BRB No. 05-0335 BLA

RALPH WEBBER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:_____
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION and ORDER
Party-in-Interest	)	*EN BANC*

Appeal of the Decision and Order – Denying Benefits of Richard D. Mills, 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.

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:

Claimant appeals the Decision and Order – Denying Benefits (03-BLA-5243) of Administrative Law Judge Richard D. Mills rendered on a claim[1] filed pursuant to the

[1] Claimant filed his initial application for benefits on May 8, 2001. Director's Exhibit 1. Prior to the adjudication of the first claim, the miner filed a second claim on

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).[2] The administrative law judge initially credited claimant with twenty-two years of coal mine employment,[3] as stipulated by the parties, and found a forty-five pack-year smoking history. The administrative law judge found that the x-ray evidence was in equipoise and did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), that the computerized tomography (CT) scan evidence was uniformly negative and thus did not establish the existence of pneumoconiosis, and that the weight of the medical opinion evidence further failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Thus, the administrative law judge concluded that claimant failed to establish the existence of pneumoconiosis through any of the four means by which pneumoconiosis may be established pursuant to 20 C.F.R. §718.202(a).[4] Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in admitting into the record, over his objection, interpretations by Drs. Wiot and Renn of a May 14, 2002 digital x-ray and a May 14, 2002 CT scan, as well as the deposition testimony of Dr. Wiot, pursuant to 20 C.F.R. §§718.101, 718.102, 718.107, and 725.414. Claimant further argues that the administrative law judge erred in finding a forty-five pack-year smoking history, and erred in his analysis of the medical evidence when he found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Employer responds, urging affirmance of the administrative

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September 12, 2001, which was merged with the first claim pursuant to 20 C.F.R. §725.309(b). Director's Exhibit 1.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The record indicates that claimant's coal mine employment occurred in Illinois. Director's Exhibit 2; Hearing Transcript at 31-32. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[4] The administrative law judge additionally found that even if all of the relevant chest x-rays, CT scan evidence, and medical opinions were weighed together, *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), the evidence was still insufficient to establish the existence of pneumoconiosis arising out of coal mine employment.

law judge's evidentiary rulings and the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a limited response addressing the administrative law judge's evidentiary rulings.[5] Claimant filed a reply brief reiterating his contentions, to which employer responded.[6]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

Admission of the Digital X-ray Interpretations

The administrative law judge admitted into evidence three positive and two negative interpretations of a conventional x-ray dated June 14, 2001, and one positive and two negative interpretations of a May 14, 2002 digital x-ray. Decision and Order at 2-3. Claimant asserts that the administrative law judge erred in admitting into the record, as employer's affirmative evidence, the negative interpretations by Drs. Wiot and Renn of the May 14, 2002 digital x-ray because the digital x-ray is not in substantial compliance with the applicable quality standards set forth at 20 C.F.R. §§718.101(b), 718.102, and Appendix A to 20 C.F.R. Part 718.[7] Petition for Review at 5; Oral Argument Transcript

[5] Claimant does not challenge the administrative law judge's finding of twenty-two years of coal mine employment, or his findings pursuant to 20 C.F.R. §718.202(a)(2), (a)(3). We therefore affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] On September 23, 2005, the Board held oral argument in this case in Chicago, Illinois, to address the issues raised concerning the administrative law judge's evidentiary rulings and his application of revised 20 C.F.R. §§718.107 and 725.414. In the interest of time, the oral argument in this case was partially consolidated with the oral argument in *Harris v. Old Ben Coal Co.*, BRB No. 04-0812 BLA (Jan. 27, 2006)(*en banc*) (McGranery and Hall, J.J., concurring and dissenting), which contained overlapping issues and which involved the same attorneys for claimant, employer and the Director, Office of Workers' Compensation Programs (the Director).

[7] The third, positive, interpretation of the May 14, 2002 digital x-ray was performed by Dr. Alexander on behalf of claimant, and was submitted for the purpose of rebuttal, conditional upon admission of employer's evidence. Claimant's Exhibit 3; Oral Argument Transcript at 3.

at 35; Director's Exhibit 25; Employer's Exhibit 2. Claimant specifically contends that digital x-rays, while in a new form, are nonetheless a type of x-ray, and, as such, must be in substantial compliance with the applicable quality standards delineated for x-rays set forth at 20 C.F.R. §§718.101(b), 718.102, and Appendix A to Part 718. Petition for Review at 5; Oral Argument Transcript at 35. In support of his position, claimant relies on the regulations, which provide that a clinical test that is not in substantial compliance with the standards for administering the test is insufficient to establish the fact for which it is proffered. 20 C.F.R. §718.101(b); Petition for Review at 5; *Harris v. Old Ben Coal Co.*, BRB No. 04-0812 BLA (Jan. 27, 2006)(*en banc*)(McGranery and Hall, J.J., concurring and dissenting), Oral Argument Transcript at 19-20. The regulations further provide that no chest x-ray shall constitute evidence of the presence or absence of pneumoconiosis unless documented and reported in compliance with 20 C.F.R. §718.102 and Appendix A to Part 718, which set forth the standards for administering and interpreting chest x-rays, developed in consultation with the National Institute for Occupational Safety and Health (NIOSH). 20 C.F.R. §§718.101(b), 718.102(a), (e); Petition for Review at 5; *Harris*, Oral Argument Transcript at 19-20. Claimant contends that because neither 20 C.F.R. §718.102 nor Appendix A differentiates between conventional and digital x-rays, but simply references chest x-rays in general, the quality standards set forth at Appendix A were intended to apply to all types of x-rays. *Webber*, Oral Argument Transcript at 35. Consequently, claimant argues, because digital x-rays do not comply with the quality standards set forth in the regulations, until there are specific quality standards in place for digital x-rays, they cannot be considered acceptable evidence for determining the presence or absence of pneumoconiosis. Petition for Review at 5; *Harris*, Oral Argument Transcript at 20. Claimant notes that digital x-rays could conceivably be considered "other medical evidence" admissible pursuant to 20 C.F.R. §718.107.[8] Claimant contends, however, that to allow the submission of digital x-

[8] 20 C.F.R. §718.107(a) provides that, in addition to the x-rays, pulmonary function studies, blood gas studies, autopsy or biopsy evidence, and medical opinion evidence admissible as supporting evidence of entitlement:

> The results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis . . . may be submitted in connection with a claim and shall be given appropriate consideration.

20 C.F.R. §718.107(a).

The regulation further states that:

rays pursuant to this subsection, which, as written, contains no express numerical limitations on the submission of evidence, would subvert the policy considerations behind the implementation of the evidentiary limitations applicable to x-rays set forth in the revised regulation at 20 C.F.R. §725.414.[9] *Harris*, Oral Argument Transcript at 21.

The Director asserts that, contrary to claimant's arguments, because 20 C.F.R. 718.202(a)(1) and its referenced provisions, including the quality standards at Appendix A to Part 718, repeatedly reference, and thus presuppose the existence of, "film," the quality standards are reasonably interpreted to apply only to conventional, analog x-rays, which utilize film, rather than digital x-rays, which do not.[10] Director's Oral Argument Brief at 4. Therefore, the Director contends, digital x-rays need not be excluded from consideration for noncompliance with the quality standards set forth for x-rays. While

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> The party submitting the test or procedure pursuant to this section bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits.

20 C.F.R. §718.107(b).

[9] The revised regulation at 20 C.F.R. §725.414 provides that each party may submit two x-ray readings, one autopsy report, one biopsy report, two pulmonary function studies, two blood gas studies, and two medical reports as its affirmative case. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Each party may then submit one piece of evidence in rebuttal of each piece of evidence submitted as the opposing party's case. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, the party that originally proffered the evidence may submit one piece of rehabilitative evidence. *Id.* Notwithstanding these limits, "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Each x-ray, autopsy or biopsy report, pulmonary function study, blood gas study, or medical report referenced in a medical report must either be admissible under the 20 C.F.R. §725.414(a) limits, or be admissible as a hospitalization or treatment record under 20 C.F.R. §725.414(a)(4). 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). "Good cause" is required to exceed the numerical limits. 20 C.F.R. §725.456(b)(1). "A physician's written assessment of a single objective test, such as a chest X-ray or a pulmonary function test, shall not be considered a medical report for the purposes of" 20 C.F.R. §725.414. 20 C.F.R. §725.414(a)(1).

[10] For example, the quality standards delineated in Appendix A to Part 718, with which an x-ray must comply, specify the size, placement, and speed of the "film" and the "focal spot to film distance" to be used in the taking of x-rays. Appendix A to Part 718; Director's Oral Argument Brief at 4.

the Director agrees with claimant that because digital x-rays do not satisfy the Appendix A quality standards of the Part 718 regulations, digital x-rays should not be considered pursuant to 20 C.F.R. §718.202(a)(1), the Director contends that they are properly considered under the alternative provision at 20 C.F.R. §718.107, which sets forth guidelines for the submission of "other medical evidence," and was intended to accommodate new diagnostic techniques as they develop. Director's Oral Argument Brief at 2, 5, *citing* 65 Fed. Reg. 79945 (Dec. 20, 2000); 62 Fed. Reg. 3343 (Jan 22, 1997).

Initially, we recognize that the United States Courts of Appeals have generally given special deference to the Director's position on issues involving the interpretation or application of the Act because the Director is charged with administration of the Black Lung Benefits Act. *Cadle v. Director, OWCP*, 19 BLR 1-56, 1-62 (1994)(citing collected cases); *see Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984). The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that "the Director's interpretation of the regulation is controlling unless it is plainly erroneous or inconsistent with the regulation." *Freeman United Coal Mining Co. v. Director, OWCP [Taskey]*, 94 F.3d 384, 387, 20 BLR 2-348, 2-355 (7th Cir. 1996); *see 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). In addition, we are cognizant that, as employer asserts, such deference may not be due where the Director's position is merely an argument crafted for the purposes of litigation, and does not necessarily represent the agency's considered position. Employer's Supplemental Brief at 3-5, *citing Pennington v. Didrickson*, 22 F.3d 1376, 1383 (7th Cir. 1994). We hold, however, that in this case, the precise level of deference due the Director's position need not be determined as we find it both reasonable and persuasive. *See Hilliard*, 292 F.3d at 541 n.8, 22 BLR at 2-445 n.8. A reading of the plain language of Appendix A to Part 718 makes clear that the x-ray standards described therein do not apply to digital x-rays, and that, therefore, the admission of digital x-rays is properly considered under 20 C.F.R. §718.107, where the administrative law judge must determine, on a case-by-case basis, pursuant to 20 C.F.R. §718.107(b), whether the proponent of the digital x-ray evidence has established that it is medically acceptable and relevant to entitlement.[11] *Taskey*, 94 F.3d at 387, 20 BLR at 2-355; *see Chevron*, 467 U.S. at 843-845; *Hilliard*, 292 F.3d at 541 n.8, 22 BLR at 2-445 n.8; *Cadle*, 19 BLR at 1-62.

[11] We note, however, in response to claimant's arguments, that our holding, *infra*, regarding the reasonable interpretation 20 C.F.R. §718.107, *i.e.*, that it contains implied limitations on the submission of "other medical evidence," is applicable to the submission of all types of "other medical evidence" appropriate under the regulations, including digital x-rays.

Administrative Law Judge's Application of 20 C.F.R. §718.107 to Admit Multiple Readings of the May 14, 2002 CT Scan

Claimant contends that the administrative law judge erred in admitting into evidence, pursuant to 20 C.F.R. §718.107, additional readings of a May 14, 2002 CT scan by Drs. Renn and Wiot, as part of employer's affirmative case.[12] Petition for Review at 7. CT scans, like digital x-rays, are admissible as "[o]ther medical evidence" under 20 C.F.R. §718.107(a), which provides for the submission of "[t]he results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis," its sequelae, "or a respiratory or pulmonary impairment." 20 C.F.R. §718.107(a); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-59 (2004)(*en banc*). Claimant contends that, by its reference to "the results," the singular phrasing of the regulation's language limits a party to the submission of only the "original radiology record reviewing a CT scan" and thus precludes the admission into the record of subsequent reviews of the same CT scan by other physicians, as the administrative law judge did here.[13] Petition for Review at 7. The Director responds, acknowledging that in *Dempsey*, the Board observed that, "[u]nlike Section 725.414, Section 718.107(a) contains no specific numerical limits" and that, therefore, the specific affirmative case evidentiary limitations of 20 C.F.R. §725.414 do not apply equally to CT scans. *Dempsey*, 23 BLR at 1-59; Director's Oral Argument Brief at 8. The Director agrees with claimant to the extent that a reasonable interpretation of 20 C.F.R. §718.107 would allow only one reading or interpretation of each CT scan or other medical test or procedure to be submitted as affirmative evidence. Director's Oral Argument Brief at 9. The Director asserts that this interpretation is supported not only by the use of singular phrasing in 20 C.F.R. §718.107, but also by the fact that if more than one reading of a single CT scan, or other medical test or procedure, is allowed as affirmative evidence, it would render meaningless the evidentiary limitation at 20 C.F.R. §715.414(a)(2)(ii), (3)(ii), which provides that, in any case in which a party has submitted the results of other testing pursuant to 20 C.F.R. §718.107, the opposing party shall be

[12] The May 14, 2002 CT scan was originally performed and interpreted on behalf of employer by Dr. Vivek Yagnik, a Board-certified radiologist, at the request of Dr. Tuteur, who in turn summarized the results of the scan in his May 17, 2002 report. Director's Exhibits 22, 23. The CT scan was subsequently read, again on behalf of employer, by Dr. Wiot on June 30, 2002, and by Dr. Renn on February 12, 2003. Director's Exhibit 25; Employer's Exhibit 2.

[13] Claimant does not specify whether Dr. Yagnik's interpretation, or Dr. Tuteur's summary, both contained in the record, would be considered the original result of the May 14, 2002 CT scan. Director's Exhibits 22, 23.

entitled to submit "one physician's assessment of each piece of such evidence in rebuttal."[14] 20 C.F.R. §725.414(a)(2)(ii), (3)(ii); Director's Oral Argument Brief at 9.

Again, we are persuaded by the Director's reasonable interpretation of the regulations. *Taskey*, 94 F.3d at 387, 20 BLR at 2-355; *see Chevron*, 467 U.S. at 843-845; *Hilliard*, 292 F.3d at 541 n.8, 22 BLR at 2-445 n.8; *Cadle*, 19 BLR at 1-62. While we note that the language of 20 C.F.R. §718.107 is virtually unchanged from the prior regulation, contrary to employer's argument, the revised regulation at 20 C.F.R. §725.414 specifically references 20 C.F.R. §718.107, and, therefore, it is appropriate to reconsider our prior interpretation of 20 C.F.R. §718.107 in order to avoid thwarting the purpose of the 20 C.F.R. §725.414 revisions in general,[15] and in particular to avoid rendering meaningless the rebuttal provision at 20 C.F.R. §725.414(a)(2)(ii), (3)(ii). *See First Nat'l Bank of Chicago v. Standard Bank & Tr.*, 172 F.3d 472, 477 (7th Cir. 1999); *Hilliard*, 292 F.3d 533, 541 n.8, 22 BLR 2-445 n.8; *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193, 1-199-200 (2002); *Lester v. Peabody Coal Co.*, 22 BLR 1-183, 1-190-191 (2002); Employer's Supplemental Brief at 6. Thus, we hold that 20 C.F.R. §718.107 is reasonably interpreted to allow for the submission, as part of a party's affirmative case, of one reading of each separate test or procedure undergone by claimant. We decline to hold, however, as urged by claimant, that a party may submit only the first, or original, results of each test or procedure, rather than the best interpretation of each test or procedure, as to do so is potentially unworkable, unnecessary, and contrary to the stated goal of the revised regulations to maintain a focus on the quality of the evidence. 64 Fed. Reg. at 54994 (Oct. 8, 1999). Instead, we hold that each party may choose which set of results to submit, for each test or procedure, in order to best support its position. We are unable to conclude, however, that under this interpretation of 20 C.F.R. §718.107, the administrative law judge's admission into the record of several readings of the May 14, 2002 CT scan was harmless, since the administrative law judge specifically accorded the CT scan readings, all of which were negative, great probative value in finding the evidence insufficient to establish the existence of pneumoconiosis. Decision and Order at

[14] The Director explains that if multiple readings of a single CT scan were deemed admissible as affirmative evidence, a party would be able to subvert the specific rebuttal limitations simply by designating its multiple readings as affirmative evidence. Director's Oral Argument Brief at 9.

[15] Both claimant and the Director assert that limiting the affirmative evidence under 20 C.F.R. §725.107 is consistent with the Secretary of Labor's goal of limiting evidence in order to avoid repetition, reduce the costs of litigation, focus attention on quality rather than quantity, and level the playing field between employers and claimants. Petition for Review at 7; Director's Oral Argument Brief at 10; 62 Fed. Reg. 3357 (Jan. 22, 1997); 64 Fed. Reg. 54972, 54992, 54994 (Oct. 8, 1999).

6 n.3, 14-15. Therefore, we vacate the administrative law judge's ruling as to the CT scan readings and instruct him to require employer to select and submit pursuant to 20 C.F.R. §718.107(a) only one reading of the May 14, 2002 CT scan, which the administrative law judge should then consider together with any supporting evidence submitted pursuant to 20 C.F.R. §718.107(b), and in conjunction with any rebuttal evidence submitted by claimant pursuant to 20 C.F.R. §725.414(a)(2)(ii). 20 C.F.R. §§718.107, 725.414(a)(2)(ii). Similarly, in accordance with our prior holding regarding the proper consideration of digital x-rays at 20 C.F.R. §718.107(a), we further vacate the administrative law judge's ruling as to the digital x-ray readings and instruct him to also require employer to select and submit only one reading of the May 14, 2002 digital x-ray, which the administrative law judge should then consider together with any supporting evidence submitted pursuant to 20 C.F.R. §718.107(b), and in conjunction with any rebuttal evidence submitted by claimant pursuant to 20 C.F.R. §725.414(a)(2)(ii). 20 C.F.R. §§718.107, 725.414(a)(2)(ii).

Admission of Dr. Wiot's Deposition Testimony for the Purposes of 20 C.F.R. §718.107(b).

Claimant asserts that the administrative law judge erred in admitting Dr. Wiot's deposition testimony, pursuant to 20 C.F.R. §718.107(b), as evidence relevant to employer's burden to demonstrate that digital x-rays and CT scans are medically acceptable and relevant evidence. Claimant contends that Dr. Wiot's testimony exceeded the scope of 20 C.F.R. §718.107(b), because the physician's testimony set forth not only his opinion as to the medical acceptability of these tests, but also his own opinion, based on a review of other medical evidence, as to whether claimant suffers from pneumoconiosis. Oral Argument Transcript at 8-9. Thus, claimant contends that Dr. Wiot's testimony constitutes a complete medical opinion, and that, therefore, the administrative law judge erred in admitting Dr. Wiot's testimony in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414.[16] Hearing Transcript at 8-9;

[16] Initially, we reject claimant's additional argument that, in this case, because the good cause exception to the evidentiary limitations, set forth at 20 C.F.R. §725.456(b)(1), refers only to documentary evidence, and not witness testimony, the administrative law judge could not have found that good cause existed for the admission of Dr. Wiot's testimony in excess of the limitations. Petition for Review at 4. Contrary to claimant's argument, in discussing 20 C.F.R. §725.456 in the preamble to the revised regulations, the Department of Labor clarified this point, stating: "A showing of 'good cause' is necessary only in the event that a party seeks to convince the administrative law judge that the particular facts of a case justify the submission of additional medical evidence, either in the form of a documentary report or testimony." 65 Fed. Reg. at 80000 (Dec. 20, 2000).

Petition for Review at 4. The Director agrees with claimant that, to the extent a physician's statement or testimony addresses the general medical acceptability and relevance of a test or procedure submitted as "other medical evidence" pursuant to 20 C.F.R. §718.107, and does not discuss the miner himself, it is properly admitted as part of that "other medical evidence" and is not subject to the evidentiary limitations set forth at 20 C.F.R. §725.414 or the attendant good cause provisions of 20 C.F.R. §725.456(b)(1). Director's Oral Argument Brief at 13. The Director further agrees that where a physician's testimony or statement relating to the relevance and medical acceptability of a 20 C.F.R. §718.107 procedure is contained within a medical report, the physician's additional comments are subject to the limitations at 20 C.F.R. §725.414. Director's Oral Argument Brief at 13-14. The Director acknowledges, however, that an administrative law judge may sever that portion of a physician's statement or testimony regarding the medical acceptability and relevance of "other medical evidence" from the rest of the physician's opinion and consider it separately at 20 C.F.R. §718.107(b). Director's Oral Argument Brief at 14. We agree with the Director that where a physician's statement or testimony offered to satisfy the party's burden of proof at 20 C.F.R. §718.107(b) also contains additional discussion, if the additional comments are not admissible pursuant to 20 C.F.R. §§725.414 or 725.456(b)(1),[17] the administrative law judge need not exclude the deposition or statement in its entirely, but may sever and consider separately those portions relevant to 20 C.F.R. §718.107(b). *See Harris*. Thus, under the facts of this case, we hold that the administrative law judge properly admitted, pursuant to 20 C.F.R. §718.107(b), the deposition testimony of Dr. Wiot pertaining to the medical acceptability and relevance of digital x-rays and CT scans. The administrative law judge further acted within his discretion in severing and separately considering Dr. Wiot's additional testimony pertaining to the medical acceptability and relevance of these tests from the rest of his opinion regarding whether the miner in this case suffers from pneumoconiosis, and in finding Dr. Wiot's opinion of little probative value for the purpose of establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).[18] *See Harris*; Employer's Exhibit 5; Decision and Order at 13, 14.

[17] For example, a physician's additional comments may be separately admissible as a physician's assessment of a single test, or as rebuttal or rehabilitative evidence, or for good cause. *See* 20 C.F.R. §§725.414(a)(1), (a)(2)(ii), (a)(3)(ii); 725.456(b)(1).

[18] In considering the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge noted that while Dr. Wiot's report and deposition testimony were negative for pneumoconiosis, the physician's expertise was in radiology, not pulmonology, and his opinion primarily focused on the issue of clinical pneumoconiosis, relevant to his x-ray and CT scan findings, and did not expressly rule out the possibility of legal pneumoconiosis. Decision and Order at 14. Thus, the administrative law judge concluded that the "crux of this case rests with the relative

Merits of Entitlement

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant initially contends that the administrative law judge erred in finding claimant to have a forty-five pack-year smoking history, as the administrative law judge offered no rationale for his conclusion. Petition for Review at 9-10. We agree. In considering the evidence of record pertaining to claimant's smoking history, the administrative law judge accurately summarized claimant's testimony that he started smoking shortly after he went into the Army in 1951, only smoked "a few…a couple, maybe four at most" cigarettes a day, and quit smoking in 2000. Hearing Transcript at 54-55; Director's Exhibit 7; Decision and Order at 5. The administrative law judge further correctly noted that, despite claimant's testimony to the contrary, the record contains medical reports documenting smoking histories of up to one pack a day for forty-five years, as well as claimant's return to smoking in 2001. Director's Exhibits 7, 22; Decision and Order at 5. While the administrative law judge noted that the documented smoking histories varied, he did not explain why he chose to credit the health summary from Dr. Uhrig's office, noting a forty-five pack-year history, over the other documented histories of record. Decision and Order at 5. The Administrative Procedure Act (APA) requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or bases therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We therefore vacate the administrative law judge's finding of a forty-five pack-year smoking history and remand this case for further consideration and discussion of all the relevant smoking history evidence. The administrative law judge's analysis of this evidence must be supported by sufficient rationale for his conclusions. *Wojtowicz*, 12 BLR at 1-165.

Pursuant to 20 C.F.R. §718.202(a)(1), claimant reiterates his earlier argument that the administrative law judge erred in considering, pursuant to this subsection, the May 14, 2002 digital x-ray readings. While we agree that digital x-ray evidence is properly considered pursuant to 20 C.F.R. §718.107, in this case, the administrative law judge

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weight I accord the medical opinions of Drs. Tuteur, Renn, and Cohen, respectively." Decision and Order at 14.

alternatively found that even "if the interpretations of the digital x-ray, dated May 14, 2002, had been excluded from evidence, this would still not affect the result" at 20 C.F.R. §718.202(a)(1). Decision and Order at 6 n.3. Thus, we hold that the administrative law judge's additional consideration of the digital x-rays pursuant to 20 C.F.R. §718.202(a)(1) is harmless error. *See Amax Coal Co v. Director, OWCP* [*Chavis*], 772 F.2d 304, 8 BLR 2-46 (7th Cir. 1985); *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Claimant also contends that the administrative law judge's weighing of only the conventional June 14, 2001 x-ray readings cannot be affirmed because the administrative law judge failed to resolve the conflicting positive and negative readings of record. Petition for Review at 11. Claimant's contention lacks merit. The administrative law judge properly noted that the June 14, 2001 x-ray was read three times as positive, once by a B reader and twice by readers dually qualified as Board-certified radiologists and B readers, and was read twice as negative, by a B reader and a dually qualified reader. Decision and Order at 6. Considering both the quantity of positive and negative x-ray readings, and that all the readings were by physicians with high radiological qualifications, the administrative law judge permissibly concluded that the conventional x-ray evidence of record "neither precludes nor establishes the presence of pneumoconiosis" and that, therefore, claimant failed to meet his burden of establishing the presence of pneumoconiosis by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); Decision and Order at 6. Contrary to claimant's suggestion, the administrative law judge was not required to defer to the numerical superiority of the x-ray readings, *see Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990), or to the readings by the physicians with dual qualifications. *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Substantial evidence supports the administrative law judge's alternative, separate weighing of the June 14, 2001 conventional x-ray readings pursuant to 20 C.F.R. §718.202(a)(1), which we therefore affirm.

Pursuant to 20 C.F.R. §718.202(a)(4), claimant contends that the administrative law judge erred in his analysis of Dr. Sparks's opinion diagnosing "Black Lung" and "Coal Workers' Pneumoconiosis." Director's Exhibit 8; Petition for Review at 13. Contrary to claimant's argument, the administrative law judge acted within his discretion in according little weight to Dr. Sparks's opinion because the physician's credentials are not in the record, he did not provide any rationale for his diagnosis of pneumoconiosis, and the pulmonary function study he relied on was invalidated by two specialists. *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); *Clark*, 12 BLR at 1-149; *McMath*, 12 BLR at 1-6; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985)(holding that an administrative law judge may properly reject a physician's opinion as unreasoned where physician failed to explain the basis for his conclusions, even though the Department of Labor form did not require rationale); *Kendrick v. Kentland-Elkhorn Coal Corp.*, 5 BLR 1-730, 1-733 (1983). We note that the administrative law judge additionally accorded little weight to Dr. Sparks's opinion because it was based in part on a smoking history in

conflict with the administrative law judge's own smoking history findings, which we have vacated herein. However, as the administrative law judge provided three valid, alternative, reasons for according little weight to Dr. Sparks's opinion, we affirm his weighing of Dr. Sparks's opinion. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Claimant also asserts that the administrative law judge failed to resolve the conflict in the medical opinions between Drs. Renn and Tuteur, who found no evidence of coal workers' pneumoconiosis or any coal dust related lung disease, and Dr. Cohen, who diagnosed both coal workers' pneumoconiosis and severe obstructive lung disease due in part to coal dust exposure. Petition for Review at 14. We note that claimant's specific contention lacks merit, as the administrative law judge clearly resolved the conflict in the medical opinion evidence and explained why he credited the opinions of Drs. Renn and Tuteur over Dr. Cohen's contrary opinion. Decision and Order at 14-15. However, the administrative law judge credited the opinions of Drs. Renn and Tuteur in part because they were more consistent with the underlying objective evidence, including the multiple negative CT scan and digital x-ray readings, as well as claimant's smoking history. As we have vacated the administrative law judge's admission into the record of multiple readings of the May 14, 2002 CT scan and digital x-ray, and have vacated his smoking history finding, we must also vacate the administrative law judge's weighing of the opinions of Drs. Renn, Tuteur, and Cohen, and instruct him to reweigh these opinions on remand. Claimant additionally argues that the administrative law judge did not make distinct findings as to the existence of clinical and legal pneumoconiosis. Petition for Review at 14. We agree that on remand, the administrative law judge should specifically address whether the medical opinion evidence is sufficient to establish the existence of either clinical or legal pneumoconiosis, as defined in the regulations. 20 C.F.R. §718.201; *see Wilburn v. Director, OWCP*, 11 BLR 1-135 (1988); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Based on the foregoing, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

We concur:

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur with the majority that 20 C.F.R. §718.107 is reasonably interpreted to allow for the submission, as part of a party's affirmative case, of one reading of each separate test or procedure undergone by claimant. I do so because there is no contention by the parties that the Director's interpretation violates any constitutional or statutory mandate, and it is appropriate to give deference to the Director's interpretation of the regulation where it is reasonable. *See Freeman United Coal Mining Co. v. Director, OWCP [Taskey]*, 94 F.3d

384, 387, 20 BLR 2-348, 2-355 (7th Cir. 1996); *see 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).

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JUDITH S. BOGGS
Administrative Appeals Judge