BRB No. 08-0534 BLA

A.T.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
	)	DATE ISSUED: 04/16/2009
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (05-BLA-5122) of Administrative Law Judge Michael P. Lesniak rendered on a subsequent 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] The administrative law judge

[1] Claimant's first application for benefits, filed on February 25, 1985, was denied by Administrative Law Judge John H. Bedford on September 30, 1988, because claimant failed to establish total disability. Director's Exhibit 1. Pursuant to claimant's appeal,

credited claimant with twenty-nine years of coal mine employment,[2] Decision and Order at 2, 16, and he rejected employer's contention that claimant should be collaterally estopped from relitigating the issue of complicated pneumoconiosis. The administrative law judge determined that the evidence submitted since the previous denial established the existence of simple and complicated pneumoconiosis and therefore established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge also found that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Therefore, the administrative law judge found that claimant is presumed to be totally disabled, and that claimant therefore established a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding that relitigation of the issue of complicated pneumoconiosis was not barred by collateral estoppel. In addition, employer asserts that even if the administrative law judge properly adjudicated the issue of complicated pneumoconiosis, his reasoning was impermissible. Claimant responds, urging affirmance of the administrative law judge's award of benefits. Employer replies, urging the Board to reject claimant's arguments. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.

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

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the Board affirmed the denial of benefits. [*A.T.*] *v. Eastern Associated Coal Corp.*, BRB No. 88-3970 BLA (Nov. 7, 1991)(unpub.); Director's Exhibit 1. Claimant did not further pursue his 1985 claim. Claimant's second claim for benefits, filed on August 14, 2000, was denied by Administrative Law Judge Daniel L. Leland on April 15, 2002, because the new evidence did not establish total disability or invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, and therefore, a material change in conditions was not established. Director's Exhibit 2. Claimant did not further pursue this claim. On September 26, 2003, claimant filed the instant claim. Director's Exhibit 4.

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibits 1, 5. 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, 1-202 (1989)(*en banc*).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under Part 718 in a living miner's claim, 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The applicable conditions of entitlement "shall be limited to those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). As claimant's prior claim was denied because he failed to establish that he was totally disabled, claimant had to submit new evidence establishing total disability in order to obtain review of the merits of his claim.[3] 20 C.F.R. §725.309(d)(2), (3). One method of establishing total disability is by means of invocation of the irrebuttable presumption set forth at 20 C.F.R. §718.304. 20 C.F.R. §718.204(b)(1).

Initially, we consider employer's assertion that the administrative law judge erred in finding that relitigation of the issue of complicated pneumoconiosis under Section 718.304 was not barred by the principles of issue preclusion. Employer asserts that Administrative Law Judge Daniel L. Leland's 2002 finding that the evidence did not establish complicated pneumoconiosis is entitled to preclusive effect because claimant did not appeal from, or seek modification of that finding. Employer asserts that "neither progressivity nor latency are at issue" and contends that claimant did not submit new evidence, rather, he merely submitted more of the same evidence. Employer's assertions of error lack merit.

While this case was before the administrative law judge, employer argued that since the issue of complicated pneumoconiosis had been decided previously, claimant

[3] Because the existence of pneumoconiosis was not addressed in Judge Leland's 2002 Decision and Order denying benefits, it was not an applicable condition of entitlement in this claim. *See* 20 C.F.R. §725.309(d)(2). Thus, the current administrative law judge's finding that the evidence establishes the existence of simple pneumoconiosis is not relevant to whether claimant established a change in the applicable condition of total disability.

should be collaterally estopped from relitigating this issue. The administrative law judge determined that claimant "did not fail to contest the issue of complicated pneumoconiosis, nor did he stipulate to its absence," and that Judge Leland "found that Claimant had not established complicated pneumoconiosis by a preponderance of the evidence." Decision and Order at 11. The administrative law judge stated:

> Claimant has offered *new* evidence (x-ray and CT scan evidence) to establish that he suffers from complicated pneumoconiosis. In light of the Department of Labor's recognition of pneumoconiosis as a latent and progressive disease and Claimant s submission of new evidence, I find that Claimant is not collaterally estopped from relitigating the issue of complicated pneumoconiosis.

Id.

The Board has held that the doctrine of *res judicata* generally has no application in the context of subsequent claims, "as the purpose of Section 725.309 is to provide relief from the principles of *res judicata* to a miner whose physical condition worsens over time." *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-79 (1993). This regulation states that if claimant establishes a change in one of the applicable conditions of entitlement, "no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see §725.463), shall be binding on any party in the adjudication of the subsequent claim." 20 C.F.R. §725.309(d)(4). In addition, courts have held that *res judicata* does not apply in a subsequent claim where the issue is claimant's physical condition at entirely different times. *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996)(*en banc*); *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 450, 21 BLR 2-50, 2-60 (8th Cir. 1997); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 314, 20 BLR 2-76, 2-87 (3d Cir. 1995). Consequently, the administrative law judge did not err in denying employer's allegation that claimant should be estopped from relitigating the issue of complicated pneumoconiosis, and we reject employer's assertion in this regard.[4]

[4] We also reject employer's contention that claimant did not submit "new" evidence to support his subsequent claim, but merely submitted the same kinds of evidence considered previously. The comments to the amended regulations indicate that Section 725.309 "allow[s] the miner to litigate his entitlement to benefits without regard to any previous findings by producing new evidence that established any of the elements of entitlement previously resolved against him." 65 Fed. Reg. 79968 (Dec. 20, 2000). In this case, claimant submitted more recent x-ray interpretations, medical opinions and treatment records, including biopsy interpretations and other test results. There is no

Employer also asserts that the administrative law judge erred in finding the existence of complicated pneumoconiosis established. Section 411(c)(3) of the Act, implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The United States Court of Appeals for the Fourth Circuit has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption found at Section 718.304, the administrative law judge must examine all the evidence relevant to the presence or absence of complicated pneumoconiosis, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflict, and weigh together all of the evidence in making his finding. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

Pursuant to 20 C.F.R. §718.304(a), employer challenges the administrative law judge's finding that the x-ray evidence established the existence of complicated pneumoconiosis.[5] The administrative law judge noted that all of the physicians found

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requirement that claimant submit new forms of evidence in order to establish a change in an applicable condition of entitlement.

[5] The newly submitted x-ray evidence includes ten interpretations of four x-rays. The January 21, 2004 film was read by Dr. Wheeler, a B reader and Board-certified radiologist, as negative for pneumoconiosis. He noted a scar or mass in the lateral right mid-lung and infiltrates or fibrosis "compatible with TB or histoplasmosis." He stated that a "few small nodules could be CWP but granulomatous disease best explains findings." Employer's Exhibit 12. The January 29, 2004 x-ray was read by Dr. DePonte,

evidence of nodules or fibrosis in claimant's lungs, and that all of the physicians who interpreted the x-rays as negative for pneumoconiosis "were unable to offer more than probable etiologies for the x-ray changes." Decision and Order at 12. The administrative law judge referred to an unpublished Board Decision and Order and stated:

> [A]pplying the same reasoning to the present case, I find Drs. Scatarige and Scott's opinions equivocal as to the source of Claimant's nodules, particularly in light of the other physician's [sic] findings of coal workers' pneumoconiosis, Claimant's 29 year coal mine dust exposure history, and Claimant's medical history. I find that Dr. Wheeler's observation of a lung mass which he provided no etiology for, and his admission that the nodules in Claimant's lungs could be coal workers' pneumoconiosis (CWP) but were more likely granulomatous disease, render his findings less persuasive. I find the interpretations of Drs. DePonte, Gaziano and Willis more consistent with Claimant's work and medical histories and therefore give them greater weight.

Id. The administrative law judge considered the qualifications of the physicians who read the films and stated "in spite of the board certifications of Drs. Wheeler, Scott and Scatarige, their x-ray interpretations are nevertheless equivocal; therefore their opinions are outweighed by the more credible findings of Drs. Willis, Gaziano and DePonte." Decision and Order at 13 n.4. Therefore, the administrative law judge found that the x-ray evidence established the existence of complicated pneumoconiosis.

Employer argues that the administrative law applied the wrong standard in weighing the x-ray evidence, and it argues that employer is not required to establish

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a B reader and Board-certified radiologist, as 2/2 B, Claimant's Exhibit 6, and by Dr. Gaziano, a B reader, as 2/3 A. Director's Exhibit 15. Dr. Scott, a B reader and Board-certified radiologist, read this film as negative for pneumoconiosis. He noted scattered granulomata and a few peripheral nodules, which he described as "probably tb, unknown activity, or histoplasmosis." Director's Exhibit 19. The June 29, 2004 x-ray was read by Dr. DePonte as 1/2 A. Claimant's Exhibit 2. Dr. Scott read this film as negative for pneumoconiosis, and noted bilateral nodules with calcified granulomata "compatible with histoplasmosis or TB." Employer's Exhibit 13. The June 19, 2006 x-ray was read by Dr. Willis, a B reader, as 2/1 B, Claimant's Exhibit 1, and by Dr. DePonte as 2/2 B. Claimant's Exhibit 6. Dr. Scott read this film as negative for pneumoconiosis, and noted "Patchy and nodular infiltrates bilaterally: possibly pneumonia and/or edema." Employer's Exhibit 14. Dr. Scatarige read this film as negative for pneumoconiosis. He noted bilateral nodules and cardiomegaly, but stated "No cwp or silicosis." Employer's Exhibit 2.

alternative etiologies for claimant's disease. Employer also challenges the administrative law judge's reliance on an unpublished Board decision.

In resolving the conflicting x-ray interpretations regarding the existence of complicated pneumoconiosis, the probative value of the respective interpretations must be assessed in light of all relevant factors affecting the credibility of the x-ray readings. The mere fact that a physician has not identified a definitive alternate source for the x-ray findings does not undermine a negative x-ray interpretation, since the burden of proof rests with claimant to establish the existence of complicated pneumoconiosis. *Lester*, 993 F.2d at 1146, 17 BLR at 2-118; *see also Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994)(holding that a medical opinion ruling out the presence of a totally disabling respiratory or pulmonary impairment can be given weight even if the physician does not identify the actual cause of claimant's total disability); *Clinchfield Coal Co. v. Lambert*, 206 F. App'x 252, 255 (4th Cir. Nov. 17, 2006)(unpub.)(stating that *Scarbro* did not impose a burden on the party opposing entitlement to affirmatively establish that opacities are not there or are not what they seem to be, and emphasized that the burden of proof remains with claimant at all times). Therefore, the administrative law judge erred in his evaluation of these x-rays. Contrary to the administrative law judge's finding, the opinions of Drs. Wheeler, Scott, and Scatarige are not equivocal on the issue of the existence of complicated pneumoconiosis.[6] Employer's Exhibits 2, 13-14, 19. Consequently, we vacate the administrative law judge's finding that the x-ray evidence established the existence of complicated pneumoconiosis. On remand, the administrative law judge must consider all of the x-ray evidence pursuant to Section 718.304(a), to determine whether it establishes the existence of complicated pneumoconiosis and apply current Circuit Court and Board case law in evaluating the evidence.

Employer further asserts that the administrative law judge erred in characterizing Dr. Aycoth's "Category A" interpretation of a May 31, 2006 x-ray as a treatment note,

[6] The administrative law judge cited *Cooper v. Westmoreland Coal Co.*, BRB No. 04-0589 BLA (Mar. 24, 2005)(unpub.) for the proposition that he may find that "a physician's equivocal identification of the process that accounts for x-ray markings that other physician's [sic] have identified as complicated pneumoconiosis diminishes his or her credibility." Decision and Order at 12. *Cooper* is distinguished from the instant case, as the radiologists in *Cooper* made questionable comments as to whether the mass they identified was, in fact, a Category A large opacity. In the instant case, however, Drs. Wheeler, Scott, and Scatarige were unequivocal that claimant did not have a Category A or larger opacity. Drs. Scott and Scatarige found no pneumoconiosis of any kind; Dr. Wheeler opined that there was no pneumoconiosis, after considering that there were some small nodules that could be simple pneumoconiosis, but which were more likely to be granulomatous disease because of their asymmetrical pattern.

and employer argues that the administrative law judge's reliance on Dr. Aycoth's x-ray reading as the "most persuasive," Decision and Order at 13, after denying employer the right to rebut the reading, violated its right to due process. We reject employer's contention that the administrative law judge erred in characterizing Dr. Aycoth's x-ray as a treatment note and relying on it as the most credible x-ray reading. The administrative law judge's characterization of Dr. Aycoth's interpretation as a treatment record was within his discretion, and employer does not point to any evidence that contradicts the administrative law judge's characterization.[7] Claimant's Exhibit 1; *see* 20 C.F.R. §725.414(a)(4). Moreover, contrary to employer's suggestion, the administrative law judge did not find that Dr. Aycoth's interpretation was the most persuasive x-ray interpretation overall; rather, the administrative law judge found it to be the most persuasive interpretation of the x-rays that were submitted as part of claimant's treatment notes. Decision and Order at 13.

However, there is merit to employer's assertion regarding the administrative law judge's exclusion of the x-ray reading that employer proffered in rebuttal to Dr. Aycoth's reading. At the hearing, employer submitted Dr. Scott's negative interpretation of the film originally read by Dr. Aycoth. The administrative law judge did not admit this interpretation, stating "I don't think we're permitted to get that rebuttal in. On the other hand, if you furnish an impression for me post-hearing, I will let it in if it favors your position." Hearing Transcript at 8-9. In its post-hearing brief, employer argued that good cause justified the admission of Dr. Scott's reading, as employer should be permitted to rebut properly classified x-ray evidence of complicated pneumoconiosis if the administrative law judge was going to rely on that evidence. Closing Argument on Behalf of Employer at 7 n.3. The administrative law judge did not address employer's post-hearing argument that good cause justified the admission of Dr. Scott's interpretation, and the administrative law judge relied in part on Dr. Aycoth's x-ray interpretation in finding the existence of complicated pneumoconiosis established. Decision and Order at 13, 15. On remand, the administrative law judge must consider whether Dr. Scott's interpretation should be admitted into the record, in view of employer's argument that good cause exists for admitting this reading. *See* 20 C.F.R. §725.456(b)(1); *North Am. Coal Co. v. Miller*, 870 F.2d 948, 952, 12 BLR 2-222, 2-228 (3d Cir. 1989); *see also L.P. v. Amherst Coal Co.*, 24 BLR 1-55 (2008)(*en banc*).

Pursuant to Section 718.304(b), employer contends that the administrative law judge mischaracterized the evidence when he found the biopsy results inconclusive because the biopsy was performed on claimant's right lower lung, while the large opacity

[7] At the hearing, employer conceded that the x-ray in question came from claimant's medical treatment records. Hearing Transcript at 7.

of pneumoconiosis identified on x-ray was located in claimant's mid-lung zone.[8] Employer argues that although doctors noted the mass in claimant's right lower lobe and in claimant's right mid-lung zone, "they were all talking about the same mass," and employer asserts that only the administrative law judge drew "a distinction-and he was incorrect." Employer's Brief at 25.

In considering the biopsy evidence, the administrative law judge stated that it "revealed interstitial fibrosis and anthracotic pigment deposits, but did not offer an explicit diagnosis of coal workers' pneumoconiosis," and he found that it was inconclusive for the presence or absence of pneumoconiosis. Decision and Order at 13. The administrative law judge also noted that "[t]he biopsy was performed on Claimant's right lower lung, while the large opacity of pneumoconiosis identified by physicians in this case was located in Claimant's mid-lung zone." Decision and Order at 13 n.5.

As employer asserts, the administrative law judge's analysis of the biopsy evidence did not address Dr. Wheeler's diagnosis of a four-centimeter mass in claimant's right lower lung. Employer's Exhibit 6. Therefore, we vacate the administrative law judge's analysis of the biopsy evidence. On remand, the administrative law judge is instructed to consider Dr. Wheeler's diagnosis, and both biopsy results, as it is unclear from his Decision and Order that he considered both reports.

Pursuant to Section 718.304(c), employer maintains that the administrative law judge's findings with respect to the CT scans are irrational, asserting that the administrative law judge erred by discounting the CT scan interpretations of Drs. Wheeler and Scatarige because they did not definitively state what the CT scan showed, despite their unequivocal opinions that the CT scan was negative for complicated pneumoconiosis.[9]

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[8] The record contains the reports of two lung biopsies performed five days apart. Dr. Rasheed evaluated the tissue specimen from the biopsy of claimant's "right lower lung" on May 26, 2004, and diagnosed the presence of blood clots and stated that no epithelial tissue was identified. Claimant's Exhibit 5. Dr. Imbing evaluated the tissue of a specimen identified as "apical segment, right lower lung" from claimant's May 31, 2004 biopsy. Dr. Imbing diagnosed "patchy interstitial fibrosis and anthracotic pigment deposits" and stated that no malignancy was identified. Claimant's Exhibit 5.

[9] The record contains five interpretations of three CT scans. Dr. Wheeler read the April 19, 2001 CT scan and noted small irregular infiltrate or fibrosis in claimant's right mid-lung and lower right hilum and stated that a few of the nodules seen "could be CWP but TB or histoplasmosis best explains the asymmetrical and peripheral predominance of nodules and infiltrates or fibrosis." Employer's Exhibit 5. The May 24, 2004 CT scan

The administrative law judge considered four interpretations of three CT scans. He gave less weight to the interpretation of the April 19, 2001 scan, because it was three years older than the other scans. Turning to the May 24 and May 25, 2004 CT scans, the administrative law judge accorded greater weight to the interpretations of Drs. Wheeler and Scatarige, because both physicians were Board-certified radiologists and B readers, and the administrative law judge noted that Dr. Cruz did not have either credential. However, the administrative law judge stated:

> I find Dr. Wheeler's explanation as to the etiology of the observed lung mass unpersuasive. While Dr. Wheeler opined that Claimant's lung mass is not CWP because the profusion of simple opacities is small, Dr. Zaldivar explained that the development of complicated pneumoconiosis involves the conglomeration of small opacities and can effectively reduce the background profusion of small opacities. Dr. Scatarige offered only an equivocal opinion on the etiology of the small opacities and did not observe any masses; therefore, I find that the CT scan evidence does not establish the presence or absence of simple or complicated pneumoconiosis.

Decision and Order at 14.

In weighing the CT scan evidence, the administrative law judge required employer to establish the etiology of the masses that the physicians opined were not coal workers' pneumoconiosis. This is tantamount to putting the burden of proof on employer to prove the etiology of the identified condition. However, as the burden is on claimant to

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was read by Dr. Patel as showing complicated pneumoconiosis. Dr. Patel stated that the noncalcified mass in claimant's right mid-lung was "likely [a] Category A large opacity of complicated pneumoconiosis." Director's Exhibit 5. This CT scan was also read by Dr. Wheeler, who noted calcified granulomata and small nodular infiltrates. He stated that "CWP could cause some small nodules in this case but granulomatous disease is more likely to give asymmetrical pattern." Employer's Exhibit 6. Dr. Wheeler noted that the mass in claimant's right lung "is not a large opacity of CWP because of very low profusion background small nodules." Employer's Exhibit 6. The May 25, 2004 CT scan was read by Dr. Cruz, who stated "The lungs again show a profusion of opacities bilaterally with some coalescence at the mid-lung zones, notably at the right consistent with complicated pneumoconiosis . . . ." Claimant's Exhibit 5. Dr. Scatarige also read this CT scan and noted increasing pleural effusions and pulmonary infiltrates "possibly due to CHF." He also noted "[m]any small, central, round opacities in upper and mid-lung zones with lymphadenopathy. He diagnosed "TB, histoplasmosis, sarcoidosis, and lymphoma." and stated that coal workers' pneumoconiosis and silicosis were less likely "since the distribution of the small opacities is asymmetrical." Employer's Exhibit 7.

establish the existence of complicated pneumoconiosis, it is error for the administrative law judge to discount the opinions of experts for failing to ascribe a definite etiology to the masses they observed. *Lester*, 993 F.2d at 1146, 17 BLR at 2-118; *Grigg*, 28 F.3d 416, 18 BLR 2-299; *Lambert*, 206 F. App'x at 255. Therefore, we vacate the administrative law judge's analysis of the CT scan evidence. On remand, the administrative law judge must weigh all of the CT scan evidence, pursuant to Section 718.304(c), to determine whether claimant establishes the existence of complicated pneumoconiosis.

Employer also challenges the administrative law judge's evaluation of the medical opinions, in particular, the administrative law judge's reliance on the opinion of Dr. Rasmussen. The administrative law judge gave "some weight" to Dr. Rasmussen's diagnosis of complicated pneumoconiosis, but found that the opinion was not well-documented or reasoned, because it pre-dated more recent x-ray evidence. Decision and Order at 15. The administrative law judge also gave "some weight" to the opinion of Dr. Gaziano, who diagnosed complicated pneumoconiosis, but the administrative law judge noted that Dr. Gaziano "offered little explanation to support his findings." *Id.* The administrative law judge gave little weight to Dr. Zaldivar's opinion that claimant did not have pneumoconiosis, and to Dr. Crisalli's opinion, which ruled out pneumoconiosis. The administrative law judge noted that Dr. Crisalli's "equivocal findings as to the etiology of Claimant's CT scan abnormalities, and his failure to consider the additional positive CT scan interpretations in [the] record, render his opinion less persuasive." *Id.* The administrative law judge also noted the relative qualifications of these physicians. Decision and Order at 15, n.8.

As an initial matter, Dr. Rasmussen's opinion is irrelevant to the issue at hand, *i.e.*, whether claimant has established a change in one of the applicable conditions of entitlement. As the administrative law judge noted, this opinion was considered by Judge Leland in the 2002 decision denying claimant's prior claim, and therefore it is not "new" evidence. Moreover, the Board is bound to accept that the prior final denial was correct, and this opinion must therefore be viewed as a misdiagnosis, because it was counter to what was found by Judge Leland in his 2002 Decision and Order. *Rutter*, 86 F.3d at 1358, 20 BLR at 2-227; *see also Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006). Further, because the administrative law judge's consideration of the other medical opinion evidence was based on his evaluation of the x-ray and CT scan evidence, and in view of our holdings regarding the administrative law judge's evaluation of the x-ray and CT scan evidence, we also vacate the administrative law judge's weighing of the medical opinion evidence.

On remand, the administrative law judge must reconsider the new evidence to determine whether it establishes the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), or the existence of

complicated pneumoconiosis pursuant to Section 718.304, to determine whether claimant has established a change in the applicable condition of entitlement pursuant to Section 725.309(d). The administrative law judge must first determine whether the evidence in each category at Section 718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis, then he must weigh together the evidence at Section 718.304(a)-(c) before determining whether invocation of the irrebuttable presumption of total disability due to pneumoconiosis is established. *Lester*, 993 F.2d at 1143, 17 BLR at 2-114; *Melnick*, 16 BLR at 1-33. If the administrative law judge finds the new evidence sufficient to establish this change, he must then consider all of the evidence of record to determine whether it establishes each of the elements of entitlement pursuant to Part 718. If the administrative law judge does not find that the new evidence establishes the existence of complicated pneumoconiosis, he must consider whether claimant has otherwise established a change in the applicable condition of total disability pursuant to Sections 725.309(d), 718.204(b)(2).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge