BRB No. 10-0170 BLA

RANDALL KEITH REED	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARKFORK COAL COMPANY	)	
	)	DATE ISSUED: 02/22/2011
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Granting Reconsideration and Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Granting Reconsideration and Awarding Benefits of Richard A. Morgan (2008-BLA-5979), rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] The relevant procedural history of the case is as

[1] Claimant filed an initial claim on October 19, 1999, which was denied by Administrative Law Judge Daniel L. Leland on May 29, 2002. Director's Exhibit 1.

follows. Claimant filed a subsequent claim on June 12, 2003.[2] Director's Exhibit 3. In a Decision and Order dated January 16, 2007, Administrative Law Judge Stephen L. Purcell denied benefits, finding that, because the newly submitted evidence did not establish total disability, claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Claimant appealed to the Board, but later filed a Motion for Modification and Remand on September 28, 2007. At claimant's request, the Board dismissed claimant's appeal and remanded the case to the district director for modification proceedings. Director's Exhibits 94, 98. On June 6, 2008, the district director issued a Proposed Decision and Order denying benefits. Director's Exhibit 102. Claimant requested a hearing and the case was assigned to Judge Morgan (the administrative law judge).

In a Decision and Order dated September 22, 2009, the administrative law judge credited claimant with at least twenty-two years of coal mine employment and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge considered all of the new evidence, in conjunction with the previously submitted evidence, and found that claimant was unable to demonstrate a change in conditions, as the evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(b), and claimant was not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.304. The administrative law judge also found that there was no mistake in a determination of fact with regard to the prior denial of claimant's subsequent claim pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

Judge Leland found that, while the evidence was sufficient to establish the existence of pneumoconiosis, claimant failed to establish total disability at 20 C.F.R. §718.204(b). *Id*. Claimant took no action with regard to the denial until he filed his current subsequent claim.

[2] By Order dated April 23, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Black Lung Benefits Act (the Act) with respect to the entitlement criteria for certain claims. *Reed v. Marfolk Coal Co.*, BRB No. 10-0170 BLA (Apr. 23, 2010) (unpub. Order). Employer and the Director, Office of Workers' Compensation Programs, have responded and assert that Section 1556 does not apply to this claim, as it was filed prior to January 1, 2005. Based upon the parties' responses and our review of the record, we hold that the recent amendments to the Act are not applicable, as this subsequent claim was filed on June 12, 2003.

Claimant filed a motion for reconsideration on October 5, 2009, asserting that the administrative law judge applied an incorrect legal standard in evaluating the evidence relevant to complicated pneumoconiosis. Relying on *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), claimant argued that, because the administrative law judge determined that the x-ray evidence supported a finding of complicated pneumoconiosis, he erred by not requiring employer's evidence to affirmatively show that the large opacities were not there, or were not what they appeared to be. On October 26, 2009, the administrative law judge issued an Order Granting Reconsideration and Awarding Benefits. The administrative law judge determined that the medical opinion evidence did not "definitively exclude" the existence of complicated pneumoconiosis, as established by the x-ray evidence and, thus, found that claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge further found that employer failed to rebut the presumption that the miner's pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203, and he awarded benefits, commencing September 2007, the month in which claimant requested modification.

On appeal, employer asserts that the administrative law judge erred in admitting as treatment records, the x-ray readings classified under the system adopted by the International Labour Organization (ILO) and contained in Claimant's Exhibits 4 and 5. Employer also contends that the administrative law judge's findings on reconsideration are irrational, because he improperly shifted the burden to employer to disprove that claimant has complicated pneumoconiosis. Employer further asserts that the administrative law judge erred in failing to weigh all the medical evidence relevant to the existence of complicated pneumoconiosis, prior to finding that claimant was entitled to invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response to employer's 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 rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding of at least twenty-two years of coal mine employment. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibits 1, 2.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. EVIDENTIARY LIMITATIONS

At the hearing, held on June 4, 2009, claimant proffered treatment records from Mariani Didyk, a physician's assistant (PA), and the New River Breathing Clinic (New River), as Claimant's Exhibits 4 and 5.[5] These records contained, *inter alia*, seven ILO classified x-ray readings: 1) a positive reading for simple pneumoconiosis by Dr. Patel, of an x-ray dated March 31, 1999; 2) a positive reading for simple pneumoconiosis by Dr. Aycoth, of an x-ray dated March 26, 2001; 3) a positive reading for complicated pneumoconiosis by Dr. Rasmussen, of an x-ray dated October 21, 2004; 4) a positive x-ray reading for complicated pneumoconiosis by Dr. Pathak, of an x-ray dated October 21, 2004; 5) a positive reading for simple pneumoconiosis by Dr. Willis, of an x-ray dated March 7, 2005; 6) a positive reading for complicated pneumoconiosis by Dr. Aycoth, of an x-ray dated January 12, 2006;[6] and 7) a positive reading for complicated pneumoconiosis by Dr. Miller, of an x-ray dated March 26, 2007.[7] Claimant's Exhibit 4.

Employer objected to the admission of the seven x-ray readings as part of claimant's treatment records, arguing that, "when an ILO classification sheet is utilized, it's utilized in a legal proceeding, not a medical proceeding." Hearing Transcript at 28. Employer further noted that certain ILO forms did not identify New River as the requesting facility and claimant had not submitted corresponding medical records to document how the readings were used by PA Didyk in her treatment of claimant.

In addressing employer's objection, the administrative law judge accepted claimant's counsel's assertion that, when he requested treatment records from PA Didyk and New River, the records and x-ray readings contained in Claimant's Exhibits 4 and 5 were what he received. The administrative law judge stated, "if these records are requested from a physician or a clinic as part of a request for treatment records and we

[5] Claimant stated at the hearing that he currently receives treatment from "Dr." Didyk at the New River Health Center. Hearing Transcript at 22. However, notations on the treatment records contained in Claimant's Exhibits 4 and 5 indicate that Ms. Didyk is a physician's assistant (PA). Claimant's Exhibits 4, 5.

[6] Employer mistakenly refers to Dr. Aycoth's reading of an x-ray dated January 12, 2008, rather than January 12, 2006. Employer's Brief in Support of Petition for Review at 31.

[7] There is a duplicate copy of Dr. Miller's reading in Claimant's Exhibit 5. There are no other x-ray readings in that exhibit.

happen to have x-ray readings on ILO forms, I think the presumption has to be that they are part of the treatment record." Hearing Transcript at 30. The administrative law judge further noted, "[j]ust because . . . a patient, let's say goes to the breathing clinic and happens to take an ILO reading from before, the doctor looks at it, the evaluation, and uses[s] it to assess whatever treatment he's going to give[,] I don't think removes it from the realm of treatment." *Id*. Nonetheless, the administrative law judge indicated that he would give employer the opportunity to depose "Dr." Didyk concerning her use of the x-rays in her treatment of claimant. *Id*. at 28-29. Employer, however, declined the administrative law judge's offer, and Claimant's Exhibits 4 and 5 were admitted into the record, in their entirety. *Id*. at 29, 32.

In his Decision and Order, the administrative law judge summarized the basis for his decision to admit the x-ray evidence contained in Claimant's Exhibits 4 and 5. He stated:

> The Employer was permitted to and did question the Claimant about whether or not he received treatment in relation to those exhibits . . . . The Employer rebutted Dr. Rasmussen's reading of the 10/21/04 X-ray with a reading of the same X-ray by Dr. Wheeler. The Employer rebutted Dr. Miller's reading of the 3/26/07 X-ray with a reading of the same X-ray by Dr. Scatarige. The Employer did not offer rebuttal of Dr. Aycoth's reading of the 3/26/01 X-ray at the hearing or post-hearing. Thus, Employer's due process rights were not impinged on as the Employer's offered rebuttal evidence to ILO form readings, in [Claimant's Exhibit] 4 and Claimant's Exhibit 5, was admitted. In addition, the Employer was permitted to depose the doctors involved . . . and chose not to depose the doctors. . . . The claimant's testimony establishes he was "treated" by Drs. Didyk and Rasmussen at the New River Clinic . . . . Finally, no evidence was adduced that[,] even had the ILO readings initially been conducted for purposes of the development of the claim, that [sic] they had not subsequently been considered as part of the miner's treatment. The Employer pointed to no rule precluding treating physicians from considering X-ray readings recorded on ILO forms.

September 22, 2009 Decision and Order at 3 (internal citations omitted).

Employer asserts on appeal that the seven ILO classified x-ray readings[8] contained in Claimant's Exhibits 4 and 5 should not have been admitted by the administrative law judge as treatment records under 20 C.F.R. §725.414(a)(4). Employer's Brief in Support of Petition for Review at 31-35; Hearing Transcript at 27-28; Claimant's Exhibits 4, 5. Employer generally asserts that, because the regulations specifically require that chest x-rays be classified under the ILO system for the purpose of establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), it is reasonable to conclude that every x-ray classified under the ILO system is, essentially, a document prepared in anticipation of federal black lung litigation and should not be admitted as a treatment record at 20 C.F.R. §725.414(a)(4). *Id.* at 34. Employer also maintains that the administrative law judge erred in concluding that any x-ray reading produced at a healthcare facility is admissible as a treatment record, without regard to whether the x-ray was procured in conjunction with a federal black lung claim.

An administrative law judge is empowered to conduct formal hearings and is given broad discretion in resolving procedural matters, including evidentiary issues. *See Dempsey v. Sewell Coal Corp*., 23 BLR 1-47 (2004) (*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). Thus, a party seeking to overturn an administrative law judge's evidentiary ruling must prove that the administrative law judge's action represented an abuse of his or her discretion. *See Clark*, 12 BLR at 1-153.

The regulations at 20 C.F.R. §§725.414 and 725.310(b) establish the evidentiary limitations that apply to cases involving a request for modification. *See* 20 C.F.R. §§725.2(c), 725.414, 725.310(b); *Rose v. Buffalo Mining Co*., 23 BLR 1-221, 1-227 (2007). Pursuant to 20 C.F.R. §725.414(a)(2), in support of a claim for benefits, claimant may submit two chest x-ray interpretations as part of his affirmative case and one x-ray interpretation in rebuttal of each x-ray interpretation submitted by employer. In conjunction with a subsequent request for modification, the terms of 20 C.F.R. §725.310(b) provide that claimant may submit one additional x-ray interpretation. The regulations further provide that, "[n]otwithstanding the limitations" of 20 C.F.R. §§725.414 and 725.310(b), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4).

In this case, the parties do not dispute that claimant submitted the full complement of x-ray readings allowable under 20 C.F.R. §§725.414(a)(2) and 725.310(b), prior to

[8] Employer's objection pertains to all ILO classified readings, not just readings recorded on an ILO form. Employer's Brief in Support of Petition for Review at 31-35; Hearing Transcript at 27-28.

seeking the admission of the x-ray interpretations contained in Claimant's Exhibits 4 and 5. Thus, the issue on appeal is the admissibility of the seven x-ray readings that were designated by claimant as treatment records. Because the regulations do not specifically define what evidence may constitute a treatment record, such a determination is a matter of discretion for the administrative law judge, based on his review of the facts and evidence in a particular case. *See Dempsey*, 23 BLR at 1-60. As an initial matter, we hold that the administrative law judge acted within his discretion in rejecting employer's general contention that the classification of an x-ray under the ILO system establishes, *per se*, that the x-ray reading is not a treatment record under 20 C.F.R. §725.414(a)(4). The administrative law judge rationally determined that employer did not provide any evidence establishing that ILO classified x-rays are obtained, or used, solely for the purpose of litigation. *See Dempsey*, 23 BLR at 1-60; September 22, 2009 Decision and Order at 3; Hearing Transcript at 29-31.

We also affirm the administrative law judge's admission of Dr. Pathak's reading of the film dated October 21, 2004 and Dr. Willis's reading of the film dated March 7, 2005. Decision and Order at 3; Director's Exhibits 50, 87. These interpretations, which are contained in the treatment records from New River, are duplicates of affirmative evidence that claimant submitted, pursuant to 20 C.F.R. §725.414(a)(2)(i), with the subsequent claim filed on June 12, 2003, and were admitted by Judge Purcell. Director's Exhibits 50, 87. Error, if any, in the administrative law judge's admission of the readings by Drs. Pathak and Willis is harmless, therefore, as they were already part of the record. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

With respect to Dr. Aycoth's reading of the x-ray dated January 12, 2006 and Dr. Miller's reading of the x-ray dated March 26, 2007, we hold that the administrative law judge rationally found that these films were treatment records. The administrative law judge acted within his discretion in relying upon claimant's testimony that he was under treatment by PA Didyk at New River at the time that the x-ray interpretations were obtained. *See Dempsey*, 23 BLR at 1-60; September 22, 2009 Decision and Order at 3; Hearing Transcript at 25. The administrative law judge also reasonably relied on the fact that Dr. Aycoth and Dr. Miller identified either "Dr." Didyk or New River as the referring entity. *See Dempsey*, 23 BLR at 1-60; September 22, 2009 Decision and Order at 3; Claimant's Exhibit 4.

Regarding Dr. Rasmussen's reading of the October 21, 2004 x-ray, employer argues that it was not obtained in the course of treatment, as there are no corresponding treatment records from Princeton Community Medical Center, the facility where the x-ray was obtained. Employer also challenges the admission of Dr. Pathak's reading of this film, noting that Dr. Pathak wrote on the radiology report that the ordering physician was Dr. Rasmussen and the reason for the examination was "comp CWP/black lung per

patient." Employer's Brief in Support of Petition for Review at 32, *quoting* Claimant's Exhibit 4. Employer maintains, "it is clear from Claimant's Exhibit 5 and Dr. Didyk's treatment notes" that claimant requested these readings in order to pursue a federal black lung claim. *Id*. at 32.

We hold that employer has not established that the administrative law judge abused his discretion in admitting these x-ray readings as treatment records. Contrary to employer's assertion, PA Didyk's treatment notes contain no indication that claimant requested a referral for the x-ray readings by Drs. Rasmussen and Pathak, to support his claim for black lung benefits.[9] Claimant testified at the hearing that Dr. Rasmussen was one of his treating physicians at New River. Hearing Transcript at 22. In addition, employer has not explained how Dr. Pathak's references to complicated coal workers' pneumoconiosis and black lung "per patient," establish that claimant procured the reading of the October 21, 2004 film for the purpose of litigation. In the absence of proof to the contrary, therefore, the administrative law judge rationally determined that these x-ray readings were obtained in the course of medical treatment for a respiratory or pulmonary or related disease in accordance with 20 C.F.R. §725.414(a)(4).[10] *See Dempsey*, 23 BLR at 1-60; September 22, 2009 Decision and Order at 3.

Lastly, we reject employer's argument that it has been denied due process because it was not allowed to obtain rebuttal readings of all of the ILO classified x-rays contained in Claimant's Exhibits 4 and 5. As the administrative law judge noted, employer did not seek the opportunity to offer additional rebuttal readings at, or after, the hearing. September 22, 2009 Decision and Order at 3. Thus, we reject employer's evidentiary challenge and affirm the administrative law judge's decision to admit Claimant's Exhibits 4 and 5, including all of the x-ray readings contained therein. *See Dempsey*, 23 BLR at 1-60; *Clark*, 12 BLR at 1-152; September 22, 2009 Decision and Order at 3-4.

II. THE SUBSEQUENT CLAIM AND THE MERITS OF ENTITLEMENT

When 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

[9] In contrast, PA Didyk's notes dated December 9, 2004 and March 11, 2009, contain references to claimant's requests for referrals for CT scans to assist in establishing his entitlement to black lung benefits. Claimant's Exhibit 5.

[10] The administrative law judge reached a contrary conclusion with regard to the admissibility of certain documents contained in Claimant's Exhibit 3, ruling in employer's favor that a CT scan reading and a report by PA Didyk were obtained solely for purposes of litigation and were inadmissible as part of claimant's treatment records. Hearing Transcript at 18-19.

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."[11] 20 C.F.R. §725.309(d); *see 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). Claimant's prior claim, filed on October 19, 1999, was denied by Administrative Law Judge Daniel L. Leland on May 29, 2002, because the evidence did not establish total disability. Director's Exhibit 1. Thus, claimant was required to submit new evidence proving this element of entitlement in order to have the administrative law judge review his claim on the merits.

Additionally, because this case involves claimant's request for modification of the denial of his June 12, 2003 subsequent claim (based on a failure to establish a change in an applicable condition of entitlement), the issue properly before the administrative law judge was whether the new evidence submitted with the request for modification, considered in conjunction with the evidence developed in the subsequent claim, establishes a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). If the evidence establishes a change in an applicable condition of entitlement, the administrative law judge must then consider all of the record evidence as to whether claimant is entitled to benefits. *Hess*, 21 BLR at 1-143.

The administrative law judge found that claimant satisfied his burden to prove a change in an applicable condition of entitlement, and his entitlement to benefits, by establishing that he suffers from complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. 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 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, yields massive lesions in the lung; or (c) when diagnosed by other

[11] In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

means, is a condition which would yield results equivalent to (a) or (b).[12] 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically invoke the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflicts, and make a finding of fact. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979).

In his September 22, 2009 Decision and Order, the administrative law judge considered nine readings of five x-rays, dated July 14, 2003, September 26, 2003, October 21, 2004, December 8, 2004 and March 7, 2005, submitted in conjunction with the June 12, 2003 subsequent claim. Dr. Patel, dually qualified as a Board-certified radiologist and B reader, read the July 14, 2003 x-ray as positive for simple pneumoconiosis, 2/3, q/t, but negative for complicated pneumoconiosis, while Dr. Wheeler, dually qualified as a Board-certified radiologist and B reader, read the same x-ray as negative for simple and complicated pneumoconiosis. Director's Exhibits 17, 67. Dr. Patel also read the September 26, 2003 x-ray as positive for simple pneumoconiosis, 2/3, q/t, and complicated pneumoconiosis, Category A, while Dr. Scatarige, a dually qualified radiologist, read the same x-ray as positive for simple pneumoconiosis, 1/2, q/r, but negative for complicated pneumoconiosis. Director's Exhibits 22, 52. Dr. Scatarige also read the October 21, 2004 x-ray as positive for simple pneumoconiosis, 1/1, but negative for complicated pneumoconiosis. Director's Exhibit 71. Dr. Zaldivar, a B reader, read the December 8, 2004 x-ray as positive for simple pneumoconiosis, 2/2, q/q, and complicated pneumoconiosis, Category A, while Dr. Wheeler read the same x-ray as negative for simple and complicated pneumoconiosis. Director's Exhibits 56, 62. Dr. DePonte, a dually qualified radiologist, read the March 7, 2005 x-ray as positive for simple pneumoconiosis, 3/3, q/p, and complicated pneumoconiosis, Category A, while Dr. Willis, also a dually qualified radiologist, read the same x-ray as positive for simple pneumoconiosis, 1/2, q/p, but negative for complicated pneumoconiosis. Director's Exhibits 75, 87.

The administrative law judge also weighed thirteen x-ray readings of eight x-rays, dated March 31, 1999, March 26, 2001, October 21, 2004, February 12, 2005, March 7, 2005, January 12, 2006, March 26, 2007 and August 23, 2008, submitted pursuant to

[12] The record in this case does not contain any biopsy evidence relevant to 20 C.F.R. §718.304(b).

claimant's request for modification. Dr. Patel read the March 31, 1999 x-ray as positive for simple pneumoconiosis, 2/2, q/p and noted that there was no "consolidation or lung mass." Claimant's Exhibit 4. Dr. Aycoth, a dually qualified radiologist, read the March 26, 2001 x-ray as positive for simple pneumoconiosis, 2/3, q/q. *Id*. Dr. Pathak, a B reader, read the October 21, 2004 x-ray as positive for simple pneumoconiosis, 2/2, q/p, and complicated pneumoconiosis. *Id*. Dr. Rasmussen, a B reader, read the same film as positive for simple pneumoconiosis, 1/2, q/q, and complicated pneumoconiosis, while Dr. Wheeler read this film as negative for simple and complicated pneumoconiosis. *Id*.; Employer's Exhibit 6. Dr. Wheeler noted that some tiny nodular infiltrates were compatible with tuberculosis, histoplasmosis or some other granulomatous disease. Employer's Exhibit 6. Dr. Wheeler also read the February 12, 2005 x-ray as negative for simple and complicated pneumoconiosis, noting in the "Comments" section of the ILO form that there was a 1.5 centimeter nodule in the right apex, which was more likely a granuloma than a tumor. Employer's Exhibit 4. Dr. Scatarige read the March 7, 2005 x-ray as negative for simple and complicated pneumoconiosis. Employer's Exhibit 3. Dr. Aycoth read the January 12, 2006 x-ray as positive for simple pneumoconiosis, 2/3, q/q, and complicated pneumoconiosis. Claimant's Exhibit 4. Dr. Miller read the March 26, 2007 x-ray as positive for simple pneumoconiosis, 2/3, and complicated pneumoconiosis, while Dr. Scatarige read the same x-ray as 1/1, q/r, but noted that coal workers' pneumoconiosis or silicosis was unlikely, and indicated that the film was negative for complicated pneumoconiosis. Claimant's Exhibit 4; Employer's Exhibit 1. Dr. DePonte read the August 23, 2008 x-ray as positive for simple pneumoconiosis, 3/3, q/q, and complicated pneumoconiosis, while Dr. Wheeler read the same x-ray as 0/1 and negative for complicated pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 4. Dr. Scott, a dually qualified radiologist, read the same film as positive for simple pneumoconiosis, 2/1, q/p, but negative for complicated pneumoconiosis. Employer's Exhibit 7.

In his September 22, 2009 Decision and Order, the administrative law judge stated that he gave "little weight to Dr. Wheeler's multiple negative readings of 0/1' [as] . . . [t]he majority of readers found a '1/1' or greater profusion of pneumoconiotic opacities, even Dr. Scatarige." September 22, 2009 Decision and Order at 21. The administrative law judge noted Dr. Wheeler's comment on his radiology report that a biopsy or CT scan was needed for an "exact" diagnosis, and found that the record does "not support Dr. Wheeler's likely etiologies of histoplasmosis, [tuberculosis], sarcoidosis, or granulomatous disease." *Id*. The administrative law judge further stated that he gave less weight to Dr. Scatarige's readings because they were "out of line" with a majority of the readings finding a higher profusion of simple pneumoconiosis, as well as complicated pneumoconiosis. The administrative law judge further noted that a majority of readings made "no mention of [tuberculosis], histoplasmosis, sarcoidosis, or fungal disease he suggests exists." *Id*. at 22. The administrative law judge also specifically noted that claimant's treatment records did not support the alternative etiologies advanced by either Dr. Wheeler or Dr. Scatarige for claimant's radiographic changes, and that these

physicians "reflected some uncertainty" in rendering their opinions, as they recommended a CT scan for a "definitive" diagnosis of claimant's lung disease. *Id*.

The administrative law judge concluded that a preponderance of the credible x-ray readings established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). September 22, 2009 Decision and Order at 24. Pursuant to 20 C.F.R. §718.304(a), the administrative law judge also found, based on the eight positive x-ray readings by Drs. Pathak, Patel, Rasmussen, Zaldivar, Aycoth, Miller and DePonte, that claimant established the existence of complicated pneumoconiosis. *Id*. at 28. The administrative law judge, however, found that claimant was not entitled to invocation of the irrebuttable presumption because the positive readings for complicated pneumoconiosis "have not been reconciled with the non-qualifying [pulmonary function] and arterial blood gas [studies]." *Id*. Thus, the administrative law judge denied benefits.

On reconsideration, the administrative law judge reiterated that the x-ray evidence was sufficient to establish the existence of both simple and complicated pneumoconiosis, and adopted his prior credibility findings with regard to the negative readings by Drs. Wheeler and Scatarige. Order Granting Reconsideration at 5. The administrative law judge acknowledged that, although it may be unusual for a miner to have complicated pneumoconiosis and no respiratory impairment, as argued by Drs. Crissali and Castle, he was not persuaded that the mere absence of an impairment precluded a finding of complicated pneumoconiosis, as defined in the Act and regulations, noting that even Dr. Castle admitted that there are times when a miner may have a Category A opacity on x-ray and no disability demonstrated on his pulmonary function testing. *Id*. at 6. The administrative law judge concluded that employer's medical opinion evidence does "not definitively exclude the existence of complicated pneumoconiosis, as defined by the regulations and medically, [as] it does not show that [the] [x]-ray opacities may not be what they appear to be." *Id*. The administrative law judge further noted that "the opinions of Drs. Crissali and Castle do not exclude the fact that the [c]laimant suffers a chronic lung disease which manifests no impairment." *Id*. Thus, the administrative law judge found that claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.304, and awarded benefits accordingly.

Employer contends that the administrative law judge erred in his consideration of the x-ray evidence, that he failed to weigh all of the relevant x-ray evidence as to the existence of complicated pneumoconiosis, and that he did not explain the bases for his credibility determinations, as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C.

§919(d) and 30 U.S.C. §932(a).[13] Employer also maintains that the administrative law judge improperly shifted the burden to employer to disprove that claimant has complicated pneumoconiosis.[14] These allegations of error are without merit.

Contrary to employer's assertion, the administrative law judge did not shift the burden of proof to employer when weighing the evidence at 20 C.F.R. §718.304. Pursuant to 20 C.F.R. §718.304(a), the administrative law judge rationally determined that claimant established the existence of complicated pneumoconiosis, based on the preponderance of positive x-ray readings by dually qualified radiologists and B readers. Order Granting Reconsideration at 5. In so doing, the administrative law judge set forth a valid rationale for assigning less weight to the negative readings by Drs. Wheeler and Scatarige, finding that their opinions regarding the potential causes of what they observed on claimant's x-rays were not adequately supported by the record. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Lester,* 993 F.2d at 1145-46, 17 BLR at 2-117-18; Order Granting Reconsideration at 5; September 22, 2009 Decision and Order at 8.

We reject employer's assertion that the administrative law judge's consideration of the alternate etiologies advanced by Drs. Wheeler and Scatarige was contrary to the Board's holding in *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999) (*en banc on recon*.).[15] The present case is distinguishable as, in contrast to the readings at issue in *Cranor*, Drs. Wheeler and Scatarige did not classify the x-rays as containing a large opacity consistent with an ILO classification of complicated pneumoconiosis, which they

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[13] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

[14] We affirm, as unchallenged by the parties in this appeal, the administrative law judge's finding that claimant established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.

[15] In *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999) (*en banc on recon.*), the Board held that comments in an x-ray report that undermine the credibility of a positive ILO classification for pneumoconiosis are relevant to the issue of the existence of pneumoconiosis, whereas comments in an x-ray report that address the source of a pneumoconiosis diagnosed by x-ray are not relevant to the issue of the existence of pneumoconiosis, but should be considered at Section 718.203. *Cranor*, 22 BLR at 1-5. Employer maintains that, under *Cranor*, the administrative law judge may consider only comments made by radiologists on ILO forms in his consideration of the evidence at 20 C.F.R. §718.203.

then explained was not consistent with complicated coal workers' pneumoconiosis. Employer's Exhibits 1, 3, 4, 6. Rather, Drs. Wheeler and Scatarige suggested that what they observed on claimant's x-rays was not properly classified as a large opacity under the ILO system. *Id*. Because their comments were relevant to whether they accurately determined that the films contained no large opacities consistent with pneumoconiosis, we discern no error in the administrative law judge's consideration of the entirety of the radiological opinions of Drs. Wheeler and Scatarige under 20 C.F.R. §718.304(a). *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Thus, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a).

Additionally, contrary to employer's contention, the administrative law judge properly considered all of the relevant medical opinion evidence as to the existence of complicated pneumoconiosis. Pursuant to 20 C.F.R. §718.304(c), the administrative law judge fully addressed the statements by Drs. Castle, Crissali and Repsher, that claimant's non-qualifying pulmonary function studies establish that claimant does not have complicated pneumoconiosis. Order Granting Reconsideration at 6. The administrative law judge acted within his discretion in finding that these physicians "consider[ed] only their medical definitions of pneumoconiosis," and did not fully acknowledge that the absence of a respiratory impairment does not preclude a finding of complicated pneumoconiosis, as defined in the Act and the implementing regulations. *Id*; *see Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18. In addition, the administrative law judge explained his credibility determinations under 20 C.F.R. §718.304(c), taking into consideration the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Order Granting Reconsideration at 6. We affirm his finding, therefore, that the evidence relevant to 20 C.F.R. §718.304(c) does not alter his determination that claimant established the existence of complicated pneumoconiosis by x-ray evidence pursuant to 20 C.F.R. §718.304(a).

Because the administrative law judge properly weighed all of the record evidence together as to the presence or absence of complicated pneumoconiosis and explained the basis for his credibility determinations in accordance with the APA, we affirm, as supported by substantial evidence, his finding that claimant is entitled to invocation of the

irrebuttable presumption of total disability at 20 C.F.R. §718.304.[16] *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003) (Gabauer, J., concurring); *Melnick*, 16 BLR at 1-33-34; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[16] We affirm, as unchallenged on appeal, the administrative law judge's finding, pursuant to 20 C.F.R. §718.203(b), that claimant's complicated pneumoconiosis arose out of coal mine employment. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Order Granting Reconsideration and Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge