Drs. Gatla and Marmo did not diagnose pneumoconiosis in their opinions, nor did they indicate that the findings observed on the CT scans were consistent with pneumoconiosis. Director's Exhibit 9. Drs. Sagel and Tuteur said that what they viewed "could be" or "might be" pneumoconiosis. Director's Exhibits 9, 28; Employer's Exhibit 18. Without medical evidence in the record that bullae, speculated nodules, and nodular areas in the upper lobes of claimant's lungs are diagnostic of pneumoconiosis, the administrative law judge relied upon his own opinion to credit Dr. Cohen's opinion and to discredit the opinions of Drs. Wiot and Spitz. This is beyond the scope of the administrative law judge's role as fact-finder. *Casella*, 9 BLR at 1-135. We vacate, therefore, the administrative law judge's determination that the CT scan evidence supports a finding of pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge must reconsider this evidence on remand.[9]

Because we have vacated the administrative law judge's ultimate findings at Section 718.202(a)(1) and (a)(4), we also vacate the administrative law judge's determination that employer did not rebut the presumption, set forth in 20 C.F.R. §718.203(b), that claimant's pneumoconiosis arose out of his coal mine employment. If the administrative law judge finds that claimant has proven the existence of pneumoconiosis on remand, he must reconsider the evidence under Section 718.203(b).

The administrative law judge determined pursuant to Section 718.304 that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis

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[9] Employer is correct in suggesting that if the administrative law judge determines on remand that the x-rays and CT scans do not support a finding of pneumoconiosis, he cannot rely upon this evidence to discredit a physician's opinion that claimant does not have pneumoconiosis.

because "the majority of physicians who read the x-rays opined that claimant had complicated pneumoconiosis and the physicians who read the CT scans did not prove that the complicated pneumoconiosis was incorrectly diagnosed." Decision and Order at 21. Employer argues that when considering whether the evidence as a whole supported the requisite finding of an opacity greater than one centimeter in diameter or its equivalent, the administrative law judge selectively analyzed the CT scan evidence. This contention has merit.

Pursuant to Section 718.304, a miner is irrebuttably presumed to be totally disabled due to pneumoconiosis if a lesion larger than one centimeter in diameter, or the equivalent, is established by chest x-ray, the results of a biopsy or autopsy, or other means. 20 C.F.R. §718.304; *Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894, 898 (7th Cir. 2003). Under Section 718.202(a)(4), the administrative law judge gave less weight to the CT scan interpretations by Drs. Wiot and Spitz because they were the only physicians who did not identify any processes in the upper lobes of claimant's lungs. When considering the same evidence pursuant to Section 718.304(c), however, the administrative law judge credited Dr. Tuteur's diagnosis of a 1.4 centimeter opacity in the lower lung as a finding of complicated pneumoconiosis although no other physician visualized a large opacity in the lower lobes and Dr. Tuteur specifically indicated that claimant had simple, not complicated, pneumoconiosis. Employer's Exhibit 18 at 20.

In addition, employer is correct in arguing that the administrative law judge relied upon the fact that a majority of physicians diagnosed complicated pneumoconiosis by x-ray, but did not consider that the majority of doctors who performed CT scan readings did not diagnose pneumoconiosis, and to the extent that they identified the source of the large lesions that they detected, they attributed them to claimant's emphysema. Decision and Order at 19-20; Director's Exhibits 9, 10, 28; Employer's Exhibits 12, 19. Because the administrative law judge did not analyze the CT scan evidence in a consistent manner, we vacate his finding that claimant established invocation of the irrebuttable presumption at Section 718.304. *See Peabody Coal Co. v. Lowis*, 708 F.2d 266, 5 BLR 2-84 (7th Cir. 1983); *Wright v. Director, OWCP*, 7 BLR 1-475 (1984); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). On remand, the administrative law judge must reconsider whether the evidence relevant to Section 718.304(a)-(c) is sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis.

Because the administrative law judge must reconsider the CT scan evidence, he must also reconsider the admissibility of the various readings on remand in light of the Board's decision in *Webber v. Peabody Coal Co.*, BRB No. 05-0335 BLA, --- BLR --- (Jan. 27, 2006)(*en banc*)(Boggs, J. concurring). The Board held in *Webber* that, pursuant to 20 C.F.R. §§718.107(a) and 725.414(a)(2)(ii), (a)(3)(ii), each party may proffer only one reading of each CT scan in support of its affirmative case and one reading in rebuttal of each reading submitted by the opposing party in support of its affirmative case.

Webber, slip op. at 8-9. The record here contains nine readings of six different CT scans. Director's Exhibits 9, 28; Employer's Exhibits 2, 11, 12. On remand, the administrative law judge must order the parties to select and designate their CT scan readings and must render a decision as to their admissibility.

The administrative law judge also weighed the evidence under Section 718.204(c) to determine whether, absent the benefit of the irrebuttable presumption, claimant established that he is totally disabled due to pneumoconiosis. The administrative law judge found that the opinion of Dr. Cohen, as corroborated by the opinions of Drs. Houser and Tuteur, was sufficient to satisfy claimant's burden of proof. The administrative law judge gave little weight to the opinions of Drs. Renn and Repsher at Section 718.204(c) because they did not diagnose pneumoconiosis. Decision and Order at 22-23; Director's Exhibits 10, 28; Claimant's Exhibit 5.

Employer argues that the administrative law judge erred in finding that Drs. Houser and Cohen rendered well-reasoned opinions on the issue of total disability causation and in finding that Dr. Tuteur's opinion supported a finding of total disability due to pneumoconiosis. These contentions have merit, in part. Regarding the reports of Drs. Cohen and Houser, because employer has not identified any specific error committed by the administrative law judge in treating their opinions as reasoned and documented, employer's allegation is tantamount to a request that the Board reweigh this evidence, a function that the Board is not empowered to perform. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We decline, therefore, to vacate the administrative law judge's decision to credit the opinions of Drs. Cohen and Houser under Section 718.204(c).

Employer is correct, however, in alleging that the administrative law judge did not address the totality of Dr. Tuteur's opinion pursuant to Section 718.204(c). Although Dr. Tuteur diagnosed simple pneumoconiosis and a totally disabling breathing impairment, he stated explicitly that claimant's total disability is not related to pneumoconiosis or his coal mine employment. Employer's Exhibit 18 at 23. The administrative law judge did not discuss this aspect of Dr. Tuteur's opinion. Consequently, we must vacate the administrative law judge's finding that claimant established total disability due to pneumoconiosis under Section 718.204(c). *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). If the administrative law judge reaches the issue of the cause of claimant's total disability on remand, he must reconsider Dr. Tuteur's medical opinion, along with the other relevant evidence at Section 718.204(c) to determine whether claimant has established that legal or simple clinical pneumoconiosis is a substantially contributing cause of claimant's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); *see Midland Coal Co. v. Director, OWCP [Shores],* 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). Additionally, because we have instructed the

administrative law judge to reconsider the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (a)(4), we also instruct the administrative law judge to reconsider the opinions of Drs. Renn and Repsher regarding the causation of claimant's total disability, which the administrative law judge discredited because they did not diagnose pneumoconiosis.[10] In determining the probative weight to which the relevant evidence is entitled and the extent to which one piece of evidence corroborates another, the administrative law judge should bear in mind the distinction between clinical and legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(1), (a)(2).

Finally, employer alleges that the administrative law judge erred in determining that the appropriate date from which claimant was entitled to benefits is July 1, 2001, based upon Dr. Houser's diagnosis of total disability due to pneumoconiosis in his July 27, 2001 report. Decision and Order at 23; Director's Exhibit 10. As a general rule, once entitlement to benefits has been demonstrated, the date for commencement of those benefits is determined by the month in which claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless credited evidence establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990).

Because we have vacated the administrative law judge's finding that Dr. Houser's opinion, along with Dr. Cohen's opinion, established total disability due to pneumoconiosis, we also vacate the administrative law judge's finding as to the onset date. If the administrative law judge awards benefits on remand, he must reconsider this issue in accordance with the principles set forth above. If the administrative law judge finds that claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth in Section 718.304, claimant is entitled to benefits from the date of onset of his complicated pneumoconiosis. *Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989). If the record evidence does not reflect when claimant's simple pneumoconiosis became complicated pneumoconiosis, the onset date is the date of filing of claimant's subsequent claim unless there is credible evidence demonstrating that claimant was not totally disabled after the date of filing of this claim. *Id.*

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[10] As employer suggests, in this regard, the opinions of Drs. Renn and Repsher, who acknowledged the existence of a respiratory impairment but attributed it to smoking, rather than coal dust exposure, could be probative of the issue of total disability due to pneumoconiosis. Employer's Exhibits 1, 9.

Accordingly, the Decision and Order – Awarding Benefits of the administrative law judge is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

We concur:

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

McGRANERY, J., concurring and dissenting:

I concur in the majority's decision except insofar as the majority has directed the administrative law judge to reconsider the digital x-ray evidence. Review of the record reveals that employer waived consideration of this evidence.

Because employer urged the administrative law judge to weigh its 2002 digital x-ray interpretation pursuant to 20 C.F.R. §718.202(a)(1), together with all the film x-ray interpretations, the administrative law judge properly considered it under that section. Decision and Order at 17. The administrative law judge accorded it "little weight" because it lacked an ILO classification and the regulations require that an x-ray be classified in accordance with the ILO system in order to be considered evidence of either

the presence or absence of pneumoconiosis. Decision and Order at 17; s*ee* 20 C.F.R. §718.202(a)(1), incorporating by reference, 20 C.F.R. §718.102.

Claimant specifically raised the issue of the weight to be accorded a digital x-ray interpretation by introducing into the record a statement of a Board-certified radiologist that the ILO system does not permit classification of digital film for pneumoconiosis. Claimant's Exhibit 3. The Board today agrees with the administrative law judge's determination that a digital x-ray interpretation cannot constitute substantial evidence at 20 C.F.R. §718.202(a)(1); hence, the Board holds that the admissibility of digital x-ray interpretations must be determined pursuant to 20 C.F.R. §718.107.

Employer was well aware that Section 718.107 is available to prove the presence or absence of pneumoconiosis by "any medically acceptable test or procedure" and employer relied upon that section to introduce CT scan evidence. 20 C.F.R. §718.107(a). I believe that because employer argued strenuously to the administrative law judge that the digital x-ray should be considered under subsection 202(a)(1), notwithstanding claimant's argument that it could not be credited under that subsection, and employer never argued that it should be considered under Section 718.107, employer waived consideration pursuant to that section. The Seventh Circuit insists upon application of the well-established law that a party who fails to make an argument to the administrative law judge has waived it. *See*, *e.g.*, *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc*), *modifying* 94 F.3d 369 (7th Cir. 1996). The majority directs the administrative law judge to consider the digital x-ray interpretation pursuant to Section 718.107, even though employer never requested that consideration and never submitted the evidence required by Section 718.107(b) to support such consideration. To remedy the latter problem, the majority directs the administrative law judge to reopen the record for employer to submit the requisite evidence showing that a digital x-ray is medically acceptable and relevant to refute a claimant's entitlement pursuant to Section 718.107(b).

Again, the majority overlooks the fact that employer waived consideration of the digital x-ray interpretation pursuant to Section 718.107 because it failed to support its argument with appropriate evidence in the record. *See*, *e.g.*, *Consolidation Coal Co., v. Director, OWCP [Stein]*, 294 F.3d 885, 895, 22 BLR 2-409, 2-427 (7th Cir. 2002). Even though the administrative law judge acceded to employer's request and properly determined that the negative digital x-ray interpretation did not constitute substantial evidence of the absence of pneumoconiosis at Section 718.202(a)(1), employer repeatedly argued on appeal that the administrative law judge failed "to even consider" this evidence. Employer's Brief at 29; *see also* Employer's Supplemental Brief at 2. Such a distortion of the record should not be rewarded by the Board's ignoring the doctrine of waiver and providing employer with an opportunity to retry its case on remand.

Accordingly, I disagree with the majority's decision to direct the administrative law judge to reopen the record for employer to submit relevant evidence to support consideration of its negative digital x-ray interpretation pursuant to Section 718.107(b), and if the digital x-ray interpretation is deemed substantial evidence, for the administrative law judge to weigh it together with the film interpretations of record.[11]

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[11] It is not a foregone conclusion that employer will be able to obtain persuasive evidence demonstrating that a digital x-ray "is medically acceptable and relevant to. . . refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(b). The Seventh Circuit's cautionary words about consideration of CT scan evidence in Black Lung cases are equally applicable to digital x-ray interpretations:

> As of this date, the Department of Labor has not issued guidelines for ALJs to follow when assessing the reliability of a physician's interpretation of a CT scan. In the absence of controlling statutory language or guidance from the agency, we defer to well-reasoned and well-documented decisions rendered by ALJs resolving the issues before them. . . .
>
> Although agencies are not bound by the evidentiary strictures of *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), litigants must still satisfy the ALJ that their experts are qualified by knowledge, training, or experience to, and have in fact applied recognized and accepted medical principles in a reliable way. *McCandless*, 255 F.3d at 468-69; *accord Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); *GE Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

Stein, 294 F.3d at 893, 22 BLR at 2-423.

Employer has waived any claim to further consideration of the digital x-ray evidence. *See Stein*, 294 F.3d at 895, 22 BLR at 2-427; *Spese*, 117 F.3d at 1009, 21 BLR at 2-129.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge