BRB No. 07-0941 BLA

J.P.L.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHADY LANE COAL CORPORATION	)	
	)	DATE ISSUED: 08/28/2008
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 on Second Remand Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand Granting Benefits (02-BLA-0122) of Administrative Law Judge Pamela Lakes Wood on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case, involving claimant's request for modification of the denial of a duplicate claim originally filed on November

22, 1996, is before the Board for the fourth time.[1] The last time this case was before the Board, pursuant to employer's appeal, the Board vacated the administrative law judge's finding that complicated pneumoconiosis was established at 20 C.F.R. §718.304, and remanded the case for further consideration. [*J.P.L.*] *v. Shady Lane Coal Corp.*, BRB No. 06-0508 BLA (Feb. 28, 2007)(unpub.).

Specifically, the Board directed the administrative law judge to reconsider the new x-ray evidence pursuant to Section 718.304(a) without counting a January 27, 2000 CT scan reading as an x-ray reading, and to consider the entirety of Dr. Sargent's interpretations of the May 19, 2000, October 19, 2000, and December 19, 2000 x rays, including his comments that it was necessary to rule out granulomatous disease, when determining whether his interpretations were positive for complicated pneumoconiosis. [*J.P.L.*], slip op. at 6-7. However, the Board rejected employer's allegation that the administrative law judge erred in finding the March 19, 2001 x-ray to be positive for complicated pneumoconiosis, holding that the administrative law judge permissibly deferred to the positive reading of Dr. Barrett based upon his superior radiological qualifications. [*J.P.L.*], slip op. at 7. Pursuant to Section 718.304(c), the Board affirmed the administrative law judge's finding that the new CT scan readings were in equipoise as to the existence of complicated pneumoconiosis, but vacated her finding that the new medical opinion evidence established the existence of complicated pneumoconiosis. [*J.P.L*], slip op. at 8-11. The Board instructed the administrative law judge to reconsider the relative qualifications of Drs. Castle, Forehand, and Hippensteel, to reconsider the adequacy of the documentation underlying Dr. Forehand's opinion diagnosing complicated pneumoconiosis, and to provide a full explanation for her credibility determinations. *Id*.

On remand, the administrative law judge determined that the new evidence established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Pursuant to Section 718.304(a), the administrative law judge reevaluated the x-ray evidence, omitting the CT scan and taking into account Dr. Sargent's comments as to the three x-rays he interpreted. The administrative law judge determined that Dr. Sargent's comments did not undermine his positive readings of large opacities of complicated pneumoconiosis, and she therefore found that Dr. Sargent's three x-ray readings were positive for complicated pneumoconiosis. Then, based on the conflicting readings by equally qualified physicians of the May 19, 2000, August 21, 2000, October 19, 2000, and December 19, 2000 x-rays, the administrative law judge found that these x-rays were in equipoise on the issue of

[1] The Board set forth previously this claim's full procedural history. [*J.P.L.*] *v. Shady Lane Coal Corp.*, BRB No. 06-0508 BLA, slip op. at 2-3 (Feb. 28, 2007)(unpub.) Our prior discussion of the procedural history is incorporated by reference.

complicated pneumoconiosis. However, based on the March 19, 2001 x-ray that was positive for complicated pneumoconiosis, the administrative law judge found that a preponderance of the chest x-ray evidence established the presence of large opacities of complicated pneumoconiosis.

Turning to the medical opinions at Section 718.304(c), the administrative law judge found that Dr. Forehand's opinion supported a finding of complicated pneumoconiosis. The administrative law judge found that Dr. Forehand's opinion was adequately documented, and that his opinion merited significant weight since he conducted appropriate tests as claimant's treating physician to exclude the possible diagnoses of other diseases raised by employer's physicians to explain claimant's x-ray abnormalities. The administrative law judge accorded less weight to the opinions of Drs. Castle and Hippensteel, finding that they were not as well-supported by the preponderance of the x-ray evidence, and she declined to credit their opinions based on their Board-certifications in Pulmonary Medicine, because she considered all three physicians qualified to render an opinion on pulmonary medicine issues.

Finding that a preponderance of the evidence under Section 718.304 established the existence of complicated pneumoconiosis, the administrative law judge determined that claimant established "a basis for modification based upon a change in conditions as well as a material change in conditions warranting that his subsequent claim be considered on the merits." 2007 Decision and Order at 8; 20 C.F.R. §§725.310 (2000), 725.309(d) (2000). Considering all the evidence of record, the administrative law judge found that claimant established the existence of complicated pneumoconiosis pursuant to Section 718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in her analysis of the x-ray and medical opinion evidence pursuant to Section 718.304(a), (c). Employer further asserts that the administrative law judge erred by not comparing the previously submitted evidence with the newly submitted evidence when rendering her determination with respect to modification. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate 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 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising

out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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 there has been a material change in conditions. 20 C.F.R. §725.309(d)(2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d)(2000), the administrative law judge must consider all of the new evidence to determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Claimant's prior claim was denied because he did not establish that he was totally disabled. Director's Exhibit 139 at 16. Therefore, he had to submit new evidence establishing that he is totally disabled to obtain review of the merits of his claim.

In considering a request for modification of the denial of a duplicate claim, which was denied based upon a failure to establish a material change in conditions, the administrative law judge must determine whether the evidence developed in the duplicate claim, including any evidence submitted with the request for modification, establishes a material change in conditions. *See* 20 C.F.R. §§725.309(d) (2000), 725.310 (2000); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). Thus, the issue properly before the administrative law judge was whether all of the new evidence in the duplicate claim established that claimant is totally disabled.

Section 411(c)(3) of the Act, implemented by Section 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; *see Eastern Associated 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, 22 BLR 2-554 (4th Cir. 1999). In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *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*). In this case, the newly submitted evidence consisted of x-ray interpretations, CT scan readings, and medical opinion evidence.

Relevant to 20 C.F.R. §718.304(a), the administrative law judge considered nineteen interpretations of five new x-rays. Finding the May 19, 2000, August 21, 2000, October 19, 2000, and December 19, 2000 x-rays to be in equipoise and the March 19, 2001 x-ray to be positive for complicated pneumoconiosis, the administrative law judge determined that the weight of the newly submitted x-ray evidence supported a finding of complicated pneumoconiosis. Decision and Order at 3; 2005 Decision and Order at 9-14.

Employer contends that the administrative law judge erred in finding the March 19, 2001 x-ray to be positive for complicated pneumoconiosis. Specifically, employer asserts that Dr. Barrett's interpretation of Category A large opacities on the x-ray classification form was internally inconsistent, because Dr. Barrett also checked "No" to the question of whether there were any parenchymal abnormalities consistent with pneumoconiosis. Employer's Brief at 33-35. We disagree. Substantial evidence supports the administrative law judge's determination to treat the reading of Dr. Barrett, a Board-certified radiologist and B reader, as positive for complicated pneumoconiosis. Although Dr. Barrett placed an "X" by the "No" box, he also indicated in section 1D of the form that the x-ray was not completely negative, and he fully completed sections 2B and C, classifying the x-ray as "2/3" for small opacities, type "q/q," and as Category "A" for large opacities. Director's Exhibit 132. Consequently, substantial evidence supports the administrative law judge's conclusion that Dr. Barrett's reading of the March 19, 2001 x-ray is positive for Category A large opacities,[2] and since we have already affirmed the administrative law judge's determination that Dr. Barrett's reading merited greater weight than that of Dr. Castle, based on Dr. Barrett's superior radiological credentials, we affirm the administrative law judge's finding that the March 19, 2001 x-ray is positive for complicated pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65-66 (4th Cir. 1992).

Employer additionally asserts that the administrative law judge erred in finding the interpretations of the May 19, 2000, October 19, 2000, and December 19, 2000 x-rays to be in equipoise. Employer's Brief at 37-39. Specifically, employer asserts that, although Dr. Sargent's readings of these three x-rays indicated the presence of Category A large opacities, his additional notations of the need to rule out granulomatous disease rendered his diagnosis uncertain. Employer asserts, therefore, that the more definitive, negative readings of the May 19, 2000, October 19, 2000, and December 19, 2000 x-rays should have been found to weigh against a finding of complicated pneumoconiosis. This contention lacks merit.

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[2] The administrative law judge's conclusion is also consistent with employer's characterization of Dr. Barrett's reading, in the prior appeal, as a diagnosis of complicated pneumoconiosis. 2006 Employer's Brief at 24.

The administrative law judge considered Dr. Sargent's additional comments, as instructed by the Board, and she determined that they did not call into question Dr. Sargent's diagnosis of complicated pneumoconiosis. The administrative law judge stated:

> Dr. Sargent unequivocally found parenchymal abnormalities consistent with pneumoconiosis (including small opacities of q/q size/type, of 2/3 profusion, in all six zones, A type large opacities). He also checked the boxes for "ax" (coalescence of small pneumoconiotic opacities), "ca" (cancer), "em" (emphysema) and "hi" (enlargement of hilar or mediastinal lymph nodes). His comments about ruling out "associated granulomatous disease" did not indicate that he was questioning the existence of large opacities consistent with pneumoconiosis, any more than his checking the box for cancer did.

Decision and Order at 3; Director's Exhibits 112, 113, 114, 115. Substantial evidence supports these findings, and the Board is not authorized to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, we reject employer's allegation of error.

Employer further asserts that the administrative law judge failed to consider all relevant x-ray evidence. Specifically, employer asserts that the administrative law judge "allowed her consideration of just one x-ray interpretation to trump all of the contrary relevant evidence of record." Employer's Brief at 32-36. We disagree. The administrative law judge considered each of the new x-ray interpretations and the qualifications of each reader. Decision and Order at 3; 2005 Decision and Order at 12-14. As discussed above, she determined that the March 19, 2001 x-ray was positive for complicated pneumoconiosis, because Dr. Barrett's positive reading was entitled to greater weight than Dr. Castle's contrary reading based on Dr. Barrett's superior radiological qualifications. The administrative law judge additionally found the May 19, 2000, August 21, 2000, October 19, 2000, and December 19, 2000 x-rays to be in equipoise because each x-ray had been read as both positive and negative for complicated pneumoconiosis by dually qualified Board-certified radiologists and B readers. Substantial evidence supports these findings. Weighing all of the new x-rays together, the administrative law judge permissibly determined that "the March 19, 2001 x-ray tip[ped] the scales in [c]laimant's favor." Decision and Order at 4; *see Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997). Consequently, we reject employer's assertion that the administrative law judge credited Dr. Barrett's x-ray interpretation at the expense of properly considering the contrary x-ray evidence.

Employer additionally challenges the administrative law judge's "suggestion that [the x-ray interpretations of] Drs. Hayes, Castle, Wheeler and Scott might support [a]

progression of claimant's disease consistent with the known development of complicated pneumoconiosis." Employer's Brief at 39. Specifically, employer asserts that none of the physicians indicated such, and the administrative law judge acted as a medical expert in pointing to notations of coalescence of opacities as evidence of progression to complicated pneumoconiosis.[3] Although employer correctly asserts that Drs. Hayes, Castle, Wheeler, and Scott did not suggest that claimant's x-rays were consistent with the development of complicated pneumoconiosis, the record reflects that the administrative law judge considered these physicians' x-ray readings to be negative for complicated pneumoconiosis. Decision and Order at 3; 2005 Decision and Order at 12-14. Therefore, any error that the administrative law judge may have made in making the additional observation that she considered the x-rays as reflective of progression when they were viewed sequentially, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Moreover, employer fails to brief with specificity how the administrative law judge's "suggestion" resulted in reversible error. *See Sarf v. Director, OWCP,* 10 BLR 1-119, 1-120 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Consequently, we decline to address the issue further.

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[3] Employer refers to the portion of the administrative law judge's decision wherein, after having found that the March 19, 2001 positive x-ray "tip[ped] the scales in [c]laimant's favor," she observed that a sequential review of the x-ray readings supported complicated pneumoconiosis:

> [A] critical review of the x-ray interpretations in this case also supports a finding of complicated pneumoconiosis. A sequential review of the x-ray readings reflects progression of the disease consistent with the known development of complicated coal workers' pneumoconiosis. In this regard, some of the readers (notably Drs[.] Sargent and Navani) found "ax" (coalescence of small pneumoconiotic opacities), the process by which the large lesions of complicated pneumoconiosis are formulated. Even Dr. Thomas Hayes, who did not find the large opacities of complicated pneumoconiosis present, noted "early coalescence of the small opacities." Likewise, Dr. Castle noted coalescence. . . . Even those readers who suggested tuberculosis (notably, Drs. Wheeler and Scott) acknowledged that it could be mixed with coal workers' pneumoconiosis, and Dr. Scott even mentioned probable silicotuberculosis, which is specifically included in the regulatory definition of clinical pneumoconiosis.

Decision and Order at 4 (internal citations omitted).

As we have rejected employer's challenges to the administrative law judge's weighing of the x-ray evidence, we affirm the administrative law judge's finding that a preponderance of the new x-ray evidence established complicated pneumoconiosis pursuant to Section 718.304(a).

Pursuant to Section 718.304(c), employer raises several challenges to the administrative law judge's determination to credit Dr. Forehand's opinion diagnosing complicated coal workers' pneumoconiosis, and to accord less weight to the opinions of Drs. Castle and Hippensteel that claimant does not have complicated pneumoconiosis. Initially, employer asserts that the administrative law judge did not adequately comply with the Board's instruction to consider the documentation underlying Dr. Forehand's opinion. Employer's Brief at 41. Specifically, employer contends that, because the administrative law judge found that the January 27, 2000 CT scan was in equipoise as to the existence of complicated pneumoconiosis, the administrative law judge's finding that Dr. Forehand's opinion is documented must be reversed where Dr. Forehand's report is based solely on an interpretation of the January 27, 2000 CT scan. Employer's Brief at 43. We disagree. The administrative law judge explained that "while the CT scan findings are inconclusive, they do not weigh against a finding of complicated pneumoconiosis and they are not inconsistent with crediting Dr. Forehand's report." Decision and Order at 6. Further, the administrative law judge found Dr. Forehand's report to be documented, because Dr. Forehand interpreted the January 27, 2000 CT scan himself, and his opinion was additionally based on claimant's work history, smoking history, and negative TB test results. *Id.* Substantial evidence supports these findings. Contrary to employer's assertion, therefore, the administrative law judge permissibly found Dr. Forehand's opinion to be adequately documented. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Employer additionally asserts that the administrative law judge erred in assigning increased weight to Dr. Forehand's opinion based on his status as claimant's treating physician. Specifically, employer asserts that, because "the underlying objective evidence does not support Dr. Forehand's conclusions, his status as a 'treating physician' cannot be a basis for crediting his opinion." Employer's Brief at 43. As discussed above, however, the administrative law judge permissibly found that Dr. Forehand's opinion was adequately documented. Further, the administrative law judge accurately noted that Dr. Forehand was claimant's treating physician from 1997-2003, and that he treated claimant twice per year. Decision and Order at 7. Employer does not challenge this finding. Moreover, the administrative law judge explained that Dr. Forehand's opinion was entitled to significant weight because, in the course of his treatment of claimant, Dr. Forehand considered the alternative diagnoses suggested by Drs. Castle and Hippensteel and ruled them out. Decision and Order at 7-8. Specifically, the administrative law judge stated:

> [M]y determination to credit Dr. Forehand as the treating physician [does] not rest upon his status alone, but rather upon the unique circumstances of this case, where a number of speculative possibilities have been suggested to explain the [c]laimant's x-ray and CT scan abnormalities. In the course of Dr. Forehand's treatment of [c]laimant, he did not find the [c]laimant to have any malignancy, tuberculosis, sarcoidosis, or other form of granulomatous disease, and he ran appropriate tests to exclude these other possibilities. I find Dr. Forehand's opinion that the [c]laimant suffers from complicated coal workers' pneumoconiosis to be entitled to significant weight.

Decision and Order at 7-8. Substantial evidence supports these findings related to the specific circumstances of this case. Contrary to employer's assertion, therefore, the administrative law judge stated a valid reason for finding Dr. Forehand's opinion to be documented, reasoned, and entitled to significant weight. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-273-74 (4th Cir. 1997).

Employer additionally asserts that the administrative law judge erred in finding that Dr. Forehand's opinion established complicated pneumoconiosis pursuant to Section 718.304(c). Specifically, employer asserts that Dr. Forehand's opinion is insufficient "to carry claimant's burden of proof as a matter of law" because Dr. Forehand failed to make an equivalency determination. Employer's Brief at 42 n.2. Contrary to employer's assertion, however, the administrative law judge did not find that Dr. Forehand's opinion independently established complicated pneumoconiosis under Section 718.304(c). Rather, the administrative law judge found Dr. Forehand's opinion to be supportive of a finding of complicated pneumoconiosis. Decision and Order at 8. Thus, an equivalency determination was not required for Dr. Forehand's opinion to be credible. *Cf. Scarbro*, 220 F.3d at 255, 22 BLR at 2-100 (requiring an equivalency determination to establish complicated pneumoconiosis by means other than x-ray). Because the administrative law judge provided valid reasons for finding Dr. Forehand's opinion to be documented, reasoned, and entitled to significant weight, we affirm the administrative law judge's credibility determination.

Employer additionally asserts that the administrative law judge improperly discounted the opinions of Drs. Castle and Hippensteel as equivocal because they did not rule out the existence of complicated pneumoconiosis. Employer's Brief at 46-47. Employer therefore asserts that the administrative law judge failed to state a valid reason for discounting the opinions of Drs. Castle and Hippensteel. Employer's Brief at 49-50. We disagree. Although the record reflects that Dr. Castle opined "to a reasonable degree of medical certainty," and Dr. Hippensteel opined "to a strong degree of medical certainty," that claimant did not have complicated pneumoconiosis, Director's Exhibit 88

at 14; Director's Exhibit 129 at 19, the administrative law judge additionally found that the opinions of Drs. Castle and Hippensteel were entitled to less weight, because they were based in part upon negative x-ray evidence that was contrary to her finding that the preponderance of the x-ray evidence established complicated pneumoconiosis. *See Scarbro*, 220 F.3d at 258, 22 BLR at 2-104. Moreover, as discussed above, the administrative law judge permissibly found Dr. Forehand's opinion entitled to increased weight. Because the administrative law judge stated a valid reason for finding the opinions of Drs. Castle and Hippensteel to be less persuasive than the contrary opinion offered by Dr. Forehand, any error she may have made in stating that Drs. Castle and Hippensteel did not rule out complicated pneumoconiosis is harmless. *See Larioni*, 6 BLR at 1-1278; *Kozele*, 6 BLR at 1-382 n.4.

Employer asserts next that the administrative law judge erred in failing to defer to the opinions of Drs. Castle and Hippensteel, where these physicians are Board-certified in Internal Medicine and Pulmonary Disease, and Dr. Forehand is not. Employer's Brief at 45-46. Contrary to employer's assertion, as the administrative law judge stated valid reasons for finding the opinions of Drs. Castle and Hippensteel less persuasive, their qualifications as pulmonologists do not require the administrative law judge to credit their properly discounted opinions. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-273-74. Moreover, the record reflects that the administrative law judge accurately characterized the physicians' qualifications and, because she found the physicians to have comparable academic appointments and publications in the field of pulmonary medicine, she concluded that "all three physicians are qualified to render medical opinions on pulmonary medicine issues." Decision and Order at 5. Substantial evidence supports this finding. Consequently, we reject employer's assertion that the administrative law judge failed to adequately consider the qualifications of Drs. Castle and Hippensteel.

Based on the foregoing, we affirm the administrative law judge's finding that the new medical opinion evidence supported a finding of complicated pneumoconiosis pursuant to Section 718.304(c).

Considering together all of the newly submitted evidence under Section 718.304, the administrative law judge determined that the preponderance of the evidence as a whole supported a finding of complicated pneumoconiosis. Specifically, the administrative law judge stated:

> [T]he x-ray evidence and medical opinion evidence supports a finding of complicated pneumoconiosis, while the CT scan evidence is in equipoise and neither supports nor undermines that finding. Upon considering the x-ray evidence in conjunction with the medical opinion evidence, I find that [c]laimant has proven the existence of complicated pneumoconiosis.

Decision and Order at 8. Based on her finding of complicated pneumoconiosis, the administrative law judge determined that claimant established a basis for modification pursuant to 20 C.F.R. §725.310 (2000), as well as a material change in conditions under 20 C.F.R. §725.309 (2000). *Id*.

Employer challenges this finding, asserting that the administrative law judge erred in finding that the newly submitted x-ray and medical opinion evidence established a material change in conditions, without considering the prior evidence submitted in the duplicate claim. Employer's Brief at 30. Because this case involves a request for modification of a duplicate claim, employer correctly asserts that the administrative law must consider whether all of the evidence in the duplicate claim establishes a material change in conditions. *See Hess,* 21 BLR at 1-143. Here, the administrative law judge considered the evidence previously submitted:

> While the evidence previously of record does not establish complicated pneumoconiosis, I do not find that to be of significance in view of the progressive nature of the disease. Taking into consideration the evidence that was previously of record, considered along with the newly submitted evidence, I find that [c]laimant suffers from complicated pneumoconiosis under the criteria set forth in [S]ection 718.304. Based upon the irrebuttable presumption under the Black Lung Benefits Act and its implementing regulations, he has presumptively established that he is

> totally disabled due to pneumoconiosis. Thus, he is entitled to benefits under the Black Lung Benefits Act.

Decision and Order at 8. Thus, the administrative law judge considered the prior evidence, but gave it less weight. As an administrative law judge may rationally assign less weight to older evidence where the newer evidence establishes pneumoconiosis, we hold that the administrative law judge stated a permissible reason for discounting the earlier evidence. *See Adkins*, 958 F.2d at 51, 16 BLR at 2-65-66; *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(*en banc*)(McGranery, J., concurring and dissenting); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004)(*en banc*). We therefore affirm the administrative law judge's finding that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).

Because we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis, we affirm the administrative law judge's award of benefits. Consequently, we need not address employer's request that the case be assigned to a different administrative law judge.

Accordingly, the administrative law judge's Decision and Order on Second Remand Granting Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge