BRB No. 07-0865 BLA

S.L. (Widow of R.L.) Claimant-Respondent v. KENLEY MINING COMPANY and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/12/2008 DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth, (Hensley, Muth, Garton & Hayes) Bluefield, West Virginia, for claimant.

Ann B. Rembrandt (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order-Awarding Benefits (05-BLA-5494) of Administrative Law Judge Ralph A. Romano on a survivor's claim filed, on February 19, 2004, 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 found that the evidence established: a coal mine employment history of "at least" thirty-three years; the presence of simple pneumoconiosis based on x-ray and medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(1) and (4); and that pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found, however, that the evidence failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1), or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death pursuant to 20 C.F.R. §718.205(c)(2). However, the administrative law judge found that because the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), claimant was entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(3). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding complicated pneumoconiosis established at Section 718.304 and, therefore, erred in finding claimant entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis at Section 718.205(c)(3). In support of this contention, employer asserts that the administrative law judge failed to correctly to consider and weigh all of the relevant x-ray and medical opinion evidence on the issue of complicated pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

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[1] Claimant is the widow of the miner, who died on January 1, 2004. The death certificate gives the cause of death as ascending aortic dissection, with coronary artery disease and mitral valve disease listed as other significant conditions contributing to death. Director's Exhibit 9. Prior to his death, on June 1, 1998, the miner was awarded benefits on his living miner's claim because the evidence established complicated pneumoconiosis and the miner was therefore entitled to the irrebuttable presumption that his pneumoconiosis was totally disabling. 20 C.F.R. §§718.202(a)(3), 718.304. Claimant is not eligible for derivative survivor's benefits, however, based on the filing date of the miner's claim. *See Smith v. Camco Mining, Inc.*, 13 BLR 1-17, 1-18-22 (1989); *cf. Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86-87 (1988). The miner's claim is not before us.

[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding, as well as his finding that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2) because there was no autopsy or biopsy evidence in the record. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

We also affirm, as unchallenged on appeal, the administrative law judge's finding that the presumptions at 20 C.F.R. §§718.305 and 718.306 were not applicable, and that

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.[3] 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).

To establish entitlement to survivor's benefits, in addition to establishing that the miner had pneumoconiosis that arose out of coal mine employment, claimant must establish that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251,

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the existence of pneumoconiosis was not, therefore, established at 20 C.F.R. §718.202(a)(3), on the basis of those presumptions. *Skrack*, 6 BLR at 1-711.

However, regarding the applicability of the irrebuttable presumption that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.304, employer contends that the administrative law judge acted inconsistently in finding that pneumoconiosis was not established at Section 718.202(a)(3) because claimant was not entitled to the Section 718.304 presumption, but then stating that claimant was entitled to that presumption because complicated pneumoconiosis was established by x-ray evidence. It is clear from the totality of the decision, however, that the administrative law judge found claimant entitled to the presumption at Section 718.304. *See* Decision and Order at 4, 8. Consequently, we hold that any error the administrative law judge made in stating that pneumoconiosis was not established at Section 718.202(a)(3) is harmless, as the totality of the administrative law judge's Decision and Order clearly shows that he found claimant entitled to the presumption at Section 718.304. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1989).

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 2.

2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992).

DIGITAL X-RAYS

In concluding that complicated pneumoconiosis was established by x-ray evidence at Section 718.304(a), the administrative law judge relied on the x-ray readings of complicated pneumoconiosis by Drs. Marshall and Alexander on a traditional x-ray taken on January 13, 1997.[4] The administrative law judge accorded little weight to the readings of Drs. Wiot and Meyer, who found neither simple nor complicated pneumoconiosis on digital x-rays taken on December 23, 2003 and December 30, 2003.[5]

In weighing this evidence, the administrative law judge found that the x-ray readings of Drs. Alexander and Marshall, Director's Exhibit 2, "[l]end strong support to each other," since both physicians noted the presence of a large opacity, size A in the left upper lobe of the miner's lungs. Decision and Order at 4. The administrative law judge accorded little weight to the digital readings of Drs. Wiot and Meyer because no evidence had been submitted showing that the digital x-rays were "medically acceptable and relevant to entitlement." Decision and Order at 4. In addition, the administrative law judge noted that he accorded little weight to the digital readings because they were "dramatically at odds" with the readings of traditional x-rays in the record which showed the existence of either complicated or simple pneumoconiosis. *Id*.

Employer asserts, however, that the administrative law judge erred in according little weight to the digital x-ray readings of Drs. Wiot and Meyer. Specifically, employer contends that the administrative law judge's application of 20 C.F.R. §718.107(b)[6] and

[4] Dr. Marshall interpreted the January 13, 1997 x-ray as showing pneumoconiosis 3/2 r, q and large opacity A. Director's Exhibit 2. Dr. Alexander interpreted the same x-ray and reported pneumoconiosis 2/2 q/q and large opacity A. *Id*.

[5] Dr. Wiot stated that the digital x-ray of December 23, 2003, showed no evidence of coal workers' pneumoconiosis and suggested a "malignancy until proven otherwise." Employer's Exhibit 8. Dr. Meyer stated that the digital x-ray of December 30, 2003, showed no evidence of coal workers' pneumoconiosis, and that malignancy was "not excluded." Employer's Exhibit 10.

[6] 20 C.F.R. §718.107(a) provides that, in addition to x-rays, pulmonary function studies, blood gas studies, autopsy or biopsy evidence, and medical opinion evidence admissible as supporting evidence of entitlement:

the Board's holding in *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(J. Boggs, concurring), *aff'd on recon.*, 24 BLR 1-1 (2007)(*en banc*) to accord little weight to the digital readings was "draconian" in view of the circumstances in this case. Specifically, employer asserts the following: that the 1997 traditional x-ray relied on by the administrative law judge had been destroyed and was, therefore, no longer available to employer for reading; that the miner is deceased so that employer can no longer obtain an x-ray that substantially complies with the quality standards at 20 C.F.R. §718.102(a)-(d); that the readings of the digital x-rays were made by two highly qualified readers, who were both B readers and Board-certified radiologists;[7] that the digital x-rays were almost ten years more recent than the 1997 traditional x-ray; and that the digital x-rays, taken on December 23, 2003 and December 30, 2003, were contemporaneous with the miner's death on January 1, 2004. Employer contends, therefore, that, in light of these factors, the administrative law judge erred in finding that there was "[n]o evidence submitted to establish that the digital x-ray readings [were] medically acceptable and relevant to

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

20 C.F.R. §718.107(a).

The regulation further states that:

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

20 C.F.R. §718.107(b).

[7] A B reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A Board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

entitlement." Decision and Order at 4. Further, citing 20 C.F.R. §718.102,[8] employer contends that the circumstances in this case require that digital x-rays be given greater consideration.

In *Webber*, the Board held that because the x-ray standards described at 20 C.F.R. Part 718, Appendix A,[9] are not applicable to digital x-rays, the admission of digital x-rays is governed by Section 718.107. Pursuant to Section 718.107, the Board held that the administrative law judge must determine, on a case-by-case basis, whether the proponent of the digital x-ray evidence established its "medical acceptability and relevance." *Webber*, 23 BLR at 1-133; *see Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting); *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting). Thus, employer asserts that the administrative law judge erred when he did not discuss the circumstances in this case before summarily concluding there was "no evidence submitted to establish that the digital x-ray readings [were] medically acceptable and relevant." Decision and Order at 4. We agree. Consequently, we hold that, the administrative law judge's finding that the x-ray evidence established complicated pneumoconiosis at Section 718.304(a) must be vacated and the case remanded for the administrative law judge to

[8] Section 718.102 states, in pertinent part:

> In the case of a deceased miner where the only available x-ray does not substantially comply with [the standards established at 20 C.F.R. §718.102(a)-(d)] such x-ray may form the basis for a finding of the presence or absence of pneumoconiosis if it is of sufficient quality for determining the presence or absence of pneumoconiosis and such x-ray was interpreted by a Board-certified or Board-eligible radiologist or a certified "B" reader.

20 C.F.R. §718.102.

[9] Appendix A to 20 C.F.R. Part 718 sets forth detailed technical instructions for obtaining a chest x-ray and explicitly prescribes film size, exposure times, and appropriate methods for processing the film. *See* Sections (1), (7), (8)(ii)-(viii) and (9) of Appendix A to 20 C.F.R. Part 718. Thus, the plain language of Sections 718.102, 718.202(a)(1), and Appendix A indicates that these regulations apply to chest x-rays recorded on film. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting); *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting).

reconsider the "medical acceptability and relevance" of the digital x-ray readings in this case. *See Harris*, 24 BLR at 1-16; *Webbe*r, 23 BLR at 1-133.

SECTION 718.304(a)

Employer next contends that the administrative law judge erred in failing to weigh together all of the x-ray evidence relevant to complicated pneumoconiosis before finding it established at Section 718.304(a), based on the readings of the 1997 x-ray. Specifically, employer contends that, in addition to not properly weighing the digital x-ray readings, the administrative law judge failed to consider the fact that Dr. Meyer read a November 6, 1996 x-ray as positive for simple pneumoconiosis only. Employer's Exhibit 12. Further, employer contends that the administrative law judge erred in treating Dr. Wiot's reading of the November 6, 1996 x-ray, Director's Exhibit 2, as positive, since the physician only stated that the changes shown on the x-ray were compatible with simple pneumoconiosis, in light of the miner's coal mine dust exposure. Employer notes that the doctor later testified on deposition that, after reviewing a 2003 digital x-ray that showed neither complicated nor simple pneumoconiosis, he now concluded that the changes seen on the November 6, 1996 x-ray were not, in fact, changes consistent with simple pneumoconiosis.[10] Employer thus argues that the administrative law judge should not have found that Dr. Wiot's reading of the November 6, 1996 x-ray constituted a positive x-ray reading.

Section 411(c)(3)(A) of the Act, 30 U.S.C. §921(c)(3)(A), implemented by 20 C.F.R. §718.304 of the regulations, provides:

> There is an irrebuttable presumption that…a miner's death was due to pneumoconiosis…if such miner is suffering or suffered from a chronic dust disease of the lung which:
>
> (a) When diagnosed by chest X-ray ... yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or
>
> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or

[10] Dr. Wiot testified that he based his initial x-ray findings on an assumption that a miner has adequate exposure to develop coal workers' pneumoconiosis. Dep. Transcript (Employer's Exhibit 11) at 55.

> (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304 [emphasis in original].

However, the introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. Rather, the administrative law judge must examine all of the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999); *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236 (2003)(Gabauer, J., concurring); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*).

In this case, as employer contends, the administrative law judge failed to address Dr. Meyer's reading of the November 6, 1996 x-ray, which was read as positive for simple pneumoconiosis only. The reading of the November 6, 1996 x-ray should have been weighed with the readings of the January 13, 1997 x-ray, showing complicated pneumoconiosis, as it reflects on the validity of those readings. Further, as employer contends, Dr. Wiot's 2003 deposition testimony calling into question his positive reading of the November 6, 1996 x-ray, should have been considered in determining the validity of the 1997 x-ray.[11] *See Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993). On remand, therefore, the administrative law judge must consider the

[11] Further, in considering this evidence the administrative law judge must resolve the discrepancy in the size of the opacities demonstrated by the x-ray evidence. As employer argues, while both Drs. Alexander and Marshall indicate that the x-ray evidence demonstrates large opacities, *i.e.* at least one centimeter, both Drs. Wiot and Meyer take issue with this conclusion. Dr. Wiot testified that the nodule was not even "one sonnometer," was far too small to be pulmonary massive fibrosis, and speculated that the nodule was the result of an infectious process. Employer's Exhibit 13. Dr. Meyer stated that the nodule was less than one centimeter large and was suggestive of "sequellae of granulomatous disease." Employer's Exhibit 12.

readings by Drs. Meyer and Wiot of the November 6, 1996 x-ray as well as Dr. Wiot's 2003 deposition testimony regarding his readings of the November 6, 1996 x-ray.

Further, in considering the x-ray evidence relevant to complicated pneumoconiosis, employer contends that the administrative law judge must consider the totality of Dr. Alexander's statement regarding his reading of the January 13, 1997 x-ray. Employer argues that the administrative law judge erred in finding that Dr. Alexander's reading of the 1997 x-ray constituted an affirmative diagnosis of complicated pneumoconiosis because the physician only stated that the x-ray film showed changes "consistent with" pneumoconiosis 2/2 with a Category A large opacity in the left upper zone. Director's Exhibit 2. Employer asserts that the physician's statement that a "follow up x-ray should be obtained in 6-12 months to ensure that the 10 mm density in the left upper zone does not represent an early lung cancer," *id.*, reflects uncertainty and equivocation in the physician's diagnosis of complicated pneumoconiosis and should have been considered by the administrative law judge before he accepted Dr. Alexander's reading as showing complicated pneumoconiosis.

Comments in an x-ray report that undermine the diagnosis of pneumoconiosis are relevant to the issue of the presence of pneumoconiosis. *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999) (*recon. en banc*); *see also Kiser v. L&J Equipment Co.*, 23 BLR 1-246 (2006). Thus, we agree with employer that Dr. Alexander's comment may reflect the doctor's uncertainty and equivocation as to whether the opacity seen is complicated pneumoconiosis or some other condition. Therefore, on remand, the administrative law judge must determine whether the comment made by Dr. Alexander on his x-ray reading calls into question his finding of complicated pneumoconiosis. *See United States Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Lester*, 993 F.2d at 1145, 17 BLR at 2-117l; *Cranor*, 22 BLR at 1-5.

Additionally, employer contends that the administrative law judge erred in crediting Dr. Alexander's reading of complicated pneumoconiosis on the 1997 x-ray over Dr. Fino's reading of a December 12, 1996 x-ray, that the lesion seen was not complicated pneumoconiosis. Instead, Dr. Fino stated that the lesion seen on the December 12, 1996 x-ray was of a calcification of the nodule consistent with a granulomatous disease process, likely a scar due to an infection. Employer's Exhibit 6. The administrative law judge accorded greater weight to Dr. Alexander's reading because he was better qualified[12] and because Dr. Fino's reading of a calcification consistent with granulomatous disease was not supported by other evidence.

[12] Dr. Alexander is a B reader and Board-certified radiologist, while Dr. Fino is only a B reader.

However, as employer notes, Dr. Fino's finding that the lesion seen reflected granulomatous disease instead of complicated pneumoconiosis was corroborated by the reading of the November 6, 1996 x-ray by Dr. Meyer, a physician who possessed the same credentials as those of Dr. Alexander, and who found that the x-ray showed "sequellae of granulomatous disease." Employer's Exhibit 12. In addition, as employer notes, the finding of calcification on x-ray was also seen by Dr. Lintala, in his reading of the December 12, 1996 x-ray, showing "partially calcified ovoid nodule". Director's Exhibit 11.[13] We thus hold that, contrary to the administrative law judge's determination, the x-ray finding of a calcified nodule consistent with the presence of granulomatous disease by Dr. Fino is corroborated by other x-ray evidence. On remand, therefore, the administrative law judge must reconsider the weight to be accorded Dr. Fino's December 12, 1996 x-ray interpretation.

In addition, employer asserts that the administrative law judge failed to consider and weigh other x-ray evidence in the miner's treatment records, Director's Exhibits 10-13, which did not diagnose complicated pneumoconiosis.[14] On remand, the administrative law judge must consider and weigh this evidence, which encompasses the years from 1992 through 2003, along with other x-ray evidence relevant to the presence or absence of complicated pneumoconiosis.

In light of the aforementioned errors in the administrative law judge's consideration of the x-ray evidence at Section 718.304(a), we vacate the administrative law judge's finding of complicated pneumoconiosis thereunder and remand the case for further consideration of the x-ray evidence at Section 718.304(a).[15]

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[13] Dr. Lintala's interpretation of the December 12, 1996 x-ray is included in the miner's treatment records.

[14] Also contained in the miner's treatment records are two x-ray interpretations by Dr. Setliff in which the physician diagnosed COPD, but is silent on the existence of complicated pneumoconiosis, Employer's Exhibit 13, an x-ray interpretation by Dr. Ramos in which the physician notes a "questionable" nodule, but is otherwise silent on the presence of complicated pneumoconiosis, *id.*, and an x-ray interpretation by Dr. Conor, who diagnosed mild interstitial edema but makes no diagnosis of any form of pneumoconiosis, *id.*

[15] There is no evidence in the record that could establish either the presence or absence of complicated pneumoconiosis at 20 C.F.R. §718.304(b).

SECTION 718.304(c)

Employer also contends that the administrative law judge did not properly consider all of the medical opinion evidence relevant to complicated pneumoconiosis at Section 718.304(c). Employer contends that the medical opinion evidence finding the existence of simple pneumoconiosis, not complicated pneumoconiosis, should be considered before the administrative law judge makes a determination regarding complicated pneumoconiosis. Specifically, employer contends that the administrative law judge erred in according determinative weight to the opinions of Drs. Mullin and Porterfield, who found that the miner had coal workers' pneumoconiosis and chronic obstructive pulmonary disease (COPD), merely because they were treating physicians. Employer also contends that these doctors' diagnoses of COPD is not supported in the record.

In crediting the opinions of Drs. Mullins and Porterfield[16] as to the existence of simple pneumoconiosis, the administrative law judge rationally accepted their opinions because: they treated the miner for close to ten years; the record included extensive documentation of their treatment of the miner; and the physicians frequently treated the miner.[17] 20 C.F.R. §718.104(d)(1)-(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Further, the administrative law judge noted that the opinions of Drs. Mullin and Porterfield finding coal workers' pneumoconiosis were supported by x-ray evidence of simple pneumoconiosis. *Island Creek Coal Co. v.*

[16] The medical opinions and treatment records of Drs. Mullin and Porterfield cover the years 1993-2003. Director's Exhibits 11-13.

[17] 20 C.F.R. §718.104(d) provides, in pertinent part, that the administrative law judge must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record and shall consider the following factors in weighing the opinion of the treating physician:

1) Nature of relationship.
2) Duration of relationship.
3) Frequency of treatment.
4) Extent of treatment.

The regulation also requires the administrative law judge to consider the treating physician's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

Compton, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Employer's argument is, therefore, rejected.

In addition, the administrative law judge noted that there was no contradictory medical opinion evidence in the record, as all of the physicians found simple pneumoconiosis, and Dr. Fino stated that the miner had evidence of a coal mine dust related lung condition. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence established the existence of simple pneumoconiosis. However, because the administrative law judge did not consider and weigh the medical opinion evidence of simple pneumoconiosis on the issue of complicated pneumoconiosis at Section 718.304(c), the case must be remanded for him to do so.[18]

In conclusion, we vacate the administrative law judge's finding that the x-ray evidence established the presence of complicated pneumoconiosis and remand this case for further consideration of all of the evidence relevant to the existence of complicated pneumoconiosis pursuant to Section 718.304(a) and (c). *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561. As we have vacated the administrative law judge's finding of complicated pneumoconiosis at Section 718.304(a), we vacate the administrative law judge's determination that claimant was entitled to the irrebutable presumption that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(3). If, on remand, the administrative law judge determines that the evidence establishes complicated pneumoconiosis, then claimant would be entitled to the irrebuttable presumption at Section 718.304, 20 C.F.R. §718.205(c)(3), and entitled to an award of benefits on the survivor's claim.[19]

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[18] Review of the record demonstrates that, in addition to the medical opinion evidence considered by the administrative law judge, the record contains a December 2003 report by Dr. McCormick, who opined that the miner demonstrated chronic obstructive lung disease, but offered no opinion on the issue of complicated pneumoconiosis, Director's Exhibit 12, and two May 2003 opinions from Dr. Oar, who opined that the miner demonstrated "acute exacerbation of COPD" and "significant" coal workers' pneumoconiosis, but provided no diagnosis of complicated pneumoconiosis, Director's Exhibit 11.

[19] Because employer does not challenge the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis contributed to the miner's death at 20 C.F.R. §718.205(c)(1) and (2), those findings are affirmed. *See Skrack*, 6 BLR at 1-711. If the administrative law judge finds that claimant is not entitled to the presumption that the miner's death was due to pneumoconiosis at Section 718.304, 20 C.F.R. §718.205(c)(3), claimant will not be entitled to benefits. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed in part, vacated in part, 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

I concur:

_____
ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision vacating the administrative law judge's Decision and Order-Awarding Benefits on this survivor's claim. Because the existence of complicated pneumoconiosis at 20 C.F.R. §718.304 was found on the miner's claim and benefits were awarded based on that finding, employer is collaterally estopped from relitigating the issue of complicated pneumoconiosis in this survivor's claim. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*); *see also Zeigler Coal Co. v. Director, OWCP* [*Villain*], 311 F.3d 332, 22 BLR 2-581 (7th Cir. 2002).

In *Hughes*, the Board held that in order for the doctrine of collateral estoppel to apply in subsequent litigation, the following criteria must be established:

(1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;

(2) determination of the issue must have been necessary to the outcome of the prior proceeding;

267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

(3) the prior proceeding must have resulted in a final judgment on the merits; and

(4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Hughes, 21 BLR at 1-137; *see Sedlack v. Braswell Services Group, Inc.*, 134 F.2d 219 (4th Cir. 1998); *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir. 1992); *see also Ramsey v. INS*, 14 F.3d 206, (4th Cir. 1994).

In this case, all of the above criteria have been established. Consequently, I believe the doctrine of collateral estoppel precludes employer from relitigating the issue of complicated pneumoconiosis and I would, therefore, hold that because the miner was found to have complicated pneumoconiosis in his living miner's claim, claimant is entitled to the irrebuttable presumption at Section 718.304 that the miner's was death was due to pneumoconiosis in this survivor's claim. 20 C.F.R. §718.205(c)(3).

Accordingly, I would affirm the administrative law judge's award of benefits in this survivor's claim.

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BETTY JEAN HALL
Administrative Appeals Judge