BRB No. 09-0743 BLA

GEORGE MESSER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 08/31/2010
	)	
DOMINION COAL CORPORATION	)	
	)	
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 Remand - Awarding Benefits of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

George Messer, Oakwood, Virginia, *pro se.*

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (2005-BLA-00070) of Administrative Law Judge Stephen L. Purcell (the administrative law

judge), with respect to a request for modification of the denial of a duplicate claim[1] filed on August 25, 1999, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] Administrative Law Judge Mollie W. Neal denied claimant's duplicate claim because he did not establish either the existence of complicated pneumoconiosis, or that his total disability was due to pneumoconiosis. Director's Exhibit 43. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *Messer v. Dominion Coal Corp.*, BRB No. 01-0849 BLA (June 28, 2002)(unpub.). On June 5, 2003, claimant requested modification of the denial of the duplicate claim. Director's Exhibit 54.

On December 8, 2006, the administrative law judge found, based on the new evidence submitted on modification, that claimant established a change in conditions by establishing the existence of complicated pneumoconiosis, thereby entitling him to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. *See* 20 C.F.R. §§725.309(d) (2000), 725.310 (2000).[3] In addition, the

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[1] Claimant filed his initial claim on March 2, 1982, which was denied on January 30, 1987, because claimant did not establish that he was totally disabled due to pneumoconiosis. This decision was affirmed by the Board. *Messer v. Dominion Coal Corp.*, BRB No. 87-0418 BLA (Aug. 31, 1988) (unpub.). Subsequently, claimant filed a request for modification on May 2, 1989, which was denied by Administrative Law Judge Clement J. Kichuk on February 10, 1992, because claimant did not establish total disability or total disability due to pneumoconiosis. Claimant filed a second modification request on December 22, 1992, which was denied by Administrative Law Judge Nicodemo De Gregorio on June 26, 1995, because although claimant established that he was totally disabled by a respiratory or pulmonary impairment, he did not establish that his total disability was due to pneumoconiosis.

[2] On May 4, 2010, the Board issued an Order granting the parties the opportunity to submit briefs regarding the potential effects of the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010. *Messer v. Dominion Coal Corp.*, BRB No. 09-0743 BLA (May 4. 2010) (unpub. Order). The Director, Office of Workers' Compensation Programs (the Director), filed a supplemental brief, asserting that, based on the filing date of the instant claim, the amendments do not apply. Employer also filed a supplemental brief, arguing that the claim is not affected by the amendments. Upon consideration of this issue, we agree with the Director and employer that the recent amendments do not apply to the present claim, as it was filed prior to January 1, 2005. Director's Exhibit 1.

[3] The Department of Labor revised the regulations implementing the Black Lung Benefits Act (the Act), 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148,

administrative law judge found that the newly submitted evidence established a mistake of fact in the denial of claimant's August 25, 1999 claim. Based upon a review of the entire record, the administrative law judge determined that claimant established all of the elements of entitlement and, therefore, awarded benefits, commencing as of August 1999. Employer appealed and the Board vacated the administrative law judge's award of benefits and his findings at 20 C.F.R. §§718.304, 725.309(d) (2000), and 725.310 (2000) and remanded the case for further consideration because the administrative law judge applied an improper legal standard at 20 C.F.R. §725.309(d) (2000) and did not properly weigh the medical evidence regarding the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. *G.M.* [*Messer*] *v. Dominion Coal Corp.*, BRB No. 07-0333 BLA (Jan. 17, 2008)(unpub.).

On remand, the administrative law judge reconsidered the evidence and again found that claimant established the existence of complicated pneumoconiosis and, therefore, was entitled to the irrebuttable presumption at 20 C.F.R. §718.304. Accordingly, the administrative law judge determined that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.310 (2000). In addition, the administrative law judge determined that claimant established the existence of simple pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis under 20 C.F.R. §718.204(b), (c). Therefore, the administrative law judge awarded benefits, commencing August 1999.

On appeal, employer argues that the administrative law judge did not follow the Board's instruction to make an initial finding at 20 C.F.R. §725.310 (2000) as to whether reopening the claim for modification would "render justice under the Act." Employer's Brief at 24-25, *citing Blevins v. Director, OWCP*, 683 F.2d 139, 4 BLR 2-104 (6th Cir. 1982), *quoting Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968). Employer also asserts that the administrative law judge erred in finding that the evidence supported a finding of a change in an applicable condition of entitlement on the issue of complicated pneumoconiosis and in determining that claimant is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). Further, employer states that the

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§1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). The substantive revisions made to 20 C.F.R. §§725.309, 725.310 apply only to claims filed after January 19, 2001. Where a former version of the regulations remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations. The miner's current claim is a "duplicate claim" as defined by 20 C.F.R. §725.309(d) (2000), as it was filed one year after the denial of his initial claim and prior to January 19, 2001, the effective date of the amended regulations.

administrative law judge improperly identified August 1999 as the date from which benefits commence.

Claimant has not responded to employer's brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, in which he disagrees with employer's arguments at 20 C.F.R. §718.304, to the extent that they relate to Dr. Robinette's opinion. In addition, the Director states that, contrary to employer's assertion, the medical opinion evidence discussing tuberculosis, or a similar disease, should be weighed in determining the credibility of the x-ray readings. In its reply brief, employer claims that the Director has not offered any basis for affirming the administrative law judge's award of benefits and reiterates its previous arguments.[4]

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.[5] 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).

I. 20 C.F.R. §725.310

In our 2008 Decision and Order, the Board instructed the administrative law judge that, in adjudicating claimant's modification request, he "should, in exercising his discretion, consider whether reopening this case renders justice under the Act." *Messer*, BRB No. 07-0333 BLA, slip op. at 8. On appeal, employer argues that the administrative law judge failed to make such a finding on remand and that reopening a claim under 20 C.F.R. §725.310 (2000) is not automatic in cases arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Therefore, since the administrative law judge did not make such a finding, employer asserts that the award cannot be affirmed.

[4] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established the existence of simple pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The record indicates that the miner's last coal mine employment was in Virginia. Director's Exhibits 2, 4. Accordingly, the Board will apply the law 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*).

Under Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), the fact-finder *may,* on the ground of a change in conditions, or because of a mistake in a determination of fact, reconsider the terms of an award or denial of benefits. 20 C.F.R. §725.310 (2000)(emphasis added). Moreover, the Fourth Circuit has held that, in addition to assessing whether there has been a change in conditions or mistake in a determination of fact in a modification proceeding, the adjudicator must exercise the discretion granted under 20 C.F.R. §725.310 (2000) by assessing other factors relevant to the rendering of justice under the Act. *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007); *see also D.S.* [*Stiltner*] *v. Ramey Coal Co.*, 24 BLR 1-35 (2008). The relevant factors include the need for accuracy; the diligence and motive of the party seeking modification; and the futility or mootness of a favorable ruling. *Id*. The court also noted that finality interests might sometimes be relevant to a proper modification request ruling. *Id*.

We hold that in this case, the administrative law judge failed to consider under 20 C.F.R. §725.310(a) (2000), whether granting claimant's petition for modification would render justice under the Act. *See Sharpe*, 495 F.3d at 134, 24 BLR at 2-70-71. Consequently, we vacate the administrative law judge's finding under 20 C.F.R. §725.310 (2000), and the award of benefits, and remand the case for the administrative law judge to make an explicit determination regarding this issue. While remand is required on this basis alone, to avoid the repetition of error on remand, we will also address employer's additional arguments regarding the administrative law judge's findings.

II. 20 C.F.R. §718.304

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), 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 which 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. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflict, and make a finding of fact. *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*).

A. The Administrative Law Judge's Findings

In evaluating whether claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304, the administrative law judge considered x-ray evidence, biopsy evidence, CT scan evidence, and the medical opinions of Drs. Iosif, Fino, Castle, Perper, and Robinette. Out of thirty interpretations of the five x-rays, the administrative law judge noted that eleven were positive for complicated pneumoconiosis, seven were positive for simple pneumoconiosis, and twelve were negative for pneumoconiosis. Decision and Order on Remand at 10. Based on an evaluation of the interpretations of the x-rays, dated October 14, 1999, May 22, 2000, February 5, 2002, March 24, 2003, and September 26, 2003, the administrative law judge concluded that the x-ray evidence was insufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). *Id*. at 10-12. In addition, the administrative law judge reaffirmed his previous finding that the December 11, 2003 biopsy evidence could not establish complicated pneumoconiosis at 20 C.F.R. §718.304(b), as the report noted that "no preserved lung tissue [was] present." Director's Exhibit 77; Decision and Order on Remand at 12.

In evaluating the CT scan evidence, dated May 5, 2000, May 22, 2000, November 13, 2003, and December 11, 2003, the administrative law judge determined that the evidence supported a finding of masses greater than one centimeter in diameter in the lungs. Decision and Order on Remand at 12. However, he concluded that the physicians did not find that the scans indicated the presence of complicated pneumoconiosis. *Id*. at 12-13.

In evaluating the medical opinion evidence, the administrative law judge found Dr. Iosif's opinion, that claimant has complicated pneumoconiosis based on the x-ray evidence, to be well-reasoned and supported by the objective medical evidence. Decision and Order on Remand at 13; Director's Exhibits 26, 54, 76. The administrative law judge indicated that Dr. Iosif has been claimant's treating physician since November 1999 and was the only physician to examine or treat claimant on more than one occasion. Decision and Order on Remand at 13. Further, the administrative law judge noted that Dr. Iosif

performed extensive tests to rule out other pulmonary diseases, like tuberculosis, to which other physicians attributed claimant's symptoms. *Id*.

The administrative law judge gave less weight to Dr. Fino's opinion, that claimant's significant lung masses are not due to coal workers' pneumoconiosis, based on the lack of restrictive lung disease or impairment in oxygen transfer, because it was inconsistent with the comments of the Department of Labor (DOL) to the amended regulations. Decision and Order on Remand at 13-14; Director's Exhibit 69; Employer's Exhibits 2, 13, 14. The administrative law judge stated that the DOL has found that coal dust exposure may cause an obstructive lung disease, by the same mechanism as smoking, and that "the risk is the same from the two sources, if the exposure to the two sources is of equal magnitude." Decision and Order on Remand at 14; *citing* 65 Fed. Reg. 79,939 (Dec. 20, 2000).

The administrative law judge also gave less weight to Dr. Castle's opinion, that claimant has simple, but not complicated, pneumoconiosis, because it was not supported by the objective medical evidence. Decision and Order on Remand at 14-15; Director's Exhibits 30, 39, 89; Employer's Exhibit 1. While Dr. Castle indicated that the masses in claimant's lung could be due to granulomatous disease, like histoplasmosis, the administrative law judge stated that Dr. Iosif ruled out any fungal infections during his extensive testing. Decision and Order on Remand at 14. Further, the administrative law judge determined that Dr. Castle's opinion, that claimant's respiratory impairment is due entirely to cigarette smoking, was based, in part, on the fact that claimant stopped his coal mine employment in 1982 and did not have a respiratory impairment for the next five to seven years, which the administrative law judge contends is contrary to the views of the DOL that pneumoconiosis may be latent and progressive. *Id*.

In contrast, the administrative law judge assigned more weight to Dr. Perper's opinion, that claimant has complicated pneumoconiosis, over the opinions of Drs. Fino or Castle, because he found it was logical and persuasive. Decision and Order on Remand at 15; Claimant's Exhibit 2. The administrative law judge stated that Dr. Perper is well-qualified and that he provided a well-reasoned opinion that was supported by the medical evidence and was consistent with the DOL's comments to the amended regulations. Decision and Order on Remand at 15. Further, the administrative law judge indicated that Dr. Perper explained why he determined the lesions in claimant's lungs were signs of complicated pneumoconiosis and not another lung disease, like tuberculosis or histoplasmosis. *Id*.

The administrative law judge found that Dr. Robinette's opinion, that claimant has simple pneumoconiosis, was thorough, well-reasoned, and consistent with the more recent medical evidence. Decision and Order on Remand at 15; Director's Exhibit 38. However, the administrative law judge determined that Dr. Robinette's opinion was not

as probative as Dr. Iosif's opinion because he only examined claimant once and that examination occurred ten years before Dr. Iosif's examination. Decision and Order on Remand at 15. The administrative law judge also noted that Dr. Robinette did not find any evidence of tuberculosis and agreed with Dr. Iosif that claimant's respiratory impairment was restrictive and obstructive and that a significant portion of it was related to coal dust exposure. *Id*.

The administrative law judge indicated that, while he determined that the x-ray, biopsy, and CT scan evidence did not support a finding of complicated pneumoconiosis, he found that the medical opinion evidence supported such a finding and was more probative than the other evidence alone. Decision and Order on Remand at 16. The administrative law judge credited the opinions of Drs. Iosif, Perper, and Robinette because he concluded that they thoroughly explained their diagnoses and their conclusions that the masses in claimant's lungs could not be caused by a disease other than pneumoconiosis. *Id*. In contrast, the administrative law judge discredited employer's experts because he found they routinely attributed the masses in claimant's lungs to granulomatous disease, like tuberculosis or histoplasmosis, while the evidence did not establish that claimant has a history of these diseases and the tests performed by Dr. Iosif were negative for these diseases. *Id*. Further, the administrative law judge indicated that the 2003 biopsy results did not reveal any evidence of malignancy in claimant's lungs. *Id*. Consequently, the administrative law judge concluded that the medical opinion evidence established complicated pneumoconiosis at 20 C.F.R. §718.304(c) and that the evidence, as a whole, demonstrated that claimant has complicated pneumoconiosis. *Id*. Therefore, the administrative law judge found that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *Id*. Accordingly, the administrative law judge determined that claimant established a change in conditions at 20 C.F.R. §725.310 (2000). *Id*.

B. Arguments on Appeal

On appeal, employer argues that the administrative law judge erred in crediting the medical opinion evidence in which the physicians diagnosed complicated pneumoconiosis at 20 C.F.R. §718.304(c), since it was based on the x-ray, biopsy, and CT scan evidence, which he determined did not support a finding of complicated pneumoconiosis. Consequently, employer asserts that the Board should reverse the award of benefits by the administrative law judge and reinstate the prior denial by Judge Neal. In the alternative, employer states that the Board should remand the case for the administrative law judge to consider the entire record in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a).

Employer indicates that the administrative law judge failed to consider prior evidence, ruling out complicated pneumoconiosis and providing alternative causes for the abnormality in claimant's lungs. In addition, employer argues that none of the "new" evidence supports a change in claimant's condition, but rather simply continues the debate as to whether the abnormalities seen on x-ray and CT scan constitute complicated pneumoconiosis at 20 C.F.R. §718.304. Further, employer notes that the conclusions reached by Drs. Iosif, Perper, and Robinette have been rejected by every other administrative law judge who has considered this claim.

Employer also asserts that, contrary to the administrative law judge's finding, Dr. Iosif's testing, which ruled out tuberculosis, did not preclude the presence of an old, healed granulomatous disease that could affect claimant's respiratory impairment. Additionally, employer states that the administrative law judge erred in discrediting the opinions of Drs. Fino and Castle, as being hostile to the Act, because neither physician denied the possibility that pneumoconiosis can be latent and progressive or that pneumoconiosis can cause an obstructive impairment, but rather, reached their conclusions based on a review of the medical evidence.

The Director responds and disagrees with employer's arguments to the extent that they apply to the administrative law judge's weighing of Dr. Robinette's opinion. The Director maintains that Dr. Robinette's opinion is not undermined by the administrative law judge's finding that the x-ray and CT scan evidence was insufficient to establish complicated pneumoconiosis, as Dr. Robinette assumed that claimant had simple, rather than complicated pneumoconiosis. Further, the Director argues that the medical opinion evidence, discussing the probability of tuberculosis being a cause of claimant's abnormalities, must be weighed with the x-ray evidence to determine the credibility of the x-ray readings diagnosing complicated pneumoconiosis.

As an initial matter, we agree with the Director that employer's contentions regarding the administrative law judge's weighing of Dr. Robinette's opinion are without merit. The administrative law judge's finding that the x-ray and CT scan evidence were in equipoise regarding the existence of complicated pneumoconiosis does not conflict with Dr. Robinette's reliance upon the assumption that claimant has simple pneumoconiosis when he addressed the issues of total disability and total disability causation. Decision and Order on Remand at 15-16; Director's Exhibit 38.

Employer is correct, however, in maintaining that the administrative law judge did not properly weigh the opinions of Drs. Iosif and Perper. The relevant inquiry under 20 C.F.R. §718.304(c) concerns whether "when diagnosed by means other than" the methods set forth in 20 C.F.R. §718.304(a) and (b), the disease is "a condition which would be reasonably expected to yield the results described" in 20 C.F.R. §718.304(a) or (b). 20 C.F.R. §718.304(c). However, Drs. Iosif and Perper relied upon their

interpretations of the ILO classified x-ray evidence and/or the biopsy evidence to diagnose complicated pneumoconiosis, which the administrative law judge determined was insufficient to support such a finding. Therefore, these physicians did not render their diagnoses "by means other than" those described in 20 C.F.R. §718.304(a) or (b). *Id*. Thus, the administrative law judge's decision to rely upon their opinions to find invocation of the irrebuttable presumption at 20 C.F.R. §718.304(c) was incorrect. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561-62.

Accordingly, we vacate the administrative law judge's finding that claimant established invocation of the irrebuttable presumption under 20 C.F.R. §718.304(c), and a change in conditions under 20 C.F.R. §725.310 (2000), and remand the case to the administrative law judge for reconsideration of these issues. In assessing whether claimant has established modification of his denied duplicate claim on remand, the administrative law judge must determine whether claimant has established a mistake in a determination of fact in the prior denial or a change in conditions since the prior denial. 20 C.F.R. §725.310 (2000); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). With respect to the latter issue, the relevant change in conditions in this case, involving a duplicate claim, concerns whether the newly submitted evidence is sufficient to establish a material change in conditions in accordance with 20 C.F.R. §725.309(d) (2000). The administrative law judge must also determine whether granting modification would render justice under the Act. *See Sharpe*, 495 F.3d at 134, 24 BLR at 2-70-71.

When addressing the newly submitted evidence on remand, the administrative law judge must reconsider whether claimant has established invocation of the irrebuttable presumption under the individual subsections set forth in 20 C.F.R. §718.304 and, based upon a weighing of all of the relevant evidence together, determine if invocation has been conclusively demonstrated. *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gollie*, 22 BLR at 1-311; *Melnick*, 16 BLR at 1-33-34. When determining whether the evidence of record, as a whole, is sufficient to establish invocation of the irrebuttable presumption, the administrative law judge must address the extent to which the medical opinions regarding tuberculosis or granulomatous disease affect the credibility of the x-ray readings considered at 20 C.F.R. §718.304(a). If the administrative law judge finds that claimant has established the existence of complicated pneumoconiosis, he must determine whether the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007). In the event that the administrative law judge concludes that invocation of the irrebuttable presumption at 20 C.F.R. §718.304 has not been established, he must determine whether claimant has established a change in conditions at 20 C.F.R. §725.310 (2000) by other means.

III. 20 C.F.R. §718.204(c)

A. The Administrative Law Judge's Findings

The administrative law judge noted that all five physicians agreed that claimant is totally disabled from a respiratory standpoint but disagreed about the cause of the impairment. Decision and Order on Remand at 17. The administrative law judge indicated that Drs. Iosif, Perper, and Robinette attributed the impairment, at least in part, to coal workers' pneumoconiosis, while Drs. Fino and Castle attributed it entirely to claimant's cigarette smoking. *Id*. Relying on his analysis at 20 C.F.R. §718.304(c), the administrative law judge determined that the opinions of Drs. Iosif, Perper, and Robinette were entitled to more weight. *Id*. Consequently, he found that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *Id*.

B. Arguments on Appeal

Employer argues that the administrative law judge's findings at 20 C.F.R. §718.204(c) are conclusory, as he merely reiterated his weighing of the evidence concerning complicated pneumoconiosis. Employer also asserts that the opinions of Drs. Iosif, Perper, and Robinette are not supported by the objective evidence and are based upon a misdiagnosis of complicated pneumoconiosis. Employer states that, in contrast, Drs. Fino and Castle fully explained why claimant's totally disabling respiratory impairment was due entirely to cigarette smoking. Again, the Director asserts that Dr. Robinette's opinion is not "undermined by the fact that the x-ray and CT scan evidence is in equipoise concerning complicated pneumoconiosis," as he diagnosed a totally disabling respiratory impairment, based on a diagnosis of simple pneumoconiosis. Director's Brief at 2.

While the Director is correct that Dr. Robinette's opinion could establish that claimant has a totally disabling respiratory impairment due to simple pneumoconiosis, the administrative law judge did not make such a finding at 20 C.F.R. §718.204(c). *See* Decision and Order at 17. Instead, the administrative law judge relied on his findings at 20 C.F.R. §718.304(c) to reach his conclusions at 20 C.F.R. §718.204(c). Therefore, based on the fact that we have vacated the administrative law judge's findings at 20 C.F.R. §718.304(c), we also vacate the administrative law judge's findings at 20 C.F.R. §718.204(c). On remand, if the administrative law judge determines that claimant established complicated pneumoconiosis at 20 C.F.R. §718.304, then claimant would be entitled to an irrebuttable presumption that he is also totally disabled due to pneumoconiosis. 20 C.F.R. §718.304. However, if the administrative law judge does not reach such a conclusion, he should reconsider whether claimant can establish total disability due to pneumoconiosis under 20 C.F.R. §718.204(c).

IV. Date From Which Benefits Commence

The administrative law judge determined that employer was required to pay to claimant all benefits to which he was entitled under the Act, commencing August 1999. However, employer argues that, even assuming a change in claimant's condition subsequent to Judge Neal's denial of benefits, the earliest date from which benefits could be paid, pursuant to 20 C.F.R. §725.503(d)(2), is the date on which claimant most recently requested modification, or June 2003.

Because we have vacated the findings that the administrative law judge made under 20 C.F.R. §§718.304 and 718.204(c), we also vacate the administrative law judge's determination regarding the onset of total disability due to pneumoconiosis at 20 C.F.R. §725.503. If, on remand, the administrative law judge again finds that claimant has established entitlement to benefits, he must reconsider the date from which benefits are payable. When benefits are awarded pursuant to a request for modification, the administrative law judge must specifically identify the basis for modification because this determination affects the date for commencement of benefits. *See Eifler v. Peabody Coal Co.*, 926 F.2d 663, 15 BLR 2-1 (7th Cir. 1991). Pursuant to 20 C.F.R. §725.503(d), if modification is premised upon a finding of a mistake in a determination of fact, the general provisions of 20 C.F.R. §725.503(b) are applicable, allowing for benefits to be paid from the original application date if a specific date of onset of total disability due to pneumoconiosis is not ascertainable. 20 C.F.R. §725.503(b), (d)(1); *see Eifler*, 926 F.2d at 666, 15 BLR at 2-4; *Gardner v. Consolidation Coal Co*., 12 BLR 1-184 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If, however, the ground for granting modification is a change in conditions, claimant is entitled to benefits from the date of that change, provided that no benefits are payable for any month prior to the effective date of the most recent denial of benefits; if the date of change is not ascertainable, benefits are payable beginning with the month in which claimant requested modification. 20 C.F.R. §725.503(d)(2); *see Eifler*, 926 F.2d at 666, 15 BLR at 2-4.

If the administrative law judge awards benefits based upon invocation of the irrebuttable presumption set forth in 20 C.F.R. §718.304, then the month in which complicated pneumoconiosis was first diagnosed generally governs the onset date. When the evidence does not reflect the point at which claimant's simple pneumoconiosis became complicated pneumoconiosis, the onset date for payment of benefits is the month during which the claim was filed, unless the evidence affirmatively establishes that claimant had only simple pneumoconiosis for any period subsequent to the date of filing, in which case benefits must commence following the period of simple pneumoconiosis. 20 C.F.R. §725.503(b); *see Williams v. Director, OWCP*, 13 BLR 1-28 (1989).

Accordingly, the administrative law judge's Decision and Order on Remand – 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