BRB No. 08-0643 BLA

W.A.Y.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
APOGEE COAL COMPANY/ARCH OF ILLINOIS	)	
	)	
	)	
and	)	
	)	DATE ISSUED: 06/30/2009
ARCH COAL, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Living Miner's Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Scott A. White (White & Risse, L.L.P.), Arnold, Missouri, for employer.

Heather A. Vitale (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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:

Claimant appeals the Decision and Order Denying Living Miner's Benefits (2004-BLA-06288) of Administrative Law Judge William S. Colwell rendered on a claim filed on February 25, 2003, 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). Director's Exhibit 4. The administrative law judge determined that claimant's Social Security Administration records established twenty-eight years and six months of coal mine employment and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that the evidence established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge further found, however, that the evidence is insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's evidentiary rulings at 20 C.F.R. §§725.406(a), 725.414(a)(2)(i), (4) and 725.456(b)(2). Claimant also argues that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.107(a) and total disability due to pneumoconiosis pursuant to Section 718.204(c). Employer responds and urges the Board to reject claimant's arguments and affirm the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response and argues that the administrative law judge erred by requiring claimant to submit Dr. Houser's supplemental letter as one of his two affirmative medical reports and urges the Board to vacate the denial of benefits and remand the case for further consideration, and admission of relevant medical evidence.[1]

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.[2] 33 U.S.C. §921(b)(3), as incorporated into the

[1] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3) and that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] The Board will apply the law of the United States Court of Appeals for the Seventh Circuit, as claimant was employed in the coal mining industry in Illinois. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Evidentiary Issues

A. Dr. Tippy's March 4, 2003 Letter

The administrative law judge held a formal hearing on May 2, 2006 and ruled on the parties' objections to the admission of evidence at a continuation of the hearing conducted by telephone on December 28, 2006. Claimant contends that the administrative law judge erred in excluding Dr. Tippy's March 4, 2003 letter on the ground that it was prepared for the purpose of litigation. Claimant asserts that the administrative law judge should have admitted it with the other treatment records from Dr. Tippy pursuant to Section 725.414(a)(4), which provides, in relevant part, that "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," notwithstanding the limitations set forth in Section 725.414(a)(2), (3). This contention is without merit.

Dr. Tippy addressed her letter "To Whom It May Concern" and noted that she has treated claimant since 1978. Director's Exhibit 6 at 21. Dr. Tippy listed claimant's medical, smoking and employment histories and indicated that he is suffering from asthma and reactive airways disease, "secondary to coal and rock dust inhalation or pneumoconiosis." *Id*. Dr. Tippy further noted that other physicians treating claimant agreed that he has "black lung disease" and that she was enclosing "other medical records" that supported her attribution of claimant's pulmonary disease to coal dust exposure. *Id*. The administrative law judge admitted these records, but excluded Dr. Tippy's letter, stating, "it appears to me to be prepared for litigation and is not a treatment record." Telephone Hearing Transcript at 6.

An administrative law judge is granted broad discretion in resolving procedural issues. *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-153 (1989)(*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491, 1-493 (1986). In accordance with this principle, a party seeking to overturn an administrative law judge's disposition of an evidentiary issue must prove that the administrative law judge's action represented an abuse of his discretion. In the present case, we hold that claimant has not met this burden. Based upon the form and contents of Dr. Tippy's letter, the administrative law judge acted within his discretion in determining that Dr. Tippy's letter did not satisfy the terms of 20 C.F.R. §725.414(a)(4). *Clark*, 12 BLR at 1-153; *Morgan*, 8 BLR at 1-493. Accordingly, his exclusion of Dr. Tippy's letter is affirmed.

B. Dr. Tippy's Updated Treatment Records Containing Dr. Tuteur's Report

We also reject claimant's argument that the administrative law judge improperly excluded Dr. Tuteur's May 26, 2004 medical report and Dr. Tippy's treatment records dated from July 30, 2004 to May 18, 2006, which also contain a copy of Dr. Tuteur's report. Dr. Tuteur examined claimant on May 26, 2004, at employer's request. Claimant's Exhibit 8. Employer exchanged Dr. Tuteur's report with claimant on August 11, 2005, but did not submit Dr. Tuteur's report for inclusion in the record. *See* Telephone Hearing Transcript at 14.

Prior to the initial hearing in this case, claimant signed a form authorizing employer to obtain more recent medical records from Dr. Tippy. On April 22, 2006, claimant attempted to submit Dr. Tuteur's report as his affirmative evidence and exchanged the report with employer. Decision and Order at 2 n.3; Hearing Transcript at 15. At the initial hearing, held on May 2, 2006, employer objected to the admission of Dr. Tuteur's report. The administrative law judge reserved his ruling on employer's objection until after employer received Dr. Tippy's updated treatment records. With respect to these records, employer stated, "I will get them in, your Honor. I will photocopy them and exchange them with the parties, leaving no specific offer or not – what I mean – we have the right to obtain medical records and treatment records. We don't necessarily have to submit them." Hearing Transcript at 20. The administrative law judge agreed that employer was not required to submit any records that it obtained. *Id*. at 21.

After the initial hearing, employer provided claimant with a copy of Dr. Tippy's updated treatment records, which included Dr. Tuteur's report. In correspondence dated June 6, 2006, however, employer notified claimant that it was not going to submit the records and that it would object if claimant sought to admit any part of them because he did not comply with the administrative law judge's pre-hearing order or the twenty-day rule set forth in 20 C.F.R. §725.456(b).[3] Claimant subsequently exchanged Dr. Tippy's updated treatment records with employer under a cover letter dated June 16, 2006. Claimant then proffered the treatment records for admission.

At the December 2006 hearing conducted by telephone, the administrative law judge excluded Dr. Tuteur's report based on his determination that claimant failed to

[3] 20 C.F.R. §725.456(b)(2) provides, in pertinent part, that "any other documentary material, including medical reports, which was not submitted to the district director, may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least [twenty] days before a hearing is held in connection with the claim." 20 C.F.R. §725.456(b)(2).

timely submit it and did not establish good cause for failing to do so. Decision and Order at 2 n.3; Telephone Hearing Transcript at 9-10, 13-15, 20. The administrative law judge cited the fact that employer sent claimant a copy of Dr. Tuteur's report on August 11, 2005, but claimant did not attempt to enter it into the record until after he had several opportunities to amend his evidentiary designations. Telephone Hearing Transcript at 9-10. The administrative law judge also excluded Dr. Tippy's updated treatment records, stating:

> This was submitted beyond the twenty-day time limit – in fact, after the hearing – and the employer has submitted an objection. No good cause has been shown to admit these documents beyond the deadline, and it appeared, from looking at the information, that the claimant had plenty of opportunity to submit them on time.

Telephone Hearing Transcript at 16.

Claimant argues that the administrative law judge erred in excluding Dr. Tippy's more recent treatment records, including Dr. Tuteur's report, as claimant's alleged failure to comply with the twenty-day rule was caused by employer's intransigence. Claimant maintains that he did not take action to obtain and submit Dr. Tippy's updated records in reliance upon employer's representations that it would do so. Claimant further asserts that because the parties understood that the records would be admitted when procured by employer, "it should not matter that [claimant] submitted them instead of [employer]." Claimant's Brief at 8. Claimant also argues, "it is not rational to say that [claimant] could have obtained the records himself and submitted them at an earlier time. Medical records are very expensive for most retired miners and too expensive for [claimant]." *Id*. Similarly, claimant contends that he was not required to exchange a copy of Dr. Tuteur's report with employer, nor could Dr. Tuteur's report be a surprise to employer, because Dr. Tuteur had examined claimant at employer's request and his report was already in employer's possession. Lastly, claimant contends that good cause existed for the late submission of this evidence because employer requested the records from Dr. Tippy before the hearing, but they did not become available until after the hearing.

Claimant's allegations of error are without merit. First, claimant's contention that he reasonably relied, to his detriment, upon employer's assurances that it would submit the evidence from Dr. Tippy is not supported by the record. At the initial hearing, the administrative law judge did not rule that the updated treatment records would be admitted, but rather stated that he would "like to see those medical records when they're actually submitted." Hearing Transcript at 20. Moreover, employer indicated that although it intended to procure the records post-hearing, it was not required to submit them. *Id*. The administrative law judge concurred with employer's statement. *Id*. at 21. In addition, claimant's argument, that employer could not be surprised by Dr. Tuteur's

report or Dr. Tippy's records because they were in its possession, is unavailing. The fact that employer had this evidence does not substitute for being notified that claimant intends to rely upon it in his affirmative case. In addition, the absence of the element of surprise does not render the twenty-day rule or the good cause requirement irrelevant, as the exclusion of evidence that is untimely submitted is also designed to promote the orderly and efficient adjudication of a claim. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-236 (1987), *aff'g on recon. en banc*, 9 BLR 1-195 (1986); *White v. Douglas Van Dyke Coal Co.*, 6 BLR 1-905 (1984). Claimant's assertion regarding the prohibitive cost of obtaining Dr. Tippy's more recent medical records is also unavailing. Claimant bears the burden of establishing entitlement to benefits by a preponderance of the evidence and, accordingly, is responsible for timely developing evidence that supports his claim. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Scott v. Bethlehem Steel Corp.*, 6 BLR 1-760 (1984).

We hold, therefore, that based upon the facts of this case, the administrative law judge rationally determined that claimant's submission of Dr. Tippy's updated treatment records post-hearing was in violation of the twenty-day rule set forth in Section 725.456(b)(2). 20 C.F.R. §725.456(b)(2); *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1985); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984); Decision and Order at 2. n.3; Telephone Hearing Transcript at 9-10, 13-15, 16, 20. The administrative law judge also acted within his discretion in finding that claimant did not establish good cause for failure to timely submit this evidence pursuant to Section 725.456(b)(3) on the ground that claimant had the opportunity to procure and submit the evidence in a timely fashion.[4] *Clark*, 12 BLR at 1-153; *Morgan*, 8 BLR at 1-493; Decision and Order at 2 n.3; Telephone Hearing Transcript at 9-10, 13-16, 16, 20. Accordingly, claimant has not established that the administrative law judge abused his discretion in excluding Dr. Tippy's updated treatment records, including Dr. Tuteur's report. *Id*.

C. Medical Journal Articles

Claimant also challenges the administrative law judge's decision to allow employer to select and admit five medical journal articles. When employer proffered forty-seven articles at the initial hearing, the administrative law judge reserved his ruling on their admissibility until he had the opportunity to review them. Hearing Transcript at 29. During the telephone hearing, the administrative law judge instructed employer to

[4] 20 C.F.R. §725.456(b)(3) provides, in relevant part: "If documentary evidence is not exchanged in accordance with paragraph (b)(2) of this section and the parties do not waive the 20-day requirement or good cause is not shown, the administrative law judge shall either exclude the late evidence from the record or remand the claim to the district director for consideration of such evidence." 20 C.F.R. §725.456(b)(3).

select five journal articles for admission and indicated that he would determine in his Decision and Order whether they were entitled to any weight. Telephone Hearing Transcript at 18-19. In his Decision and Order, the administrative law judge stated that he would "accord little weight or consideration to the articles," as none of employer's experts referred to them in their opinions, employer did not cite them in its closing argument, and the most recent article was written over eight years ago. Decision and Order at 17. In light of the administrative law judge's determination, and the fact that he did not refer to this evidence in any other part of his Decision and Order, we hold that error, if any, in the administrative law judge's admission of the five articles was harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

D. Dr. Houser's Supplemental November 24, 2005 Letter

Claimant further argues that the administrative law judge erred in requiring him to designate the November 24, 2005 supplemental medical report by Dr. Houser, the physician who examined claimant at the request of the Department of Labor (DOL) pursuant to 20 C.F.R. §725.406(a), as one of his two affirmative case medical reports pursuant to Section 725.414(a)(2)(i). Dr. Houser examined claimant at the request of DOL on July 21, 2003. Director's Exhibit 7. Dr. Houser diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease (COPD) secondary to claimant's exposure to coal and rock dust and characterized claimant's impairment as "severe." *Id*. In response to a letter from claimant's counsel, Dr. Houser submitted a letter dated November 24, 2005, in which he stated:

> [Claimant] has evidence of coal workers' pneumoconiosis, category 1/0 and moderately severe chronic obstructive pulmonary disease. He is able to walk about 200 feet and does have evidence of severe hypoxemia . . . . In addition to coal workers' pneumoconiosis, I believe the etiology of chronic pulmonary disease and restrictive change on pulmonary function testing is also secondary to exposure to coal and rock dust arising from his coal mine employment. I believe the hypoxemia is secondary to the coal workers' pneumoconiosis and chronic obstructive pulmonary disease. Due to [claimant's] respiratory impairment, he is physically unable to perform his prior job, which involved extensive walking and carrying and lifting parts and supplies that weighed up to 100 pounds.

Claimant's Exhibit 6.

Claimant proffered Dr. Houser's letter at the initial hearing in this case. Employer objected and stated "[i]t's our opinion that although Dr. Houser did conduct the [DOL] evaluation, this is an attempt by the claimant to be able to put in another medical report

and simply to couch it as part of Dr. Houser's [Department of Labor] exam." Hearing Transcript at 14. The administrative law judge determined that he would reserve ruling on employer's objection until the parties made their post-hearing submissions. *Id*. at 20. At the subsequent telephone hearing, the administrative law judge informed claimant that if he wanted Dr. Houser's supplemental report in the record, he would have to designate it as one of his affirmative medical reports under Section 725.414(a)(2)(i). Telephone Hearing Transcript at 7-15, 20-23. Claimant took issue with the administrative law judge's finding, but designated Dr. Houser's report as instructed by the administrative law judge. *Id*. at 22.

Claimant contends that the administrative law judge erred in requiring him to designate Dr. Houser's supplemental report as one of his affirmative case medical opinions. Claimant asserts that an additional statement from a physician who has prepared a medical report does not constitute a second medical report under Section 725.414(a)(1). Claimant also maintains that "[i]t is fundamentally unfair to require [claimant] to use a supplemental statement that merely adds clarity and missing information to the Director's medical expert's opinion as one of his two medical reports[.]" Claimant's Brief at 5. The Director concurs with claimant that Dr. Houser's initial medical report dated July 21, 2003, was incomplete because he did not address whether claimant's severe pulmonary impairment was totally disabling. The Director further asserts, therefore, that because Dr. Houser's November 24, 2005 letter "merely clarified the diagnoses and conclusions contained in his original report," the administrative law judge should have admitted it pursuant to Section 725.406(b).[5] Director's Brief at 7. Employer urges the Board to reject claimant's argument, asserting that because the district director based his initial finding of entitlement upon Dr. Houser's first report, the Director provided claimant with a complete pulmonary evaluation that did not require supplementation.

After reviewing the administrative law judge's Decision and Order, the relevant evidence and the parties' arguments, we agree with the Director's position on this issue. The Director, as the agent of the Secretary of Labor, is the party responsible for the administration of the Act. Deference is generally given, therefore, to the Director's reasonable interpretation of the regulation. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Freeman United Coal MiningCo. V. Director, OWCP* [*Taskey*], 94 F.3d 384, 387, 20 BLR 2-348, 2-355 (7th Cir. 1996); *Cadle v. Director, OWCP*, 19 BLR 1-55, 1-62 (1994). Because the purpose of Dr. Houser's supplemental report was to provide additional detail and to clarify his

[5] The terms of 20 C.F.R. §725.406(b) provide, in relevant part, that "[t]he results of the complete pulmonary evaluation shall not be counted as evidence submitted by the miner under Sec. 725.414." 20 C.F.R. §725.406(b).

diagnoses, the Director's assertion that this report comprised part of the complete pulmonary evaluation DOL provided to claimant which, pursuant to Section 725.406(b), does not count as evidence submitted by claimant pursuant to Section 725.414(a)(2)(i), represents a reasonable interpretation of the regulations. Accordingly, we reverse the administrative law judge's ruling regarding Dr. Houser's supplemental report and remand the case to the administrative law judge so that he can permit claimant to designate a second affirmative case medical report under Section 725.414(a)(2)(i). Because the consideration of this report could alter the administrative law judge's findings with respect to entitlement, we must also vacate the denial of benefits in this case. The administrative law judge must reconsider his findings pursuant to Sections 718.202(a)(4) and 718.204(c).

II. The Merits of Entitlement

In order to promote judicial efficiency, we will address claimant's allegations of error with respect to the administrative law judge's findings at Sections 718.202(a)(1), (4), 718.107, and 718.204(c).

A. Section 718.202(a)(1)

Regarding the administrative law judge's determination that the x-ray evidence was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1), claimant argues that the administrative law judge erred in relying on a "simple head count." Claimant's Brief at 14. Claimant also contends that the administrative law judge was required to consider the effect of his finding that the October 10, 2001 x-ray was positive, on the credibility of the negative interpretations of the July 21, 2003 and November 23, 2003 x-rays. These allegations of error are without merit.

Pursuant to Section 718.202(a)(1), the administrative law judge weighed nine readings of three x-rays. The administrative law judge permissibly found that that the x-ray dated October 10, 2001, was positive for pneumoconiosis, as the two positive readings by Drs. Ahmed and Cappiello, who are dually qualified as Board-certified radiologists and B readers, outweighed the negative readings by Dr. Wiot, also a dually qualified radiologist, and Dr. Spitz, a B reader.[6] *Zeigler Coal Co. v. Kelley*, 112 F.3d

[6] 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 for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co. Inc. of Va. 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). A Board-certified

839, 21 BLR 2-92 (7th Cir. 1997); Decision and Order at 8; Claimant's Exhibits 1, 2; Employer's Exhibits 14, 15. The administrative law judge permissibly found that the July 21, 2003 x-ray was in equipoise because Dr. Whitehead, a dually qualified radiologist, read the x-ray as positive for pneumoconiosis, while Dr. Wiot, who is equally qualified, read it as negative for pneumoconiosis. *See Ondecko*, 512 U.S. at 280-81, 18 BLR at 2A-12; Decision and Order at 8; Director's Exhibits 7, 18. The administrative law judge permissibly found that the November 10, 2003 x-ray was negative, as the two negative readings by Dr. Wiot and Dr. Repsher, a B reader, outweighed the positive reading by Dr. Capiello. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004)(*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon*.); Decision and Order at 8; Claimant's Exhibit 3; Employer's Exhibits 1, 3.

Based on the foregoing analysis of each individual x-ray, the administrative law judge did not rely on a "simple head count," but rather performed both a quantitative and qualitative analysis of the x-ray evidence, taking into account the qualifications of the readers. *Kelley*, 112 F.3d at 852, 21 BLR at 2-97; *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); *Dempsey*, 23 BLR at 1-65. We affirm, therefore, the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1).

B. Section 718.202(a)(4)

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Houser, Repsher, Renn and Cohen, who are all Board-certified in internal and pulmonary medicine. Dr. Houser examined claimant on July 21, 2003, and in his report of that examination, he diagnosed coal workers' pneumoconiosis and COPD secondary to exposure to coal and rock dust. Director's Exhibit 7. Dr. Houser further indicated that claimant is suffering from a severe impairment and identified coal workers' pneumoconiosis as a significant factor contributing to the impairment. *Id*. Dr. Houser stated: "I believe that this is the etiology of the mild restrictive changes on pulmonary function testing and a significant cause of the hypoxemia. The other factor contributing to the impairment is the COPD[.]" *Id*. Dr. Houser reiterated his diagnoses of coal workers' pneumoconiosis, COPD, and a totally disabling impairment in a letter dated November 24, 2005. Claimant's Exhibit 6. Dr. Houser also stated: "In addition to coal workers' pneumoconiosis, I believe the etiology of [COPD] and restrictive change on pulmonary function testing is secondary to exposure to coal and rock dust arising from his coal mine employment. I believe the hypoxemia is secondary to the coal workers' pneumoconiosis and [COPD]." *Id*.

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radiologist is a physician who has been certified by the American Board of Radiology as having particular expertise in the field of radiology.

Dr. Cohen reviewed claimant's medical records, the opinions of Drs. Houser, Repsher and Renn, work and smoking history and issued a report on November 22, 2005. Claimant's Exhibit 7. Dr. Cohen diagnosed coal workers' pneumoconiosis, symptoms consistent with chronic lung disease, and obstructive lung disease based on x-rays, CT scans, pulmonary function studies (PFSs), and blood gas studies (BGSs). *Id.*

Dr. Repsher examined claimant on November 10, 2003, issued a report on December 16, 2003 and was deposed on April 24, 2006. Employer's Exhibits 1, 13. Dr. Repsher diagnosed extremely severe bronchial asthma based on an abnormal diffusing capacity and the results of claimant's PFS, atopy based on elevated eosinophils, and chronic granulomatous disease. *Id*. Dr. Repsher ruled out coal workers' pneumoconiosis or any other pulmonary or respiratory disease caused or aggravated by coal mine employment based on a negative x-ray, CT scan, a PFS indicating asthma and a low p02 on the BGS. *Id.*

Dr. Renn conducted a review of claimant's medical records and work history, issued a report on November 25, 2004 and was deposed on June 19, 2006. Employer's Exhibits 6, 9. Dr. Renn diagnosed allergic asthma causing chronic hypoxemia and very severe, significantly reversible obstructive defect, old granulomatous disease and concluded that claimant does not have a totally disabling pulmonary or respiratory impairment significantly related to, substantially aggravated by, or caused by dust exposure, based on x-rays, CT scans, PFSs, BGSs and the reports of Drs. Houser, Repsher and Sanjabi. Employer's Exhibit 6. Dr. Renn explained that the obstruction remaining after the administration of bronchodilators seen in claimant's PFSs might be due to "remodeling" of the airways caused by asthma and ruled out COPD due to coal mine dust. Employer's Exhibit 9 at 35.

The administrative law judge weighed these opinions and determined that Dr. Houser's diagnosis of clinical pneumoconiosis was based upon an x-ray that the administrative law judge found did not support a finding of pneumoconiosis. Decision and Order at 21. The administrative law judge found that Dr. Houser's diagnosis of COPD arising out of coal mine employment was not well-reasoned or supported. *Id*. The administrative law judge noted that Dr. Houser relied upon claimant's denial of a history of asthma. *Id*. The administrative law judge also determined that Dr. Houser indicated that claimant's July 21, 2003 PFS showed mild restriction, but "in the narrative to the [PFS], Dr. Houser made no mention of any restriction and the pulmonary function report shows that total lung capacity and residual volume were not listed." [7] *Id*. The

[7] In a typewritten addendum to the computer-generated report of the pulmonary function study that he obtained, Dr. Houser noted: "These studies show mild reduction in

administrative law judge further determined that Dr. Houser's diagnosis of a restrictive impairment, attributable to coal workers' pneumoconiosis, was undermined by the fact that Drs. Cohen and Renn both noted that claimant's total lung capacity had not been measured during the July 21, 2003, study. *Id*. The administrative law judge concluded, therefore, that "Dr. Houser's finding of restriction is unsupported, and his reliance on a finding of restriction in diagnosing pneumoconiosis renders his opinion not well documented." *Id*. Lastly, the administrative law judge determined that Dr. Houser's opinion was entitled to less probative weight than the opinions of Drs. Cohen, Renn and Repsher, because he did not have the opportunity to review additional medical records, including evidence of claimant's high level of eosinophils and his history of asthma. *Id*.

Claimant argues that the administrative law judge committed several errors in discrediting Dr. Houser's opinion. Claimant alleges that the administrative law judge mischaracterized the evidence by indicating that Dr. Houser relied upon claimant's denial of a history of asthma. Claimant also maintains that the administrative law judge's suggestion that asthma was the cause of any impairment suffered by claimant is unsupported by the record. Claimant further contends that the administrative law judge did not adequately distinguish between clinical and legal pneumoconiosis when weighing Dr. Houser's opinion. In addition, claimant argues that the administrative law judge erred in finding that the PFS obtained by Dr. Houser did not support his diagnosis of mild restriction. Finally, claimant alleges that the administrative law judge erred in determining that Dr. Houser's opinion was entitled to less weight than the opinions of Drs. Cohen, Renn and Repsher because he relied upon a smaller amount of objective medical evidence.[8] These contentions have merit, in part.

As claimant has indicated, Dr. Houser did not identify the absence of a history of asthma as a rationale for his attribution of claimant's severe obstructive impairment to coal dust exposure. Director's Exhibit 7; Claimant's Exhibit 6. In addition, the basis for the administrative law judge's suggestion that asthma is the cause of claimant's obstructive impairment is not clear. Claimant's treatment and hospital records do not

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the forced vital capacity. Moderately severe airways obstruction is noted with moderate response to bronchodilator." Director's Exhibit 7.

[8] We decline to address claimant's argument that the administrative law judge erred in finding twenty-eight years and six months of coal mine employment, rather than the thirty-two years alleged by claimant, as claimant has not identified how this discrepancy had any detrimental effect on the administrative law judge's consideration of the evidence. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

contain a diagnosis of asthma unrelated to coal dust exposure and the administrative law judge found the opinion of Dr. Repsher, the only examining physician who diagnosed asthma unrelated to coal dust exposure, less probative due to inconsistencies within his opinion and because it was contrary to the comments of the regulations.[9] Decision and Order at 22; Director's Exhibit 6; Employer's Exhibits 1, 13. In addition, the administrative law judge did not consider Dr. Cohen's statement that eosinophils are seen in patients with COPD, or Dr. Renn's testimony that eosinophils do not rule out other pulmonary diseases besides asthma, including COPD, or COPD coexisting with asthma. Claimant's Exhibit 7; Employer's Exhibits 6, 9.

Claimant is also correct in contending that the basis for the administrative law judge's determination that Dr. Houser's diagnosis of restriction was unsupported is not clear. The administrative law judge apparently found that Dr. Houser's comment on the "narrative" accompanying the PFS, that claimant's FVC was reduced, did not constitute a diagnosis of a restrictive impairment, but the administrative law judge did not set forth the rationale underlying his finding. Decision and Order at 21; Director's Exhibit 7. The

[9] We reject employer's argument that the administrative law judge erred in discrediting Dr. Repsher's opinion because it contains internal inconsistencies and is contrary to the comments to the amended definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2). The administrative law judge's findings are rational and supported by substantial evidence. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge found correctly that in his December 16, 2003 report, Dr. Repsher diagnosed "[c]hronic granulomatous disease, either histoplasmosis or tuberculosis[,]" despite his earlier notation that claimant has no history of TB and all of his TB tests were negative. Decision and Order at 22; Employer's Exhibit 1. The administrative law judge also determined accurately that Dr. Repsher testified at his deposition that he found evidence of chronic obstructive pulmonary disease (COPD), but stated later in the deposition that claimant does not have COPD. Decision and Order at 22; Employer's Exhibit 13 at 84, 94. The administrative law judge further rationally found that Dr. Repsher's opinion is inconsistent with the definition of legal pneumoconiosis, because his views were at odds with the comments to the amended definition of legal pneumoconiosis indicating that coal dust exposure can cause centrilobular emphysema and clinically significant emphysema and COPD. *Beeler*, 521 F.3d at 726, 24 BLR at 2-103-4; Decision and Order at 22; Employer's Exhibit 13 at 74-75, 91. The administrative also acted within his discretion in determining that Dr. Repsher's opinion was in conflict with the amended definition of legal pneumoconiosis because he stated his disagreement with the studies that the Department of Labor relied upon in drafting the amended regulation. *Beeler*, 521 F.3d at 726, 24 BLR at 2-103-4; Decision and Order at 22; Employer's Exhibit 13 at 83.

administrative law judge also did not explain how Dr. Houser's diagnosis of a mild restrictive impairment was undermined by Dr. Cohen's and Dr. Renn's respective notations that the PFS obtained by Dr. Houser only included measures of FVC and FEV1. Decision and Order at 21; Employer's Exhibits 1, 6. In addition, the administrative law judge did not explicitly address the issue of whether Dr. Houser's attribution of claimant's severe obstructive impairment to coal dust exposure constituted a reasoned and documented diagnosis of legal pneumoconiosis pursuant to 20 C.F.R. §718.201(a)(2). Director's Exhibit 7; Claimant's Exhibit 6.

Because the administrative law judge did not accurately characterize Dr. Houser's opinion, did not determine whether Dr. Houser provided a reasoned and documented diagnosis of legal pneumoconiosis, and did not adequately explain his findings, we must vacate his discrediting of Dr. Houser's opinion at Section 718.202(a)(4). *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 24 BLR 2-33 (7th Cir. 2007). Regarding claimant's argument that the administrative law judge erred in determining that Dr. Houser's opinion was entitled to less weight than the opinions of Drs. Cohen, Renn and Repsher because he relied upon a smaller amount of objective medical evidence, we hold that although the administrative law judge may give greater relative weight to medical opinions that are based upon a greater amount of documentation, this rationale is valid only if the administrative law judge has properly characterized the medical opinion evidence and rendered a valid determination as to whether each medical opinion is reasoned and documented. *See Clark*, 12 BLR at 1-151. On remand, therefore, the administrative law judge must reconsider Dr. Houser's opinion and must set forth his findings in detail, including the underlying rationale, in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

With respect to Dr. Cohen's opinion, the administrative law judge found that his diagnoses of pneumoconiosis were not well-reasoned, as Dr. Cohen did not diagnose COPD, emphysema, or bronchitis. Decision and Order at 21. The administrative law judge also found that Dr. Cohen relied solely upon claimant's history of coal dust exposure and studies linking obstructive impairments to coal dust exposure to determine that claimant's obstruction is related to coal dust exposure. *Id*. The administrative law judge further noted Dr. Cohen's failure to diagnose asthma and his "partial reliance on Dr. Tuteur's report and associated testing, which have been excluded[.]" *Id*.

Claimant argues that the administrative law judge erred in concluding that Dr. Cohen did not diagnose COPD, emphysema, or bronchitis. Claimant also contends that the administrative law judge was incorrect in stating that Dr. Cohen did not explain why the data in this case supports a determination that coal dust exposure caused claimant's

lung disease. Claimant further maintains that the administrative law judge's reference to claimant's history of asthma is unsupported by the record and that the administrative law judge misinterpreted Dr. Cohen's comments regarding the reversibility seen on claimant's PFSs. Lastly, claimant asserts that the administrative law judge did not adequately explain his decision to discredit Dr. Cohen's opinion because he relied, in part, upon Dr. Tuteur's excluded report. These contentions have merit.

We agree with claimant that the administrative law judge did not accurately characterize Dr. Cohen's opinion. Although Dr. Cohen may not have used the terms "COPD," "emphysema," or "bronchitis," he listed obstructive lung disease caused by occupational exposure as a diagnosis and reported that claimant's PFS revealed moderate obstructive lung disease. Claimant's Exhibit 7. In addition, contrary to the administrative law judge's finding, Dr. Cohen explained that scientific studies show that dust-caused impairment is at a level comparable to that of cigarette smoke and the effect of dust exposure on FEV1 is highly significant in both smokers and non-smokers. *Id*. Dr. Cohen further stated that based on this literature *and* his consideration of claimant's significant underground exposure, symptoms, reported physical examinations, objective and historical data, claimant's totally disabling obstructive lung disease was due to his occupational exposure. *Id.*

Regarding the issue of the reversibility of claimant's obstructive impairment, Dr. Cohen indicated that the improvement in response to a bronchodilator does not establish that the obstruction is caused by asthma or that claimant's condition is unrelated to his extensive exposure to coal mine dust. *Id.* Dr. Cohen further acknowledged that claimant's medical history included a diagnosis of asthma related to dust exposure, but found that the development of claimant's breathing difficulties after eighteen years of coal dust exposure is not typical of patients with severe asthma, who cannot tolerate any exposure to coal dust, fumes, extremes of temperature or humidity. *Id.* In addition, as indicated in our discussion of the administrative law judge's consideration of Dr. Houser's opinion, it is not clear that claimant's medical records support a determination that he had a history of asthma unrelated to coal dust exposure. *See* slip op. at 19-20. Finally, the administrative law judge did not explain how the fact that Dr. Cohen reviewed Dr. Tuteur's report "weakened his opinion," when Dr. Cohen also based his assessment on: (1) reports by examining physicians Drs. Sanjabi, Houser, and Repsher; (2) x-rays read by Drs. Wiot, Ahmed, Capiello, Whitehead and Repsher; (3) CT scans interpreted by Drs. Meeks, Wiot and Renn; (4) PFSs dated November, 8, 2000, October 10, 2001, July 21, 2003 and November 10, 2003; (5) blood gas studies dated March 10, 2001, July 21, 2003 and November 10, 2003; (6) EKGs performed on July 21, 2003 and November 10, 2003; (7) Dr. Tippy's opinion; (8) treatment and hospital records by Drs. Dave, Smaga and Gibbs; (9) a consultation report by Dr. Renn; (10) depositions by Drs. Repsher and Renn; and (11) medical and scientific studies. *Id.*

Because the administrative law judge did not fully explain his findings and did not accurately characterize Dr. Cohen's report, we vacate his determination that Dr. Cohen's opinion was entitled to diminished weight pursuant to Section 718.202(a)(4). *Beeler*, 521 F.3d at 736, 24 BLR at 2-103; *Stalcup*, 477 F.3d at 2-490, 24 BLR at 2-38. On remand, the administrative law judge must reconsider his weighing of Dr. Cohen's opinion and must set forth his findings in full, including the underlying rationale, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Finally, claimant argues that the administrative law judge erred in crediting Dr. Renn's opinion that claimant has asthma and an obstructive defect, both of which are unrelated to dust exposure in coal mine employment. Claimant contends that the administrative law judge did not adequately explain his decision to credit Dr. Renn's determination regarding the etiology of claimant's obstructive impairment in light of the lack of support in the record for Dr. Renn's view that claimant's airways have "remodeled" over the years, such that his impairment is no longer completely reversible. Employer's Exhibit 9 at 34-35. Claimant also alleges that the administrative law judge did not explain why he accepted Dr. Renn's reliance upon medical literature regarding asthma, but did not accord the same treatment to Dr. Cohen's reference to medical literature concerning miners who suffer from hyper-reactive airways disease. Claimant further maintains that the factors identified by Dr. Renn as those he would expect to see if claimant's lung disease was related to coal mine employment, and cited by the administrative law judge, are not accurate markers for identifying the etiology of claimant's obstructive lung disease.[10] Finally, claimant alleges that Dr. Renn's opinion is at odds with the Act because he "ruled out occupational exposure as a cause of [claimant's] obstructive lung disease because of his subjective view that an obstructive lung impairment is not caused by coal dust." Claimant's Brief at 25. These contentions have merit.

Regarding the issue of whether claimant has asthma that is unrelated to coal dust exposure, the administrative law judge did not consider whether the fact that claimant's medical records contains only a notation by Dr. Smaga that claimant has a history of industrial asthma detracts from the probative value of Dr. Renn's diagnosis of allergic

[10] These factors are: (1) lack of persistency and consistency of abnormal findings during examination; (2) a lack of bronchoreversibility; (3) some reduction of the diffusing capacity instead of normal or supernormal capacity seen in claimant; (4) some degree of restriction accompanying the obstruction or, in the absence of restriction, an elevation of the residual volume, but not above 120% (whereas claimant's residual volume was from 135 to 161% of the predicted residual value volume); and (5) some radiographic evidence of opacities consistent with pneumoconiosis. Employer's Exhibit 6 at 12; Employer's Exhibit 9 at 45.

asthma. Director's Exhibit 6. The administrative law judge's also did not consider whether Dr. Renn's opinion was rendered equivocal by his statements that: (1) the lack of consistency of abnormal findings during examination could also be consistent with COPD; (2) that claimant's lung volumes, diffusing capacity and blood gas studies are consistent with an obstructive defect and certain types of COPD; and (3) that the levels of eosinophils would not rule out other pulmonary processes. Employer's Exhibit 9 at 58, 71, 74. Moreover, as claimant has alleged, the administrative law judge did not determine whether Dr. Renn's theory concerning airways "remodeling" is supported by the evidence of record. Decision and Order at 23; Employer's Exhibit 9 at 34-35. The administrative law judge also did not explain his determination that Dr. Renn's reference to medical literature regarding asthma provided support for his opinion while he did not render the same finding with respect to Dr. Cohen's citation to literature indicating that claimant's obstructive impairment is related to coal dust exposure. *Id*. Further, the administrative law judge did not consider whether the factors identified by Dr. Renn in support of his opinion – including the lack of evidence of a restrictive impairment and the absence of radiographic evidence of opacities consistent with pneumoconiosis – establish that Dr. Renn's opinion is inconsistent with the prevailing view of the medical community cited by DOL when it adopted the revised definition of legal pneumoconiosis that appears in Section 718.201(a)(2).

Because the administrative law judge did not fully address the aspects of Dr. Renn's opinion that could affect its probative value and did not adequately explain his findings, we vacate the administrative law judge's decision to accord greatest weight to Dr. Renn's opinion pursuant to Section 718.202(a)(4). *Beeler*, 521 F.3d at 736, 24 BLR at 2-103; *Stalcup*, 477 F.3d at 2-490, 24 BLR at 2-38. On remand, the administrative law judge must reconsider his weighing of Dr. Renn's opinion, particularly whether it is based upon premises that are inconsistent with the amended definition of legal pneumoconiosis at Section 718.201(a)(2), and must set forth his findings in full, including the underlying rationale, in accordance with the APA. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103-4; *Wojtowicz*, 12 BLR at 1-165. We also note that the administrative law judge determined that, although Dr. Renn reviewed evidence that was not admitted into the record, this did not detract from his opinion, as he did not rely upon this evidence in rendering his opinion. Decision and Order at 23. Claimant asserts correctly that the administrative law judge did not adequately explain how he arrived at the conclusion that Dr. Renn did not rely upon inadmissible evidence, whereas Dr. Cohen did. *Id*. at 22, 23. On remand, therefore, the administrative law judge must also reconsider the effect the review of inadmissible evidence has upon the probative value of the opinions of Drs. Renn and Cohen and must explain his findings. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984).

C. Section 718.107

Claimant also argues that the administrative law judge erred in failing to find that the CT scan evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.107(b).[11] The administrative law judge considered three interpretations of two CT scans.[12] The administrative law judge found that Dr. Meeks's reading of the CT scan dated November 9, 2000, did not support a finding of pneumoconiosis because Dr. Meeks did not provide a definitive diagnosis and his qualifications were not of record. Decision and Order at 19; Director's Exhibit 6. The administrative law judge determined that the CT scan dated November 10, 2003, was negative for pneumoconiosis, as the negative interpretation by Dr. Wiot, a Board-certified radiologist and B reader, outweighed the positive reading by Dr. Cohen, a B reader. Decision and Order at 19; Claimant's Exhibit 4; Employer's Exhibit 4.

Based upon the decision of the United States Court of Appeals for the Seventh Circuit in *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002), claimant asserts that the administrative law judge erred in failing to determine whether Dr. Wiot is qualified to interpret a CT scan for pneumoconiosis.[13] Claimant asserts that, in contrast to Dr. Wiot, Dr. Cohen explicitly indicated that he has

[11] The administrative law judge initially found, and we affirm as unchallenged by the parties on appeal, that the burden of establishing the medical acceptability and reliability of the November 9, 2000 and November 10, 2003 CT scans pursuant to 20 C.F.R. §718.107(b) was met through the statements of Drs. Wiot and Renn. *Skrack*, 6 BLR at 1-711; Decision and Order at 19; Employer's Exhibits 4, 9.

[12] The administrative law judge also found that while the record contains a reading of the November 8, 2000 lung scan by Dr. Gulati that qualifies as other evidence pursuant to 20 C.F.R. §718.107(a), he would not consider it because neither party's physicians commented upon its medical relevance or acceptability. Decision and Order at 19; Director's Exhibit 6. This finding is unchallenged on appeal and, therefore, is affirmed. *See Skrack*, 6 BLR at 1-711.

[13] In *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002), the court affirmed the administrative law judge's finding that a physician's negative reading of a CT scan was unreliable because he was not a Board-certified radiologist or B reader and had no training or certification in interpreting CT scans. *Stein*, 294 F.3d at 893, 22 BLR at 2-422. Citing supporting literature, the court noted that CT scans are typically read by radiologists, who may also be B readers, who have developed specialized knowledge and expertise through years of training and experience in interpreting CT scans. *Stein*, 294 F.3d at 893-94, 22 BLR 2-424.

developed expertise in reading CT scans, stating in his November 22, 2005 medical opinion:

> I have been reviewing and interpreting patient CT scans of the lung for many years, probably hundreds of them. I have education, on going training and experience in this area. Reviewing CT scans continues to be a regular and expected part of my practice.

Claimant's Exhibit 7. Because the administrative law judge did not address this aspect of Dr. Cohen's opinion in resolving the conflict between the physicians' CT scan readings, we vacate the administrative law judge's finding that the CT scan evidence was insufficient to establish the existence of pneumoconiosis at Section 718.107 and instruct him to reconsider his finding on remand in light of this evidence. *See Abshire v. D & L Coal Co.*, 22 BLR 1-202, 1-214-15 (2002); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

D. Section 718.204(c)

Because the administrative law judge relied upon the findings that we have vacated at Section 718.202(a), we also vacate the administrative law judge's determination that claimant failed to establish disability causation at Section 718.204(c). If reached, the administrative law judge must consider all evidence relevant to Section 718.204(c) and set forth his findings in detail, including the underlying rationale. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 496, 23 BLR 2-18, 1-35-36 (7th Cir. 2004); *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002).

III. Conclusion

In summary, we affirm the administrative law judge's exclusion of Dr. Tippy's letter dated March 4, 2003, Dr. Tuteur's medical report and Dr. Tippy's updated treatment records. We vacate, however, the administrative law judge's determination that claimant was required to designated Dr. Houser's letter dated November 24, 2005, as part of his affirmative evidence pursuant to Section 725.414(a)(2)(i). We remand the case to the administrative law judge to permit claimant to designate another affirmative medical report. Accordingly, we also vacate the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) or total disability due to pneumoconiosis pursuant to Section 718.204(c) and the denial of benefits.

Regarding the findings that the administrative law judge made under Sections 718.202(a)(1), (4), we affirm the administrative law judge's determination that the x-ray

evidence was insufficient to establish the existence of pneumoconiosis, but vacate the administrative law judge's weighing of the medical reports of Drs. Houser, Cohen, and Renn. The administrative law judge must reconsider these reports in accordance with the holdings rendered above, along with the evidence designated by claimant on remand, and set forth his findings in detail, including the underlying rationale. With respect to the CT scan evidence, we vacate the administrative law judge's finding that it was insufficient to establish the existence of pneumoconiosis and instruct him to reconsider the qualifications of Drs. Wiot and Cohen regarding the interpretation of CT scans.

Accordingly, the administrative law judge's Decision and Order Denying Living Miner's Benefits is affirmed in part, reversed 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