BRB No. 07-0288 BLA

H.M.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 12/31/2007
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

H.M., Clintwood, Virginia, *pro se*.[1]

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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.

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (03-BLA-6241) of Administrative Law Judge Linda S. Chapman rendered on a subsequent claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[2] This case is before the Board for a second time. In a Decision and Order dated December 15, 2004, Administrative Law Judge Mollie S. Neal determined that the newly submitted evidence supported a finding that claimant had complicated coal workers' pneumoconiosis. Judge Neal found that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 and awarded benefits.

Employer appealed to the Board, alleging that the administrative law judge erred in excluding a January 15, 2004 supplemental report prepared by Dr. Fino on the ground that he referenced x-rays that were inadmissible under the evidentiary limitations at 20 C.F.R. §725.414. The Board agreed with employer that, insofar as the administrative law judge indicated at the hearing that she would admit Dr. Fino's report, notwithstanding his reference to the inadmissible x-ray readings, her determination to exclude the report in her Decision and Order appeared inconsistent, and required further explanation.[3] *[H.M.]*

[2] Claimant filed an initial claim for benefits on January 3, 1999, which was denied by the district director on April 15, 1999 for failure to establish any of the requisite elements of entitlement. Director's Exhibit 36. Within one year, claimant submitted additional evidence along with a request for modification. *Id.* On November 29, 1999, the district director denied modification on the ground that claimant had failed to establish a mistake in fact or a material change in conditions pursuant to 20 C.F.R. §725.310 (1999). *Id.* Claimant took no further action with regard to the denial of his modification request until he filed his subsequent claim on January 13, 2002. Director's Exhibit 1.

[3] In her December 15, 2004 Decision and Order, Administrative Law Judge Mollie S. Neal noted that neither the February 23, 1999 x-ray nor the November 28, 1997 x-ray, which were among the x-rays reviewed by Dr. Fino in his 2004 report, was admissible under 20 C.F.R. §725.414. She concluded that "[b]ecause Dr. Fino's January 15, 2004 opinion modifying his earlier September 26, 2003 report is based on inadmissible evidence, I decline to consider EX 2." Decision and Order at 11; *see* Employer's Exhibit 2.

v. Clinchfield Coal Co., BRB No. 05-0373 BLA, slip. op. at 4 (Dec. 30, 2005) (Hall J., dissenting) (unpub.). Thus, the Board vacated the award of benefits and remanded the case for the administrative law judge to explain whether Dr. Fino's opinion was admissible under Section 725.414. *Id*. The administrative law judge was also instructed to redetermine whether the evidence of record established claimant's entitlement to benefits under 20 C.F.R. §718.304 on the merits of the claim. *Id.* at 5.

On remand, the case was reassigned to Administrative Law Judge Linda S. Chapman (the administrative law judge). The administrative law judge directed the parties to designate, in accordance with *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-133 (2006), *aff'd on recon.*, -- BLR --, BRB No. 05-0335 BLA (Mar. 15, 2007) (*en banc*), one CT scan reading as part of their affirmative case evidence, and one CT scan interpretation as rebuttal evidence. *See* ALJ Status Order (Sept. 12, 2006). Following receipt of the designations made by employer and claimant,[4] and their respective briefs, the administrative law judge issued a Decision and Order on Remand on November 17, 2006. The administrative law judge first addressed the Board's remand order. Citing to *Harris v. Old Ben Coal Co*., 23 BLR 1-98, 1-108 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon*., -- BLR -- , BRB No. 04-0812 BLA (June

[4] In response to the administrative law judge's September 12, 2006 Status Order, employer submitted a letter dated September 26, 2006, wherein it designated Dr. Fino's interpretation of a January 4, 2003 CT scan and Dr. Fino's interpretation of a September 26, 2003 CT scan as affirmative evidence. Upon receipt of employer's designation, a law clerk for the administrative law judge contacted employer's counsel asking that it revise its designation to include only one affirmative reading. Decision and Order Awarding Benefits on Remand (Decision and Order on Remand) at 11, n.16. By letter dated October 9, 2006, employer objected to the administrative law judge's interpretation of *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-133 (2006), *aff'd on recon.*, -- BLR --, BRB No. 05-0335 BLA (Mar. 15, 2007) (*en banc*) as precluding employer from submitting two affirmative CT scan readings. The administrative law judge issued a Second Order on October 12, 2006, rejecting employer's argument with respect to *Webber*, and directing employer to designate only one affirmative CT scan reading. Employer, however did not respond to the administrative law judge's second Order. In her Decision on Remand, the administrative law judge stated that because there was no response by employer, she would consider only the one CT scan interpretation designated by claimant as affirmative evidence, and any CT scan readings that were included in claimant's treatment records. She specifically excluded all of employer's CT scan evidence. Decision and Order on Remand at 11 n.16. Employer avers in this appeal that it did not respond, "as it was sure its interpretation was correct and its designation as set out in the September 26, 2006 letter was lawful." Employer's Brief in Support of Petition for Review at 10.

27, 2007) (McGranery & Hall, JJ., concurring and dissenting), the administrative law judge stated that she would admit Dr. Fino's January 15, 2004 report into the record, but would accord no weight to those portions of Dr. Fino's opinion that referenced inadmissible x-rays dated November 28, 1997 and February 23, 1999. The administrative law judge specifically rejected employer's argument that there was "good cause" for Dr. Fino's review of the inadmissible x-ray evidence simply because Dr. Fino deemed it necessary to review multiple films to track the pattern of claimant's disease over time. The administrative law judge further stated that she was not considering any of employer's CT scan evidence because employer had not properly designated its evidence in accordance with her instruction. Reviewing the merits of the claim, the administrative law judge determined that claimant was entitled to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. Accordingly, the administrative law judge awarded benefits.

Employer appeals, asserting that the administrative law judge erred by redacting portions of Dr. Fino's 2004 report, and by excluding all of employer's CT scan evidence. Employer also contends that the administrative law judge erred in finding that claimant was entitled to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's argument that the administrative law judge abused his discretion in his treatment of Dr. Fino's opinion. The Director takes no position with regard to employer's remaining arguments on 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).

Evidentiary Challenges:

Employer initially challenges the administrative law judge's award of benefits, asserting that she erred in failing to find that employer had demonstrated "good cause" for having Dr. Fino prepare a supplemental opinion based on his review of two x-rays that were relevant, but otherwise inadmissible under Section 725.414. Employer asserts that the administrative law judge erred in choosing to redact those portions of Dr. Fino's January 2004 report that referenced the inadmissible x-rays, as opposed to accepting the entirety of Dr. Fino's opinion. Employer's argument is without merit.

The pertinent regulations provide that each x-ray mentioned in a medical report must be admissible under Section 725.414(a)(2)-(3) or Section 725.414(a)(4), which

provides for the admission of hospital and treatment records. 20 C.F.R. §725.414(a)(2)(i), (3)(i), (4). However, 20 C.F.R. §725.456(b)(1) allows for the admission of medical evidence in excess of the Section 725.414 limitations if the party offering the excess evidence can show good cause. *See* 20 C.F.R. §725.456(b)(1); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-59 (2004)(*en banc*).

Employer concedes that Dr. Fino reviewed x-rays dated November 28, 1997 and February 23, 1999, which were inadmissible as excess evidence under Section 725.414, because employer had already designated its two affirmative x-rays. Employer, however, maintains that it established "good cause" for admitting these additional x-ray reports since the evidence was not proffered by employer in an attempt to circumvent the evidentiary limitations, and since Dr. Fino specifically requested to review additional x-rays in order to provide a reasoned opinion as to the presence or absence of complicated pneumoconiosis.

Contrary to employer's assertion, the administrative law judge properly considered employer's good cause arguments and decided that they were without merit. Decision and Order Awarding Benefits on Remand (Decision and Order on Remand) at 5. As noted by the administrative law judge, "[e]mployer's argument that good cause is established because admission of the x-ray reports would increase the quality of the evidence in the record is essentially the 'more is better'8 argument rejected by the regulations." *Id*. Moreover, the administrative law judge properly recognized that employer's argument that the "excess films are relevant" to the issue of whether claimant suffers from complicated pneumoconiosis is not sufficient under *Dempsey* to warrant their admission into the record. *See Dempsey*, 23 BLR at 1-58-59 (2004). Thus, we affirm the administrative law judge's good cause ruling as it was rational and within her discretion as the trier-of-fact.

Furthermore, contrary to employer's assertion, because the applicable regulations are silent as to what an administrative law judge should do when evidence that exceeds the evidentiary limitations is referenced in an otherwise admissible medical opinion, the disposition of this issue is committed to an administrative law judge's discretion. *Harris*, 23 BLR at 1-108; *Dempsey*, 23 BLR at 1-67. The Board recognized in *Harris*, that an administrative law judge should not *automatically* exclude medical opinions without first ascertaining what portions of the opinions are tainted by review of inadmissible evidence. *Harris*, 23 BLR at 1-108. If the administrative law judge finds that the opinion is tainted, he or she is not required to exclude the report or testimony in its entirety. *Id*. Rather, the administrative law judge may redact the objectionable content, ask the physician to submit a new report, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which the physician's opinion is entitled. *Id*. In accordance with *Harris*, the administrative law judge in this case fashioned a permissible remedy for Dr. Fino's review of inadmissible evidence, by determining to redact only those portions

of Dr. Fino's opinion that relied on the excluded x-ray readings. Decision and Order on Remand at 5. This was rational. We therefore reject employer's argument that the administrative law judge erred by failing to consider Dr. Fino's entire report, and in determining to redact those portions of his report that refer to the inadmissible x-ray reports.

Nevertheless, we agree with employer that the administrative law judge erred in failing to admit employer's affirmative CT scan evidence into the record. Contrary to the administrative law judge's ruling, under the facts of this case, employer was entitled to submit more than one affirmative CT scan reading pursuant to 20 C.F.R. §718.107. As noted by the Board in *Webber*, the regulations provide for the admission of CT scan readings as affirmative case evidence under Section 718.107, which allows for the admission of "[t]he results of any medically accepted test or procedure reported by a physician and not addressed [in Sections 718.102-718.106] which tends to demonstrate the presence or absence of pneumoconiosis… or a respiratory or pulmonary impairment." Moreover, the regulations do not limit the number of separate CT scans that may be admitted into the record; rather, the parties are limited only to one affirmative reading of each separate scan. *See Dempsey*, 23 BLR at 1-59. In this case, the record contains two CT scans dated January 4, 2002 and September 26, 2003. In accordance with *Webber*, each party was allowed to submit one affirmative reading of each of these CT scans, and one rebuttal reading, as necessary, to respond to the opposing party's affirmative reading. *Id.* The administrative law judge's interpretation of *Webber*, to limit the parties to only one affirmative CT scan reading when the record contains two separate CT scans, was erroneous. Thus, because employer was allowed under *Webber* to designate both of Dr. Fino's CT scan interpretations as affirmative evidence, we vacate the administrative law judge's award of benefits and remand this case to the administrative law judge for further consideration. On remand, the administrative law judge is instructed to admit employer's affirmative CT scan evidence into the record, along with any rebuttal readings proffered by the parties, and reconsider the evidence. *See* 20 C.F.R. §718.107; *Webber*, 23 BLR at 1-134-135; *Dempsey*, 23 BLR at 1-59.

Merits of Entitlement:

In the interest of judicial economy, we further address employer's arguments on the merits. Based on our review of the Decision on Remand, the briefs of the parties, and the evidence or record, we agree with employer that the administrative law judge erred in her analysis of whether claimant was entitled to invocation of the irrebuttable presumption.

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement … has changed since

the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, claimant's prior claim was denied because he failed to establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant initially was required to submit new evidence establishing that he was totally disabled in order to proceed to the merits of his claim. 20 C.F.R. §725.309(d)(2),(3); *see also Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc*) (holding under former provision that claimant must establish at least one element of entitlement that was previously adjudicated against him). Reviewing the new evidence, the administrative law judge determined that it was sufficient to establish the existence of complicated pneumoconiosis, thereby entitling claimant to an irrebuttable presumption that he was total disabled due to pneumoconiosis under Section 718.304.

Employer argues that the administrative law judge applied an incorrect legal standard in analyzing the x-ray, CT scan, and medical opinion evidence for complicated pneumoconiosis, and that she improperly shifted the burden to employer to prove that the large opacities seen on the miner's x-rays are not due to complicated coal workers' pneumoconiosis, contrary to the holding in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000). Employer's argument has merit.

Section 411(c)(3) of the Act, as implemented by Section 718.304, 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 introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 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 of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003) (Gabauer, J., concurring); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc).*

In *Scarbro*, the United States Court of Appeals for the Fourth Circuit held that a single piece of relevant evidence could support an administrative law judge's finding that the irrebuttable presumption was successfully invoked "if that piece of evidence

outweighs conflicting evidence in the record." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. The court further explained:

> Thus, even where some x-ray evidence indicates opacities that would satisfy the requirements of prong (A), if other x-ray evidence is available or if evidence is available that is relevant to an analysis under prong (B) or prong (C), then all of the evidence must be considered and evaluated to determine whether the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray. [Citation omitted]. Of course, if the x-ray evidence vividly displays opacities exceeding one centimeter, its probative force is not reduced because the evidence under some other prong is inconclusive or less vivid. Instead, the x-ray evidence can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be, perhaps because of an intervening pathology, some technical problem with the equipment used, or incompetence of the reader.

Scarbro, 220 F.3d at 256, 22 BLR at 2-101.

In this case, the administrative law judge cited the holdings of the Fourth Circuit in *Scarbro*. Decision and Order on Remand at 15. The administrative law judge prefaced her consideration of the evidence by stating her interpretation of *Scarbro*:

> If the [c]laimant meets the congressionally defined condition, that is, if he establishes that he has a condition that manifests itself on x-rays with opacities greater than one centimeter, he is entitled to the irrebuttable presumption of total disability due to pneumoconiosis, unless there is affirmative evidence under prong A, B, or C that persuasively establishes either that these opacities do not exist, or that they are the result of a disease process unrelated to his exposure to coal mine dust.

Decision and Order on Remand at 15.

Turning to the record evidence, the administrative law judge began her analysis by considering whether claimant had established a condition of such severity that it would produce opacities greater than one centimeter in diameter on x-ray. *Id*. at 16.. Reviewing the x-ray evidence under Prong A, she noted that the record included nine interpretations of three different x-rays performed in 2002 and 2003, of which there were four readings that listed Category A or B opacities. She also reviewed the CT scan evidence, designated by claimant and contained in the treatment records, under Prong C, and determined that it corroborated the x-ray evidence in showing that the miner had a condition of such severity that it would produce opacities greater than one centimeter in

diameter on x-ray.[5] *Id* The administrative law judge next discussed the etiology of the masses/large opacities that were reported. *Id.* The administrative law judge specifically rejected the opinions of Drs. Wheeler, Fino, Scott and Scatarige, that claimant did not suffer from complicated coal workers' pneumoconiosis, because she considered their opinions to be only "speculative" as to the etiology of claimant's x-ray findings. *Id*. In support of her determination, she stated that Drs. Wheeler, Fino and Scott were "willing to exclude pneumoconiosis" but were unable to make a definitive diagnosis as to etiology of claimant's condition, noting only the possibility of healed tuberculosis or granulomatous disease. *Id*. at 17. She then stated:

> I have considered this CT scan evidence in conjunction with the x-ray evidence, and I find that the preponderance of the persuasive x-ray evidence establishes that the [c]laimant's x-rays show a Category A or B opacity, an abnormality that is due to pneumoconiosis, and that the [e]mployer has not offered persuasive affirmative evidence either that the opacity is not there, or that it is due to a process other than pneumoconiosis.

Id. at 18.

We agree with employer that the administrative law judge improperly shifted the burden of proof to employer to disprove the existence of complicated pneumoconiosis, and that she ignored the fact that Drs. Wheeler, Fino, Scott, and Scatarige each made an unequivocal diagnosis on the ILO classification sheet that claimant had no parenchymal abnormalities consistent with pneumoconiosis on the x-rays they reviewed. As an initial matter, we hold that the administrative law judge erred in her interpretation of *Scarbro*. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption. The administrative law judge is required to weigh all of the evidence relevant to this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Melnick*, 16 BLR at 1-33.

In this case, however, once the administrative law judge found that claimant had presented evidence supportive of a finding of complicated pneumoconiosis, she improperly shifted the burden to employer to produce "persuasive affirmative evidence" to establish that the findings on claimant's x-ray or CT scan are caused by something other than coal dust exposure. *Id*. The particular language cited by the administrative

[5] In addressing the CT scan evidence under Prong C, the administrative law judge noted that her findings would not change even if she considered all of the CT scans proffered by employer that were excluded from the record. Decision and Order on Remand at 18.

law judge in *Scarbro* was used by the court only in reference to situations where the x-ray evidence "vividly displays opacities exceeding one centimeter." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. Moreover, in a recent unpublished case issued by the Fourth Circuit, the court specifically rejected the analysis employed by the administrative law judge, stating that: "*Scarbro* holds only that once the claimant presents legally sufficient evidence (here, x-ray evidence of large opacities classified as category A, B, or C in the ILO system, [citation omitted], he is likely to win unless there is contrary evidence . . . in the record." *Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. Nov. 17, 2006) (unpub.), slip op. at 6. Thus, because the administrative law judge's analysis of the evidence relevant to invocation of the irrebuttable presumption is based on a faulty interpretation of *Scarbro*, we vacate her finding at Section 718.304(c).

The administrative law judge also erred in her consideration of the x-ray readings of Drs. Wheeler, Scott, Scatarige and Fino. The administrative law judge stated that the x-ray readings by Drs. Wheeler, Scott, Scatarige and Fino were "equivocal, in that they do not make a diagnosis or an 'objective determination' as to the etiology of the mass or masses that they described. Decision and Order on Remand at 17. However, because each of these physicians specifically noted on the ILO form that there was no parenchymal abnormalities consistent with pneumoconiosis, their opinions are not speculative with respect to the absence of pneumoconiosis, and should have been weighed against the conflicting x-ray readings by those physicians who opined that claimant's x-rays showed parenchymal abnormalities consistent with the disease.

Contrary to the administrative law judge's analysis, complicated pneumoconiosis seen as Category A, B or C opacities on x-ray, is not determined solely by the dimensions of the irregularity. Section 718.304 establishes invocation of the irrebuttable presumption if "such miner is suffering from a chronic dust disease of the lung" which, when diagnosed by x-ray, yields one or more opacities which would be classified as Category A, B or C. 20 C.F.R. §718.304(a); *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993); *Melnick*, 16 BLR at 1-33. The ILO classification form requires the physician interpreting the x-ray film to first determine whether there are "[a]ny [p]arenchymal [a]bnormalities [c]onsistent with [p]neumoconiosis." If the physician answers in the affirmative, then he/she proceeds to the sections regarding the size of the opacities, *i.e.*, small opacities or large opacities of size A, B, or C. *See* Form CM-933, questions 2A, 2B and 2C. However, if the physician answers the question in the negative, then he/she is to skip the section regarding the size of the opacities. *See* Form CM-933, question 2A.

On remand, the administrative law judge must consider each x-ray interpretation independently and determine whether or not it supports a finding of complicated pneumoconiosis pursuant to Section 718.304(a). The administrative law judge must then weigh all of the x-ray evidence together and determine whether it establishes the

existence of complicated pneumoconiosis at Section 718.304(a). *Melnick*, 16 BLR at 1-33. Further, the administrative law judge is advised that under the regulations, an x-ray interpretation on an ILO form, which notes a mass that is larger than one centimeter in the "Comments" section, but which does not diagnose pneumoconiosis with an opacity size A, B, or C, is not sufficient to assist claimant in establishing complicated pneumoconiosis pursuant to Section 718.304(a). 20 C.F.R. §718.304(a).

Consequently, we vacate the administrative law judge's finding that claimant is entitled to the irrebuttable presumption at Section 718.304, and remand the case for further consideration. On remand, the administrative law judge must discuss and weigh all evidence in determining whether claimant established complicated pneumoconiosis at Section 718.304. The administrative law judge must first determine whether the relevant evidence in each category under 20 C.F.R. §718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis, and then must weigh the evidence at subsections (a), (b), and (c) together before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145, 17 BLR at 2-117; *Melnick*, 16 BLR at 1-33.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is affirmed in part, and vacated in part, and the case is remanded 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