BRB No. 09-0368 BLA

ELSIE T. LESTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARD TIMES MINING, INCORPORATED	)	DATE ISSUED: 12/02/2009
	)	
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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (06-BLA-6036) of Administrative Law Judge Linda S. Chapman (the administrative law judge) awarding benefits on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine

[1] Claimant filed his first claim on June 2, 1997. Director's Exhibit 1. It was finally denied by a claims examiner on March 9, 1998 because the evidence did not establish that claimant was totally disabled due to pneumoconiosis. *Id*. Claimant filed his second claim on September 27, 1999. Director's Exhibit 2. It was finally denied by a claims examiner on January 3, 2000 because the evidence did not establish that claimant was totally disabled due to pneumoconiosis and, thus, the evidence did not establish a material change in conditions. *Id*. Claimant filed this claim on August 30, 2004. Director's Exhibit 4. By letter dated October 26, 2005, claimant's lay representative requested the withdrawal of the claim due to claimant's illness. Director's Exhibit 47.

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge credited claimant with 27 years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R Part 718. The administrative law judge found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Nevertheless, the administrative law judge found that the new evidence established the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a),[2] thereby establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that the evidence established the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) and, thus, she found that the evidence established invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge ordered benefits to commence as of August 2004.

On appeal, employer challenges the administrative law judge's finding that the new x-ray evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). Employer also challenges the administrative law judge's consideration of Dr. Hippensteel's new opinion regarding the presence of complicated pneumoconiosis at

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On October 26, 2005, the district director issued a Proposed Decision and Order withdrawing the claim. Director's Exhibit 48. By letter dated November 21, 2005, claimant appealed the district director's decision to withdraw the claim, asserting that his lay representative misunderstood his intention regarding pursuing the claim. Director's Exhibit 50. On November 30, 2005, the district director vacated the Proposed Decision and Order to withdraw the claim and advised claimant that the timely processing of his claim will continue. Director's Exhibit 51.

[2] The administrative law judge stated that "[t]here were no findings of pneumoconiosis on the numerous biopsies that [claimant] underwent." Decision and Order at 18. The administrative law judge additionally stated, "[b]ut while the CT scan findings, as well as the narrative x-ray findings, are not sufficient to satisfy prong (C), standing alone, I find that they lend support to the conclusion that [claimant's] x-rays show large opacities of [C]ategory A or B." *Id*. Further, after noting that the medical records overwhelmingly establish that claimant has pneumoconiosis, the administrative law judge concluded: "[u]nder these circumstances, weighing the x-ray findings of complicated pneumoconiosis by Dr. Miller, Dr. Forehand, and Dr. Alexander with all of the medical evidence, I find that [claimant] has established that he has a process in his lungs that appears on x-ray as opacities greater than one centimeter, and that these opacities are due to pneumoconiosis." *Id*.

20 C.F.R. §718.304. Further, employer challenges the administrative law judge's finding that August 2004 was the onset date of total disability due to pneumoconiosis in this case. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

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). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish total disability due to pneumoconiosis. Consequently, in order to establish a change in an applicable condition of entitlement, claimant had to submit new evidence establishing this element. 20 C.F.R. §725.309(d)(2), (3); *see generally Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227, 2-235-237 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

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 total

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[3] We affirm the administrative law judge's length of coal mine employment finding as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record indicates that claimant was last employed in the coal mining industry in Virginia. Director's Exhibits 1, 6, 8. Accordingly, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991)(*en banc*). Additionally, the Fourth Circuit has held that "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999).

Employer initially contends that the administrative law judge erred in finding that the new x-ray evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). Specifically, employer argues that the administrative law judge erred in according greater weight to x-ray readings of Drs. Miller, Alexander, and Forehand, than to the contrary x-ray readings of record, as "[she] has not offered a valid basis for finding that the evidence as a whole establishes complicated pneumoconiosis." Employer's Brief at 14. Employer maintains that the administrative law judge violated the requirements of the Administrative Procedure Act (APA).[5]

The administrative law judge considered the seven interpretations of six x-rays dated December 19, 2003, June 8, 2004, October 18, 2004,[6] December 13, 2004,

[5] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for her findings of fact and conclusions of law.

[6] Dr. Navani, a B reader and a Board-certified radiologist, read the October 18, 2004 x-ray for quality only. Director's Exhibit 13.

February 1, 2006, and July 6, 2006. Dr. Patel, whose qualifications are not contained in the record, found that the December 19, 2003 x-ray showed interstitial changes and possible resolving infiltration for the right mid-lung zone. Director's Exhibit 15. Dr. Alexander, a B reader and a Board-certified radiologist, found that the June 8, 2004 x-ray showed possible Category A complicated coal workers' pneumoconiosis. *Id*. Dr. Forehand, a B reader, classified the large opacities on the October 18, 2004 x-ray as Category B. Director's Exhibit 12. Dr. Patel found that the December 13, 2004 x-ray showed "[m]ild progression and worsening of the interstitial lung markings noted in the mid and lower lung fields" and that "[t]here is also enlargement of one of the densities in the right lower lobe." Director's Exhibit 15. Dr. Patel concluded that "these finding may represent normal progression of the PMF." *Id*. Dr. Hippensteel, a B reader, classified the large opacities on the February 1, 2006 x-ray as Category 0. Employer's Exhibit 1. Similarly, Dr. Alexander found that the February 1, 2006 x-ray showed that no large opacities were present. Claimant's Exhibit 2. Lastly, Dr. Miller, a B reader and a Board-certified radiologist, classified the large opacities on the July 6, 2006 x-ray as Category B. Claimant's Exhibit 1.

After noting that the new x-ray evidence included only five ILO readings,[7] the administrative law judge stated:

> Relying on the most recent ILO interpretation by Dr. Miller, who is dually qualified, as well as the previous interpretations by Dr. Forehand and Dr. Alexander,[] I find the [claimant] has established by a preponderance of the x-ray evidence that he has a condition that produces opacities greater than one centimeter in diameter on his x-ray.

Decision and Order at 17 (footnote omitted).

Employer argues that the administrative law judge erred in according greater weight to Dr. Miller's x-ray reading because it was the most recent x-ray. While an administrative law judge may credit the most recent x-ray of record, *Adkins v. Director,*

[7] Of the seven readings of six x-rays, the two readings by Dr. Patel of the x-rays dated December 19, 2003 and December 13, 2004 were not classified in accordance with the ILO classification system. Director's Exhibit 15. In her summary of the x-ray evidence, the administrative law judge listed the ILO classifications by Drs. Alexander, Forehand, and Miller of the small and large opacities on x-rays dated June 8, 2004, October 18, 2004, and July 6, 2006. Decision and Order at 4. The administrative law judge also listed the ILO classifications by Drs. Alexander and Hippensteel of the small opacities on the February 1, 2006 x-ray. *Id*. Further, the administrative law judge noted the findings in Dr. Patel's narrative report concerning the x-rays dated December 19, 2003 and December 13, 2004. *Id*.

OWCP, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), she, nevertheless, must provide more of an explanation for her finding that the later x-ray is more credible, where the x-rays are only separated by a short period of time. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, Drs. Hippensteel and Alexander read an x-ray taken on February 1, 2006, while Dr. Miller read a subsequent x-ray taken on July 6, 2006. The administrative law judge indicated that she relied on Dr. Miller's reading of the July 6, 2006 x-ray because it was the most recent x-ray that was classified in accordance with the ILO classification system. However, Dr. Hippensteel read the February 1, 2006 x-ray in accordance with the ILO classification system, as the doctor classified the large opacities on the x-ray as Category 0. Employer's Exhibit 1. Moreover, Dr. Alexander found that the February 1, 2006 x-ray showed that no large opacities were present. Claimant's Exhibit 2. While Section 718.304(a) provides that an x-ray diagnosis of the presence of complicated pneumoconiosis must be based on the classification of large opacities as Category A, B, or C, the pertinent regulation does not provide that an x-ray finding the absence of complicated pneumoconiosis must be based on the classification of opacities as Category 0. 20 C.F.R. §718.304(a); *see generally Marra v. Consolidation Coal Co.*, 7 BLR 1-216 (1984). Thus, the administrative law judge did not provide an adequate explanation for giving greater weight to Dr. Miller's reading of the July 6, 2006 x-ray because it was the most recent x-ray that was classified in accordance with ILO classification system. *Wojtowicz*, 12 BLR at 1-165. Consequently, the administrative law judge erred in giving greater weight to Dr. Miller's reading of the July 6, 2006 x-ray than to the contrary readings of the February 1, 2006 x-ray by Drs. Hippensteel and Alexander based on the "later evidence" rule, where the films are separated by a short period of time.

Employer also argues that the administrative law judge erred in according greater weight to Dr. Miller's reading of the July 7, 2006 x-ray because of the doctor's superior qualifications. While Dr. Miller is dually qualified as a B reader and a Board-certified radiologist, Dr. Alexander is also dually qualified as a B reader and a Board-certified radiologist. As previously noted, Dr. Alexander found that the February 1, 2006 x-ray showed that no large opacities were present. Claimant's Exhibit 2. The administrative law judge did not explain why she found that Dr. Miller's x-ray reading outweighed Dr. Alexander's contrary x-ray reading based on their respective qualifications. *Wojtowicz*, 12 BLR at 1-165. Consequently, the administrative law judge erred in giving greater weight to Dr. Miller's reading of the July 6, 2006 x-ray because Dr. Miller is dually qualified as a B reader and a Board-certified radiologist, given Dr. Alexander's comparable qualifications.

In addition, as employer asserts, the administrative law judge erred in failing to explain why she gave greater weight to Dr. Alexander's reading of the June 8, 2004 x-ray and Dr. Forehand's reading of the October 18, 2004 x-ray, over the contrary x-ray readings, to find that a preponderance of the x-ray evidence established the presence of

complicated pneumoconiosis. *Wojtowicz*, 12 BLR at 1-165. Further, the administrative law judge erred in failing to address the speculative nature of Dr. Alexander's reading of the October 18, 2004 x-ray.[8] *U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

Employer additionally argues that the administrative law judge erred in failing to consider all of the contrary x-ray evidence. Specifically, employer asserts that "[the administrative law judge] erred by failing to weigh Dr. Fino's interpretation of the October 26, 2006 [x-ray] film, which is actually the 'most recent' film." Employer's Brief at 11. Employer maintains that Dr. Fino's x-ray interpretation does not have to be reported on a separate form. In his report dated November 21, 2006, Dr. Fino noted that he read two x-rays taken on October 18, 2004 and October 26, 2006 as 2/2, positive for simple pneumoconiosis. Employer's Exhibit 4 at 13. Further, in classifying the October 18, 2004 x-ray, Dr. Fino noted, "[t]here is abnormality seen in the upper portion of the left lung" and "I can not rule out a mass lesion or the possibility of a rounded opacity greater than 1 cm in diameter on the chest film." *Id*. at 4. The administrative law judge did not weigh Dr. Fino's readings of October 18, 2004 and October 26, 2006 x-rays at Section 718.304(a). Although she noted that Dr. Fino referred to his interpretations of these x-rays in his report, the administrative law judge indicated that she did not weigh them at Section 718.304(a) because Dr. Fino's report did not include a classification of the x-rays on an ILO form. *Id*. at 3-4 n.2, 16 n.6. Because Dr. Fino is only a B reader, and the administrative law judge has indicated her preference for physicians who are dually qualified as B readers and Board-certified radiologists, we hold that any error by the administrative law judge in failing to weigh these x-rays at Section 718.304(a) was harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In view of the foregoing, we vacate the administrative law judge's finding that the new x-ray evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), and remand the case for further consideration of all the relevant x-ray evidence in accordance with the requirements of the APA.

Employer next contends that "[the administrative law judge's] consideration of Dr. Hippensteel's medical opinion [regarding the issue of complicated pneumoconiosis] reflects inconsistencies which she failed to explain." Employer's Brief at 14. Specifically, employer asserts that the administrative law judge did not explain why she initially found that Dr. Hippensteel's opinion was well-reasoned and supported by

[8] While the administrative law judge noted that "Dr. Alexander reported a *possible* [C]ategory A opacity on this [June 8, 2004] film," Decision and Order at 17 n.7 (emphasis added), she did not address the equivocal nature of the doctor's reading of the x-ray.

objective evidence, but subsequently discounted it because the "medical records" demonstrated the presence of pneumoconiosis.

Contrary to employer's assertion, the administrative law judge did not render inconsistent findings with regard to Dr. Hippensteel's opinion at Section 718.304. At Section 718.204(b)(2)(iv), the administrative law judge found that Dr. Hippensteel's opinion was well-reasoned and supported by the objective evidence. Decision and Order at 15. However, the administrative law judge's findings at Section 718.204(b)(2)(iv) are not relevant to her findings at Section 718.304. *Compare* 20 C.F.R. §718.203(b)(2)(iv) *with* 20 C.F.R. §718.304.

Further, the administrative law judge did not discount Dr. Hippensteel's opinion because she found that Dr. Hippensteel did not diagnosis simple pneumoconiosis. In considering Dr. Hippensteel's opinion at Section 718.304, the administrative law judge stated:

> Dr. Hippensteel acknowledged that [claimant] had large opacities on x-ray, but he felt that they were more likely due to granulomatous disease. He felt that there was no "distinct" evidence that the opacities were related to [claimant's] coal workers' pneumoconiosis, and pointed to the speed of progression of the opacities, which was more compatible with granulomatous disease.

Decision and Order at 18. The administrative law judge further stated that "the medical records overwhelmingly establish that [claimant] has pneumoconiosis, as even Dr. Hippensteel has acknowledged." *Id*. Thus, we reject employer's assertion that the administrative law judge erred in her consideration of Dr. Hippensteel's opinion regarding the issue of complicated pneumoconiosis at Section 718.304.

Employer finally contends that the administrative law judge erred in finding August 2004 to be the date from which benefits commence. Employer asserts that "[i]n a complicated pneumoconiosis case, benefits can only be awarded from the date on which the evidence establishes invocation of the irrebuttable presumption." Employer's Brief at 17. In ordering benefits to commence as of August 2004, the date that claimant filed his subsequent claim, the administrative law judge stated:

> As the evidence reflects that [claimant's] simple pneumoconiosis became complicated pneumoconiosis as early as November 1999, when Dr. Lippman read his x-ray as showing [C]ategory A opacities, and there is no evidence to affirmatively establish that [claimant] had only simple pneumoconiosis for any period after he filed this claim, I have used the date [claimant] filed this [subsequent] claim as the date of onset.

Decision and Order at 19.

Contrary to the administrative law judge's finding, claimant did not establish the presence of complicated pneumoconiosis in his prior claim, based on Dr. Lippman's reading of the November 1999 x-ray. Employer's Exhibit 2. Nevertheless, claimant has filed a subsequent claim in this case. Director's Exhibit 4. The Board has held that if the evidence does not reflect when claimant's simple pneumoconiosis became complicated pneumoconiosis, the date from which benefits commence is the month during which a claimant filed the claim, unless the evidence affirmatively establishes that the claimant had only simple pneumoconiosis for any period subsequent to the date of filing.[9] *Williams v. Director, OWCP*, 13 BLR 1-28 (1989). Consequently, we reject employer's assertion that benefits can be awarded only from the date on which the evidence establishes invocation of the irrebuttable presumption at Section 718.304. However, because we vacate the administrative law judge's award of benefits, we also vacate the administrative law judge's finding that benefits commence as of August 2004 and remand the case for further consideration of the evidence thereunder, if reached. *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

At the outset, on remand, the administrative law judge must determine whether the new evidence establishes a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *White v. New White Coal Co.*, 23 BLR 1-1 (2004). If the administrative law judge finds that the new evidence establishes a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, then she must consider the evidence on the merits at 20 C.F.R. Part 718.

[9] Section 725.503 provides that "[w]here the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed." 20 C.F.R. §725.503(b).

Accordingly, the administrative law judge's Decision and Order 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

I concur.

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ROY P. SMITH
Administrative Appeals Judge

McGranery, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's decision to affirm the administrative law judge's consideration of Dr. Hippensteel's opinion and her determination of the date for commencement of benefits. Based upon a slightly different analysis from the majority, I concur in its decision to vacate the administrative law judge's determination that the x-ray evidence established the existence of complicated pneumoconiosis. Moreover, I dissent from the majority's determination that the administrative law judge's exclusion of Dr. Fino's x-ray readings was harmless error. I believe that on remand, the administrative law judge should determine the appropriate weight she should accord all of the ILO classified readings.

I agree with the majority that the administrative law judge erred in her analysis of the x-ray evidence. It appears that she gave additional weight to Dr. Miller's reading of the July 6, 2009 x-ray as positive, despite the fact that it is five months more recent than an x-ray which two physicians read as negative. While five months might be significant in cases where all the preceding x-rays were read as negative, in the case at bar, an October 18, 2004 x-ray was read as positive. Under these circumstances, I do not believe that the recency of the positive x-ray can be deemed significant. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

It also appears that the administrative law judge credited as positive for complicated pneumoconiosis Dr. Alexander's reading of the June 20, 2004 x-ray ("2/3, p,

q; possible category A opacity" Director's Exhibit 15), although she acknowledged that the doctor reported a "possible category A opacity on this film." Decision and Order at 17 n.7. The regulations do not permit equivocal readings to be considered as substantial evidence of pneumoconiosis. *See* 20 C.F.R. §718.102(b). Of course, such evidence may be considered corroborative of other evidence.

I agree with the majority that the administrative law judge did not provide a valid reason for excluding Dr. Fino's x-ray readings from consideration, *i.e.*, that he had not recorded the requisite information on an ILO form. Decision and Order at 16 n.6. The regulations do not require that the readings be recorded on an ILO form, only that certain specific information be recorded. *See* 20 C.F.R. §§718.102, 718.202(a)(1). I disagree with the majority's suggestion that Dr. Fino's status as a B reader justifies the administrative law judge's disregarding his readings. *See* 20 C.F.R. §718.202(a)(1)(ii)(E). I would hold that on remand, the administrative law judge should determine whether Dr. Fino's report satisfies the regulatory requirements for x-ray readings. If so, she should weigh them together with the other ILO readings, unless of course, she finds them to be equivocal.

Dr. Fino's readings of both the October 18, 2004 x-ray and the October 26, 2006 x-ray were identical:

> Classification: 2/2, t/q, 6 zones. There is abnormality seen in the upper portion of the left lung. I can not rule out a mass lesion or the possibility of a rounded opacity greater than 1 cm in diameter on the chest film.

Employer's Exhibit 4 at 4. In his statement of diagnoses, Dr. Fino wrote:

> This man only had one acceptable effort on lung function studies subsequent to 1999, and that was on the Department of Labor lung function study dated 10/18/04. This showed a very mild obstructive defect, but there was also significant resting and exercise hypoxemia.
>
> The chest x-ray is very abnormal, and I am in agreement with Dr. Hippensteel that simple coal workers' pneumoconiosis is indeed likely present.
>
> What concerns me are the findings of the CT scan of the chest. He has developed slowly increasing bilateral large opacities. This is not a malignancy, because he would not still be alive if this were malignant disease.

> I am quite concerned that this does represent complicated coal workers' pneumoconiosis. However, in order for me to give a reasoned medical opinion as to the etiology of the bilateral masses, it would be quite helpful to review old CT scans.
>
> I would note that, at the present time and if the above-referenced records represent all of the information available to me, I must conclude that simple coal workers' pneumoconiosis and complicated coal workers' pneumoconiosis are present.

Employer's Exhibit 4 at 14. On remand, I think the administrative law judge should discuss all of Dr. Fino's relevant statements to determine whether or not he has provided unequivocal x-ray interpretations of only simple pneumoconiosis. If Dr. Fino's interpretations are not equivocal, and all of the regulatory requirements for x-ray readings are satisfied, I think the administrative law judge should consider Dr. Fino's x-ray interpretations together with the four other x-ray readings with definite ILO classifications.

In sum, I agree with the majority that the administrative law judge erred in her analysis of the x-ray evidence. But I would hold that on remand, she should reconsider Dr. Fino's x-ray readings, as well as the other ILO classified readings, to determine whether the x-ray evidence has established the existence of complicated pneumoconiosis.

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REGINA C. McGRANERY
Administrative Appeals Judge