

BRB No. 10-0691 BLA

COLLEEN MOORE	)	
(Widow of DALE A. MOORE)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 08/25/2011
	)	
MATT MINING COMPANY,	)	
INCORPORATED	)	
	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand – Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Helen H. Cox (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand – Awarding Benefits (2005-BLA-5485) of Administrative Law Judge Thomas M. Burke, with respect to a survivor's claim<sup>1</sup> filed on September 2, 2003, 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

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<sup>1</sup> Claimant is the widow of a miner, Dale A. Moore, who died on June 17, 2003. Director's Exhibit 4.

Act).<sup>2</sup> This case is before the Board for the third time.<sup>3</sup> In its most recent decision, the Board held that, in the administrative law judge's 2008 Decision and Order – Awarding Benefits, he properly admitted, pursuant to 20 C.F.R. §725.414(a)(4), the reading of the September 14, 1998 x-ray by Dr. Humphreys and the readings by Drs. Robinette and McReynolds of the May 8, 2001 x-ray, as treatment records. *Moore v. Matt Mining Co.*, BRB No. 09-0188 BLA, slip op. at 5-6 (Nov. 25, 2009)(unpub.). The Board also held that the administrative law judge permissibly rejected employer's assertion that its due process rights were violated, because it was precluded from submitting x-ray interpretations to rebut the readings of the September 14, 1998 and May 8, 2001 x-rays. *Id.* However, the Board agreed with employer that the administrative law judge failed to consider whether Dr. Robinette based his medical opinion on inadmissible evidence. *Id.* at 7-8. Therefore, the Board vacated the administrative law judge's determination that claimant established invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304.<sup>4</sup> *Id.* at 8. Accordingly, the Board vacated the

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<sup>2</sup> The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the present claim, as it was filed prior to January 1, 2005. Director's Exhibit 1.

<sup>3</sup> In the administrative law judge's initial award of benefits, he determined that claimant did not satisfy her burden of proving that pneumoconiosis caused, or hastened, the miner's death pursuant to 20 C.F.R. §718.205(c). 2006 Decision and Order at 17. This issue was not raised on appeal before the Board, which affirmed the administrative law judge's finding that employer was properly designated as the responsible operator and his exclusion of evidence that exceeded the limitations at 20 C.F.R. §725.414. *Moore v. Matt Mining Co.*, BRB No. 06-0848 BLA, slip op. at 3 (Aug. 30, 2007)(unpub.). The Board vacated the award of benefits on the ground that the administrative law judge erred in his consideration of the evidence relevant to complicated pneumoconiosis at 20 C.F.R. §718.304. *Id.* at 4-6. In a Decision and Order on Remand – Awarding Benefits, the administrative law judge determined that claimant established the existence of complicated pneumoconiosis and invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. 2008 Decision and Order on Remand at 5-6. Employer appealed to the Board.

<sup>4</sup> Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of death due to pneumoconiosis if the miner 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 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.

administrative law judge's award of benefits and remanded the case to the administrative law judge for further consideration. *Id.*

On remand, in a Decision and Order dated July 23, 2010, the administrative law judge determined that Dr. Robinette's diagnosis of complicated pneumoconiosis was reasoned and documented, as it was adequately supported by x-ray and CT scan evidence that was properly admitted into the record under 20 C.F.R. §725.414. Pursuant to the Board's instructions, the administrative law judge also conducted a reassessment of all relevant medical evidence and again determined that the miner had complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and that claimant was entitled to the irrebuttable presumption of death due to pneumoconiosis. Therefore, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding complicated pneumoconiosis established at 20 C.F.R. §718.304, because Dr. Robinette's report, on which the administrative law judge relied, was based on inadmissible evidence and because the administrative law judge did not make the required equivalency determination. Further, employer asserts that the administrative law judge erred in his reassessment of the medical evidence and in determining that this evidence established the presence of complicated pneumoconiosis. Therefore, employer states that the evidence was insufficient to invoke the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a response brief on the merits 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.<sup>5</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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<sup>5</sup> The record indicates that the miner's coal mine employment was in Virginia. Director's Exhibit 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

## **I. The Administrative Law Judge's Crediting of Dr. Robinette's Opinion**

### **A. Dr. Robinette's Reports**

Dr. Robinette first examined the miner on June 18, 1998, to evaluate a spot on the miner's right lung after the Department of Labor notified the miner that he had an abnormal chest x-ray. Director's Exhibit 5. Dr. Robinette noted that, as part of his evaluation, he reviewed copies of x-ray interpretations by Drs. Scott and Wheeler, which included findings "consistent with possible [tuberculosis] with a granulomatous mass versus cancer in his right mid lung zone." *Id.* Dr. Robinette stated:

Chest x-ray, date 4/29/98[,] demonstrated borderline cardiomegaly. There were [sic] diffuse interstitial fibrosis with a category A mass in the right mid lung zone. The bony skeleton appeared to be normal. When compared to the Standard ILO X-ray Series for the interpretation of pneumoconiosis[,] there were diffuse opacities present consistent with pneumoconiosis with a primary opacity size of [q] and a secondary opacity size of [t] with a profusion abnormality of 2/2. There was a category A mass in the right mid lung zone.

*Id.* Dr. Robinette also noted that he reviewed a November 13, 1993 x-ray for comparison to the more recent x-ray. *Id.* In addition, Dr. Robinette referenced a CT scan performed by Dr. Mullins, which contained findings consistent with silicosis and progressive fibrosis, and a June 8, 1998 pulmonary function study showing a restrictive impairment. *Id.* With respect to the miner's tuberculosis status, Dr. Robinette indicated that he ordered an acid fast smear and cultures and that "all smears were negative to date." *Id.*

On September 14, 1998, the miner saw Dr. Robinette for "follow-up of his underlying coal workers' pneumoconiosis and progressive massive fibrosis (PMF)." Director's Exhibits 5, 17. Dr. Robinette noted, "the most [sic] B reader interpretation have [sic] suggested evidence of pneumoconiosis with a profusion abnormality of 3/2, predominant [q/r] opacities with a Category B mass." *Id.* Dr. Robinette described the results of his physical examination and then indicated, without identifying the date of the film, that the "x-ray demonstrated a generalized profusion abnormality of 2/3 and predominant [q/r] opacities with a category B mass in the right upper lung zone." *Id.* Dr. Robinette further noted that the x-ray findings were consistent with a CT scan performed at Johnson Memorial Hospital and concluded that all of the miner's cultures had been negative for tuberculosis. *Id.*

The miner returned on October 1, 1999, and Dr. Robinette noted that CT scans confirmed evidence of nodular interstitial disease with bilateral apical masses and that

this was consistent with silicosis and PMF, with the largest opacity measuring 2.5 centimeters. Director's Exhibits 5, 17. On November 8, 1999, Dr. Robinette reported that he saw the miner and indicated that there was evidence of complicated coal workers' pneumoconiosis, based on the results of pulmonary function studies, blood gas studies, and a chest x-ray. *Id.* During office visits on May 8, 2000, and November 8, 2000, Dr. Robinette continued to opine that the miner had evidence of complicated coal workers' pneumoconiosis and that the miner's condition was chronic and irreversible. *Id.* The record also contains reports of the miner's visits to Dr. Robinette on November 6, 2001, for additional "follow-up of his underlying black lung disease with areas of PMF," and on May 6, 2002, for "follow-up of his underlying black lung disease with chronic airflow obstruction." Director's Exhibits 5, 17. During the May 2002 visit, Dr. Robinette noted that the chest x-ray performed on May 8, 2001, did not show any changes. *Id.* Dr. Robinette saw the miner again for "follow-up of his underlying black lung disease with chronic airflow obstruction" on November 4, 2002 and on May 5, 2003. *Id.*

## **B. The Administrative Law Judge's Findings on Second Remand**

Regarding Dr. Robinette's June 18, 1998 report, the administrative law judge concluded that the only tests referred to by Dr. Robinette that were not in evidence are the negative x-ray interpretations by Drs. Scott and Wheeler and a November 13, 1993 x-ray that Dr. Robinette used as an historical comparison to the April 29, 1998 x-ray. Decision and Order on Second Remand at 2. The administrative law judge explained that the CT scan interpretation by Dr. Mullins, and the June 8, 1993 pulmonary function study, were both admitted into evidence at Director's Exhibit 5. *Id.* The administrative law judge, relying on a November 3, 1998 letter from Dr. Robinette to the miner's attorney, disagreed with employer's contention, that Dr. Robinette was not the reader of the April 29, 1998 x-ray. *Id.* at 2-3. Therefore, the administrative law judge found that it was "inconsequential" that Dr. Robinette did not use and attach an ILO form to his reading of this x-ray. *Id.* at 3.

The administrative law judge also rejected employer's assertion concerning Dr. Robinette's testing of the miner for tuberculosis. Decision and Order on Second Remand at 3. The administrative law judge found that, although Dr. Robinette's report of his initial evaluation was dated June 18, 1998, the record shows that the miner underwent testing on June 8, 1998, so it was "reasonable to assume that sputum for [the] acid fast smear was taken on or about that day rather than assuming that Dr. Robinette reported the existence of pending cultures and negative smears when none existed." *Id.* Accordingly, the administrative law judge determined that the opinion set forth by Dr. Robinette in his June 18, 1998 report, that the miner suffered from complicated pneumoconiosis, was well reasoned and documented, as it was supported by Dr. Robinette's interpretation of the April 29, 1998 x-ray, the findings of bilateral peripheral infiltrates in the mid and upper

lung zone on the x-ray readings by Drs. Scott and Wheeler, and the negative tuberculosis test results. *Id.*

The administrative law judge then summarized Dr. Robinette's reports concerning visits with the miner on September 14, 1998, October 1, 1999, November 8, 1999, May 8, 2000, November 8, 2000, November 6, 2001, May 6, 2002, November 2, 2002 and May 5, 2003. Decision and Order on Second Remand at 3-5. The administrative law judge reiterated his finding that Dr. Robinette's diagnosis of complicated pneumoconiosis was supported by x-ray readings, both his own and those conducted by others, and a CT scan interpretation. *Id.* at 5. The administrative law judge stated:

These reports of Dr. Robinette diagnosing complicated pneumoconiosis are supported by: (1) x-ray readings, including his reading of a December 12, 1997 x-ray as 3/2, r/t, 6 zones, with size A, large opacities; (2) his reading of the April 29, 1998 x-ray as a profusion abnormality of 2/2 and Category "A" mass; (3) the descriptive interpretation by Dr. Humphreys, a radiologist at Abingdon Radiology Services, Ltd., of the September 14, 1998 x-ray as "nodular interstitial disease throughout the lungs bilaterally" and "conglomerate masses upper lobe bilaterally" as well as the "[l]argest mass is in right perihilar region and appears to measure 3.5 cm in maximum diameter;" (4) a descriptive interpretation of a May 8, 2001 chest x-ray by Dr. McReynolds, a radiologist at Abingdon Radiology Services, Ltd., stating diffuse interstitial pattern with nodularity in the mid and upper lung zones, with a confluent perihilar density on the right, and findings consistent with silicosis/CWP and PMF; and (4) [sic] Dr. Robinette's interpretation of a May 8, 2001 x-ray as showing 2/3 predominant q/t opacities with a category "A" mass in the right upper lobe and axillary coalescence of pneumoconic nodules.

Dr. Robinette's reports diagnosing complicated pneumoconiosis are also supported by a CT scan reading dated June 8, 1998, by Dr. J. Richard Mullins, a physician in the Radiology Department at Johnston Memorial Hospital.

*Id.* The administrative law judge further reiterated that the supporting x-ray and CT scan evidence was contained in the record at Director's Exhibits 5 and 17 and was admissible at 20 C.F.R. §725.414. *Id.* at 6.

When reweighing all of the relevant medical evidence together at 20 C.F.R. §718.304, the administrative law judge credited Dr. Robinette's diagnosis of complicated pneumoconiosis, as supported by other physicians, who found large opacities or PMF, over the contrary x-ray and CT scan interpretations by Drs. Scott and Wheeler. Decision

and Order on Second Remand at 7-8. The administrative law judge agreed with employer that Drs. Scott and Wheeler, as Board-certified radiologists, were better qualified than Dr. Robinette. *Id.* at 7. Nevertheless, he explained that he gave more weight to Dr. Robinette's opinion, although he is not a Board-certified radiologist, because he is a B reader and Board-certified pulmonologist and he treated the miner for his respiratory issues, which gave him "better knowledge of the miner's pulmonary condition and the cause of the abnormalities on his lungs." *Id.* at 7-8.

The administrative law judge indicated that because all of the physicians who read the x-rays or CT scans observed abnormalities on the miner's lungs, including large masses about 2.5 centimeters in size, the relevant issue was "the cause of the abnormalities." Decision and Order on Second Remand at 7. The administrative law judge stated that Drs. Scott and Wheeler suggested numerous causes for the abnormalities, including tuberculosis, probable granulomatous disease, cancer, and histoplasmosis, but consistently opined that there was no evidence of complicated pneumoconiosis or PMF. *Id.* at 7-8. However, the administrative law judge relied on Dr. Robinette's rejection of the alternative causes of the lung abnormalities in his treatment records to discredit the opinions of Drs. Scott and Wheeler. *Id.* at 8.

The administrative law judge indicated that employer offered Dr. Dahhan's report in support of the assertion that a negative tuberculosis skin test does not preclude a diagnosis of tuberculosis in an individual, like the miner, who had diabetes. Decision and Order on Second Remand at 9. The administrative law judge found that Dr. Dahhan's opinion was insufficient to discredit Dr. Robinette's contrary finding, as the two physicians were equally-qualified and Dr. Robinette was the miner's treating pulmonologist. *Id.* The administrative law judge noted that he did not consider Dr. Fino's report, as he did not offer an opinion as to whether the miner had complicated pneumoconiosis. *Id.* at 8.

Accordingly, the administrative law judge again determined that claimant established that the miner had complicated pneumoconiosis, arising out of his twenty-three years of coal mine employment, at 20 C.F.R. §§718.304, 718.203(b), and awarded benefits. Decision and Order on Second Remand at 9.

### **C. Arguments on Appeal**

Employer asserts that it is not clear from Dr. Robinette's initial June 18, 1998 report that he performed his own interpretation of the x-ray, dated April 29, 1998, as there is no ILO form in evidence. Employer states that the administrative law judge erred in relying on the November 3, 1998 letter from Dr. Robinette to the miner's attorney to determine that Dr. Robinette read the x-ray, as the letter was excluded by the administrative law judge. Employer also objects to Dr. Robinette's citation, in the

September 14, 1998 report, to letters from the Department of Labor concerning the miner's pneumoconiosis and B reader interpretations that suggested evidence of a category B mass.

Employer further asserts that the administrative law judge assumed, without any foundation, that the x-ray interpretation that Dr. Robinette set forth in his report dated September 14, 1998, was a recitation of Dr. Humphreys' reading of a film obtained on the same date. In addition, employer maintains that the administrative law judge relied on "sheer speculation" to assume that the sputum for the miner's acid fast smear was taken on June 8, 1998 and provided the basis for Dr. Robinette's statement, in his June 18, 1998 report, that, "[a]ll [tuberculosis] smears were negative to date." Employer's Brief at 4; Director's Exhibit 5. Employer raises similar issues with respect to Dr. Robinette's September 14, 1998 report, in which he again noted that all cultures were negative for tuberculosis, because he did not specifically identify what he relied on to make this determination.

Employer also faults the administrative law judge's consideration of Dr. Robinette's October 1, 1999 and November 8, 1999 reports, alleging that the administrative law judge did not address whether Dr. Robinette was relying upon inadmissible evidence when he referenced unidentified CT scan and x-ray reports and a copy of a tuberculosis skin test that the miner showed him. In addition, employer asserts that the administrative law judge erred by not addressing the inconsistency in Dr. Robinette's reports concerning the pulmonary function studies. Employer states that in Dr. Robinette's June 18, 1998 report, he found that the miner had a moderate restrictive disease, but in his November 8, 1999 report, Dr. Robinette noted the presence of mild restrictive lung disease and opined that the miner's condition was "chronic and irreversible." Employer's Brief at 6. Employer raises additional issues regarding Dr. Robinette's subsequent reports, alleging either that they do not refer to any objective testing or that they are unclear about the evidence upon which Dr. Robinette relied.

Employer's allegations of error have merit in one respect. At the hearing, employer objected to the admission of the November 3, 1998 letter from Dr. Robinette to the miner's attorney because it was not a treatment note or hospitalization record.<sup>6</sup> Hearing Transcript at 6. In his 2006 Decision and Order – Awarding Benefits, the administrative law judge noted, "as stated at the formal hearing, Dr. Robinette's (partial)

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<sup>6</sup> Dr. Robinette indicated in the November 3, 1998 letter that he was responding to an inquiry from the miner's attorney, requesting clarification of the x-ray interpretations referenced in his June 18, 1998 report. Director's Exhibit 5. Dr. Robinette stated, "[a]s part of my evaluation[,] an x-ray was supplied to my office, dated 4/28/98. I felt that the film demonstrated evidence of diffuse opacities, more consistent with an [sic] profusion abnormality of 2/2 with a category A mass in the right mid lung zone." *Id.*



letter to [claimant's counsel], dated November 3, 1998, has been excluded from Director's Exhibit 5."<sup>7</sup> 2006 Decision and Order – Awarding Benefits at 2 n.2. Therefore, it was error for the administrative law judge to rely on the letter to support his conclusion that Dr. Robinette conducted the reading of the April 29, 1998 x-ray mentioned in his June 1998 report. Because the administrative law judge relied, in part, upon Dr. Robinette's alleged reading of the April 29, 1998 film to determine that his diagnosis of complicated pneumoconiosis was reasoned and documented, we must vacate his decision to credit Dr. Robinette's opinion at 20 C.F.R. §718.304. *See United States Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 389, 21 BLR 2-639, 2-647 (4th Cir. 1999); *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir 1997); *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006).

However, we reject employer's assertion that the administrative law judge's crediting of Dr. Robinette's diagnosis of complicated pneumoconiosis was tainted by his reliance upon an unidentified reading of an x-ray obtained on September 14, 1998. In Dr. Robinette's report of the same date, he stated, "[x]-ray demonstrated a generalized profusion abnormality of 2/3, predominant [q/r] opacities with a category B mass in the right upper lung zone." Director's Exhibit 5. Contrary to employer's contention, the administrative law judge did not include this x-ray interpretation in his summary of Dr. Robinette's September 14, 1998 report, nor did he cite it in support of his finding that Dr. Robinette's opinion was reasoned and documented. Decision and Order on Second Remand at 3-4, 5. Rather, the administrative law judge merely summarized Dr. Humphreys' reading of the September 14, 1998 x-ray and identified it as documentation supporting Dr. Robinette's diagnosis of complicated pneumoconiosis. *Id.* at 5.

Similarly, there is no merit in employer's assertion that the administrative law judge erred in failing to consider Dr. Robinette's reference, in his September 14, 1998 report, to x-ray interpretations that are not of record. The administrative law judge did not cite these interpretations as evidence supporting Dr. Robinette's opinion.

We also find no merit in employer's assertion that the administrative law judge should have discredited Dr. Robinette's diagnosis of complicated pneumoconiosis, based upon the conflict between the physician's finding of a moderate impairment in June 1998 and a mild impairment in November 1999. The administrative law judge was not required to find Dr. Robinette's opinion to be less credible on this basis, in light of his rational determination that Dr. Robinette relied primarily on x-ray and CT scan evidence to diagnose complicated pneumoconiosis. *See Grizzle v. Pickands Mather & Co.*, 994

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<sup>7</sup> Only the first page of Dr. Robinette's letter appears in the record. The administrative law judge stated at the hearing, "[w]hen I look at the record and it does appear to be a mere report to an attorney, I'll exclude it." *Id.* at 10-11.

F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); Decision and Order on Second Remand at 5; Director's Exhibit 5. We also reject employer's argument, that the administrative law judge did not evaluate the weight to be given to Dr. Robinette's May 8, 2000, November 8, 2000, November 6, 2001, November 4, 2002, and May 5, 2003 reports in light of the physician's alleged reliance on inadmissible evidence. The administrative law judge did not cite these reports in support of his finding that Dr. Robinette's diagnosis of complicated pneumoconiosis was documented by evidence in the record. Decision and Order on Second Remand at 3-5.

Finally, contrary to employer's allegation of error, the administrative law judge acted within his discretion in finding that Dr. Robinette's opinion, that tuberculosis did not cause the conditions observed on the miner's x-rays and CT scans, was supported by substantial evidence. 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, 2-275-76 (4th Cir. 1997). In the report dated June 18, 1998, Dr. Robinette indicated that he had examined claimant, reviewed his medical records, and performed objective testing. Director's Exhibit 5. The objective studies attached to Dr. Robinette's report are dated June 8, 1998. *Id.* Dr. Robinette also noted that, because there were findings compatible with tuberculosis in the records from Dr. Scott, he requested "sputum times 3 for acid fast smear." *Id.* Dr. Robinette commented that "[c]ultures were pending" but that "[a]ll smears were negative to date." *Id.* (emphasis added). In Dr. Robinette's subsequent report, dated September 14, 1998, he stated, "[a]ll cultures have been negative for tuberculosis." Director's Exhibit 17 (emphasis added). Based upon this evidence, the administrative law judge rationally determined, "[i]t is more reasonable to assume that sputum for [an] acid fast smear was taken on or about [June 8, 1998] rather than assuming that Dr. Robinette reported the existence of pending cultures and negative smears when none existed." Decision and Order on Second Remand at 3; see *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Accordingly, the administrative law judge acted within his discretion in crediting Dr. Robinette's finding that tuberculosis did not account for the conditions observed on the miner's x-rays and CT scans. See *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006).

Nevertheless, because the administrative law judge did not properly resolve the issue concerning the reading of the film dated April 29, 1998, we must remand this case to the administrative law judge for reconsideration of Dr. Robinette's diagnosis of complicated pneumoconiosis. When addressing Dr. Robinette's opinion on remand, the administrative law judge must reassess his determination that Dr. Robinette set forth his own reading of the x-ray obtained on April 29, 1998, in light of the administrative law judge's exclusion of Dr. Robinette's letter dated November 3, 1998. If the administrative law judge finds that Dr. Robinette interpreted this x-ray, he must determine whether it is admissible as a treatment record pursuant to 20 C.F.R. §725.414(a)(4). In the event that

the administrative law judge admits the x-ray reading, he must also make a finding as to whether employer has established good cause for the admission of a rebuttal reading pursuant to 20 C.F.R. §725.456. If the administrative law judge concludes that the x-ray reading is inadmissible, he must then determine whether to redact that portion of Dr. Robinette's September 14, 1998 report or accord less probative weight to Dr. Robinette's diagnosis of complicated pneumoconiosis on this basis. See *Brasher*, 23 BLR at 1-148 n.8; *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-103 (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).

## II. 20 C.F.R. §718.304

Employer also asserts that the administrative law judge did not properly weigh the evidence relevant to the individual subsections of 20 C.F.R. §718.304, in finding that claimant established invocation of the irrebuttable presumption of death due to pneumoconiosis. Because the administrative law judge relied on Dr. Robinette's opinion in rendering his determination, his findings at 20 C.F.R. §718.304 cannot be affirmed. On remand, based upon his findings with respect to Dr. Robinette's x-ray reading, the administrative law judge must first render a specific finding as to whether the existence of complicated pneumoconiosis has been established at 20 C.F.R. §718.304(a).<sup>8</sup> The administrative law judge must then determine whether the CT scan evidence is sufficient to establish the presence of complicated pneumoconiosis under 20 C.F.R. §718.304(c).<sup>9</sup> When addressing the x-ray readings that are not classified under the ILO system and the CT scan readings, the administrative law judge must make the necessary equivalency determinations.<sup>10</sup> See *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220

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<sup>8</sup> The administrative law judge must also consider the radiological qualifications of the physicians performing x-ray readings, but is not required to defer to the interpretations of Board-certified radiologists. See 20 C.F.R. §718.202(a)(1); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004)(*en banc*). Neither party has submitted evidence establishing the existence of special qualifications for interpreting CT scans for complicated pneumoconiosis.

<sup>9</sup> The record does not contain biopsy or autopsy evidence relevant to 20 C.F.R. §718.304(b).

<sup>10</sup> 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 that 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.

F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000). In addition, although the administrative law judge is not required to discredit an x-ray or CT scan interpretation that is expressed in equivocal terms, he must address the equivocal nature of the reading.<sup>11</sup> See *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

Lastly, the administrative law judge must reweigh all of the relevant medical evidence together to determine whether it establishes the presence of complicated pneumoconiosis at 20 C.F.R. §718.304. See *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*). When resolving the conflict between Dr. Robinette’s diagnosis of complicated pneumoconiosis and the contrary evidence of record, the administrative law judge is also required to render specific findings under 20 C.F.R. §718.104(d)(1)-(5), as to whether Dr. Robinette’s diagnosis of complicated pneumoconiosis, based on the x-ray and CT scan evidence, is entitled to additional weight, in light of his status as claimant’s treating pulmonologist. See *Consolidation Coal Co. v. Held*, 314 F.3d 184, 187-188, 22 BLR 2-564, 2-571 (4th Cir. 2002).

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*Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000).

<sup>11</sup> As noted by employer, Dr. Humphreys stated that the September 14, 1998 x-ray contained findings “suggestive of silicosis with PMF” and Dr. Mullins indicated that the findings on the June 8, 1998 CT scan “are most consistent with silicosis and PMF.” Director’s Exhibit 5.

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

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge