BRB Nos. 07-0812 BLA
and 07-0812 BLA-A

J.V.S.	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
ARCH OF WEST VIRGINIA/APOGEE COAL COMPANY	)	DATE ISSUED: 07/30/2008
	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Richard A. Seid (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor of Labor; 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 and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (06-BLA-5698) of Administrative Law Judge Richard A. Morgan awarding benefits on 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). This case involves a subsequent claim filed on October 1, 2002.[1] After crediting claimant with thirty-five years of coal mine employment,[2] the administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309(d). Consequently, the administrative law judge considered the merits of claimant's 2002 claim. In his consideration of all of the evidence of record, the administrative law judge found that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b). The administrative law judge further found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in not excluding from the record Dr. Miller's interpretation of a November 21, 2002 x-ray, and Dr. Perper's biopsy report. Employer further contends that the administrative law judge erred in finding that the evidence established the existence of clinical pneumoconiosis. Employer argues, *inter alia*, that the administrative law judge erred in his consideration of the biopsy evidence. Claimant responds in support of the administrative law judge's award of benefits. Claimant has also filed a cross-appeal, contending that the administrative law judge erred in excluding certain x-ray evidence from the record.

[1] Claimant's prior claim, filed on May 22, 1995, was denied by the district director on May 23, 1996, because claimant did not establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 1. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. *Id.* However, after claimant failed to attend the scheduled hearing, Administrative Law Judge Pamela Lakes Wood issued an Order to Show Cause, requiring claimant to explain why his claim should not be dismissed. *Id.* After claimant failed to respond to the Order, Judge Wood, by Order dated March 25, 1997, dismissed claimant's 1995 claim. *Id.*

[2] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

Claimant further contends that the administrative law judge erred in permitting employer to submit two rebuttal readings of an April 30, 2004 x-ray. Claimant also argues that the administrative law judge erred in finding that the evidence did not establish the existence of legal pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, requesting that the Board reject all but one of employer's contentions of error. The Director urges the Board to accept employer's argument that the administrative law judge erroneously required the report of a pathologist who reviewed claimant's lung biopsy slides to include a gross description of the biopsied lung tissue in order to substantially comply with the quality standards for biopsy evidence at 20 C.F.R. §718.106. Neither employer nor the Director has filed a response brief regarding claimant's cross-appeal.[3]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the 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).

Evidentiary Limitations

X-ray Evidence

Employer contends that claimant should not have been permitted to "rebut" the positive x-ray interpretation obtained as part of the Department of Labor-sponsored complete pulmonary evaluation by submitting a positive rereading.[4] Employer argues

[3] Because no party challenges the administrative law judge's finding pursuant to 20 C.F.R. §725.309(d), or his finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] Dr. Gaziano conducted the Department of Labor-sponsored pulmonary evaluation. As part of his evaluation, Dr. Gaziano interpreted a November 21, 2002 x-ray as positive for pneumoconiosis. Director's Exhibit 13. As rebuttal evidence, claimant submitted Dr. Miller's positive interpretation of this x-ray and employer submitted Dr. Wiot's negative interpretation. Director's Exhibit 17; Claimant's Exhibit 6.

that to "rebut" means "to refute, oppose, counteract, or contradict" something, not confirm it. Employer's Brief at 9. The Director disagrees with employer's argument, noting that it is inconsistent with the plain language of Section 725.414, providing that a claimant is permitted:

> to submit, in rebuttal of the case presented by the party opposing entitlement, no more than one physician's interpretation of each chest X-ray . . . submitted by the designated responsible operator or the fund as appropriate, under paragraph (a)(3)(i) or (a)(3)(iii) of this section *and by the Director pursuant to §725.406.*

20 C.F.R. §725.414(a)(2)(ii) (emphasis added).

Consequently, the Director notes that the evidentiary limitations set forth at 20 C.F.R. §725.414, by their very terms, entitle a claimant to submit a rereading of the x-ray obtained by the Director in conjunction with the 20 C.F.R. §725.406 examination. Director's Brief at 5. The Director explains that 20 C.F.R. §725.414 does not limit a party to rebutting a particular item of evidence, but permits the party to respond to a particular item of evidence in order to rebut "the case" presented by the opposing party. *Id.*

In this case, the Director points out that claimant submitted Dr. Miller's rereading of the November 21, 2002 x-ray to rebut employer's case, not as rebuttal of Dr. Gaziano's initial positive interpretation. *Id.* In *Sprague v. Freeman United Coal Mining Co.*, BRB No. 05-1020 BLA (Aug. 31, 2006) (unpub.), the Board considered the identical argument made by the Director, and agreed with the Director's position, holding that "rebuttal evidence submitted by a party pursuant to 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), need not contradict the specific item of evidence to which it is responsive, but rather, need only refute 'the case' presented by the opposing party." *Sprague*, slip op. at 6. In this case, we apply the Board's reasoning in *Sprague* and reject employer's contention that the administrative law judge erred in allowing claimant to submit Dr. Miller's positive interpretation of the November 21, 2002 x-ray.[5]

[5] We reject employer's contention that allowing a claimant to submit a positive reading in rebuttal to the Department of Labor physician's positive reading places employers at an "unfair disadvantage" because it permits claimants to both select the physician who will read the x-ray associated with the Department of Labor-sponsored pulmonary evaluation and to also submit an identical rebuttal reading. The regulations provide for claimant and the responsible operator to each submit an x-ray interpretation in rebuttal to the x-ray interpretation submitted by the Director, Office of Workers' Compensation Programs (the Director), pursuant to 20 C.F.R. §725.406. *See* 20 C.F.R.

In his cross-appeal, claimant contends that the administrative law judge erred in not admitting Dr. Smith's positive interpretation of the March 24, 2003 x-ray into the record. As part of its affirmative case, employer submitted Dr. Wiot's negative interpretation of the March 24, 2003 x-ray. Director's Exhibit 15. Claimant submitted Dr. Miller's positive interpretation of this x-ray as his rebuttal evidence. Claimant's Exhibit 4. However, at the hearing, claimant proffered another interpretation of this x-ray, Dr. Smith's positive interpretation. *See* Excluded Claimant's Exhibit 5. Claimant asserted that, because this x-ray interpretation was generated by employer, and the result was against employer's interest, it should be admitted for "good cause."[6] Transcript at 11. Employer argued that claimant's rationale was not sufficient to constitute "good cause," noting that claimant had an opportunity to submit a reading of the March 24, 2003 x-ray. *Id.* at 13. The administrative law judge, noting that claimant was afforded an opportunity to rebut the negative interpretation of the March 24, 2003 x-ray offered by employer, found that claimant had not demonstrated "good cause" for the admission of an additional interpretation of the March 24, 2003 x-ray. An administrative law judge is afforded broad discretion in dealing with procedural matters. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*). Under the facts of this case, we hold that the administrative law judge did not abuse his discretion in finding that good cause did not exist to admit Dr. Smith's interpretation of the March 24, 2003 x-ray into the record.

Claimant also contends that the administrative law judge erred in not considering Dr. Duncan's interpretation of the November 21, 2002 x-ray. Claimant argues that, because no party objected to the admission of this x-ray interpretation, it should have been admitted into the record. We disagree. In his decision, the administrative law judge explained:

> As part of the Claimant's Department of Labor-sponsored complete pulmonary evaluation, Dr. Ronald Duncan completed a "Roentgenographic Quality Reading" of the November 21, 2002 X-ray on January 20, 2003.

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§725.414(a)(2)(ii), (a)(3)(ii). Thus, the parties submit the same amount of evidence. Employer's argument also mistakenly assumes that the x-ray interpretation submitted by the Director, as part of his obligation to provide claimant with a complete pulmonary evaluation, will always be positive for pneumoconiosis. However, if this x-ray interpretation is negative for pneumoconiosis, an employer would nevertheless be entitled to submit a negative interpretation of the x-ray to refute the case presented by claimant. *See* 20 C.F.R. §725.414(a)(3)(ii).

[6] Medical evidence in excess of the limitations contained in Section 725.414 may be admitted into the hearing record for good cause. 20 C.F.R. §725.456(b)(1).

> (DX 13). Dr. Duncan included, in the comments section of the form, a finding of opacities at the profusion of 2/2. However, because his reading was a quality reading and not a reading for the existence of pneumoconiosis, I redact these comments and consider his reading for quality purposes only.

Decision and Order at 5 n.8. Because Dr. Duncan's x-ray interpretation was submitted by the Director for quality purposes only, the administrative law judge properly declined to consider the physician's comments regarding the presence or absence of pneumoconiosis.

We also reject claimant's contention that the administrative law judge erred in allowing employer to submit two rebuttal readings of the April 30, 2004 x-ray. As part of his affirmative case, claimant submitted two positive interpretations of an April 30, 2004 x-ray. Claimant's Exhibits 1, 2. In *Ward v. Consolidation Coal Co.*, 23 BLR 1-151, 1-155 (2006), the Board held that the rebuttal provisions set forth at 20 C.F.R. §§725.414(a)(2)(ii), (3)(ii), permitting each party to submit "no more than one physician's interpretation of each chest X-ray" in rebuttal, refer to the x-ray *interpretations* that are proffered by the opposing party in its affirmative case, not to the underlying x-ray film. The United States Court of Appeals for the Fourth Circuit, in *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007), upheld this interpretation of the rebuttal provisions at 20 C.F.R. §§725.414(a)(2)(ii), (3)(ii). Thus, pursuant to *Blake* and *Ward*, each party may submit one rebuttal x-ray interpretation for each x-ray interpretation that the opposing party submits in support of its affirmative case, even if the two affirmative-case interpretations are of the same x-ray. *Id.* Therefore, since claimant submitted two interpretations of the April 30, 2004 x-ray in support of his affirmative case, employer was entitled to submit two interpretations in rebuttal under 20 C.F.R. §725.414(a)(3)(ii). *See* Employer's Exhibits 5, 5(a).

Biopsy Evidence Contained in Treatment Records

Employer contends that, while biopsy reports generated in the course of a miner's hospitalization or treatment are admissible, they should count against the two biopsy reports (one affirmative biopsy report and one rebuttal biopsy report) that a claimant may submit into evidence pursuant to 20 C.F.R. §725.414(a)(2)(i), (ii). We disagree. Section 725.414(a)(4) provides that:

> *Notwithstanding the limitations in paragraphs (a)(2) and (a)(3) of this section*, 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) (emphasis added).

The Director notes that:

> In proposing paragraph (a)(4), the Director stated his belief that this provision "would require the admission of any medical record relating to the miner's respiratory or pulmonary condition without regard to the limits set forth elsewhere in §725.414." 64 Fed. Reg. 54966, ¶(i) (Oct. 8, 1999). As an exception to the limitations in §725.414(a)(2) and (a)(3), paragraph (a)(4) independently permits the admission of specific types of evidence without limit and in addition to the evidence permitted by paragraphs (a)(2) and (a)(3). Thus, the plain language of the regulation and the Director's unequivocal description of its intended operation refute the employer's argument. Hospital and treatment records, including the clinical studies performed during the hospitalization or treatment, are admissible without limit and do not count against the clinical and opinion evidence limitations on affirmative and rebuttal evidence in §725.414(a)(2) and (a)(3).

Director's Response Brief at 9.[7]

Because employer's argument contradicts the plain language of 20 C.F.R. §725.414(a)(4), we reject it and hold that biopsy reports generated as part of a claimant's hospitalization or treatment for a respiratory or pulmonary condition do not count against

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[7] The Director also points out the illogical nature of employer's argument, noting that:

> Accepting employer's argument at face value, a claimant may submit unlimited hospitalization/treatment biopsies, but must designate one as affirmative evidence and one as rebuttal evidence. The designations, however, are meaningless because all of the hospitalization/treatment biopsy evidence is admissible and therefore must be considered by the factfinder. And biopsy reports from a hospitalization or treatment would not respond to a biopsy review report obtained by the employer specifically for litigation of the claim. Consequently, a claimant who submits two or more hospitalization/treatment biopsy reports would be precluded from submitting a rebuttal report addressing the employer's affirmative-case evidence.

Director's Response Brief at 9 (footnote omitted).

the claimant's affirmative and rebuttal biopsy reports under 20 C.F.R. §725.414(a)(2)(i), (ii).

Employer next contends that it is entitled to submit a rebuttal report to each biopsy report submitted by claimant, regardless of whether the biopsy report is a part of claimant's affirmative-case evidence or is a part of claimant's hospitalization or medical treatment records. As the Director notes, there is no direct regulatory authority for the rebuttal of hospitalization and medical treatment records that are received into evidence pursuant to 20 C.F.R. §725.414(a)(4).[8] Although the evidentiary limitations do not provide for direct rebuttal of clinical tests contained in treatment records, the Director accurately notes that a party can nevertheless have those tests reviewed and evaluated. For example, a party can have its expert evaluate the biopsy tissue slides and submit the report as part of its affirmative evidence. In this case, the Director notes that employer submitted Dr. Crouch's report, wherein the doctor addressed the biopsy tissue slides reviewed by Drs. Mangano and Aubry. Employer also submitted Dr. Bush's biopsy report in rebuttal to Dr. Perper's report.

The Director also notes that a party may have its physicians, who have prepared affirmative medical reports, review all of the medical evidence in the record in the course of preparing a written medical report or providing testimony at a deposition or the hearing. *See* 20 C.F.R. §§725.414(a)(1); 725.457(d); 725.458. In this case, employer's

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[8] In its second notice of proposed rulemaking, the Department of Labor explained that:

> The Department believes that proposed subsection (a)(4) would require the admission of any medical record relating to the miner's respiratory or pulmonary condition without regard to the limitations set forth elsewhere in Sec. 725.414 . . . . The Department has not included an independent provision governing rebuttal of this evidence. As a general rule, this evidence is not developed in connection with a party's affirmative case for or against entitlement, and therefore the Department does not believe that independent rebuttal provisions are appropriate. Any evidence that predates the miner's claim for benefits may be addressed in the two medical reports permitted each side by the regulation. If additional evidence is generated as the result of a hospitalization or treatment that takes place after the parties have completed their evidentiary submission, the ALJ has the discretion to permit the development of additional evidence under the "good cause" provision of §725.456.

64 Fed. Reg. 54,965, 54,996 (Oct. 8, 1999).

medical experts, Drs. Zaldivar and Crisalli, each reviewed claimant's treatment records, including the biopsy reports of Drs. Mangano and Aubry. Consequently, employer had an adequate opportunity to evaluate claimant's biopsy tissue slides.

Moreover, as previously noted, medical evidence in excess of the limitations contained in Section 725.414 may be admitted into the hearing record for good cause. 20 C.F.R. §725.456(b)(1). If a party wishes to submit evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414, it is required to make a showing of "good cause" for its submission. *See Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006). In this case, there is no indication that employer argued that an additional biopsy report from a third pathologist should have been admitted for "good cause." We, therefore, reject employer's contention that it was entitled to submit evidence in rebuttal to biopsy evidence admitted as part of claimant's hospitalization and medical treatment records.[9]

Having addressed the parties' arguments regarding the application of the evidentiary limitations, we will now address the parties' contentions regarding the merits of the case.

Clinical Pneumoconiosis

X-ray Evidence

Employer contends that the administrative law judge erred in his consideration of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge considered eleven interpretations of four x-rays taken on November 21, 2002, March 24, 2003, April 28, 2004, and April 30, 2004. Dr. Gaziano, a B reader, and Dr. Miller, a B reader and Board-certified radiologist, interpreted the November 21, 2002 x-ray as positive for pneumoconiosis. Director's Exhibit 13; Claimant's Exhibit 6. Dr. Wiot, a B reader and Board-certified radiologist, interpreted the same x-ray as negative for the disease.[10] Director's Exhibit 17.

[9] Employer argues that due process requires that it be provided with an opportunity to rebut each biopsy opinion submitted by claimant, even if the opinion was generated in the course of claimant's treatment. Employer's Brief at 8. However, employer does not develop this argument or refer the Board to any relevant case law in the "due process" context. We, therefore, decline to further address this issue.

[10] Dr. Duncan, a B reader and Board-certified radiologist, interpreted the November 21, 2002 x-ray for its film quality only. Director's Exhibit 13.

Dr. Miller, a B reader and Board-certified radiologist, interpreted the March 24, 2003 x-ray as positive for pneumoconiosis, Claimant's Exhibit 4, and Dr. Wiot, an equally qualified physician, interpreted this x-ray as negative for the disease. Director's Exhibit 15.

Dr. Miller, a B reader and Board-certified radiologist, interpreted the April 28, 2004 x-ray as positive for pneumoconiosis. Claimant's Exhibit 3. Dr. Wheeler, an equally qualified physician, interpreted this x-ray as negative for the disease. Employer's Exhibit 4.

Finally, Drs. Miller and Cappiello, both of whom are B readers and Board-certified radiologists, interpreted the April 30, 2004 x-ray as positive for pneumoconiosis. Claimant's Exhibits 1, 2. However, Drs. Wheeler and Scott, two equally qualified physicians, interpreted this x-ray as negative for the disease. Employer's Exhibits 5, 5(a).

In his consideration of the x-ray evidence, the administrative law judge stated:

> In this case, although a close call, the properly classified chest X-ray evidence supports the existence of pneumoconiosis. Initially, based on recency, I first note that I accord greater weight to the readings submitted in the current claim over those submitted in the prior claim, particularly given that the time difference between the two exceeds five years. Next, I find the November 21, 2002 X-ray to be positive. To that end, two dually qualified physicians have interpreted the X-ray, one reading it positive and one reading it negative for pneumoconiosis. The tie is broken by the positive reading of Dr. Gaziano, a B-reader. The three remaining X-rays, those taken on March 24, 2003, April 28, 2004, and April 30, 2004 respectively, are all in equipoise because each has been read equally positive and negative by dually qualified physicians. Therefore, the current claim contains one positive chest X-ray, zero negative chest X-rays, and three in equipoise. As a result, I find that the chest X-ray evidence supports the existence of pneumoconiosis.

Decision and Order at 24 (footnote omitted).

Employer argues that the administrative law judge erred in disregarding four x-ray interpretations contained in claimant's treatment records because they were not properly classified pursuant to the ILO classification system. Because these x-ray interpretations, rendered by Drs. Smith, Hasan, Reifsteck, and Dwyer, do not include a diagnosis of coal

workers' pneumoconiosis,[11] Director's Exhibit 47, employer asserts that they support an inference that pneumoconiosis was not present.

In this case, the administrative law judge noted the existence of additional chest x-ray interpretations in claimant's hospitalization and treatment records. Decision and Order at 5 n.7. However, he stated that "[f]or the purpose of determining the existence of pneumoconiosis, I credit the properly classified readings submitted by the parties over the X-ray evidence contained in the hospitalization and treatment records, as those readings were not classified as prescribed by the Regulations." Decision and Order at 24 n.33; *see* 20 C.F.R. §718.102(b).

The administrative law judge erred in automatically according less weight to the x-rays contained in claimant's hospitalization and treatment records because they were not properly classified. The quality standards referenced by the administrative law judge apply only to evidence that is developed in connection with a claim for benefits.[12] Therefore, they are inapplicable to the hospitalization and treatment records in this case. *See* 20 C.F.R. §718.101(b); 64 Fed. Reg. 54,965, 54,975 (Oct. 8, 1999). However, in this case, the administrative law judge properly accorded greater weight to the x-ray interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists. Because the radiological qualifications of Drs. Smith, Hasan, Reifsteck, and Dwyer are not found in the record, the administrative law judge's error in not considering these x-ray interpretations was harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer also contends that the administrative law judge erred in not thoroughly analyzing Dr. Miller's interpretation of claimant's November 21, 2002 x-ray. Employer argues that Dr. Miller's "reading is, at best, equivocal for the presence of pneumoconiosis

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[11] Dr. Smith interpreted a September 4, 2002 x-ray as revealing chronic-appearing interstitial changes in the lung bases, most consistent with pulmonary fibrosis. *Id.* Dr. Reifsteck interpreted a September 6, 2002 x-ray as revealing chronic interstitial changes in the lungs. *Id.* Dr. Dwyer interpreted an October 9, 2002 x-ray as revealing diffuse changes of pulmonary fibrosis. *Id.*

Although employer asserts that Dr. Hasan interpreted an x-ray taken on September 5, 2002, it appears that Dr. Hasan actually listed Dr. Smith's interpretation of claimant's September 4, 2002 x-ray in his "History and Physical Examination," a report generated by Dr. Hasan on September 4, 2002.

[12] The standards for the administration of clinical tests apply only to evidence "developed by any party . . . in connection with a claim governed by this part . . . . " 20 C.F.R. §718.101(b).

and should not have been credited." Employer's Brief at 12. We disagree. Dr. Miller both noted that the findings on claimant's November 21, 2002 x-ray were "consistent with atypical coal workers' pneumoconiosis," and unequivocally classified the x-ray as having a profusion of "3/2." Claimant's Exhibit 6. Consequently, the administrative law judge reasonably considered Dr. Miller's interpretation of this film as positive for pneumoconiosis. *See* 20 C.F.R. §§718.102(b); 718.202(a)(1).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[13]

Biopsy Evidence

Employer next contends that the administrative law judge erred in his consideration of the biopsy evidence pursuant to 20 C.F.R. §718.202(a)(2). As part of his treatment at the Charleston Area Medical Center, claimant underwent a lung biopsy on September 5, 2002. Director's Exhibit 47. Dr. Hasan performed the biopsy, but did not review the biopsy lung tissue. *Id.* Dr. Mangano examined the lung tissue slides and issued a report on September 6, 2002, wherein he diagnosed "coal workers' pneumoconiosis, including fibrosis and coal dust deposition." *Id.* Dr. Mangano also diagnosed a "minor component of bronchiolitis obliterans-organizing pneumonia." *Id.* Dr. Mangano sent the slides to the Mayo Clinic for a second opinion. There, Dr. Aubry,

[13] In his cross-appeal, claimant contends that the administrative law judge erred in not finding that all four of the new x-rays of record were positive for pneumoconiosis. Claimant contends that because Dr. Miller "is in the unique position" of having interpreted all of the new x-rays, his interpretations should have been accorded greater weight. We disagree. In weighing x-ray evidence, an administrative law judge should consider the number of x-ray interpretations, along with the readers' qualifications, dates of film, quality of film, and the actual reading. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984); *see generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988). An administrative law judge should focus upon the weighing of positive and negative x-ray interpretations, as opposed to counting the number of individual readers rendering such interpretations. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Rankin v. Keystone Coal Mining Corp.*, 8 BLR 1-54 (1985). There is no requirement that an administrative law judge credit the readings of a doctor because he or she reviewed multiple x-rays. Consequently, we reject claimant's contention that the administrative law judge should have accorded the interpretations of Dr. Miller additional weight based upon his interpretation of multiple x-ray films.

in consultation with Dr. Churg, reviewed the biopsy slides and diagnosed "interstitial pulmonary fibrosis associated with coal dust exposure." *Id.*

As part of its affirmative case, employer submitted Dr. Crouch's review of the biopsy slides. In a report dated July 2, 2003, Dr. Crouch interpreted the slides as follows:

> There is histologic evidence of mixed dust deposition within the lung; however, there is no histologically discern[i]ble coal workers' pneumoconiosis. The pattern of fibrosis – although non-specific – does not suggest an underlying dust-related etiology. In particular, underlying lesions of coal workers' pneumoconiosis including coal dust macules, micronodules or nodules or areas of focal emphysema are not observed. In this regard, accompanying radiographic reports indicate interstitial lung disease that preferentially involves the lower zones of the lung, regions that were sampled in the open biopsies. This is not an expected distribution for pneumoconiosis and is more consistent with idiopathic pulmonary fibrosis.

Director's Exhibit 18.

As part of his affirmative case, claimant submitted Dr. Perper's November 25, 2005 report. Based upon his review of the biopsy slides, Dr. Perper diagnosed, *inter alia*, "[c]oal workers' pneumoconiosis, severe, primarily interstitial type with solid fibro-anthracotic area in excess of 1.5 cm and consistent with complicated coal workers' pneumoconiosis (Progressive Massive Fibrosis)[.]" Director's Exhibit 62 at 21.

Employer submitted Dr. Bush's March 1, 2006 report as rebuttal evidence. In his report, Dr. Bush criticized some of Dr. Perper's conclusions. Employer's Exhibit 3(a).

In his consideration of the biopsy evidence, the administrative law judge stated:

> I find that the biopsy evidence supports the existence of pneumoconiosis. Initially, I credit the biopsy reports of Drs. Mangano, Bush, and Perper over those of Drs. Crouch and Aubry because the reports of the first three doctors all include gross descriptions, as required by §718.106. To that end, Dr. Mangano included a section of his report devoted to the "gross description," Dr. Bush referred to the details of the "gross findings" as part of his analysis, and Dr. Perper included the photographs of the samples, along with descriptions. Between the three credited biopsy reports, Drs. Mangano and Perper both found CWP while Dr. Bush found no evidence of the disease. Therefore, based on the numerical superiority of the credited

> biopsy reports, I find that the biopsy evidence, as a whole, supports the existence of pneumoconiosis.

Decision and Order at 25.

Employer contends that the administrative law judge erred in according less weight to Dr. Crouch's report as its affirmative-case biopsy report on the ground that it did not substantially comply with the quality standards set forth in 20 C.F.R. §718.106. Section 718.106 requires that an autopsy or biopsy report include a detailed, gross macroscopic and microscopic description of the lungs or visualized portion of a lung. *See* 20 C.F.R. §718.106(a). Employer urges the Board to apply the reasoning of its decision in *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2007) (*en banc*), which held that an autopsy report other than the original report prepared by the physician who performed the autopsy, need not include a gross tissue description in order to conform to the requirements of 20 C.F.R. §718.106.

In *Keener*, the claimant objected to the admission of employer's autopsy report because it was based on a review of the autopsy slides and, therefore, lacked any macroscopic description of the miner's lungs. The Director disagreed, arguing that an autopsy review report based solely on microscopic findings was in "substantial compliance" with 20 C.F.R. §718.106(a). The Board agreed with the Director's position, holding that:

> In light of the comments to the regulations and the practical concerns surrounding the requirement for a detailed macroscopic description of the lungs, we hold that the administrative law judge properly admitted [the physician's] slide review as employer's affirmative report of an autopsy pursuant to Section 725.414(a)(3)(i).

Keener, 23 BLR at 1-238.

In this case, the Director, in its response brief, states:

> We agree with the employer that the logic behind *Keener* and autopsy evidence applies with equal force to biopsy reports other than the original report derived from the actual biopsy procedure. A physician who reviews the tissue slides and reports his or her microscopic findings need not also provide a gross macroscopic description of the tissue samples. Such reports are in "substantial compliance" with §718.106(b). Only the physician who performs the biopsy itself must include the gross macroscopic findings as part of the original report.

> In this case, the ALJ disregarded Dr. Crouch's report because she did not include macroscopic findings as part of her report. In view of *Keener*, the ALJ erroneously disregarded Dr. Crouch's report.

Director's Response Brief at 7-8.

We agree with the Director's position. Consequently, we extend the Board's reasoning in *Keener* to biopsy evidence and hold that a biopsy slide review can be in substantial compliance with 20 C.F.R. §718.106 even if it does not include a gross macroscopic description of the tissue samples. Consequently, we hold that the administrative law judge erred in discrediting Dr. Crouch's biopsy report as employer's affirmative-case biopsy evidence solely because it lacked a gross description. *See* 20 C.F.R. §§718.101(b); 718.106(a); 725.414(a)(3)(i).

Claimant and the Director also contend that the administrative law judge erred in discrediting Dr. Aubry's biopsy report, contained in claimant's treatment records, because he did not include a macroscopic description of the biopsy lung tissue. As previously noted, the quality standards apply only to evidence developed in connection with a claim for benefits. *See* 20 C.F.R. §718.101(b); 64 Fed. Reg. 54,965, 54,975 (Oct. 8, 1999). Because Dr. Aubry's biopsy report was developed as part of claimant's treatment, it is not subject to the quality standards set forth at 20 C.F.R. §718.106. Consequently, the administrative law judge erred in discrediting Dr. Aubry's biopsy report for failing to conform to the requirements of Section 718.106.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the biopsy evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), and we remand the case for further consideration.

Medical Opinion Evidence

Employer also argues that the administrative law judge erred in his consideration of the medical opinion evidence. In his consideration of whether the medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge initially noted that he credited the medical opinion evidence submitted in connection with the current claim, over the medical opinion evidence submitted in the prior claim, based upon its recency. Decision and Order at 25. The administrative law judge considered the opinions of Drs. Gaziano, Perper, Crisalli, Zaldivar, and Rao. The administrative law judge accorded diminished weight to Dr. Gaziano's opinion, that claimant suffered from coal workers' pneumoconiosis, because he found that Dr. Gaziano based his opinion on "comparatively less extensive medical information" than the other four physicians. Decision and Order at 25; Director's Exhibit 13; Claimant's Exhibit 10.

The administrative law judge credited the opinions of Drs. Perper and Rao, that claimant suffered from coal workers' pneumoconiosis, over the contrary opinions of Drs. Zaldivar and Crisalli, because he found that the opinions of Drs. Perper and Rao were more consistent with the positive pathologic evidence. In light of our decision to vacate the administrative law judge's finding that the biopsy evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), we also vacate the administrative law judge's finding that the medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer also notes that the administrative law judge did not address the fact that Dr. Perper, in his report, referred to autopsy evidence and opined that claimant's "organized pneumonia was . . . a contributory cause of death." Employer's Brief at 13. As employer notes, claimant is still alive. Employer contends that Dr. Perper's "confusion and/or inattention to detail lessens his credibility." *Id.* Employer also contends that the administrative law judge, in weighing the medical opinion evidence, should have considered the fact that Dr. Perper was the only pathologist to find evidence of complicated pneumoconiosis and centrilobular emphysema. On remand, when reconsidering whether the medical opinion evidence establishes the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

CT Scan Evidence

In his cross-appeal, claimant contends that the administrative law judge erred in finding that the CT scan evidence did not establish the existence of clinical pneumoconiosis. The administrative law judge considered two interpretations of a CT scan taken on May 13, 2002.[14] Dr. Wiot interpreted the scan as confirming that "there is no evidence of coal worker's pneumoconiosis." Director's Exhibit 5. Dr. Miller interpreted the scan as follows:

> There is evidence of moderately severe, somewhat patchy interstitial lung disease with a predominately-reticular appearance, greater in the lower lungs than the upper lungs. The appearance is nonspecific but could be

[14] The administrative law judge found that the CT scan evidence contained in claimant's hospitalization and treatment records did not include any finding of pneumoconiosis. Decision and Order at 25.

> consistent with pneumoconiosis. The profusion of the interstitial abnormalities cannot be graded since there are no ILO standards for CT scans. There are several bullae. There is mild bronchiectasis. There is a small amount of thin, finely nodular pleural thickening.

Claimant's Exhibit 7.

The administrative law judge permissibly found that Dr. Miller's opinion, that the findings on claimant's May 13, 2002 CT scan "could be consistent with pneumoconiosis" was too equivocal to constitute a diagnosis of clinical pneumoconiosis. *See* 20 C.F.R. §718.201(a)(1); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 25; Claimant's Exhibit 7. Having found that Dr. Miller's opinion was equivocal, the administrative law judge credited Dr. Wiot's negative interpretation of claimant's May 13, 2002 CT scan. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the CT scan evidence did not establish the existence of pneumoconiosis. Decision and Order at 24-25.

Legal Pneumoconiosis

In his cross-appeal, claimant argues further that the administrative law judge erred in finding that the evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[15] In his consideration of whether the evidence established the existence of legal pneumoconiosis, the administrative law judge stated:

> [T]here exists some evidence in the record of legal pneumoconiosis; however, that evidence is insufficient to establish such a finding. Specifically, Dr. Perper found the presence of emphysema associated with coal dust exposure. However, because, amidst the voluminous medical evidence that exists in this case, there is no other evidence of emphysema due to coal dust exposure, I find that Dr. Perper's opinion is insufficient to establish that the Claimant had legal pneumoconiosis. The same is true with respect to Dr. Aubry's finding of interstitial pulmonary fibrosis associated with coal dust exposure; there is no other evidence of such a condition in the record. Thus, this reference is insufficient to establish the presence of legal pneumoconiosis. Finally, the records of Drs. Al-Asadi and Rao contain findings of [chronic obstructive pulmonary disease]. However, there is no indication in their records that this [chronic

[15] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

> obstructive pulmonary disease] arose out of coal mine employment. Therefore, these references are also insufficient to establish the presence of legal pneumoconiosis.

Decision and Order at 27.

Claimant contends that the administrative law judge erred in his consideration of Dr. Perper's opinion. In his report, Dr. Perper noted that, although centrilobular emphysema is a known complication of smoking, he could not attribute claimant's centrilobular emphysema to smoking because claimant was never a smoker. Director's Exhibit 62 at 30. Dr. Perper also noted that:

> While it is legitimate to recognize in general the role of smoking in producing centrilobular emphysema, it is equally legitimate to recognize the significant role of exposure to coal mine dust and coal workers' pneumoconiosis, and there is no logical reason to exclude it.

Id.

Claimant contends that the administrative law judge should have found that his emphysema was caused by coal dust exposure because "[n]o evidence of any other exposure which would tend to create . . . emphysema has been introduced into [the] record." Claimant's Brief at 19. However, in this case, the administrative law judge questioned Dr. Perper's opinion, which stood alone, in light of the fact that there was no other evidence of centrilobular emphysema in the record. Because claimant does not challenge the administrative law judge's specific basis for discrediting Dr. Perper's diagnosis of emphysema, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

However, we agree with claimant that the administrative law judge erred in his consideration of Dr. Aubry's opinion. The administrative law judge noted that Dr. Aubry interpreted claimant's biopsy evidence as revealing "interstitial pulmonary fibrosis associated with coal dust exposure." Director's Exhibit 47. The administrative law judge accorded less weight to Dr. Aubry's opinion because he found that "there was no other evidence of such a condition in the record." Decision and Order at 47. However, Drs. Crisalli and Zaldivar diagnosed pulmonary fibrosis, albeit from a source other than claimant's coal mine employment.[16] The administrative law judge failed to provide an

[16] Dr. Crisalli opined that claimant suffered from idiopathic pulmonary fibrosis that had nothing to do with coal dust exposure. Director's Exhibit 46; Employer's Exhibit 7(a) at 37. Dr. Zaldivar opined that claimant suffered from pulmonary fibrosis, unrelated to his occupation as a coal miner. Employer's Exhibits 1, 6(a).

adequate explanation for discrediting Dr. Aubry's diagnosis.[17]

In light of the above-referenced errors, we vacate the administrative law judge's finding that the evidence did not establish the existence of legal pneumoconiosis. On remand, when reconsidering whether the medical opinion evidence establishes the existence of legal pneumoconiosis, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

On remand, should the administrative law judge find that the evidence establishes the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and/or (a)(4), he must weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), before determining whether the evidence establishes the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

In light of our decision to vacate the administrative law judge's finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), we also vacate his finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and instruct him to reconsider this issue, if reached, on remand.

[17] The administrative law judge accurately noted that, while Drs. Rao and Al-Asadi diagnosed chronic obstructive pulmonary disease, they did not attribute the disease to claimant's coal mine employment. Consequently, the administrative law judge properly found that the opinions of Drs. Rao and Al-Asadi did not support a finding of legal pneumoconiosis.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge