BRB Nos. 09-0228 BLA
and 09-0359 BLA

MARY ADKINS[1]	)	
(Widow of and o/b/o SAMUEL ADKINS)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEERLESS EAGLE COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 12/29/2009
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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.

Timothy C. MacDonnell (Washington and Lee University Legal Clinic), Lexington, Virginia, for claimant.

William P. Margelis (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

[1] Claimant is the surviving spouse of the miner, Samuel Adkins, who died on January 14, 2005. Living Miner's (LM) Director's Exhibit 54. She is pursuing the miner's claim on behalf of his estate and a claim for survivor's benefits on her own behalf.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (06-BLA-5465) of Administrative Law Judge Linda S. Chapman (the administrative law judge), rendered on claims filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case, which involves a subsequent claim filed on October 1, 2002,[2] and a survivor's claim filed on February 24, 2005, is before the Board for the second time. Initially, the administrative law judge credited the miner with nineteen years of coal mine employment,[3] based upon employer's stipulation, and, in the miner's claim, found that the medical evidence developed since the denial of the miner's prior claim established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), and 718.203. The administrative law judge, therefore, found that claimant established a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d). On the merits of entitlement, the administrative law judge found that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits in the miner's claim.

Regarding the survivor's claim, the administrative law judge found the x-ray evidence to be in equipoise as to the existence of simple pneumoconiosis, but that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203. The administrative law judge further determined that claimant established that pneumoconiosis was a substantially contributing cause of the miner's death under 20 C.F.R. §718.205(c). In addition, the administrative law judge found that claimant established invocation of the irrebuttable presumption of death due to pneumoconiosis set forth at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits in the survivor's claim.

[2] The miner filed an application for benefits on February 19, 1973, which was denied by the district director on May 22, 1979, as the miner did not establish any of the elements of entitlement. LM Director's Exhibit 1. The record does not reflect that the miner took any further action until filing the instant claim on October 1, 2002. LM Director's Exhibit 3.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); LM Director's Exhibit 3.

Pursuant to employer's appeal in the miner's claim, the Board vacated the administrative law judge's findings under 20 C.F.R. §§718.202(a)(1), (4), 718.304(a), (c), 725.309(d), and remanded the case for further consideration. *M.F.A.* [*Adkins*] *v. Peerless Eagle Coal Co.*, BRB Nos. 07-0585, 07-0780 BLA (April 30, 2008)(unpub.). Pursuant to 20 C.F.R. §§718.202(a)(1), 718.304(a), the Board instructed the administrative law judge, on remand, to consider all of the properly admitted x-ray readings, and to consider the full range of radiological qualifications of the readers. Further, because the administrative law judge based her credibility determinations at 20 C.F.R. §§718.202(a)(4), 718.304(c), on her x-ray findings, and did not resolve the conflict between her finding that the biopsy evidence did not establish simple or complicated pneumoconiosis and her decision to credit the opinions of Drs. Alexander and Koenig, which were based in part on the biopsy evidence, the Board vacated the administrative law judge's finding that the medical opinion evidence supported a finding of both simple and complicated pneumoconiosis. *Id.* slip op. at 7-8. The Board instructed the administrative law judge, on remand, to reweigh the medical opinions pursuant to 20 C.F.R. §§718.202(a)(4), 718.304(c), taking into account the physicians' qualifications, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses, and to explain her findings. Further, the Board instructed the administrative law judge to address the impact of her finding that the biopsy evidence does not support a finding of complicated pneumoconiosis on the credibility of the opinions of Drs. Alexander and Koenig. Further, the Board instructed the administrative law judge to first determine whether the evidence relevant to each category under 20 C.F.R. §718.304(a)-(c) tended to establish the existence of complicated pneumoconiosis, and to then weigh the evidence at subsections (a), (b), and (c) together before determining whether invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 was established.

Pursuant to employer's appeal in the survivor's claim, the Board vacated the administrative law judge's findings under 20 C.F.R. §§718.202(a)(4), 718.304, because the administrative law judge relied upon the same credibility determinations that she made in the miner's claim under 20 C.F.R. §§718.202(a)(4), 718.304, and which the Board vacated. The Board instructed the administrative law judge to reconsider the medical opinion evidence under 20 C.F.R. §718.202(a)(4), and to reconsider whether claimant is entitled to the irrebuttable presumption of death due to pneumoconiosis under 20 C.F.R. §718.304, in accordance with the Board's remand instructions on the same issues in the miner's claim.[4]

[4] The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) in either the miner's claim or the survivor's claim. *M.F.A.* [*Adkins*] *v. Peerless Eagle Coal Co.*, BRB Nos. 07-0585, 07-0780 BLA, slip op. at 3 n.4 (April 30,

On remand, the administrative law judge found that the new x-ray and medical opinion evidence established the existence of both simple and complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.304, and that the biopsy evidence did "not detract from" the x-ray and medical opinion evidence. Decision and Order on Remand at 15. The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further determined that, because claimant established the existence of complicated pneumoconiosis, she was entitled to the irrebuttable presumption that the miner was totally disabled due to pneumoconiosis. In the survivor's claim, the administrative law judge found that the x-ray and medical opinion evidence established the existence of both simple and complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.304. The administrative law judge therefore found that claimant was entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits in both claims.

On appeal, employer asserts that the administrative law judge erred in her weighing of the evidence under 20 C.F.R. §§718.202(a)(1), (4), and 718.304(a)-(c) in both the miner's claim and the survivor's claim. Employer additionally asserts that the administrative law judge erred in reconsidering the x-ray evidence in the survivor's claim. Claimant responds in support of the awards in both claims. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

The Miner's Claim

To be entitled to benefits under the Act, the miner had to demonstrate by a preponderance of the evidence that he was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. If 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

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2008)(unpub.). The Board additionally affirmed, as unchallenged, the administrative law judge's determination that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) in the survivor's claim. *Id*.

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). The miner's prior claim was denied because he failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 1. Consequently, the miner had to submit new evidence establishing either of these elements of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Under Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §718.304, there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c). The administrative law judge must consider all relevant evidence on this issue, *i.e.*, evidence that supports a finding of complicated pneumoconiosis, as well as evidence that does not support a finding of complicated pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*).

Pursuant to 20 C.F.R. §§718.202(a)(1) and 718.304(a),[5] the administrative law judge considered seven readings of three new x-rays.[6] With regard to the August 1, 1997 x-ray, the administrative law judge stated:

[5] The administrative law judge did not conduct separate analyses pursuant to 20 C.F.R. §§718.202(a)(1), 718.304(a). Rather, she considered the newly submitted x-ray evidence once and rendered findings pursuant to both 20 C.F.R. §§718.202(a)(1), 718.304(a).

[6] Dr. Alexander, who is a Board-certified radiologist and B reader, interpreted the August 1, 1997 x-ray as positive for simple pneumoconiosis and indicated that he detected Category B large opacities. LM Claimant's Exhibit 1. Dr. Wheeler, a Board-certified radiologist and B reader, read this x-ray as negative for pneumoconiosis. LM Employer's Exhibit 4. Dr. Alexander read the September 15, 1998 x-ray as positive for both simple pneumoconiosis and Category B large opacities. LM Claimant's Exhibit 1. Dr. Scott, Board-certified radiologist and B reader, interpreted this x-ray as negative for pneumoconiosis. LM Employer's Exhibit 8. Dr. Alexander interpreted the x-ray obtained on December 30, 2002 as positive for simple pneumoconiosis and Category B

> Dr. Wheeler has impressive credentials, including his involvement in [the] development of the NIOSH B-reader program; but his *curriculum vitae* do[es] not reflect significant "hands-on" clinical experience. On the other hand, Dr. Alexander has both impressive academic credentials as well as significant "hands-on" clinical experience based on his service as a Staff Radiologist at various hospitals. Clinical experience in a physician's practice is helpful in that it allows him or her to put "into practice" and test academic theory. In my opinion, Dr. Alexander's blend of board certifications, academic credentials, and clinical experience, specifically in the area of radiology, renders his interpretation of this x-ray more probative.

Decision and Order on Remand at 4. The administrative law judge therefore found the August 1, 1997 x-ray to be positive for simple and complicated pneumoconiosis. For the same reasons, the administrative law judge found Dr. Alexander's positive interpretation of the December 30, 2002 x-ray, as supported by the x-ray interpretation of Dr. Patel, to be entitled to more weight than Dr. Wheeler's negative interpretation of the same x-ray. Further finding that both Drs. Alexander and Scott have "impressive academic backgrounds and clinical experience," the administrative law judge found their conflicting interpretations of the September 15, 1998 x-ray to be in equipoise. *Id*. The administrative law judge therefore concluded that the weight of the x-ray evidence was positive for both simple and complicated pneumoconiosis. *Id*.

Employer asserts that the administrative law judge erred in her consideration of Dr. Wheeler's qualifications, and that this affected her weighing of the x-ray evidence under 20 C.F.R. §§718.202(a)(1), 718.304(a). We agree. As employer states, in finding that Dr. Wheeler lacks "hands-on" clinical experience, the administrative law judge did not consider Dr. Wheeler's testimony regarding his clinical practice:

> Q: Have you limited your practice in medicine to the area of radiology?
>
> A: Yes.
>
> Q: Do you primarily see chest films, or do you interpret all different sorts of x-rays?

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large opacities. LM Claimant's Exhibit 1. Dr. Patel, Board-certified radiologist and B reader, read this x-ray as positive for simple pneumoconiosis and Category A large opacities. LM Director's Exhibit 18. Dr. Wheeler interpreted the December 30, 2002 x-ray as negative for pneumoconiosis. LM Director's Exhibit 29. Dr. Binns reviewed the December 30, 2002 x-ray for quality purposes only. LM Director's Exhibit 19.

> A: Primarily chest, but on weekends I'll do, when I cover the emergency room and during the week when I cover the main department at the hospital, I'll be reading pretty much everything except MRIs and nuclear medicine.
>
> Q: About how many chest x-rays would you say you interpret in an average week?
>
> A: It's highly variable. It -- on a weekend, it can be up to two hundred -- up to four hundred and forty cases. During the week, it's quite frequently a hundred or more cases a day.

LM Employer's Exhibit 21 at 6-7.

> Q: How is your current practice of medicine apportioned between or among direct patient care, your academic responsibilities, and research?
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> A: I do very little research now. My main research interest was in computerized reporting . . . . But, over the last ten years, I have been spending most of my time doing clinical practice, including the Pneumoconiosis Section. About half my time is devoted to the hospital practice of general radiology of Johns Hopkins, about half the time to the pneumoconiosis section, which also does the Baltimore City Tuberculosis Clinic as part of its responsibility and several long term industrial surveys for a number of big companies.

Id. at 10. Because the administrative law judge did not consider this testimony, substantial evidence does not support her finding that Dr. Wheeler lacks "hands-on" clinical experience, and we must therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.304(a) and remand this case for further consideration. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993). On remand, the administrative law judge must accurately characterize Dr. Wheeler's credentials and experience, and again consider whether the x-ray evidence supports a finding of complicated pneumoconiosis.

With respect to the biopsy evidence[7] of record, the administrative law judge clarified her previous findings. She explained that, although the biopsy evidence does

[7] A March 31, 2003 needle biopsy of a mass in the miner's right lung was conducted by Dr. Mangano. Dr. Mangano noted the presence of fibrosis and anthracotic pigment and stated that there was no evidence of malignancy. LM Director's Exhibit 21. Drs. Oesterling and Naeye reviewed this biopsy and found that coal dust was present, but

not support a finding of complicated pneumoconiosis, she did not find it to be "negative" for complicated pneumoconiosis, given the limited amount of tissue from the right lung that was available for analysis. Decision and Order on Remand at 7; *see* 20 C.F.R. §718.106(c).

Employer asserts that, in failing to consider the biopsy evidence as negative for complicated pneumoconiosis, the administrative law judge placed the burden of proof on employer to establish that the miner does not have complicated pneumoconiosis. We disagree. The administrative law judge specifically found that the biopsy evidence does not support a finding of complicated pneumoconiosis.

However, we find merit in employer's assertion that the administrative law judge erred in her consideration of the evidence pursuant to 20 C.F.R. §718.304(c). Under 20 C.F.R. §§718.202(a)(4), 718.304(c),[8] the administrative law judge considered the new medical opinions of Drs. Alexander, Koenig, Rasmussen, Zaldivar, Naeye, Oesterling, and Wheeler.[9] The administrative law judge determined that the opinions of Drs.

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there were no lesions of coal workers' pneumoconiosis. LM Employer's Exhibits 18, 20. Dr. Naeye specifically indicated that there was no fibrosis resulting from toxic, fibrogenic silica. LM Employer's Exhibit 18. An April 3, 2003 needle biopsy of a mass in the miner's left lung was interpreted by Drs. Oesterling and Naeye as consistent with cancer. LM Director's Exhibit 31; Employer's Exhibit 4. Both doctors indicated that there were no findings of pneumoconiosis on the limited tissues available for review. *Id*. Dr. Oesterling specifically stated that "[t]here is no lung tissue present to determine whether coalworkers' [*sic*] pneumoconiosis is present." LM Employer's Exhibit 4 at 3.

[8] The administrative law judge did not conduct separate analyses pursuant to 20 C.F.R. §§718.202(a)(4), 718.304(c). Rather, she summarized the medical opinion evidence and rendered findings pursuant to both 20 C.F.R. §§718.202(a)(4), 718.304(c).

[9] Based upon their review of x-rays, CT scans, lung biopsy reports, PET scan reports, and the miner's medical records, Drs. Alexander and Koenig determined that the miner suffered from simple and complicated pneumoconiosis, and lung cancer. LM Director's Exhibit 46; LM Claimant's Exhibits 1, 3, 6, 8, 10. Dr. Rasmussen examined the miner on December 30, 2002, recorded the miner's work and medical histories and obtained an EKG, a chest x-ray, a pulmonary function study, and a blood gas study. Dr. Rasmussen diagnosed coal workers' pneumoconiosis with a Category A large opacity, chronic bronchitis, and possible heart disease. LM Director's Exhibit 12. Dr. Zaldivar examined the miner on September 24, 2003. Based upon an x-ray, a pulmonary function study, and a blood gas study, and his review of the miner's medical records, Dr. Zaldivar diagnosed simple pneumoconiosis, and cancer in the right lung. LM Director's Exhibit 30. Drs. Naeye and Oesterling reviewed the biopsy evidence and the miner's medical

Alexander and Koenig, as supported by that of Dr. Rasmussen, were entitled to greatest weight, because they addressed the totality of medical evidence and were supported by the "preponderantly positive chest x-ray evidence." Decision and Order on Remand at 8, 15. The administrative law judge further found that the opinions of Drs. Alexander and Koenig were not undermined by their reliance on the biopsy evidence because neither physician opined that the biopsy evidence was diagnostic of complicated pneumoconiosis; rather, they opined that it did not detract from their diagnoses. By contrast, the administrative law judge determined that Dr. Wheeler's opinion was entitled to less weight because Dr. Wheeler "does not accept a diagnosis of pneumoconiosis based on x-ray or CT scan alone," he did not provide an etiology of the large masses in the miner's right lung, and because, unlike Dr. Koenig, Dr. Wheeler failed to cite medical literature in support of his opinion. Decision and Order on Remand at 13, 14, 16. Further, the administrative law judge found that Dr. Zaldivar's opinion was not well-reasoned because he failed to explain his opinion that the mass in the miner's right lung was due to cancer rather than pneumoconiosis, in light of the biopsy evidence indicating that the right lung mass was not malignant. Thus, the administrative law judge determined that the weight of the medical opinion evidence supports a finding of complicated pneumoconiosis.

Because it is premised on her finding regarding the weight of the x-ray evidence at 20 C.F.R. §718.304(a), which we have vacated, we cannot affirm the administrative law judge's finding that the opinions of Drs. Alexander and Koenig are better supported by the x-ray evidence of record. Further, employer correctly asserts that substantial evidence does not support the administrative law judge's findings with regard to the opinions of Drs. Alexander and Koenig. In finding that Dr. Alexander did not base his diagnosis of complicated pneumoconiosis on the biopsy evidence of record, the administrative law judge did not reconcile that determination with Dr. Alexander's statement that the results of the March 31, 2003 biopsy "are diagnostic of complicated coal workers' pneumoconiosis." LM Claimant's Exhibit 1. Further, although there is some support for the administrative law judge's finding that Dr. Koenig did not rely primarily on the biopsy evidence, the administrative law judge did not address Dr. Koenig's testimony that his diagnoses of simple and complicated pneumoconiosis were "confirmed by clinical history, a series of chest x-rays . . ., and the CT guided lung biopsy of the right upper lobe large opacity." LM Employer's Exhibit 6.

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records and determined that the biopsy evidence did not support a diagnosis of either simple or complicated pneumoconiosis. LM Director's Exhibit 31; LM Employer's Exhibits 12, 14. Dr. Wheeler reviewed x-rays, CT scans, and Dr. Koenig's report and indicated that the miner did not have either simple or complicated pneumoconiosis. LM Employer's Exhibits 11, 17, 21.

Based on the foregoing, we must vacate the administrative law judge's findings at 20 C.F.R. §718.304(c) and remand this case for further consideration of the relevant evidence.[10] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). In assessing the probative value of Dr. Alexander's opinion on remand, the administrative law judge must resolve the conflict between her finding regarding the biopsy evidence and Dr. Alexander's testimony that the biopsy evidence is "diagnostic of complicated coal workers' pneumoconiosis." Similarly, in assessing the probative value of Dr. Koenig's opinion, on remand, the administrative law judge must resolve the conflict between her finding regarding the biopsy evidence and Dr. Koenig's testimony that the biopsy evidence "confirmed" his diagnoses of simple and complicated pneumoconiosis.

Further, we agree with employer that the administrative law judge did not provide a valid reason for discounting Dr. Wheeler's medical opinion. Substantial evidence does not support the finding that Dr. Wheeler does not accept a diagnosis of pneumoconiosis based on x-ray or CT scan alone; Dr. Wheeler evaluated the x-ray and CT scan evidence for opacities consistent with pneumoconiosis and based his opinion on these interpretations. LM Employer's Exhibits 4, 11, 17, 21 at 26-27, 36. Further, employer correctly asserts that it is not employer's burden to prove the exact etiology of the masses seen on the miner's x-rays. *See Lester*, 993 F.2d at 1146, 17 BLR at 2-118; *Clinchfield Coal Co. v. Lambert*, No. 06-1154 slip op. at 2 (4th Cir. Nov. 17, 2006)(unpub.); *Adkins*, slip op. at 10 n.11. Moreover, although the administrative law judge accurately observed that Drs. Wheeler and Koenig offered contrary opinions as to where, in the lung, lesions of complicated pneumoconiosis would appear on x-rays and CT scans, and that Dr. Koenig supported his opinion with references to medical literature, the administrative law judge did not explain her credibility determination in light of the fact that Dr. Koenig is not a radiologist, while Dr. Wheeler, who cited his experience, is a Board-certified radiologist. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Consequently, the administrative law judge must reconsider the probative value of Dr. Wheeler's opinion on remand. In so doing, the administrative law judge must accurately characterize Dr. Wheeler's opinion, consider his radiological credentials, and explain her credibility determination. Further, the administrative law judge must

[10] We reject employer's assertion that substantial evidence does not support the administrative law judge's finding with respect to Dr. Zaldivar's opinion. As the administrative law judge stated, Dr. Zaldivar failed to explain his opinion, that the mass in the miner's right lung was due to cancer rather than complicated pneumoconiosis, in light of the fact that the biopsy evidence indicated that this mass was not malignant. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993).

bear in mind that it is claimant's burden to establish her entitlement to benefits. *See Lester*, 993 F.2d at 1146, 17 BLR at 2-118; *Lambert*, slip op. at 2.

Employer additionally asserts that the administrative law judge did not properly weigh all of the evidence together because, in failing to find that the biopsy evidence is negative for complicated pneumoconiosis, the administrative law judge, in effect, failed to weigh the biopsy evidence in conjunction with the x-ray and other medical evidence under 20 C.F.R. §§718.202(a), 718.304. We disagree. Contrary to employer's assertion, the administrative law judge did not exclude the biopsy evidence from her consideration of all relevant evidence under 20 C.F.R. §718.304. Rather, she found that the biopsy evidence, which did not support a finding of complicated pneumoconiosis, was not determinative of the absence of pneumoconiosis, given the limited tissue sample that was available for review.[11] Decision and Order on Remand at 7, 15 n.8; *see* 20 C.F.R. §718.106(c). However, because the administrative law judge did not adequately resolve the conflict between her biopsy findings and her crediting of the opinions of Drs. Alexander and Koenig, we again instruct the administrative law judge, on remand, to explain the impact of her biopsy findings on the medical opinion evidence when weighing all relevant evidence together. *See Lester v.* 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick*, 16 BLR at 1-33-34.

Employer additionally contends that the administrative law judge failed to consider the lack of a pulmonary or respiratory impairment in her evaluation of the medical evidence of complicated pneumoconiosis. Employer's Brief at 42. Contrary to employer's assertion, the administrative law judge considered the non-qualifying[12] pulmonary function study and arterial blood gas study evidence of record. Decision and

[11] The record reflects that Dr. Alexander testified that "one would not be surprised" to see an absence of coal workers' pneumoconiosis macules on a needle biopsy. LM Claimant's Exhibit 8 at 33. Moreover, Dr. Oesterling stated that the single slide obtained from the April 3, 2003 biopsy contained no lung tissue from which to determine whether coal workers' pneumoconiosis was present, and that the March 31, 2003 needle biopsy provided "no tissue confirmation that [the miner] had significant coalworkers' [*sic*] pneumoconiosis," and noted that he could not be more specific, given the "limited material present" on the two slides that were available for review. LM Employer's Exhibits 4, 20.

[12] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

Order on Remand at 17. However, on remand, the administrative law judge should explain what weight, if any, she accords this evidence.

Further, we must vacate the administrative law judge's attendant finding that, in establishing the existence of simple and complicated pneumoconiosis, claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On remand, the administrative law judge must again consider whether claimant has established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) in light of her consideration of the new evidence pursuant to 20 C.F.R §§718.202(a), 718.304. If the administrative law judge finds that the irrebuttable presumption of total disability due to pneumoconiosis is not invoked in the miner's claim, but that the new evidence is sufficient to establish the existence of pneumoconiosis by a preponderance of the evidence, she must then address the merits of entitlement, based upon a consideration of all of the evidence of record in the miner's claim.

The Survivor's Claim

To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205, 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis where the irrebuttable presumption of death due to pneumoconiosis set forth at Section 718.304 is applicable, or if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-93 (4th Cir. 1992).

The administrative law judge found that the x-ray and medical opinion evidence established the existence of both simple and complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.304. The administrative law judge therefore found that claimant was entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis.

Employer asserts that the administrative law judge erred in reconsidering the x-ray evidence, because the Board previously affirmed, as unchallenged, her finding in the survivor's claim that the x-ray evidence was in equipoise as to the existence of pneumoconiosis. Employer's Brief at 44. Specifically, employer asserts that the law of

the case doctrine barred the administrative law judge from reconsidering the x-ray evidence as to the existence of pneumoconiosis. *Id*.

Under the circumstance of this case, we decline to find error by the administrative law judge in reconsidering the x-ray evidence in the survivor's claim. The law of the case doctrine is a discretionary rule of practice, and we note that, in the prior appeal, neither party had an incentive to challenge the administrative law judge's finding as to the x-ray evidence in the survivor's claim. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989). Moreover, in the survivor's claim, essentially the same evidence is at issue as in the miner's claim, and the findings that the administrative law judge made in the miner's claim--findings that the Board vacated--affected her analysis of the relevant evidence in the survivor's claim. Consequently, we reject employer's assertion that the administrative law judge was barred from reconsidering the x-ray evidence in the survivor's claim.

However, for the same reasons given herein with respect to the administrative law judge's findings, on remand, in the miner's claim, we vacate the administrative law judge's findings in the survivor's claim, pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.304(a), (c). The administrative law judge must reconsider the x-ray and other relevant evidence in the survivor's claim in accordance with her weighing of this evidence, on remand, in the miner's claim.

Further, because we must vacate the administrative law judge's finding at 20 C.F.R. §718.304(a), we cannot affirm her finding that Dr. Stanley's opinion[13] is well-supported by the x-ray evidence. Moreover, employer correctly asserts that the administrative law judge did not explain how Dr. Stanley's opinion was supported by the x-ray readings contained in the miner's treatment records, which the administrative law judge found did not establish complicated pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336. Consequently, in considering the medical opinion evidence at 20 C.F.R. §718.304(c), on remand, the administrative law judge must also reconsider the probative value of Dr. Stanley's opinion.

[13] Dr. Stanley listed complicated pneumoconiosis as a contributing cause of the miner's death due to lung cancer on the miner's death certificate. LM Director's Exhibit 54. The administrative law judge credited his diagnosis of complicated pneumoconiosis at 20 C.F.R. §718.304(c), finding it to be well-supported by her x-ray findings as well as the narrative x-ray interpretations contained in the miner's treatment records. Decision and Order on Remand at 24.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is vacated, and the case is remanded for further proceedings 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