BRB No. 07-0777 BLA

B.B.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CUMBERLAND RIVER COAL COMPANY	)	
	)	
and	)	
	)	
UNDERWRITERS SAFETY & CLAIMS	)	DATE ISSUED: 07/31/2008
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 – Award of Benefits (2004-BLA-06718)[1] of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a subsequent 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).[2] In his Decision and Order dated May 18, 2007, the administrative law judge determined that the claim before him was a timely filed subsequent claim pursuant to 20 C.F.R. §§725.308 and 725.309. The administrative law judge credited claimant with at least seventeen years of coal mine employment, based on the record and a stipulation by the parties, and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that the newly submitted evidence was sufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) and, thus, that claimant had established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Reviewing the record evidence on the merits of entitlement, the

[1] In his Decision and Order, the administrative law judge incorrectly listed the case number as "2005-BLA-5086." *See* Hearing Transcript at 4.

[2] Claimant filed his first claim for benefits on February 3, 1992, which was denied by Administrative Law Judge Richard K. Malamphy in a Decision and Order issued on July 23, 1993, because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 1 at 495. Claimant appealed, and the Board affirmed the denial of benefits. Director's Exhibit 1 at 436; *see [B.B.] v. Cumberland River Coal Co.*, BRB No. 93-2140 BLA (July 29, 1993) (unpub.). The United States Court of Appeals for the Sixth Circuit vacated the denial of benefits and remanded the case to the Office of Administrative Law Judges. *[B.B.] v. Cumberland River Coal Co.*, No. 94-3877 (6th Cir. Mar. 15, 1995)(unpub.); Director's Exhibit 1 at 400. On remand, in a Decision and Order issued on May 15, 1996, Judge Malamphy denied benefits because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 1 at 379. Claimant took no further action with regard to the denial of his initial claim until he filed a duplicate claim on January 5, 2000, which the district director denied on July 3, 2000, because claimant failed to establish the existence of pneumoconiosis and, therefore, did not demonstrate a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 2 at 49. Claimant sought reconsideration, which the district director denied on February 20, 2001. Director's Exhibit 2 at 43. Claimant took no further action with regard to the denial of his duplicate claim until he filed this subsequent claim on July 11, 2003. Director's Exhibit 4.

administrative law judge determined that claimant established the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and that pneumoconiosis was a substantially contributing cause of his total disability under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding claimant's subsequent claim to be timely filed under 20 C.F.R. §725.308. In addition, employer contends that the administrative law judge erred in his determination that a change in the applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309. Employer also argues that the administrative law judge erred in excluding Dr. Wiot's post-hearing x-ray reading. Employer also challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, declining to address the merits of this claim, but urging the Board to reject employer's arguments pursuant to 20 C.F.R. §§725.308, 725.309(d), as the Director asserts that the administrative law judge properly resolved the timeliness issue and that the administrative law judge was not required to perform a qualitative analysis of the evidence before making a determination that a change in an applicable condition of entitlement was established.[3]

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

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings with regard to the length of claimant's coal mine employment and total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment took place in Kentucky. Director's Exhibit 3; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Timeliness of the Subsequent Claim

Section 422(f) of the Act, 30 U.S.C. §932(f), as implemented by 20 C.F.R. §725.308(a), provides that a claim for benefits by, or on behalf of, a miner must be filed within three years of "a medical determination of total disability due to pneumoconiosis. . . ." 30 U.S.C. §932(f). The terms of 20 C.F.R. §725.308 require that the medical determination be "communicated to the miner or a person responsible for the care of the miner. . . ," and further provide a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c). The United States Court of Appeals for the Sixth Circuit held in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001), that "[t]he three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis. . . ." *Kirk*, 264 F.3d at 608, 22 BLR at 2-298; *Brigance v. Peabody Coal Co.*, 23 BLR 1-170, 1-174-175 (2006)(*en banc*). In *Adkins v. Donaldson Coal Co.*, 19 BLR 1-34 (1993), the Board held that "communication to the miner" requires that the medical determination "is actually received by the miner." *Adkins*, 19 BLR at 1-43; *see also Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-95 (1993) (receipt of a medical determination of total disability due to pneumoconiosis by a claimant's attorney does not constitute communication to the miner).

The administrative law judge rejected employer's allegation that the subsequent claim was not timely filed, as "[e]mployer has pointed to no evidence that a physician offered any opinion to the [c]laimant, much less a well reasoned opinion, that he was totally disabled due to pneumoconiosis," and employer "did not even address the issue" in its post-hearing brief. Decision and Order at 5. The administrative law judge also noted that "[e]mployer has shown no evidence that any physician communicated his findings to [c]laimant." Decision and Order at 6 n.7. In this regard, the Director notes that "[g]iven the lack of evidence that Dr. Rasmussen's report was directly communicated to [claimant], the [administrative law judge] properly determined that the claim was timely filed." Director's Letter Brief at 3.

Employer contends that the administrative law judge's analysis of the timeliness issue does not accord with the requirements of the Administrative Procedure Act (the APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a). In this regard, employer argues that the administrative law judge failed to determine whether Dr. Rasmussen's March 15, 2000 report, submitted in conjunction with claimant's prior claim, constituted a communication to claimant of a medical determination of total disability due to pneumoconiosis under 20 C.F.R. §725.308. Claimant and the Director respond, asserting that the administrative law judge did not err in finding that this claim was timely filed because employer failed to identify with specificity evidence that would satisfy its burden of proof and, furthermore, that there is no proof that Dr. Rasmussen's conclusions were ever communicated to claimant.

Employer's allegations of error in the administrative law judge's finding under 20 C.F.R. §725.308 have merit, in part.[5] Contrary to the administrative law judge's view, employer's failure to explicitly identify the medical determination of total disability that was communicated to claimant does not provide a basis for rejecting employer's timeliness argument, as such a holding would be tantamount to a finding that employer waived the issue. Because timeliness is a jurisdictional issue, however, it cannot be waived and must be fully addressed by the administrative law judge. *See Cabral v. Eastern Associated Coal Co.*, 18 BLR 1-25 (1993). In addition, in this case, the administrative law judge's determination that Dr. Rasmussen's March 15, 2000 report contained a well-reasoned and well-documented diagnosis of total disability due to pneumoconiosis necessarily raises the question of whether this opinion is sufficient to establish rebuttal of the presumption that claimant's 2003 subsequent claim was timely filed. *See* Decision and Order at 20, 23. Because this is a question of fact that must be resolved by the administrative law judge, we vacate the administrative law judge's finding under 20 C.F.R. §725.308 and remand this case for further consideration of this issue. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

The administrative law judge must determine on remand whether Dr. Rasmussen's report constitutes a "medical determination of total disability due to pneumoconiosis which was communicated to" claimant more than three years before he filed his current claim. 20 C.F.R. §725.308(a); *see Furgerson v. Jericol Mining Inc.*, 22 BLR 1-206 (2002); *Abshire v. D&L Coal Co.*, 22 BLR 1-202 (2002)(*en banc*). In so doing, the administrative law judge must set forth his findings in detail, including the underlying rationale, as required by the APA. *Wojtowicz*, 12 BLR at 1-165. If the administrative law judge determines that Dr. Rasmussen's report satisfies the terms of 20 C.F.R. §725.308(a) and, therefore, that employer has rebutted the presumption that claimant's subsequent claim was timely filed, entitlement to benefits is precluded and the administrative law judge need not reach the remaining issues in this case. *Kirk*, 264 F.3d at 607, 22 BLR at 2-298; *Sturgill v. Bell County Coal Corp.*, 23 BLR 1-159, 1-166 (2006)(*en banc*).

Although we have vacated the administrative law judge's award of benefits and are remanding this case to the administrative law judge for further consideration at 20 C.F.R. §725.308, in the interest of judicial economy and to avoid the repetition of error

[5] We reject employer's contention that communication to claimant's attorney is equivalent to communication to claimant since the Board has held that a medical report must be provided directly to claimant to commence the Act's limitation period. *Daughtery v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-96, 1-99 (1999).

on remand, we will also address employer's allegations of error with respect to the administrative law judge's findings under 20 C.F.R. §§725.309, 718.202(a)(1), (4), and 718.204(c).

The Subsequent Claim

Pursuant to 20 C.F.R. §725.309(d), 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 judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 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 was denied because he failed to establish that he had pneumoconiosis. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis in order to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

In his consideration of 20 C.F.R. §725.309, the administrative law judge found that total disability was established based upon his determination that the newly submitted evidence was sufficient to establish total disability. Decision and Order at 19-28. Employer contends that the administrative law judge erred in finding that a change in conditions was established, based on new evidence of total respiratory disability, when the prior denial was actually based on a finding that claimant failed to establish the existence of pneumoconiosis. Employer also asserts that because this case arises within the jurisdiction of the Sixth Circuit, the administrative law judge's analysis pursuant to 20 C.F.R. §725.309(d) must include consideration of the qualitative difference between the prior evidence and the new evidence, consistent with *Kirk*, 264 F.3d 602, 22 BLR 2-288; *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003); *Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80 (2000)(*en banc*)(Hall and Nelson, JJ., concurring and dissenting).

We agree with employer that the administrative law judge erred in finding a change in an applicable condition of entitlement demonstrated based upon the administrative law judge's determination that the newly submitted evidence was sufficient to establish total disability. A review of the record reveals that the claims for benefits filed by claimant have been denied because the evidence did not show that claimant had pneumoconiosis or that claimant was totally disabled by the disease. Claimant has consistently been found to have established that he is suffering from a

totally disabling respiratory impairment.[6] Consequently, claimant was required to submit new medical evidence proving that he now has pneumoconiosis in order for the administrative law judge to proceed to consider the merits of claimant's 2003 subsequent claim. 20 C.F.R. §725.309(d)(2), (3); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*), *vac'd and remanded on other grounds, Sewell Coal Corp. v. Director, OWCP* [*Dempsey*], F.3d , 2008 WL 1795592 (4th Cir. 2008). Because the administrative law judge did not address the correct element of entitlement when considering whether claimant satisfied the terms of 20 C.F.R. §725.309(d), we vacate the administrative law judge's finding and instruct the administrative law judge to reconsider this issue on remand. The administrative law judge must consider whether the newly submitted evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[7]

Weighing of the Medical Evidence

Employer has raised several allegations of error with respect to the administrative law judge's consideration of the medical evidence under 20 C.F.R. §§718.202(a)(1), (4) and 718.204(c). Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered interpretations of films dated March 15, 2000, March 16, 2000, July 29, 2003, September 18, 2003, March 29, 2004 and November 25, 2005. Decision and Order at 22; Director's Exhibits 13, 17-19; Claimant's Exhibits 1, 4; Employer's Exhibit 4. The administrative law judge determined that the film dated March 15, 2000 was negative,

[6] Claimant's 1992 claim contained qualifying pulmonary function study results, as well as medical opinions of total disability, but Judge Malamphy denied the claim on the ground that the evidence was insufficient to establish the existence of pneumoconiosis. Director's Exhibit 1. Claimant's 2000 claim was denied by the district director on July 3, 2000. The district director's Summary of Medical and Employment Evidence Form listed the qualifying values of claimant's pulmonary function studies and blood gas studies performed on March 15 and 16, 2000, as well as unanimous opinions, by Drs. Rasmussen and Dahhan, diagnosing a totally disabling respiratory impairment. Director's Exhibit 2.

[7] As the Board indicated in *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(*en banc*) and *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004)(*en banc*), however, the administrative law judge is not required to consider separately whether claimant has proven that the form of pneumoconiosis from which he is suffering is progressive and has actually progressed since the denial of a prior claim. Newly submitted evidence that establishes the existence of pneumoconiosis when pneumoconiosis was not demonstrated in the earlier claim suffices to demonstrate that the pneumoconiosis from which the claimant now suffers is progressive.

based upon the preponderance of readings by physicians who were dually qualified as Board-certified radiologists and B readers. Decision and Order at 22. Regarding the film dated March 16, 2000, the administrative law judge found it to be negative based upon the uncontradicted readings of Drs. Dahhan and Wiot. *Id*. The administrative law judge determined that the x-ray obtained on July 29, 2003 was positive, as Dr. Wiot's negative reading was outweighed by the contrary readings of Drs. Forehand and Alexander. *Id*. With respect to the film dated September 18, 2003, the administrative law judge found it to be negative in light of the uncontradicted negative reading of Dr. Wiot. *Id*. The administrative law judge determined that the x-ray dated March 29, 2004 was positive, as Dr. Patel's positive interpretation was uncontradicted. *Id*. The administrative law judge accorded no weight to Dr. Wiot's negative interpretation of the film dated November 25, 2005, because Dr. Wiot indicated that film was "quality 3." *Id*.; Employer's Exhibit 4. Noting that he had found the x-ray evidence from claimant's earlier claim to be negative for pneumoconiosis, the administrative law judge concluded, based upon the preponderance of the newly submitted x-ray evidence, that the existence of pneumoconiosis was established at 20 C.F.R. §718.202(a)(1).

Employer contends that the administrative law judge erred in his evaluation of the March 29, 2004 x-ray by considering only Dr. Patel's positive reading and failing to include Dr. Wiot's negative reading of the same x-ray. Employer's Brief at 22-24. This contention has merit. The administrative law judge's determination that Dr. Patel's positive interpretation was uncontradicted was based upon his exclusion of Dr. Wiot's rereading of this x-ray. At the hearing, held on July 27, 2006, when claimant's counsel proffered Dr. Patel's reading of the March 29, 2004 x-ray, employer's counsel waived her objection to the admission "with the understanding that I'll have an opportunity post-hearing" to have the x-ray reread and submitted as rebuttal evidence. Hearing Transcript at 6-8. Employer submitted Dr. Wiot's reading of the March 29, 2004 x-ray to the administrative law judge on August 29, 2006. In his Decision and Order, however, the administrative law judge stated:

> Employer filed [a reading of the March 29, 2004] x-ray in September by Dr. Wiot, over two months after the hearing. However, I specifically stated at the hearing that should either party wish to submit additional evidence beyond what was designated in their summary evidence form, they needed to submit an amended summary evidence form to include the new evidence for consideration. (Tr. 9). Employer did not do this – thus the Employer's reading of the March 29, 2004 x-ray is not admitted.

Decision and Order at 9 n.19. As employer correctly points out, Dr. Wiot's reading was submitted on August 29, 2006, and therefore within the sixty-day period for submitting post-hearing evidence that the administrative law judge imposed upon the parties at the hearing held on July 27, 2006. Hearing Transcript at 24-25; Employer's Brief at 22.

Thus, we agree with employer that exclusion of this evidence as untimely was not a valid rationale for excluding Dr. Wiot's x-ray reading.

As to the second reason offered by the administrative law judge for excluding Dr. Wiot's x-ray interpretation - that employer did not submit an amended summary evidence form with Dr. Wiot's reading - employer asserts that the only discussion at the hearing in reference to amending the evidence summary form occurred after employer's counsel indicated that some treatment records were going to be submitted post-hearing. The administrative law judge stated that "[i]f any more records are submitted by either party this goes to and you submitted a summary evidence form, it must be amended to include those." Hearing Transcript at 9. Employer contends that the administrative law judge's statement "did not clearly order the parties to amend their evidence summary forms in order for the evidence to be admitted" and that the administrative law judge never indicated "he would summarily exclude evidence submitted in a timely manner." Employer's Brief at 23-24.

We are persuaded by employer's argument that the administrative law judge's instructions were unclear regarding both the requirement to amend the evidence summary form in order for the post-hearing submission to be admitted and the consequences of failing to amend the form. Moreover, the Board has indicated that the exclusion of evidence based upon a party's failure to strictly comply with requirements established by the regulations or the administrative law judge is disfavored. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*) (McGranery & Hall, JJ., concurring and dissenting). Accordingly, we vacate the administrative law judge's exclusion of Dr. Wiot's post-hearing x-ray reading and instruct the administrative law judge to reconsider the issue on remand.

Employer also contends that the administrative law judge erred in discounting Dr. Wiot's x-ray reading of the November 25, 2005 x-ray. We agree. In considering this x-ray, the administrative law judge stated that:

> The fourth and final x-ray dated November 25, 2005 was read by Dr. Wiot to be negative for pneumoconiosis. However, Dr. Wiot found that the film was "quality 3." If a film's quality is poor or unreadable, then the study may be given little or no probative value as it is very poor quality. *Gober v. Reading Anthracite Co.*, 12 B.L.R. 1-67 (1988). Since Dr. Wiot, a highly credentialed reader, found this x-ray to be quality three, I accord it no weight for determining the existence of pneumoconiosis.

Decision and Order at 22; *see* Employer's Exhibit 4. The administrative law judge did not adequately explain why this film, with a quality 3 rating, is entitled to "no weight" since the radiologist did not indicate that the film was unreadable. *See Gober*, 12 BLR at

1-70. As employer indicates, Dr. Wiot stated at his deposition that the film was acceptable from a quality standpoint. Employer's Brief at 25-26; Employer's Exhibit 7 at 22-23. We vacate, therefore, the administrative law judge's finding with respect to Dr. Wiot's reading of the November 25, 2005 x-ray reading. The administrative law judge must reconsider this reading on remand.

In light of the foregoing, we vacate the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(1) and instruct the administrative law judge to reconsider this issue on remand. Furthermore, since the administrative law judge's consideration and weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4) may have been influenced by his determination that the x-ray evidence established clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), we vacate his finding thereunder. We also find merit in employer's assertion that the administrative law judge must reconsider his finding, pursuant to 20 C.F.R. §718.202(a)(4), that Dr. Jarboe's opinion is entitled to no weight on the issue of clinical pneumoconiosis, as Dr. Jarboe erroneously stated that Dr. Forehand's 1/0 reading of the July 29, 2003 x-ray was negative for the disease. Decision and Order at 26. Employer indicates correctly that Dr. Jarboe did not state that Dr. Forehand's x-ray interpretation was negative for pneumoconiosis, but instead, "merely noted that a 1/0 x-ray interpretation reflects that the reader considered the possibility of a category 0 (*i.e.* negative) interpretation, in addition to the category 1 (*i.e.* positive) interpretation." *Id*.

Because the administrative law judge's analysis of whether claimant satisfied his burden of proving total disability due to pneumoconiosis was influenced by his finding that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a), we also vacate the administrative law judge's disability causation determination at 20 C.F.R. §718.204(c).

In summary, we vacate the administrative law judge's determination that claimant's subsequent claim was timely filed pursuant to 20 C.F.R. §725.308, and his findings under 20 C.F.R. §§725.309(d), 718.202(a), and 718.204(c). We remand this case to the administrative law judge for reconsideration of these issues. If the administrative law judge determines that employer has rebutted the presumption that claimant's subsequent claim was timely filed, entitlement to benefits is precluded and the administrative law judge need not reach the remaining issues in this case. *Kirk*, 264 F.3d at 607, 22 BLR at 2-298. If the administrative law judge finds that claimant's 2003 subsequent claim was timely filed, he must reconsider whether claimant has established, by a preponderance of the newly submitted evidence, a change in an applicable condition of entitlement at 20 C.F.R. §725.309 by demonstrating that he is now suffering from pneumoconiosis under 20 C.F.R. §718.202(a). If so, the administrative law judge must

consider whether claimant has established, based on a *de novo* review of the entire record, the existence of pneumoconiosis at 20 C.F.R. §718.202(a).[8]

If the administrative law judge determines that claimant has proven that he has pneumoconiosis, the administrative law judge must assess all of the record evidence relevant to the issue of whether pneumoconiosis is a substantially contributing cause of claimant's disabling respiratory impairment at 20 C.F.R. §718.204(c). When considering the medical opinion evidence under 20 C.F.R. §§718.202(a)(4) and 718.204(c) on remand, the administrative law judge should address 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 opinions and the significance of any flaws in the opinions. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005). The administrative law judge also must provide an adequate rationale for his credibility findings in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

[8] In evaluating the conflicting x-rays and medical opinions on the issues of the existence of pneumoconiosis and disability causation, the administrative law judge did not consider the earlier medical opinions from claimant's initial claim since they were older. Although the administrative law judge can find such evidence to be of diminished probative value, *see generally Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc*), he must indicate that he has considered the evidence and set forth his finding regarding the weight to which it is entitled.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge