BRB No. 06-0459 BLA

BARBARA ANN SHREWSBURY (Widow of WILEY BLAINE SHREWSBURY)	)	
Claimant-Respondent	)	
v.	)	
ITMANN COAL COMPANY/ CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 01/30/2007
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Pamela Lakes Wood, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton, and Hayes), Bluefield, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Rita Roppolo (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (05-BLA-5015 and 05-BLA-5185) of Administrative Law Judge Pamela Lakes Wood on a miner's claim and a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). Initially, the administrative law judge noted that the parties stipulated to fourteen years of coal mine employment. Hearing Transcript at 7. The administrative law judge found that claimant[1] established the existence of complicated pneumoconiosis and, therefore, was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis and death due to pneumoconiosis pursuant to 20 C.F.R. §718.304. *Id.* Accordingly, benefits were awarded on the miner's claim, commencing on February 1, 2001, and on the survivor's claim, commencing on January 1, 2004.

On appeal, employer contends that the administrative law judge erred in "selectively and inconsistently" applying the evidentiary limitations found at 20 C.F.R. §725.414. Employer's Brief at 5-6. Employer additionally asserts that it was denied due process by the administrative law judge's refusal to admit employer's rebuttal evidence. Employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304. Claimant responds, urging affirmance of the administrative law judge's award of benefits in the miner's and survivor's claims. Employer has not filed a reply brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response to employer's appeal. The Director argues that a remand is required because the administrative law judge "erred in her evidentiary ruling concerning digital X-ray readings contained in various treatment records." Director's Brief at 1. The Director maintains that while the administrative law judge's "evidentiary ruling was originally correct, a remand is required based upon the judge's use of the readings." *Id.*

[1] Claimant is the widow of the miner, who died on January 4, 2004. Director's Exhibit 36. The miner filed his claim for benefits on February 7, 2001. Director's Exhibit 2. The district director awarded benefits on June 3, 2003, and employer timely requested a hearing before the Office of Administrative Law Judges (OALJ). Director's Exhibits 22, 23. Claimant filed her claim for benefits on January 23, 2004. Director's Exhibit 42. On February 25, 2004 and April 12, 2004, claimant sent a letter to the OALJ requesting that the miner's claim be remanded to be consolidated with the survivor's claim. Director's Exhibits 36, 37. Administrative Law Judge Jeffrey Tureck issued an Order of Remand on April 28, 2004, ordering that the miner's claim be remanded for consolidation with the survivor's claim. Director's Exhibit 38. A Department of Labor claims examiner awarded benefits on the survivor's claim on September 9, 2004, and employer timely requested a hearing before the OALJ. Director's Exhibits 57, 60.

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

Exclusion of Employer's Rereadings of the Digital X-rays

We first address employer's assertion that the administrative law judge erred in excluding from the record its rebuttal readings of twenty-three digital x-rays contained in the miner's treatment records at Director's Exhibit 51. At the hearing, the administrative law judge admitted the digital x-ray readings contained in the miner's treatment records pursuant to Section 725.414(a)(4) without regard to the evidentiary limitations. Employer sought to submit rereadings of the digital x-rays. Recognizing that the regulations do not provide for rebuttal of evidence contained within the treatment records, employer argued that good cause pursuant to 20 C.F.R. §725.456(b)(1) justified the admission of its rereadings of these digital x-rays. Employer reasoned that "by due process right the Employer should have the right to rebut those treatment records which are also admitted outside the limitations contained in 725.414." Hearing Transcript at 20. The administrative law judge declined to allow employer to submit its rereadings of the digital x-rays. However, the administrative law judge stated that she would "not giv[e] them very much weight in terms of x-ray interpretations, just consider them as part of the hospital records and as other evidence to be considered." *Id.*

In her Decision and Order, the administrative law judge reiterated her decision to reject employer's rereadings of the digital x-rays contained in the miner's treatment records. Decision and Order at 7. The administrative law judge stated that "[a]lthough Employer's counsel argued that certain of the x-ray rereadings were relevant to counter the digital x-rays appearing in the medical records, I do not find that to be a basis for including the otherwise inadmissible evidence." *Id.* The administrative law judge cited the Board's decision in *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*) as stating that "mere relevance is insufficient to establish good cause." Decision and Order at 7. The administrative law judge stated that the digital x-ray readings in the treatment records cannot be considered for the purpose of establishing the existence of pneumoconiosis because they "do not satisfy the regulatory criteria or utilize the ILO criteria." *Id.* Thus, the administrative law judge concluded that "[w]hile [the digital x-ray readings in the treatment records] may be considered as 'other evidence,' they are entitled to little weight." *Id.*

Later, in the administrative law judge's consideration of the medical opinion evidence, and despite her earlier ruling that she would give the digital x-rays contained in the treatment records little weight, she effectively used these x-ray readings, which

diagnosed complicated pneumoconiosis and made no mention of granulomatous disease, to discredit the opinion of Dr. Crisalli, who diagnosed granulomatous disease and no complicated pneumoconiosis. Specifically, the administrative law judge found Dr. Crisalli's opinion to be undermined by the fact that the miner's team of physicians diagnosed complicated pneumoconiosis and not granulomatous disease. The administrative law judge also noted that "there is no evidence that the Miner suffered from any form of granulomatous disease in his lifetime." *Id.* at 20. Accordingly, the administrative law judge found Dr. Rasmussen's discussion that the etiology of the lesions in the miner's lungs is complicated pneumoconiosis to be most persuasive. In considering all of the evidence, the administrative law judge concluded that "the medical records, CT scan, and medical opinions . . . weigh[] in favor of a finding of complicated pneumoconiosis." *Id.*

Employer contends that the administrative law judge "clearly gave considerable weight to the digital x-ray readings submitted by the [miner's] 'team of physicians,' despite the fact that they were not classified pursuant to the ILO system." Employer's Brief at 7. Employer argues that by allowing claimant to submit these digital x-ray readings as "other medical evidence," without allowing employer the opportunity to rebut these readings, the administrative law judge violated the Administrative Procedure Act[2] and employer's due process rights. Employer further argues that "[x]-rays are static evidence in the sense that once an image is reproduced on film, it does not change. Serial

[2] Employer cites to 5 U.S.C. §556(d), which states that "[a] party is entitled to present his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." Employer additionally asserts that *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989)(holding that North American's due process rights were violated because the administrative law judge provided it no opportunity to respond to the medical evidence the administrative law judge relied upon in awarding benefits), *Coughlan v. Director, OWCP*, 757 F.2d 966, 7 BLR 2-177 (8th Cir. 1985)(holding that it was error for the administrative law judge to use a B reader's x-ray report to discredit claimant's medical opinion evidence, without providing claimant the opportunity to rebut this x-ray report), and *Souch v. Califano*, 599 F.2d 577 (4th Cir. 1979)(holding "that where a claimant's request to subpoena negative readers is denied and the disputed X-rays are not made available to him for inspection and re-reading, the Secretary may not use the X-rays as substantial evidence to support the claim"), support its position that "parties in a federal black lung claim have a right to submit rebuttal evidence pursuant to the APA." Employer's Brief at 9.

interpretations of one film are akin to cross examination, as it brings to bear more than one expert's opinion with regard to precisely the same piece of evidence."[3] *Id.* at 7-8.

The Director responds by stating that "[w]hile we believe that the judge's evidentiary ruling was originally correct, a remand is required based upon the judge's use of the readings." Director's Brief at 1. The Director argues, "[g]iven that the [miner's] physicians relied on the suspect X-rays in making their diagnoses, the ALJ's reliance on those conclusions appears to be inconsistent with her finding that the x-rays were entitled to little weight." *Id.* at 2. Therefore, the Director requests that the Board remand this case "to allow the judge to weigh the evidence consistent with her evidentiary ruling," and if on remand the administrative law judge accords significant weight to the digital x-ray readings, then she must reconsider employer's good cause argument.

While Section 725.414 does not specifically provide for the rebuttal of evidence submitted pursuant to Section 725.414(a)(4), an administrative law judge is allowed to admit such evidence, which may be in excess of the evidentiary limitations, with a showing of good cause pursuant to Section 725.456(b)(1). The Department of Labor, in its second notice of proposed rulemaking, explained that:

> The Department believes that proposed subsection (a)(4) would require the admission of any medical record relating to the miner's respiratory or pulmonary condition without regard to the limitations set forth elsewhere in §725.414 . . . . The Department has not included an independent provision governing rebuttal of this evidence. As a general rule, this evidence is not developed in connection with a party's affirmative case for or against entitlement, and therefore the Department does not believe that independent rebuttal provisions are appropriate. Any evidence that predates the miner's claim for benefits may be addressed in the two medical reports permitted each side by the regulation. If additional evidence is generated as the result of a hospitalization or treatment that takes place after the parties have completed their evidentiary submission, the ALJ has the discretion to permit the development of additional evidence under the "good cause" provision of §725.456.

64 Fed. Reg. 54996 (Oct. 8, 1999). Additionally, in published comments regarding the implementation of the revised regulations, the Department of Labor stated with respect to the good cause exception and a party's submission of rebuttal evidence that:

[3] The digital x-rays contained in the miner's treatment records are individual readings of different x-rays taken from 1999 until January 4, 2004, the date of the miner's death. Director's Exhibit 51.

> [t]he Department does not believe that the regulation or this preamble can explicitly anticipate every conceivable situation that may arise in the adjudication of claims. Instead, the Department fully expects that administrative law judges will be able to fashion a remedy in all cases that . . . permits the party opposing entitlement to develop such rebuttal evidence as is necessary to ensure a full and fair adjudication of the claim . . . .

65 Fed. Reg. 79,993 (Dec. 20, 2000).

The administrative law judge's decision to refuse to find that good cause exists to allow employer to submit its rereadings of the digital x-rays contained in the miner's treatment records, and her reliance on these digital x-rays readings to support her finding that claimant established the existence of complicated pneumoconiosis, are inconsistent with what the Department of Labor intended in proposing Section 725.414(a)(4). Moreover, the administrative law judge's refusal to find good cause for admitting employer's digital x-ray rereadings, and her subsequent reliance on the original digital x-ray readings, deprived employer of a full and fair adjudication as discussed in the published comments in the regulations. *See Souch v. Califano*, 599 F.2d 577 (4th Cir. 1979); *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Coughlan v. Director, OWCP*, 757 F.2d 966, 7 BLR 2-177 (8th Cir. 1985). Given the administrative law judge's subsequent use of the digital x-ray readings, we vacate the administrative law judge's decision to refuse to admit employer's rereadings of the digital x-rays and remand this case for her to reconsider this issue. *See generally Dempsey*, 23 BLR at 1-61; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). Because the administrative law judge's refusal to admit employer's rereadings of the digital x-rays affects her finding of the existence of complicated pneumoconiosis pursuant to Section 718.304, we vacate that finding as well.

Exclusion of Dr. Spagnolo's Report

Employer asserts that the administrative law judge erred in excluding Dr. Spagnolo's December 5, 2003 report contained in Director's Exhibit 31.[4] Specifically,

[4] Employer also challenges the administrative law judge's exclusion of Dr. Spagnolo's December 1, 2004 report because she found that employer did not demonstrate good cause for why this report, which exceeds the limitations of 20 C.F.R. §725.414, should be admitted into the record pursuant to 20 C.F.R. §725.456(b)(1). Hearing Transcript at 22. In light of *Keener v. Peerless Eagle Coal Co.*, --- BLR ---,

employer argues that the administrative law judge erred "because the Employer is allowed two affirmative medical opinions in each claim. The opinions of Drs. Hippensteel and Crisalli constituted the Employer's two affirmative opinions in the survivor's claim. Submitting only Dr. Spagnolo's report placed the Employer's one report below the limit in the living miner's claim." Employer's Brief at 2 n.2.

In her Decision and Order, the administrative law judge stated that "other administrative law judges have generally excluded evidence developed in connection with a miner's claim from consideration in a surviving spouse's claim to the extent that the limitations have been exceeded." Decision and Order at 7. However, the administrative law judge determined that there is "good cause for consideration of all of the admissible evidence in both claims" because these two "cases have been consolidated and the evidence is commingled." *Id.* But the administrative law judge noted that in her consideration of the evidence in both these claims, she would "require compliance with the evidentiary limitations." *Id.*

We have recently addressed this issue in *Keener v. Peerless Eagle Coal Co.*, --- BLR ---, BRB No. 05-1008 BLA (Jan. 26, 2007)(*en banc*). In *Keener*, we held that, where a miner's claim and a survivor's claim were consolidated for purposes of the hearing pursuant to 20 C.F.R. §725.460, the parties are entitled to submit separate, affirmative case, rebuttal, and rehabilitative evidence, as set forth at Section 725.414, in support of the miner's claim and in support of the survivor's claim. We further held that the parties must designate the claim which each piece of evidence supports, and the administrative law judge should consider this evidence separately on the specific issues of entitlement in each claim, and under the evidentiary rules which apply to each claim. Additionally, we noted in *Keener* that the parties are not precluded from submitting the same medical reports in support of both the miner's claim and the survivor's claim, where appropriate. In accordance with *Keener*, we instruct the administrative law judge to direct the parties to designate which claim each piece of evidence supports. Applying the evidentiary rules to each claim, the administrative law judge must consider the evidence designated for the miner's claim separately on the specific issues of entitlement in the miner's claim and consider the evidence designated for the survivor's claim separately on the specific issues of entitlement in the survivor's claim.

Administrative Law Judge's Use of Section 725.414 in her Weighing of the Medical Opinion Evidence

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BRB No. 05-1008 BLA (Jan. 26, 2007)(*en banc*), *see* discussion, *infra*, the administrative law judge must consider whether Dr. Spagnolo's December 1, 2004 report may also be admissible as part of employer's affirmative evidence in the miner's claim.

Additionally, employer asserts that the administrative law judge inconsistently applied Section 725.414. Specifically, employer argues that the administrative law judge erred in striking "Dr. Hippensteel's report due to it's [sic] reference to inadmissible evidence" and in discrediting Dr. Crisalli's opinion based on an x-ray reading that is not in the record. Employer's Brief at 6. At the hearing, the administrative law judge admitted Dr. Crisalli's original report of his May 12, 2003 examination of the miner and Dr. Hippensteel's initial report dated December 3, 2003, as part of Director's Exhibit 31. The administrative law judge also admitted Dr. Crisalli's supplemental reports dated November 18, 2004 and February 28, 2005, as Employer's Exhibits 2 and 4, and Dr. Hippensteel's supplemental report dated March 1, 2005, as Employer's Exhibit 5. Hearing Transcript at 16-17, 21-22. Additionally, the administrative law judge kept the record open to allow employer to submit Dr. Crisalli's April 11, 2005 deposition transcript as Employer's Exhibit 8. *Id.* at 15, 21-22.

In her Decision and Order, the administrative law judge noted that employer designated three reports by Dr. Crisalli and two by Dr. Hippensteel and stated:

> [w]hile I have in the past allowed multiple reports by a physician when they could easily be changed into two-part reports to spare the time and expense involved in making the physician reissue a two part report, the regulations do not provide for rebuttal medical reports and only allow for rehabilitative reports in response to rebuttal evidence.

Decision and Order at 8. The administrative law judge found that although Dr. Crisalli's reports of May 12, 2003 and November 18, 2004 "could be issued as a single report, the November 18, 2004 report is based primarily on inadmissible evidence and is inextricably intertwined with that evidence . . . , so it will not be given any weight." *Id.* The administrative law judge stated that Dr. Crisalli's supplemental report of February 28, 2005 and Dr. Hippensteel's supplemental report of March 1, 2005 exceed the limitations and do not qualify as rebuttal or rehabilitative evidence. Moreover, the administrative law judge noted that Dr. Hippensteel's 2005 supplemental report "references multiple exhibits that are not of record and exceed the evidentiary limitations." *Id.* The administrative law judge added that "to the extent that [these supplemental reports] are based upon admissible evidence, these exhibits are cumulative of matters addressed at the deposition of [Drs. Crisalli and Hippensteel] so Employer will not be prejudiced by their not being considered." *Id.* Accordingly, the administrative law judge found that Dr. Crisalli's supplemental reports of November 2004 and February 2005 and Dr. Hippensteel's supplemental report of March 2005 "will not be given any weight" in accordance with *Dempsey*. *Id.* The administrative law judge noted that it was unclear whether Dr. Crisalli's initial report of May 12, 2003 and Dr. Hippensteel's initial report of December 3, 2003 are admissible because they refer to inadmissible evidence.

The administrative law judge stated that in evaluating these reports, she would consider the extent to which they are based upon inadmissible evidence.

In discussing the x-ray evidence pursuant to Section 718.304(a), the administrative law judge noted that in Dr. Crisalli's initial 2003 report, in addition to referencing x-ray readings that were admitted into the record, Dr. Crisalli also referenced x-ray readings that were not in evidence. Specifically, the administrative law judge noted that Dr. Crisalli referenced an x-ray reading by Dr. Smith, a dually qualified reader, of the May 12, 2003 x-ray, and "Dr. Crisalli also referenced readings by Drs. Scott and Wheeler of an October 23, 2001 x-ray which is [sic] not in evidence."[5] Decision and Order at 12-13.

In discussing the medical opinion evidence[6] pursuant to Section 718.304(c) later in her Decision and Order, the administrative law judge stated that "Dr. Crisalli has referenced inadmissible evidence in his report and at his deposition. As they[7] are not inextricably intertwined with his opinion, they are **STRICKEN**, with the exception of the reference to Dr. Smith's reading, which bears on his credibility." *Id.* at 18. In evaluating the credibility of Dr. Crisalli's opinion, the administrative law judge found that:

> His discussion of the x-ray readings undermines his credibility. Although one of the major bases for his opinion was the absence of a background of small rounded opacities on the x-rays, there is disagreement among the readers as to whether such opacities were visible on the x-rays. First, such opacities ("p") were found by Dr. Patel to coexistent [sic] with the primary irregular opacities ("t"). Second, the x-ray taken during Dr. Crisalli's examination of the Miner was interpreted by another dually qualified reader, Dr. Smith. Although that reading is not of record, Dr. Crisalli references it as showing "r/r, 1/0 changes involving the mid to upper lung

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[5] In her Decision and Order, the administrative law judge stated that "[i]t appears that Dr. Crisalli is referencing inadmissible x-ray reports [at his deposition], in view of his subsequent reference to Dr. Scatarige, whose x-ray readings have been excluded because they exceed the evidentiary limitations." Decision and Order at 17 n.18.

[6] Drs. Crisalli and Hippensteel did not find the existence of either simple or complicated pneumoconiosis, and found that the miner's obstructive lung disease was due to his cigarette smoking. Dr. Rasmussen found the existence of complicated pneumoconiosis, and found that the miner's chronic obstructive pulmonary disease was due to coal dust exposure.

[7] The administrative law judge appears to be referring to the readings of the October 23, 2001 x-ray by Drs. Scott and Wheeler and all of the x-ray readings by Dr. Scatarige.

> zones," [sic] a large opacity type B and emphysema." (DX 31). As the standard x-ray interpretation form indicates, "r" opacities are small rounded opacities. Why was Dr. Smith's interpretation not accepted? Why was another reading sought? Dr. Crisalli indicated at his deposition that he relied upon interpretations by Drs. Scott and Wheeler because they required that any opacities found be representative of coal workers' pneumoconiosis. There is, however, nothing in the regulations that requires that the opacities be due to coal dust or coal workers' pneumoconiosis; any type of coal mine dust is sufficient, as is any type of pneumoconiosis caused by coal mine dust.[8] In fact, Dr. Rasmussen indicated that the Miner's occupation running the continuous miner left him exposed to significant quantities of silicon dioxide as well as coal dust, both of which are liberated when the continuous miner cuts the rock seams. I find that Dr. Crisalli's actions in considering the x-ray evidence suggest bias on his part and therefore his credibility is undermined.

Id. at 20.

In discussing the credibility of Dr. Hippensteel's opinion pursuant to Section 718.304(c), the administrative law judge excluded this physician's opinion from the record because she found that he relied on x-ray interpretations and reports that are not of record. The administrative law judge stated that while it is her "practice to consider reports that reference inadmissible evidence to the extent possible," she found that Dr. Hippensteel's opinion is entitled to "no weight" because it "is so inextricably intertwined with the inadmissible evidence that I cannot separate the essence of Dr. Hippensteel's opinion from the inadmissible evidence upon which it is in part based." *Id.* at 19.

Employer's assertions regarding the administrative law judge's inconsistent application of the evidentiary limitations have merit. It was irrational for the administrative law judge to explicitly strike Dr. Crisalli's references to inadmissible evidence, but then consider Dr. Crisalli's reference to Dr. Smith's reading of the May 12, 2003 x-ray, which was not offered into evidence. *See Tackett v. Cargo Mining Co.*, 12

[8] It is unclear what point the administrative law judge is making by her reference to Dr. Crisalli's testimony "at his deposition that he relied upon interpretations by Drs. Scott and Wheeler because they required that any opacities found be representative of coal workers' pneumoconiosis" and by her statement that "[t]here is . . . nothing in the regulations that requires that the opacities be due to coal dust or coal workers' pneumoconiosis . . . ." Decision and Order at 20. We instruct the administrative law judge, on remand, to clarify her statements regarding Dr. Crisalli's testimony.

BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Moreover, it was unreasonable for the administrative law judge to strike Dr. Hippensteel's entire opinion because of this physician's references to inadmissible evidence, but then to discredit Dr. Crisalli's opinion based on the x-ray interpretation of Dr. Smith, which is not in the record. *Id.* Because the administrative law judge inconsistently applied Section 725.414 in weighing the medical opinions of Drs. Crisalli and Hippensteel, we instruct the administrative law judge to reassess the credibility of these opinions on remand.

EXISTENCE OF COMPLICATED PNEUMOCONIOSIS

Employer has raised specific allegations of error regarding the administrative law judge's finding that claimant has established the existence of complicated pneumoconiosis. Notwithstanding our decision to remand this case for the administrative law judge to reconsider her admission and treatment of selected evidence, as discussed, *supra*, in the interest of judicial economy, we now address those allegations.

Regarding the administrative law judge's consideration of the x-ray evidence pursuant to Section 718.304(a), employer asserts that the administrative law judge erred in failing to consider the additional credentials of Drs. Wheeler and Scott. The administrative law judge considered four interpretations by Drs. Patel, Wheeler, and Scott, B readers[9] and Board-certified radiologists, of the October 22, 2001 and May 12, 2003 x-rays.[10] In weighing the x-ray evidence, the administrative law judge noted that Drs. Patel, Wheeler, and Scott are all dually qualified. The administrative law judge found the x-ray evidence to be "in equipoise on the issue of whether the large opacities found on x-rays were representative of complicated pneumoconiosis" because Drs. Patel, Wheeler, and Scott disagree as to whether claimant suffered from complicated pneumoconiosis. Decision and Order at 13. Employer argues that, in considering these physicians' qualifications, the administrative law judge erred by failing to consider the professional appointments of Drs. Wheeler and Scott. Employer asserts, and the record reveals, that both Dr. Wheeler and Dr. Scott are associate professors of radiology at The

[9] A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[10] The administrative law judge noted that Dr. Gaziano read the October 22, 2001 x-ray for quality only. Director's Exhibit 14. Dr. Gaziano also noted on his x-ray report that a mass existed and that cancer should be ruled out. *Id.*

Johns Hopkins Medical Institutions. Director's Exhibit 31. Employer maintains that Drs. Wheeler's and Scott's "professorships in radiology at one of the nation's most renowned medical centers give their readings controlling weight" over the x-ray reading of Dr. Patel. Employer's Brief at 11.

An administrative law judge "is not barred from considering further factors relevant to the level of radiological competence" of an x-ray reader, after considering the B reader and Board-certified status of a physician who has read an x-ray. *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993). Because we remand this case for the administrative law judge to reconsider her exclusion of employer's rereadings of the digital x-rays contained in the miner's treatment records, it is possible that the x-ray evidence in the record may change on remand. While the additional qualifications of Drs. Wheeler and Scott do not mandate that their x-ray interpretations be accorded greater weight, we instruct the administrative law judge to consider these physicians' additional qualifications on remand, as they may affect her findings regarding the x-ray evidence. *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003).

Regarding the administrative law judge's consideration of the medical opinion evidence pursuant to Section 718.304(c), employer asserts that Dr. Rasmussen's opinion "should have been discredited because his diagnosis of pneumoconiosis was merely a restatement of Dr. Patel's positive [x-ray] reading." Employer's Brief at 13. Employer further contends that Dr. Rasmussen also relied in large part on the miner's history of coal dust exposure, which, "by itself, is insufficient to establish the existence of pneumoconiosis." *Id.* at 14. An administrative law judge may permissibly discredit a diagnosis of complicated pneumoconiosis when she determines that it is merely a restatement of an x-ray opinion. *See Worhach*, 17 BLR at 1-110; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Moreover, occupational exposure is not evidence of pneumoconiosis, but merely a reason to expect that evidence of the disease might be found. *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); *see generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998) (Just as a miner's length of coal mine employment does not compel the conclusion that his disability was entirely respiratory in nature, it also does not conclusively establish that the miner's pneumoconiosis contributed to his total respiratory disability). In light of employer's assertions, we instruct the administrative law judge to address these considerations when reevaluating the medical opinion evidence on remand.

Finally, if, on remand, the administrative law judge does not find that claimant has established the existence of complicated pneumoconiosis pursuant to Section 718.304, she must then consider whether claimant has established entitlement to benefits in the miner's claim by proving the existence of simple pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203(b), 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v.*

Director, OWCP, 9 BLR 1-1 (1986)(*en banc*). Additionally, the administrative law judge must consider whether claimant has established entitlement in her survivor's claim by proving the existence of simple pneumoconiosis arising out of coal mine employment and death due to pneumoconiosis. *See* 20 C.F.R. §§718.202, 718.203(b), 718.205(c); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85 (1993).

Accordingly, the administrative law judge's Decision and Order Granting Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge