

BRB No. 09-0345 BLA

JOHN W. SMITH)
)
 Claimant-Petitioner)
)
 v.)
)
 EASTERN ASSOCIATED COAL)
 COMPANY)
) DATE ISSUED: 01/27/2010
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (06-BLA-5132) of Administrative Law Judge Stephen L. Purcell denying benefits on a 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). This case involves a subsequent claim filed on September 30, 2004.¹ The administrative law judge, after crediting claimant with fifteen years of coal

¹ Claimant initially filed a claim for benefits on July 31, 1981. Director's Exhibit 1. In a Decision and Order dated June 16, 1987, Administrative Law Judge Thomas W.

mine employment,² found that the new evidence established the existence of a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2004 claim on the merits. In considering the merits of claimant's 2004 claim, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in not allowing him to obtain re-readings of an x-ray taken on December 29, 2004. Claimant also argues that the administrative law judge erred in not allowing him to designate his affirmative and rebuttal evidence pursuant to 20 C.F.R. §725.414. Claimant further contends that the administrative law judge, in considering whether the evidence established the existence of simple and complicated pneumoconiosis, erred in his weighing of the x-ray and CT scan evidence. Additionally, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer responds in support of the administrative law judge's denial of benefits. In the event that the denial of benefits is not affirmed, employer challenges the administrative law judge's finding that claimant established a change in an applicable condition of entitlement. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

Murrett found that the evidence did not establish that claimant suffered from a totally disabling respiratory or pulmonary impairment. *Id.* Accordingly, Judge Murrett denied benefits. *Id.* Claimant filed a second claim on September 11, 1991. Director's Exhibit 2. The district director denied benefits on February 18, 1992 because he found that the evidence did not establish that claimant was totally disabled due to pneumoconiosis. *Id.* Claimant filed a third claim on July 11, 1994. Director's Exhibit 3. In a Decision and Order dated January 2, 1997, Administrative Law Judge Edward J. Murty, Jr., found that the evidence did not establish that claimant was totally disabled due to pneumoconiosis. *Id.* Consequently, Judge Murty denied benefits. *Id.* Claimant filed his current claim on September 30, 2004. Director's Exhibit 4.

² The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner’s claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant’s Request to Obtain a Re-Reading of a December 29, 2004 X-Ray

Claimant initially argues that the administrative law judge erred in not permitting him to obtain a re-reading of a December 29, 2004 x-ray. We initially note that the admissibility of evidence in the instant case was complicated by the fact that the hearing was postponed and rescheduled on multiple occasions. As a result, by the time the administrative law judge held the hearing on May 23, 2007, the parties had submitted several different Evidence Summary forms. During the hearing, after an extended discussion regarding the state of the evidence, the administrative law judge determined that it was necessary to clarify the evidence that the parties wished to submit in support of their respective cases. Consequently, the administrative law judge ordered the parties “to submit briefs post-hearing identifying each of their exhibits as far as whether they’re being offered as affirmative evidence, rebuttal evidence or rehabilitative evidence.” Hearing Tr. at 51-52.

After the parties filed post-hearing briefs designating their respective affirmative and rebuttal evidence, the administrative law judge issued an “Order Designating Admissible Evidence” on September 5, 2007. In response, claimant requested reconsideration, arguing, *inter alia*, that he was not afforded an opportunity to adequately rebut employer’s affirmative interpretation of a December 29, 2004 x-ray because employer did not comply with claimant’s requests to provide him with the x-ray film.

In an Order on Reconsideration dated September 24, 2007, the administrative law judge rejected claimant’s argument, because claimant waited too long to raise the issue:

Claimant requested the [December 29, 2004] film from [e]mployer via letters written on February 16, 2006, and July 10, 2006. While [c]laimant did not receive the film itself from [e]mployer, [c]laimant did receive Dr. Zaldivar’s reading and decided to designate it as one of his affirmative readings permitted under 20 C.F.R. §725.414(a)(2)(i). As [c]laimant has

submitted a reading of the December 29, 2004, [x]-ray as one of his two affirmative readings, he is not entitled to rebuttal of his own [x]-ray.

Furthermore, [c]laimant did not bring to the undersigned's attention the unavailability of the December 29, 2004, [x]-ray until the July 23, 2007, post-hearing submission of *Claimant's Brief on Evidentiary Issues*. In this brief, [c]laimant raised the issue of the difficulty in obtaining the [x]-ray film and attached two letters sent to [e]mployer on February 16, 2006, and July 10, 2006, in which [c]laimant requested the films. The [Office of Administrative Law Judges] was not copied on these two letters when they were sent. Furthermore, at the May 23, 2007 hearing, [c]laimant made no mention of the December 29, 2004, [x]-ray film's unavailability. Claimant's argument that he has been denied the opportunity to obtain a dually-qualified reading of the X-ray or to rebut [e]mployer's affirmative reading is unconvincing given his failure to bring the film's unavailability to the undersigned's attention until after the hearing.

Order on Reconsideration dated September 24, 2007 at 1-2 (footnote omitted).

The administrative law judge also noted that claimant did not move to compel discovery of the x-ray film:

Claimant submitted a *Motion to Compel Discovery* on April 7, 2006, that he later withdrew on April 14, 2006, upon receiving the requested evidence. In the *Motion*, [c]laimant requested Dr. Zaldivar's reading of the December 29, 2004, [x]-ray, but did not request the film itself. It is unclear why [c]laimant did not file a similar motion to obtain the film, choosing instead to submit Dr. Zaldivar's reading as his affirmative evidence. On May 3, 2007, Claimant again submitted a *Motion to Compel Discovery* in which he requested all [x]-ray readings and rereadings, but not any films.

Order on Reconsideration dated September 24, 2007 at 2 n.3.

The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*). In this case, the administrative law judge found that, although claimant could have filed a motion to compel employer to produce the December 29, 2004 x-ray film, *see Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006), claimant failed to timely avail himself of this opportunity, waiting until after the hearing to do so. The administrative law judge, therefore, declined to grant claimant's post-hearing motion to compel employer to produce the December 29, 2004 film. Detecting no abuse of discretion by the administrative law judge, we reject claimant's argument that

he was improperly denied an opportunity to obtain a re-reading of the December 29, 2004 x-ray. *See Clark*, 12 BLR at 1-153.

Claimant's Right to Designate His Affirmative and Rebuttal Evidence

Claimant next argues that the administrative law judge erred in not adhering to claimant's designation of his affirmative and rebuttal evidence pursuant to 20 C.F.R. §725.414.³

The December 29, 2004 X-Ray

Claimant argues that the administrative law judge erred in admitting Dr. Zaldivar's positive interpretation of a December 29, 2004 x-ray as one of claimant's two affirmative x-ray interpretations. Claimant alleges that he designated Dr. Zaldivar's interpretation as rebuttal evidence. Upon review, we conclude that error, if any, by the administrative law judge on this issue was harmless.

The administrative law judge admitted Dr. Zaldivar's positive interpretation of a December 29, 2004 x-ray as one of claimant's two affirmative readings. Order Designating Admissible Evidence dated September 5, 2007. The administrative law

³ Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "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). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

judge admitted Dr. Wheeler's negative interpretation of the December 29, 2004 x-ray as one of employer's affirmative readings, and Dr. Scatarige's negative interpretation of the same x-ray as employer's rebuttal x-ray evidence. *Id.*

In regard to claimant's December 29, 2004 x-ray, the administrative law judge considered the interpretations rendered by Drs. Zaldivar, Wheeler, and Scatarige. While Dr. Zaldivar, a B reader, interpreted the December 29, 2004 x-ray as positive for simple pneumoconiosis, Claimant's Exhibit 6, Drs. Wheeler and Scatarige, each qualified as a B reader and Board-certified radiologist, interpreted the x-ray as negative for pneumoconiosis. Director's Exhibit 16; Employer's Exhibit 9. The administrative law judge acted within his discretion in crediting the negative interpretations of Drs. Wheeler and Scatarige over Dr. Zaldivar's positive interpretation, based upon their superior radiological qualifications. *See* 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 39. The administrative law judge, therefore, permissibly found that this x-ray is negative for pneumoconiosis. *Id.*

Claimant, however, argues that he designated only one affirmative x-ray reading, Dr. Ahmed's positive interpretation of a March 3, 2006 x-ray. Claimant asserts that he did not designate Dr. Zaldivar's interpretation of the December 29, 2004 x-ray as affirmative evidence, but rather as rebuttal evidence to Dr. Wheeler's negative interpretation of the December 29, 2004 x-ray. Claimant, therefore, argues that employer should not have been permitted to submit Dr. Scatarige's negative interpretation of the December 29, 2004 x-ray as rebuttal to Dr. Zaldivar's positive reading. However, even if Dr. Scatarige's x-ray interpretation were excluded, the administrative law judge would have still credited Dr. Wheeler's negative interpretation of claimant's December 29, 2004 x-ray over Dr. Zaldivar's positive interpretation, based upon Dr. Wheeler's superior qualifications. Consequently, the administrative law judge's error, if any, in his designation of Dr. Zaldivar's x-ray as claimant's affirmative evidence, rather than rebuttal evidence, is harmless.⁴ *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

The December 29, 2004 CT Scan

Claimant further contends that the administrative law judge erred in his treatment

⁴ Because Drs. Zaldivar, Wheeler, and Scatarige all interpreted claimant's December 29, 2004 x-ray as negative for complicated pneumoconiosis, Director's Exhibit 16; Claimant's Exhibit 6; Employer's Exhibit 9, the administrative law judge properly found that this x-ray is negative for complicated pneumoconiosis. Decision and Order at 32.

of the interpretations of a December 29, 2004 CT scan. The administrative law judge admitted Dr. Anton's interpretation of the December 29, 2004 CT scan as claimant's affirmative interpretation and Dr. Scatarige's interpretation of this CT scan as employer's affirmative interpretation. Order Designating Admissible Evidence dated September 5, 2007; *see* 20 C.F.R. §718.107. The administrative law judge also admitted Dr. Zaldivar's interpretation of the December 29, 2004 CT scan as claimant's rebuttal evidence and Dr. Scott's interpretation of the December 29, 2004 CT scan as employer's rebuttal evidence. Order Modifying Designation of Evidence dated September 10, 2007 at 1.

In considering whether claimant's December 29, 2004 CT scan supported a finding of simple pneumoconiosis, the administrative law judge stated:

The CT scan performed on December 29, 2004 was interpreted as positive for pneumoconiosis by Dr. Anton, a Board Certified Radiologist, and Dr. Zaldivar, a B reader. As the same CT scan was interpreted as negative by two dually qualified physicians, Dr. Scatarige and Dr. Scott, I find it to be negative for pneumoconiosis.

Decision and Order at 41. The administrative law judge acted within his discretion in crediting the negative interpretations of the December 29, 2004 CT scan rendered by Drs. Scatarige and Scott, based upon their superior qualifications. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-65; *Sheckler*, 7 BLR at 1-131; Director's Exhibit 16; Claimant's Exhibits 5, 6; Employer's Exhibits 1, 6.

Claimant, however, argues that he designated only Dr. Anton's interpretation of the December 29, 2004 CT scan as rebuttal evidence to Dr. Scatarige's interpretation. Claimant's Brief at 12 n.9. Claimant asserts that he did not designate Dr. Zaldivar's interpretation of the December 29, 2004 CT scan as either affirmative or rebuttal evidence. *Id.* Claimant, therefore, argues that employer should not have been permitted to submit Dr. Scott's interpretation of the December 29, 2004 CT scan as rebuttal evidence. However, even if the CT scan interpretations of Drs. Zaldivar and Scott were excluded, the administrative law judge would still have credited Dr. Scatarige's negative interpretation over Dr. Anton's positive interpretation, based upon Dr. Scatarige's superior qualifications. Consequently, the administrative law judge's error, if any, in his designation of the interpretations of the December 29, 2004 CT scan, is harmless.⁵ *See Larioni*, 6 BLR at 1-1278.

⁵ Because none of the physicians (Drs. Anton, Zaldivar, Scatarige or Scott) interpreted the December 29, 2004 CT scan as positive for complicated pneumoconiosis, Director's Exhibit 16; Claimant's Exhibits 5, 6; Employer's Exhibit 6, the administrative

Admissibility of Dr. Wiot's Interpretations

Claimant argues that the administrative law judge erred in his consideration of Dr. Wiot's interpretations of two x-rays and a CT scan. The administrative law judge admitted Dr. Wiot's negative interpretation of a January 25, 2005 x-ray as one of employer's two affirmative x-ray interpretations and Dr. Wiot's negative interpretation of a March 3, 2006 x-ray as employer's rebuttal evidence. The administrative law judge also admitted Dr. Wiot's interpretation of a March 3, 2006 CT scan as employer's affirmative evidence. However, because Dr. Wiot rendered his interpretations in the form of a narrative report, in which he interpreted several other x-rays and CT scans, claimant argues that the administrative law judge "erred by trying to extract individual readings from Dr. Wiot's collective assessment." Claimant's Brief at 14. Claimant contends that there is no way of knowing whether Dr. Wiot would have made the same readings if he had rendered individual interpretations of the films. We disagree. Dr. Wiot clearly indicated that he interpreted the January 25, 2005 and March 3, 2006 x-rays, and the March 3, 2006 CT scan, as negative for pneumoconiosis.⁶ See Employer's

law judge properly found that this CT scan is negative for complicated pneumoconiosis. Decision and Order at 34.

Claimant argues that the administrative law judge erred in failing to address the fact that Dr. Scatarige indicated that the December 29, 2004 CT scan was "incomplete." We disagree. Although Dr. Scatarige noted certain limitations, he did not indicate that the December 29, 2004 CT scan was unacceptable for interpretation. Dr. Scatarige reported that there were no small round opacities to suggest coal workers' pneumoconiosis. Director's Exhibit 16. We reject claimant's additional contention that the administrative law judge erred in treating Dr. Scott's interpretation of the December 29, 2004 CT scan as negative for pneumoconiosis. Although the administrative law judge recognized that Dr. Scott's interpretation of the December 29, 2004 CT scan was "silent as to the presence of pneumoconiosis," the administrative law judge permissibly construed his report as negative for pneumoconiosis in light of the fact that "Dr. Scott specifically reviewed the [December 29, 2004] CT scan for pneumoconiosis in connection with this litigation." See *Marra v. Consolidation Coal Co.*, 7 BLR 1-216 (1984); Decision and Order at 34; Employer's Exhibit 6.

⁶ In his June 16, 2006 narrative report, Dr. Wiot indicated that the findings on the x-rays "are not those of coal workers' pneumoconiosis." Employer's Exhibit 5. Dr. Wiot further indicated that none of the CT scans shows any evidence of coal workers' pneumoconiosis. *Id.* Moreover, Dr. Wiot completed a separate x-ray report for the March 3, 2006 film, interpreting it as negative for both simple and complicated pneumoconiosis. *Id.*

Exhibits 5, 15. We, therefore, hold that the administrative law judge properly considered Dr. Wiot's negative interpretations of the January 25, 2005 and March 23, 2006 x-rays, and the March 3, 2006 CT scan, as negative for simple and complicated pneumoconiosis.

The Existence of Pneumoconiosis

Section 718.202(a)(1)

Claimant argues that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge considered both the new x-ray evidence and the x-ray evidence submitted in connection with claimant's prior claims and considered the readers' radiological qualifications. After evaluating the interpretations of each x-ray, the administrative law judge found that:

In sum, of the x-rays submitted with the current claim, I have found one x-ray to be negative, one to be inconclusive, and the remaining three x-rays to be in equipoise. Of the x-rays submitted with the prior claims, I have found one to be positive, six to be negative, and two to be inconclusive. I conclude therefore that [c]laimant cannot be found to have pneumoconiosis on the basis of the x-ray evidence.

Decision and Order at 41.

Claimant contends that the administrative law judge erred finding that the November 3, 2004 x-ray does not support a finding of pneumoconiosis. While Dr. Alexander, a B reader and Board-certified radiologist, interpreted the November 3, 2004 x-ray as positive for both simple and complicated pneumoconiosis, Claimant's Exhibit 2, Dr. Scott, an equally qualified physician, interpreted this x-ray as negative for both simple and complicated pneumoconiosis. Director's Exhibit 16. Dr. Forehand, a B reader, interpreted this x-ray as positive for simple pneumoconiosis, but negative for complicated pneumoconiosis. Director's Exhibit 14. Because the best qualified physicians, Drs. Alexander and Scott, disagreed as to whether the November 3, 2004 x-ray established the existence of simple and complicated pneumoconiosis, the administrative law judge permissibly found that the evidence was equally balanced, and that the November 3, 2004 x-ray was, therefore, insufficient to support a finding of simple or complicated pneumoconiosis. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-65; *Sheckler*, 7 BLR at 1-131; Decision and Order at 32, 39.

We reject claimant's contention that the administrative law judge failed to assign appropriate weight to Dr. Forehand's positive interpretation of the November 3, 2004, x-ray. Having determined that the interpretations of the dually-qualified physicians were entitled to the greatest weight, *see Sheckler*, 7 BLR at 1-131, the administrative law judge

properly declined to accord determinative weight to an x-ray interpretation rendered by a lesser qualified B reader to resolve the evidentiary conflict.

Because claimant does not allege any additional error in regard to the administrative law judge's consideration of the x-ray evidence, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).⁷

Section 718.202(a)(3)

Claimant contends that the administrative law judge erred in finding that the evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.⁸ Specifically, claimant argues that the administrative law judge erred in finding that the February 14, 2005 CT scan evidence did not support a finding of complicated pneumoconiosis.⁹ 20 C.F.R. §718.304(c). Dr. Groten, a Board-certified radiologist, interpreted claimant's February 14, 2005 CT scan as revealing "multiple pulmonary parenchymal masses . . . most likely secondary to complicated pneumoconiosis." Director's Exhibit 15. Dr. Groten noted that the largest of the nodules "measures approximately 1 cm in diameter." *Id.* Dr. Scatarige, a B reader and Board-certified radiologist, also interpreted this CT scan, finding no small, central round opacities to suggest coal workers' pneumoconiosis. Employer's Exhibit 1. The administrative law judge acted within his discretion in crediting Dr. Scatarige's negative

⁷ Because claimant does not challenge the administrative law judge's finding that the biopsy evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁸ Claimant is not entitled to the other presumptions set forth at 20 C.F.R. §718.202(a)(3). The Section 718.305 presumption is inapplicable because claimant's claim was filed after January 1, 1982. 20 C.F.R. §718.305(e). Claimant is not entitled to the Section 718.306 presumption because it applies only to survivors' claims. 20 C.F.R. §718.306.

⁹ CT scan evidence falls into the "other means" category of establishing complicated pneumoconiosis at 20 C.F.R. §718.304(c). *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*). Claimant does not challenge the administrative law judge's findings that the x-ray and biopsy evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), (b). These findings are, therefore, affirmed. *See Skrack*, 6 BLR at 1-711.

interpretation over Dr. Groten's positive interpretation based upon his superior qualifications. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-65; *Sheckler*, 7 BLR at 1-131; Decision and Order at 41. The administrative law judge, therefore, permissibly found that this CT scan is negative for pneumoconiosis.¹⁰ *Id.*

Because claimant does not allege any additional error in regard to the administrative law judge's consideration of the CT scan evidence, we affirm the administrative law judge's finding that the CT scan evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). Consequently, the administrative law judge's finding that claimant is not entitled to invocation of the Section 718.304 presumption is affirmed. 20 C.F.R. §§718.202(a)(3), 718.304.

Section 718.202(a)(4)

Lastly, claimant argues that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis¹¹ pursuant to 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §718.201(a)(2). In addressing the issue of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Zaldivar, Tuteur, Forehand, and Rasmussen. The administrative law judge found that the opinions of Drs. Zaldivar, Tuteur, and Forehand, that claimant does not suffer from a lung disease arising out of his coal mine employment, were of little probative value because they are not sufficiently reasoned. Moreover, the administrative law judge found that Dr. Rasmussen's opinion, the only medical opinion that attributed claimant's respiratory impairment to his coal dust exposure, was "equivocal, internally inconsistent and based on generalities." Decision and Order at 53. The administrative law judge, therefore, found that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant argues that the administrative law judge erred in finding that Dr. Rasmussen's opinion did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). We disagree. The administrative law judge permissibly found that Dr. Rasmussen, in attributing claimant's chronic obstructive pulmonary disease in part to his coal dust exposure, failed to adequately explain his basis for initially identifying asthma as an "obvious cause" for claimant's obstructive impairment, but then

¹⁰ Claimant provides no support for his assertion that it is improper for an administrative law judge to consider a physician's status as a B reader in weighing conflicting CT scan evidence.

¹¹ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

later, excluding asthma as a cause. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); Decision and Order at 45. Despite characterizing claimant's asthma as an "obvious" potential cause of his lung disease and acknowledging that claimant exhibited a significant, partial reversibility of airway obstruction in 1995 (a finding that Dr. Rasmussen characterized as being "consistent with bronchial asthma"), Dr. Rasmussen subsequently stated, without explanation, that reversibility of airway obstruction was not diagnostic of bronchial asthma. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155; Claimant's Exhibit 1. Further, the administrative law judge permissibly found that the record contains evidence suggesting that claimant has asthma, which was not adequately addressed by Dr. Rasmussen. *See Cooper v. United States Steel Corp.*, 7 BLR 1-842, 1-845 (1985). The administrative law judge acted within his discretion as the fact-finder when he also accorded less weight to Dr. Rasmussen's opinion because he found that it was "based on generalities." Decision and Order at 53; *see Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103-4 (7th Cir. 2008); *Knizer v. Bethlehem Mining Corp.*, 8 BLR 1-5, 1-7 (1985). The administrative law judge noted that Dr. Rasmussen based his opinion, that cigarette smoking and coal mine dust both significantly contributed to claimant's chronic obstructive pulmonary disease, on medical literature supportive of the proposition that both cigarette smoking and coal mine dust are known to cause chronic obstructive pulmonary disease. Dr. Rasmussen, however, did not indicate that he based his opinion upon any information particular to claimant's case. Claimant's Exhibits 1, 9, 11. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Dr. Rasmussen's opinion does not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant does not allege any additional error in regard to the administrative law judge's consideration of the medical opinion evidence. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).¹²

¹² In light of our affirmance of the administrative law judge's denial of benefits, we need not address employer's challenges to the administrative law judge's finding pursuant to 20 C.F.R. §725.309. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge