U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0270 BLA

HARRY E. KIDWELL Claimant-Petitioner v. ICG, LLC and BRICKSTREET MUTUAL INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/31/2015 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and Order Denying Motion for Reconsideration of Drew A. Swank, Administrative Law Judge, United States Department of Labor

Roger D. Forman (The Law Offices of Roger D. Forman, L.C.), Buckeye, West Virginia, for claimant.

Paul E. Frampton and Thomas M. Hancock (Bowles Rice LLP), Charleston, West Virginia, for employer.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and Order Denying Motion for Reconsideration (2012-BLA-5577) of Administrative Law Judge Drew A. Swank, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on January 6, 2011.

After crediting claimant with 19.32 years of coal mine employment,[1] the administrative law judge found that the evidence did not establish the existence of complicated pneumoconiosis. Consequently, the administrative law judge found that claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Considering amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge found that the evidence is insufficient to establish that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), or that claimant has at least fifteen years of qualifying coal mine employment. Therefore, the administrative law judge determined that claimant failed to invoke the Section 411(c)(4) presumption. Turning to whether claimant could affirmatively establish entitlement to benefits under 20 C.F.R. Part 718, the administrative law judge determined that, while the evidence established the existence of simple pneumoconiosis arising out of coal mine employment

[1] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. 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).

[2] As part of the Patient Protection and Affordable Care Act, Public Law No. 111-148, Congress enacted amendments to the Black Lung Benefits Act (the Act), which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where claimant worked at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those of an underground mine, and a totally disabling respiratory impairment is established. 30 U.S.C. §921(c)(4). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

pursuant to 20 C.F.R. §§718.202(a), 718.203(b), claimant failed to establish total disability. The administrative law judge, therefore, found that claimant was not entitled to benefits under 20 C.F.R. Part 718.

Claimant moved for reconsideration, asserting that the administrative law judge erred in excluding Dr. Alexander's medical report as being in excess of the evidentiary limitations at 20 C.F.R. §725.414. Claimant also attached additional medical evidence for consideration by the administrative law judge, consisting of three sets of medical treatment records and a February 6, 2014 determination by the West Virginia Occupational Pneumoconiosis Board (West Virginia Board). The administrative law judge denied claimant's reconsideration request, and denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Claimant also asserts that the administrative law judge erred in excluding certain medical evidence from the record.[3] Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the denial of benefits should be vacated and the case remanded for reconsideration of the evidence of complicated pneumoconiosis.[4]

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

[3] Claimant, in his Petition for Review and Brief, attached the medical treatment notes that were excluded from the record by the administrative law judge. Because this evidence was not admitted into the record by the administrative law judge, the Board is precluded from considering it on appeal. *See* 20 C.F.R. §802.301(b); *Berka v. North American Coal Corp.*, 8 BLR 1-183, 1-184 (1985). In order to have additional evidence considered, claimant may file a petition for modification, 33 U.S.C. §922, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §§725.310 and 725.480. *See Baumgartner v. Director, OWCP*, 9 BLR 1-65, 1-67 (1986).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that the medical evidence of record does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). In light of that affirmance, we also affirm the administrative law judge's determination that claimant did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); Decision and Order at 5, 17, 27.

Complicated Pneumoconiosis

Claimant argues that the administrative law judge erred in finding that the evidence does not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which, (A) when diagnosed by x-ray, yields an opacity greater than one centimeter in diameter that would be classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, would be a condition that could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 20 C.F.R. §718.304.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically invoke the irrebuttable presumption found at 20 C.F.R. §718.304 (2013). The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflicts, and make a finding of fact. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283, 24 BLR 2-269, 2-280-81 (4th Cir. 2010); *E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991) (en banc).

In considering whether the analog x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), the administrative law judge noted that while Dr. Alexander, a dually-qualified Board-certified radiologist and B reader, and Dr. Jaworski, a B reader, both read a February 1, 2011 x-ray as positive for both simple and complicated pneumoconiosis, Drs. Wheeler and Scott, who are dually qualified, read the same x-ray as negative for both simple and complicated pneumoconiosis. Decision and Order at 11-12. Finding that the positive and negative x-ray readings are in equipoise, the administrative law judge concluded that claimant failed to establish the existence of complicated pneumoconiosis by a preponderance of the analog x-ray evidence. *Id.* at 12.

Considering the biopsy evidence pursuant to 20 C.F.R. §718.304(b), the administrative law judge considered the pathology reports of Drs. Swedarsky, Caffrey and Abrahams, relevant to the results of a needle biopsy performed on April 13, 2006, and a wedge biopsy performed on July 6, 2006. Decision and Order at 14. The administrative law judge noted that while all three pathologists agree that claimant has simple pneumoconiosis, only Dr. Abraham affirmatively diagnosed complicated pneumoconiosis. *Id.* at 15-16. Accordingly, the administrative law judge found that the

preponderance of the biopsy evidence established the existence of simple, but not complicated, pneumoconiosis. *Id.* at 16.

Finally, pursuant to 20 C.F.R. §718.304(c), the administrative law judge considered the digital x-ray[5] and medical opinion evidence of record.[6] The administrative law judge noted that Dr. Wheeler interpreted a September 28, 2006 digital x-ray as negative for simple and complicated pneumoconiosis, while Dr. Alexander read the same digital x-ray as positive for both simple and complicated pneumoconiosis, category "B." Finding that, although both are dually-qualified readers, Dr. Wheeler is "more qualified [than Dr. Alexander] in that he has a much more extensive publication and lecture history,"[7] the administrative law judge concluded that claimant failed to establish the existence of complicated pneumoconiosis by a preponderance of the digital x-ray evidence. Decision and Order at 14. Turning to the medical opinion evidence, the administrative law judge found that while Dr. Jaworski, Dr. Renn, and the West Virginia Board all opined that claimant suffers from complicated pneumoconiosis, their reports were inadequately documented and reasoned, and ultimately unpersuasive. Thus, the administrative law judge concluded that claimant failed to establish the existence of complicated pneumoconiosis through other medical evidence, pursuant to 20 C.F.R. §718.304(c). *Id.* at 14, 22.

[5] The Department of Labor recently revised the regulations governing the admission and weighing of chest x-rays to include digital x-ray readings. However, these revisions do not apply to the instant case, which was decided prior to May 19, 2014, the effective date of the revised regulations. Thus, the administrative law judge properly admitted the digital x-rays in this case pursuant to 20 C.F.R. §718.107, and considered them pursuant to 20 C.F.R. §718.304(c). *See* 79 Fed. Reg. 21606 (Apr. 17, 2014); 78 Fed. Reg. 35,575, 35,577 (proposed June 13, 2013) (explaining standards to be codified at 20 C.F.R. §§718.102, 718.202(a)(1), and 718.304).

[6] The administrative law judge also considered an interpretation of a March 14, 2006 PET/CT scan by Dr. Veselicky. The administrative law judge found that because Dr. Veselicky did not mention simple pneumoconiosis or progressive massive fibrosis, it "is not helpful in determining whether [c]laimant has coal workers' pneumoconiosis of any type." Decision and Order at 13.

[7] The administrative law judge noted that Dr. Wheeler is an Associate Professor of Radiology at the Johns Hopkins Medical Institute. Decision and Order at 11. On appeal, employer references the "subsequent closing" of the Johns Hopkins pneumoconiosis program. Employer's Brief at 12; Claimant's Exhibit 15.

Weighing all the relevant evidence together, the administrative law judge concluded that claimant established the existence of simple, but not complicated, pneumoconiosis, and is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Decision and Order at 16, 22.

On appeal, claimant argues that the administrative law judge erred in crediting the negative x-ray readings of Drs. Wheeler and Scott in finding that neither the analog, nor the digital x-ray readings, established the existence of complicated pneumoconiosis. Claimant's Brief at 2. The Director agrees, arguing that the administrative law judge erred by failing to consider the credibility of Dr. Wheeler's and Dr. Scott's negative x-ray readings for complicated pneumoconiosis, given that neither physician diagnosed simple pneumoconiosis, contrary to the administrative law judge's finding that the biopsy evidence establishes the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Director's Brief at 4-5. The Director's contention has merit.

In evaluating the analog x-ray evidence, the administrative law judge correctly noted that, while all of the radiologists agree that claimant has masses in his lungs exceeding one centimeter in diameter, they disagree as to the etiology of those masses. Decision and Order at 11-12. Dr. Alexander, a dually-qualified reader, interpreted the February 1, 2011 x-ray as positive for simple pneumoconiosis and category "A" large opacities. Claimant's Exhibit 6. Dr. Jaworski, a B-reader, interpreted same x-ray as positive for both simple pneumoconiosis and category "B" large opacities. Director's Exhibit 11. By contrast, Drs. Wheeler[8] and Scott[9], both dually-qualified readers, interpreted the February 1, 2011 x-ray as negative for both simple and complicated pneumoconiosis, and attributed the large masses they observed to histoplasmosis, tuberculosis, granulomatous disease, or mycobacterium avium complex (MAC). Director's Exhibit 12; Employer's Exhibit 1.

[8] Dr. Wheeler described a four centimeter mass and a "few 1-2.5 cm masses . . . compatible with conglomerate granulomatous disease: histoplasmosis or mycobacterium avium complex (MAC) more likely than [tuberculosis]." Employer's Exhibit 1. Dr. Wheeler also described "minimal small nodular infiltrates . . . compatible with granulomata from histoplasmosis or [tuberculosis]." *Id.*

[9] In the comments section of the ILO form, Dr. Scott noted that claimant's x-ray showed "pleural thickening or mass or possibly . . . rib lesion" on the right lateral chest wall, a "4 cm irregular mass" in the right middle lung zone and a "few small calcified granulomata[s]." Director's Exhibit 12. Dr. Scott also noted two large lesions, measuring two centimeters and one centimeter, respectively, "probably due to histoplasmosis or [tuberculosis] or atypical [tuberculosis]." *Id.*

While Dr. Wheeler acknowledged that some small nodules seen on the February 11, 2011 x-ray could be coal workers' pneumoconiosis, he ultimately classified the x-ray as negative, 0/1, explaining that the pattern and location of the nodules was not characteristic of coal workers' pneumoconiosis. Employer's Exhibit 1. In a narrative report attached to the ILO form, Dr. Wheeler explained that the "[m]asses are not large opacities of [coal workers' pneumoconiosis] because the profusion of background nodules is too low," adding that "diagnosis should have been made with biopsy or microbiology when lung symptoms first developed or first abnormal x-ray was reported." *Id.* However, contrary to Dr. Wheeler's opinion, the administrative law judge specifically determined that the biopsy evidence establishes the existence of simple, clinical pneumoconiosis. Decision and Order at 16.

Similarly, while Dr. Scott did not specifically state that his finding of no complicated pneumoconiosis was based on his finding of no simple pneumoconiosis, Dr. Scott's opinion, that the February 1, 2011 x-ray is negative for pneumoconiosis, is belied by the biopsy results, which the administrative law judge found established the existence of simple pneumoconiosis. Decision and Order at 16.

In weighing the medical evidence, the administrative law judge must consider the credibility of the physicians' explanations, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses, and must explain his findings. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). As the Director asserts, in finding that the preponderance of the analog x-ray evidence of record does not establish the existence of complicated pneumoconiosis, the administrative law judge failed to reconcile the opinions of Drs. Wheeler and Scott, that claimant does not have simple or complicated pneumoconiosis, with his own determination that the biopsy evidence establishes the existence of simple pneumoconiosis. As the administrative law judge did not address this discrepancy, we vacate the administrative law judge's finding that the analog x-ray evidence does not establish the existence of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(a).[10] *See Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

[10] The Director, Office of Workers' Compensation Programs (the Director), also notes that the administrative law judge may wish to reconsider on remand the persuasive value of the findings of the joint study conducted by ABC News and the Center for Public Integrity with respect to the credibility of Dr. Wheeler's negative readings for complicated pneumoconiosis. Director's Brief at 5 n.3. The administrative law judge admitted the Center for Public Integrity's report and the ABC News story into evidence, but ultimately found them unpersuasive because "they do not relate in any specific way to

Turning to the digital x-ray readings, the administrative law judge noted that Dr. Wheeler interpreted the September 28, 2006 digital x-ray as negative for simple and complicated pneumoconiosis,[11] while Dr. Alexander read the same digital x-ray as positive for both simple, clinical pneumoconiosis and category "B" large opacities. Decision and Order at 14; Claimant's Exhibit 13; Employer's Exhibit 2. Again, Dr. Wheeler opined that the "[m]asses are not large opacities of [coal workers' pneumoconiosis] because profusion of background nodules is low[,] and high unprotected exposures have been illegal for decades." *Id.* As the administrative law judge also did not consider Dr. Wheeler's digital x-ray reading in light of the biopsy evidence, we also vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.304(c).

Also relevant to 20 C.F.R. §718.304(c), the administrative law judge considered the medical opinions of Dr. Jaworski, Dr. Renn, and the West Virginia Board, correctly noting that the physicians unanimously opined that claimant suffers from complicated pneumoconiosis. The administrative law judge found, however, that all of the opinions were based on coal mine employment histories "far longer than the 19.32 years supported by the record." Decision and Order at 21. The administrative law judge also found all of the opinions to be inadequately reasoned or documented. Therefore, the administrative law judge concluded that the opinions of Dr. Jaworski, Dr. Renn, and the West Virginia Board were entitled to little weight. *Id.*

Initially, we agree with claimant that the administrative law judge erred in discounting all three medical opinions, as based on inaccurate coal mine employment histories. Claimant's Brief at 3-4. An administrative law judge may reject a report that is based on an erroneous assumption or which reflects an incomplete picture of the miner's health. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993). However, under the circumstances of this case, where the administrative law judge found that the evidence establishes "at least 19.32 years" of coal mine employment and only .58 pack-years of cigarette smoking, and further establishes the existence of clinical pneumoconiosis through biopsy evidence, the administrative law judge has not explained

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the findings of [Dr.] Wheeler on the particular x-ray evidence submitted [in this case]." *Id.* The Director notes that reconsideration of this information may be appropriate in light of the fact that "Dr. Wheeler's negative x-ray readings have been proven false in this case." *Id.*

[11] Dr. Wheeler described "nodular infiltrates . . . compatible with conglomerate granulomatous disease: histoplasmosis or mycobacterium avium complex (MAC) more likely than [tuberculosis]." Employer's Exhibit 2.

how the physicians' reliance on longer coal mine employment histories undermines the credibility of their opinions.[12] *See Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *see also Looney*, 678 F.3d at 311 n.2, 25 BLR at 2-124 n.2.

The administrative law judge also discounted Dr. Renn's opinion as unsupported by the medical evidence of record. The administrative law judge correctly noted that, in diagnosing complicated pneumoconiosis Dr. Renn relied, in part, on Dr. Swedarsky's pathology report. Decision and Order at 20; Claimant's Exhibit 7. In finding Dr. Renn's opinion to be unpersuasive, the administrative law judge found that Dr. Swedarsky's pathology report "is in fact contradictory to" Dr. Renn's opinion. Decision and Order at 22. Dr. Swedarsky, a Board-certified pathologist, noted that the July 6, 2006 wedge biopsy demonstrated a 2 x 1.5 x 1.5 cm central area of consolidation and small palpable nodules measuring .2 to .5 cm in size. Claimant's Exhibit 3. Dr. Swedarsky opined that the overall pattern was "consistent with coal workers' pneumoconiosis," and that there was no evidence of granulomas or neoplasia. *Id.* Reviewing Dr. Swedarsky's opinion, Dr. Renn acknowledged that it was "unclear whether or not [Dr. Swedarsky] found the criteria necessary for a pathologic diagnosis of complicated [coal workers' pneumoconiosis]."[13] Claimant's Exhibit 7. As the Director asserts, however, the administrative law judge has not explained how Dr. Swedarsky's opinion, that in 2006 claimant had a "2 x 1.5 x 1.5 cm central area of consolidation" consistent with pneumoconiosis, is contradictory to, or inconsistent with, Dr. Renn's opinion that by 2011, claimant had developed complicated pneumoconiosis. Director's Brief at 5. Thus, the administrative law judge's finding does not comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), which requires that an administrative law judge set forth the rationale underlying

[12] Moreover, as claimant asserts, the record does not support the administrative law judge's conclusion that Dr. Renn relied on a forty-four year history of coal mine employment. Decision and Order at 21; Claimant's Brief at 4. A review of Dr. Renn's report reveals that, while he documented that claimant worked for approximately forty-four years in total, Dr. Renn only attributed the periods from 1972 to 1977, 1978 to 1990, and 2004 to 2011, to coal mine employment. Claimant's Exhibit 7 at 1.

[13] The administrative law judge accurately noted that Dr. Swedarsky indicated neither the presence, nor absence, of complicated pneumoconiosis in his report. Decision and Order at 16. With respect to the measurements Dr. Swedarsky provided, the administrative law judge found that "[i]t is unclear if the measurement of [the] 'central area of consolidation' [measuring 2 x 1.5 x1.5 cm] is of a single nodule or if it describes an area containing a confluence of such nodules." *Id.*

his findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

The administrative law judge also discounted Dr. Renn's opinion as being based, in part, on his "reading an x-ray[,] performed in conjunction with his [September 28, 2011] examination of Claimant[,] which has not been designated as affirmative evidence by either party." Decision and Order at 22. Contrary to the administrative law judge's finding, both Dr. Wheeler's reading of the September 28, 2011 digital x-ray, proffered by employer, and Dr. Alexander's reading of the same x-ray, proffered by claimant, were admitted into the record as "[o]ther medical evidence" under 20 C.F.R. §718.107(a). Decision and Order at 11 n.12, 13; Claimant's Exhibit 13; Employer's Exhibit 2. In addition, the regulations provide that in any case in which a party has submitted the results of other testing pursuant to 20 C.F.R. §718.107, as part of his affirmative case, the opposing party shall be entitled to submit "one physician's assessment of each piece of such evidence in rebuttal." 20 C.F.R. §725.414(a)(2)(ii), (3)(ii). Thus, claimant was entitled to submit two readings of the September 28, 2011 x-ray, one as part of his affirmative case evidence, and one in rebuttal to Dr. Wheeler's reading. While claimant did not specifically designate Dr. Renn's digital x-ray reading as part of its affirmative case or rebuttal evidence, at the hearing, the administrative law judge stated that he would attempt to admit all evidence to which the parties were entitled.[14] On remand, the administrative law judge must reconsider the admissibility of Dr. Renn's x-ray reading, and reevaluate the credibility of Dr. Renn's opinion, as appropriate.[15]

[14] At the hearing, the administrative law judge explained: "[w]hen I go through the case, I match everything up with the black lung evidence summary form and when I can find the appropriate holes to plug it in, it[']s allowed and if it exceeds, it[']s not." Hearing Tr. at 24.

[15] The administrative law judge should also consider the extent to which the opinion of the West Virginia Board is based on x-ray evidence that is not contained in the record. As the administrative law judge correctly observed, in its November 15, 2007 opinion diagnosing progressive massive fibrosis, the West Virginia Board stated:

> [X-ray] views of the chest are compared to the . . . Board's previous study of 07-08-94 and again show parenchymal changes consistent with advanced occupational pneumoconiosis. There are now large opacities in both upper lung zones . . . . Impression: Progression of occupational pneumoconiosis. Progressive Massive Fibrosis is now present.

Claimant's Exhibit 4. While the West Virginia Board did not indicate the date of the x-ray that now revealed large opacities, the Board indicated that it had reviewed treatment

Finally, we address claimant's contention that the administrative law judge erred in excluding certain items of evidence from the record. Considering the medical opinions, the administrative law judge initially noted that, after the hearing, claimant submitted a medical report from Dr. Alexander in support of his claim for benefits. In his Decision and Order, the administrative law judge found that claimant had already designated the reports of Dr. Renn and the West Virginia Board as its two affirmative medical reports, and therefore the administrative law judge excluded Dr. Alexander's report from the record as being in excess of the evidentiary limitations at 20 C.F.R. §725.414(a)(2)(i). Decision and Order at 19 n.18.

On appeal, claimant challenges this determination, asserting that during the hearing, the administrative law judge stated that, because employer's evidence had not been submitted within the time frame required by the administrative law judge's pre-hearing order, claimant could submit evidence in response to employer's evidentiary submissions. Decision and Order at 3, n.1; Claimant's Brief at 4. Claimant contends that his submission of Dr. Alexander's narrative medical report is appropriate rebuttal evidence, within the scope of the administrative law judge's ruling, and should not have been excluded from the record as excess medical opinion evidence, pursuant to 20 C.F.R. §725.414(a)(2)(i).[16] Claimant's Brief at 4. Claimant's contention has merit.

A review of the hearing transcript reveals that, after finding that employer had violated his pre-hearing order, the administrative law judge declined to strike employer's evidence. He explained that, instead, claimant's counsel would be allowed an extended amount of time after the hearing to respond to employer's evidence, if he chose:

> Now, normally when I allow one side to respond, the other side[ ] wants to rehabilitate and respond back and forth and back and forth. We're not

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records from Preston Memorial Hospital and Dr. Ghamande. Claimant's Exhibit 4. Dr. Ghamande's treatment records from June 6, 2006 to November 6, 2006 were submitted into evidence by claimant pursuant to 20 C.F.R. 725.414(a)(4), and contain an ILO-classified B reading of a November 2, 2006 x-ray, performed at Preston Memorial Hospital, that is positive for small opacities 2/2, and large opacities category "A." On remand the administrative law judge should consider whether this x-ray constitutes admissible evidence under the evidentiary limitations, and reevaluate the opinion of the West Virginia Board, as appropriate.

[16] Claimant raised this same argument to the administrative law judge in his Motion for Reconsideration. The administrative law judge denied claimant's motion without explaining his ruling on this issue.

> going to do that. [Claimant's counsel], you get to respond to these items and any other item that's admitted today and there will be no further response from the Employer.

Hearing Tr. at 11. We agree with claimant that it is unclear from the transcript what limits, if any, the administrative law judge placed on claimant's responsive evidence. Moreover, the regulations specifically provide for the submission of excess evidence, for good cause shown. *See* 20 C.F.R. §§725.414(d), 725.456(b)(1). As the administrative law judge has not explained why Dr. Alexander's narrative report could not be admitted into evidence in light of the administrative law judge's ruling, and pursuant to 20 C.F.R. §725.456, we hold that the administrative law judge erred in excluding Dr. Alexander's report. On remand, the administrative law judge must reconsider the admissibility of Dr. Alexander's narrative report and explain his ruling.

We reject, however, claimant's contention that the administrative law judge erred in excluding the additional medical treatment records from Morgantown Pulmonary Associates, Harned Memorial Medical Clinic, and Preston Memorial Hospital. Claimant's Brief at 5-6. Following the administrative law judge's decision, claimant moved for reconsideration and asked that these treatment records be admitted, asserting that he mistakenly believed that they were in evidence when they were not. Claimant's Motion for Reconsideration at 1-2. The administrative law judge declined to admit the treatment records, noting that claimant had been granted an extended period, post-hearing, for the submission of additional rebuttal evidence and failed to submit the records. Order Denying Reconsideration at 1.

On appeal, claimant reiterates his contention that he was confused about what evidence had been proffered and admitted at the hearing, and asserts that the treatment records are "very significant" and should not have been excluded on a technicality. Claimant's Brief at 5-6. Contrary to claimant's assertion, however, on motion for reconsideration an administrative law judge may, but is not required to, accept new evidence. *Hensley v. Grays Knob Coal Co.*, 10 BLR 1-88, 1-91 (1987). Rather, the administrative law judge must consider whether the party proffering the evidence has established "good cause" for its untimely submission. *Hensley*, 10 BLR at 1-92. Here, the administrative law judge fully considered claimant's argument and explained that, in light of the fact that claimant was given an additional period of time after the hearing in which to submit evidence, claimant failed to establish good cause for the admission of its untimely evidence. We therefore hold that the administrative law judge did not abuse his discretion by declining to admit claimant's submissions after the close of the evidentiary record. *Clark*, 12 BLR at 1-153.

In summary, on remand, the administrative law judge must reconsider whether claimant established the existence of complicated pneumoconiosis, pursuant to 20 C.F.R.

§718.304(a) and (c). In determining the weight to assign the analog and digital x-ray readings by Drs. Wheeler and Scott, the administrative law judge should take into consideration the physicians' rationale and the fact that claimant has established the existence of simple pneumoconiosis through biopsy evidence. Further, in considering whether Dr. Wheeler's additional discussion of the dust controls in the mines is a reliable basis for excluding a diagnosis of complicated pneumoconiosis, the administrative law judge must also reconsider claimant's testimony as to the extent of his dust exposure.[17] *See Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Employer's Exhibit 2. Additionally, when considering whether claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a) and (c), and based on the record as a whole, the administrative law judge must bear in mind that claimant is not required to categorically exclude all other possible causes of the large opacities seen on his x-rays. *See Cox*, 602 F.3d at 285-87, 24 BLR at 2-282-84. In rendering all of his findings on remand, the administrative law judge must explain the basis for his conclusions in accordance with the APA, 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165.

[17] In his Decision and Order, the administrative law judge credited claimant's testimony that he was exposed to coal mine dust while working for employer. Decision and Order at 5; Hearing Tr. at 30. At the hearing, however, in addition to testifying to specific periods of his employment, claimant generally described his working conditions as a surface miner:

> I'll say today the dust outside is worse than the dust underground. Most underground mines, they have sprinklers and all kinds of stuff on the [continuous] miner heads. I never worked in the mines, but outside, it's impossible to water the dust. It's impossible to water it. You get off a shot and you get in there and you push out of that shot with a tractor and like I say, that dust goes on top of the blade. The fan stirs that dust up and it goes everywhere.

Hearing Tr. at 29. On remand, the administrative law judge should consider claimant's testimony and explain his findings as to the extent of claimant's dust exposure, in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, the administrative law judge's Decision and Order Denying Benefits and Order Denying Motion for Reconsideration are affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge