BRB No. 02-0520 BLA

TERRY M. FIFE Claimant-Respondent v. YOGI MINING COMPANY, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand - Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Terry M. Fife, Maxie, Virginia, *pro se*.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer/carrier.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge.

Employer appeals the Decision and Order on Remand - Awarding Benefits (99-BLA-1207) of Administrative Law Judge Joseph E. Kane 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).[1] This case is on appeal to the Board for the second time. Pursuant to employer's previous appeal, the Board affirmed the administrative law judge's

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[1] 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, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

findings regarding length of coal mine employment, timeliness of the claim, responsible operator status, number of dependents, and commencement of benefits as unchallenged on appeal, but vacated the administrative law judge's determination that claimant[2] established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and thereby invocation of the irrebuttable presumption of totally disabling pneumoconiosis, 30 U.S.C. §921(c)(3), and remanded the case to the administrative law judge to specifically consider whether Dr. Sutherland's opinion was well-reasoned and documented, and consequently, to reconsider all of the other medical opinion evidence of record because his weighing of that evidence was dependent on his crediting of Dr. Sutherland's opinion. The Board also instructed the administrative law judge to reconsider Dr. Dahhan's opinion and to provide a more detailed explanation of his weighing of the entirety of Dr. Dahhan's opinion, as evidenced by his multiple reports, and to weigh the CT scan evidence along with all of the relevant evidence to determine whether claimant established the existence of complicated pneumoconiosis by a preponderance of the evidence. The Board further instructed the administrative law judge that if, on remand, he found the evidence of record insufficient to establish the existence of complicated pneumoconiosis, he must then determine whether claimant established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a), considering both x-ray, medical opinion, and CT scan evidence together pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), and determine whether total disability due to pneumoconiosis was established pursuant to 20 C.F.R. §718.204, if reached. The Board also instructed the administrative law judge to determine whether claimant's pneumoconiosis arose out of coal mine employment. Accordingly, the case was remanded for reconsideration. *Fife v. Yogi Mining Company, Inc.*, BRB No. 00-1197 BLA (Oct. 17, 2001)(unpub.).

On remand, the administrative law judge again found that claimant established the existence of complicated pneumoconiosis under Section 718.304 by a preponderance of the evidence because the positive x-ray interpretations of Drs. Forehand and Alexander and the medical opinions of Drs. Forehand and Sutherland diagnosing the existence of complicated pneumoconiosis outweighed the equivocal x-ray readings of Drs. Wheeler, Scott, and Sargent and the equivocal and unreasoned medical opinion of Dr. Dahhan and the vague opinion of Dr. Tuteur, who had no first-hand knowledge of claimant's condition. Decision and Order on Remand at 18. Accordingly, benefits were awarded commencing as of February 1999, the month in which claimant was first diagnosed with complicated pneumoconiosis.

[2] Claimant, Terry M. Fife, filed his application for benefits on December 17, 1998. Director's Exhibit 1.

On appeal, employer argues that the administrative law judge erred by not properly weighing all of the relevant evidence and particularly, that he failed to comply with the Board's October 2001 remand order when he, among other things, did not reevaluate all of the evidence under Section 718.202(a)(1) and did not discuss the CT scan evidence in finding that claimant established the existence of complicated pneumoconiosis. Employer also contends that the administrative law judge's findings are not supported by the record. Claimant, who is without the assistance of counsel, has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating that he is not participating in the appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We first address employer's contention regarding the existence of complicated pneumoconiosis. Employer contends that the case must be remanded because the administrative law judge failed to explicitly analyze the credibility of the CT scan evidence provided by Drs. Wheeler and Scott either in isolation, or in conjunction with the other evidence in determining whether claimant established the existence of complicated pneumoconiosis or medical or legal pneumoconiosis as instructed by the Board in its remand order.

We disagree. In addition to discussing the CT scan evidence when he evaluated the opinions of Drs. Dahhan and Tuteur, the administrative law judge summarized the CT scan evidence in his current Decision and Order, noting that Dr. Wheeler interpreted the CT scan as showing advanced conglomerate tuberculosis with masses containing calcified granulomata, and minimal emphysema, and concluded that tuberculosis explained all of the lung findings except emphysema, noting that claimant was quite young. The administrative law judge stated that Dr. Scott interpreted the same CT scan as showing nodular apical infiltrates and/or scarring, multiple calcified granulomata, and changes compatible with tuberculosis of unknown activity, but partially healed as evidenced by calcified granulomata. The administrative law judge further stated that Dr. Scott went on to find that there was no background of small rounded opacities to suggest that masses could be rounded opacities of pneumoconiosis. Decision and Order on Remand at 12-13.

A correct understanding of this case requires a brief discussion of its history. In his first decision, the administrative law judge accorded little evidentiary weight to the interpretations of the July 28, 1999 CT scan by Drs. Wheeler and Scott because they attributed the changes in claimant's lungs to tuberculosis when neither physician had

considered the fact that claimant had been evaluated for tuberculosis by his treating physician, Dr. Sutherland, and that no evidence of the disease had been found. Administrative Law Judge's Decision and Order dated September 8, 2000. On appeal, the Board rejected employer's argument that the administrative law judge was required to give determinative weight to the CT scan evidence but agreed with employer that the administrative law judge had not specifically discussed the reasoning and documentation of Dr. Sutherland's opinion when he had relied upon it to reject employer's CT scan interpretations. Accordingly, the Board vacated the administrative law judge's crediting of Dr. Sutherland's opinion and remanded the case for the administrative law judge to specifically determine whether Dr. Sutherland's opinion was reasoned and documented; the Board also vacated the remainder of the administrative law judge's findings at Section 718.304 because the administrative law judge's consideration of the other evidence rested on his crediting of Dr. Sutherland's opinion. On remand the administrative law judge fully explained his determination to credit Dr. Sutherland's report as documented and reasoned, discussed *infra*. Considering the administrative law judge's decision in light of his prior decision and that of the Board, it is clear that the administrative law judge had thereby justified his determination to reject the CT scan interpretations of Drs. Wheeler and Scott, since their diagnoses of probable tuberculosis were disproved by Dr. Sutherland's testing. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). Employer's request for another remand to weigh the CT scan evidence is merely an attempt to delay the inevitable.

Employer further asserts that the mere presence of a category A or B interpretation on x-ray or CT scan does not automatically constitute evidence of complicated pneumoconiosis sufficient to trigger the irrebuttable presumption and that abnormalities seen on x-ray reflecting the presence of non-coal dust related afflictions, such as tuberculosis, neoplasm, histoplasmosis or sarcoidosis, do not establish entitlement to the irrebuttable presumption. Thus, in this case, employer contends that the administrative law judge selectively analyzed the evidence and mischaracterized the evidence when he relied on a minority of x-ray interpretations which were not supported by more reliable and uncontradicted CT scan evidence showing evidence of tuberculosis, not complicated pneumoconiosis. Further, employer contends that the administrative law judge did not consider the superior qualifications of Drs. Wheeler and Scott when he discounted their x-ray interpretations and found their opinions equivocal on the existence of complicated pneumoconiosis.

In finding the existence of complicated pneumoconiosis established, the administrative law judge found that the x-ray readings of Drs. Forehand and Alexander were entitled to greater weight than the equivocal readings of Drs. Wheeler, Scott, and Sargent. Specifically, employer contends that the readings of Drs. Wheeler and Scott were not equivocal since their "0/1" classifications on x-ray justified their conclusions that pneumoconiosis "could account" for some of the x-ray changes.

Contrary to employer's argument, the administrative law judge was not required to accord greater weight to the readings of Drs. Wheeler and Scott, dually qualified board-certified, B-readers, solely because of their superior qualifications, when the readers the administrative law judge relied on, Drs. Forehand and Scott, were also highly qualified. The administrative law judge noted that Dr. Forehand was a B-reader, and Dr. Scott, was a dually qualified reader. *See* 20 C.F.R. §718.202(a); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). In this case, the administrative law judge accorded less weight to the readings of Drs. Wheeler and Scott because of the equivocal language they used to describe the abnormalities seen on claimant's x-ray and because they were unable to state that claimant did not suffer from pneumoconiosis, *i.e.*, Dr. Wheeler acknowledged that pneumoconiosis/silicosis could account for some of the nodules revealed on the miner's July 28, 1999 x-ray and Dr. Scott stated that he could not rule out minimal silicosis/coal workers' pneumoconiosis when he read the December 21, 1999 x-ray. Likewise, the administrative law judge found that Dr. Sargent's reading of claimant's February 12, 1999 x-ray as positive for pneumoconiosis with A large opacities was equivocal because Dr. Sargent indicated that he was uncertain as to whether the opacities seen were early large opacities, tuberculosis, or granulomatous disease. The administrative law judge, however, found that both Dr. Forehand, a B-reader, and Dr. Alexander, a dually qualified reader, read claimant's x-rays positive for pneumoconiosis and noted the presence of large opacities. Further, as discussed *infra*, the administrative law judge properly accorded greater weight to the opinions of Drs. Forehand and Sutherland than the opinions of Drs. Dahhan and Tuteur. Accordingly, we affirm the administrative law judge's finding that the x-ray and medical opinion evidence established the existence of complicated pneumoconiosis. *See Mays*, 176 F.3d at 764, 21 BLR at 2-606 (4th Cir. 1999); (both the meaning of an ambiguous word or phrase and the weight to give testimony of an uncertain witness are questions for the trier of fact); 20 C.F.R. §718.202(a)(1); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987).

Employer next asserts that the administrative law judge erred in relying on Dr. Sutherland's opinion that claimant had been evaluated for tuberculosis and that no evidence of the disease was found in the absence of any discussion by Dr. Sutherland of when, where, or by whom claimant was so evaluated. Employer's Brief in Support of Petition for Review at 10. The administrative law judge credited Dr. Sutherland's opinion that claimant did not have evidence of either tuberculosis or coccidial mycosis as well-reasoned and documented because it was based on claimant's medical and occupational histories, the chest x-ray readings by Drs. Sutherland and Scott, and Dr. Sutherland's observations upon testing and examinations of claimant, in addition to the fact that Dr. Sutherland had been claimant's treating physician for seven years and was the only physician who had evaluated claimant for tuberculosis. This was rational. *Hicks*, *supra*; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17

BLR 1-85, 1-88-89 (1993); *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-6 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773-4 (1985); Decision and Order on Remand at 14; Claimant's Exhibit 1. Thus, contrary to employer's argument, the administrative law judge sufficiently identified the underlying documentation upon which Dr. Sutherland relied and properly found that his opinion was a well-reasoned and documented opinion. Further, employer's contention that Dr. Sutherland's opinion is somehow undocumented and unreasoned because he did not discuss when, where, or by whom claimant was evaluated for tuberculosis is without merit as employer has not shown how the absence of this information renders the opinion of Dr. Sutherland, who noted that he had been seeing claimant since 1992 for his pulmonary condition, unreasoned or undocumented. *See Clark*, *supra*. Consideration of the totality of Dr. Sutherland's medical report reveals that it is a reasoned medical opinion, demonstrating that claimant shows no signs of tuberculosis. *See Compton*, *supra*.

Employer also argues that the administrative law judge erred in finding that Dr. Dahhan, a consulting physician, failed to consider the opinions of Drs. Sutherland and Forehand and erred in finding that Dr. Dahhan did not provide a proper explanation for the inconsistency between his x-ray reading and his narrative opinions. Instead, employer contends that Dr. Dahhan offered a well-reasoned opinion regarding the absence of complicated and simple pneumoconiosis. The administrative law judge accorded less weight to Dr. Dahhan's March 27, 2000 opinion diagnosing the absence of pneumoconiosis, in reliance on the CT scan interpretations of Drs. Wheeler and Scott, because Dr. Dahhan failed to reconcile his conclusion with the countervailing opinions of Drs. Alexander, Sargent and Forehand diagnosing the existence of pneumoconiosis and failed to address the substantial differences between his conclusions and the conclusions of the examining physicians. Further, the administrative law judge noted that Dr. Dahhan failed to consider that claimant had been evaluated for tuberculosis by his treating physician but that no evidence for that disease had been found. This was rational. *Clark*, *supra*; *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); *Brown v. Director, OWCP*, 7 BLR 1-730, 1-732 (1985); *see also Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-20 (1985); *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984).

Employer also mistakenly argues that the administrative law judge erred by finding that Dr. Dahhan failed to reconcile the inconsistency between his July 28, 1999 x-ray reading of "r/r, 1/1" pneumoconiosis and an "A" large opacity and his deposition testimony that claimant suffered from neither simple nor complicated pneumoconiosis. Employer's Exhibits 2, 7. Contrary to employer's argument, however, the administrative law judge noted that Dr. Dahhan had adequately explained his ultimate conclusion that pneumoconiosis was absent in the claimant, despite his initial x-ray interpretation of a 1/1 A large opacity when he

opined that a subsequent CT scan revealed to him that what he had seen on x-ray was not a large opacity but a "large shadow." Decision and Order on Remand at 16.

Nonetheless, the administrative law judge went on to find that Dr. Dahhan's opinion was entitled to less weight because it failed to address the medical evidence available from Drs. Alexander, Sargent, Sutherland and Forehand regarding the presence of pneumoconiosis and complicated pneumoconiosis. The administrative law judge also noted that Dr. Dahhan failed to address Dr. Sutherland's finding of no tuberculosis, even though he relied on the opinions of Drs. Wheeler and Scott, speculating on the existence of tuberculosis. Thus, the administrative law judge noted that while Dr. Dahhan had listed Dr. Sutherland's report as one that he had considered, Dr. Dahhan's opinion did not demonstrate that he had adequately considered Dr. Sutherland's report in reaching his determination. *See Clark*, *supra*; *Stark*, *supra*; *see also Anderson*, *supra*; *Worley*, *supra*.

Likewise, employer contends that the administrative law judge erred in rejecting Dr. Tuteur's opinion. The administrative law judge accorded less weight to Dr. Tuteur's opinion, than to Dr. Forehand's, because Dr. Tuteur offered only a vague explanation for the abnormalities seen on claimant's chest x-ray and because Dr. Tuteur stated that a "consensus" of the x-ray and CT scan readings suggested the absence of pneumoconiosis, but failed to explain how the abnormalities seen on x-ray and CT scan were consistent with infection rather than a large opacity. Accordingly, the administrative law judge properly rejected Dr. Tuteur's opinion as equivocal. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice*, *supra*.

Additionally, employer contends that the administrative law judge erred in crediting Dr. Forehand's diagnosis of complicated pneumoconiosis because it was based solely on a single x-ray interpretation which was subsequently rejected by a better qualified physician, Dr. Tuteur, and because Dr. Forehand's opinion was inconsistent with the CT scan evidence. Employer also contends that Dr. Forehand's opinion was equivocal and unexplained as to the existence of complicated pneumoconiosis because Dr. Forehand acknowledged the possibility that the abnormalities seen on claimant's x-ray could be tuberculosis instead of complicated pneumoconiosis.

The administrative law judge accorded great weight to Dr. Forehand's opinion that claimant suffers from complicated pneumoconiosis because it was supported by specific physical examination findings, claimant's coal mine employment and cigarette smoking histories, and a positive chest x-ray interpretation. The administrative law judge also accorded greater weight to the opinion of Dr. Forehand, than to the opinion of Dr. Tuteur, because Dr. Forehand, who had examined claimant, had first-hand knowledge of claimant's condition and acknowledged that claimant should have had a tuberculin skin test to rule out tuberculosis, <u>as an additional diagnosis</u>. (emphasis added). The administrative law judge concluded that this addendum to the opinion of Dr. Forehand, diagnosing complicated

pneumoconiosis did not undermine the credibility of Dr. Forehand's opinion because he did not suggest a diagnosis of tuberculosis as opposed to pneumoconiosis, as did Drs. Wheeler, Scott, and Dahhan. Decision and Order on Remand at 18. Hence, contrary to employer's argument, the administrative law judge, properly accorded Dr. Forehand's opinion greater weight. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 7 BLR 2-202 (4th Cir. 1985); *Clark*, *supra*; *Stark*, *supra*; *Hutchens*, *supra*; *see also Anderson*, *supra*; *Worley*, *supra*; *Brown*, *supra*; *Rickey*, *supra*.

In sum, the administrative law judge properly determined that claimant had established the existence of complicated pneumoconiosis at Section 718.304(a). He credited the x-ray readings of Drs. Alexander and Forehand diagnosing complicated pneumoconiosis, category B. He gave less weight to the readings of Drs. Scott, Wheeler and Dahhan, who equivocally attributed the abnormalities on claimant's chest x-ray to granulomatous disease, particularly tuberculosis, since testing by claimant's treating physician showed no evidence of the disease. The administrative law judge properly considered the medical opinion evidence to help him determine the credibility of the x-ray readings. He ultimately determined that the readings of Dr. Alexander, a Board-certified radiologist and B-reader, and of Dr. Forehand, a B-reader, both finding category B pneumoconiosis were the most credible and therefore that claimant had established the existence of complicated pneumoconiosis at Section 718.304.

Consequently, we affirm the administrative law judge's determination that claimant established the existence of complicated pneumoconiosis under Section 718.304.[3] *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243-244 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Because we affirm the administrative law judge's finding of complicated pneumoconiosis, we need not consider employer's argument at 20 C.F.R. §718.202(a).[4]

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[3] Employer has not challenged the administrative law judge's finding of causality at Section 718.203(b). 20 C.F.R. §718.203(b); Decision and Order on Remand at 19. That finding is, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] Our affirmance of the administrative law judge's Decision and Order awarding benefits renders moot employer's request that the case be assigned to a new administrative law judge on remand. *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, BRB No. 02-0365 BLA (Feb. 12, 2003)(Gabauer, J., concurring).

Accordingly, the Decision and Order on Remand - Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's finding that claimant was entitled to invocation of the irrebuttable presumption of totally disabling pneumoconiosis based on a finding of complicated pneumoconiosis in this case, 30 U.S.C. §921(c)(3), as implemented by 20 U.S.C. §718.304. Instead, I would vacate the administrative law judge's invocation of the irrebuttable presumption based on a finding of complicated pneumoconiosis and remand the case for further consideration. Although the administrative law judge summarized the CT scan reports of Drs. Wheeler and Scott in the list of medical evidence of record, Decision and Order on Remand at 12-13, I agree with employer that the administrative law judge failed to assess specifically the probative value, if any, of the CT scan evidence in isolation, or in conjunction with the other evidence relevant to the existence of complicated pneumoconiosis as he was instructed to do in the Board's remand order. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 191, 22 BLR 2-251, 2-260 (4th Cir. 2000) ("When ALJs simply state that they have 'considered' certain evidence and have decided to discount it, the Board and reviewing courts are left to guess at the judges' rationale.").

In addition, I would vacate the administrative law judge's finding that Dr. Sutherland's opinion was documented and reasoned because, in addressing whether claimant had tuberculosis, a crucial issue in this case, Dr. Sutherland merely stated in one sentence, "The patient was evaluated for tuberculosis and coccidial mycosis with no evidence of these diseases." Claimant's Exhibit 1. As employer contends, Dr. Sutherland did not identify the

testing used to rule out tuberculosis, did not indicate when the testing was done, and did not discuss the specific findings of the testing. Unlike my colleagues, therefore, I cannot conclude that this constituted a reasoned opinion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993).

Additionally, the administrative law judge's consideration of Dr. Dahhan's opinion is also faulty inasmuch as Dr. Dahhan recanted his initial diagnosis of pneumoconiosis based on later more extensive medical data. His second opinion of no pneumoconiosis does not, therefore, contradict his first opinion. Moreover, because Dr. Sutherland's opinion of no tuberculosis is not reasoned, the administrative law judge's rejection of Dr. Dahhan's opinion as well as other opinions because they failed to address Dr. Sutherland's finding of no tuberculosis is not supported by the record. Consequently, I would vacate the administrative law judge's determination that claimant established the existence of complicated pneumoconiosis under Section 718.304, and remand the case for the administrative law judge to reconsider the CT scan evidence of record together with the other relevant evidence under Section 718.304(c). *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243-244 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

Finally, because I would vacate the administrative law judge's finding of complicated pneumoconiosis and his finding that the irrebuttable presumption of totally disabling pneumoconiosis was invoked, I would address employer's other arguments. Employer argues that the administrative law judge erred in incorporating the determinations from his original decision regarding the existence of simple pneumoconiosis at Section 718.202(a)(1) and (2) into his current decision inasmuch as those determinations had not been challenged.[1] Instead, employer contends that inasmuch as the administrative law judge's finding at Section 718.202(a)(1) was vacated and the case remanded, the administrative law judge was required to reconsider the relevant evidence under that section. Specifically, employer argues that the administrative law judge erred by finding that the x-ray interpretations of Drs. Wheeler and Scott, physicians who possess superior radiological qualifications, were equivocal because the administrative law judge did not consider their comments or deposition testimony that further explained their conclusions that claimant suffered from neither simple nor complicated pneumoconiosis. Instead employer contends that the "0/1" x-ray readings of Drs. Wheeler and Scott justified their conclusions that pneumoconiosis

[1] The administrative law judge stated, that inasmuch as his analysis under Section 718.202(a)(1) and (a)(2) had not been challenged, it was incorporated into his current Decision and Order. Decision and Order on Remand at 13.

"could account" for some of the x-ray changes. I agree with employer that inasmuch as the Board vacated the administrative law judge's finding at Section 718.202(a)(1), and remanded the case for reconsideration of the relevant medical evidence, *i.e.*, x-rays, medical opinions, and CT scan readings, together at Section 718.202(a) pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the administrative law judge must reconsider the evidence on the existence of simple pneumoconiosis.

Because the administrative law judge found the existence of complicated pneumoconiosis established, and claimant entitled to the irrebuttable presumption of totally disabling pneumoconiosis, however, he did not reconsider the evidence relevant to the existence of simple pneumoconiosis. Inasmuch as I would remand this case for reconsideration of the CT scan evidence at Section 718.304, I would also instruct the administrative law judge to consider, if reached, whether the evidence considered together establishes the existence of simple pneumoconiosis at Section 718.202(a), and also, if reached, total disability due to pneumoconiosis at Section 718.204(b), (c). I would deny employer's request that the case be remanded to a new administrative law judge, however. Employer has not established that the administrative law judge has exhibited the necessary intransigence in his second decision on this case to require remand to a new administrative law judge. *Zamora v. C.F. & I Steel Corp.*, 7 BLR 1-568 (1984); *see Hicks*, *supra*; *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-108 (1992).

ROY P. SMITH
Administrative Appeals Judge