BRB No. 10-0487 BLA

CLARK J. JONES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KING COAL COMPANY	)	
	)	
and	)	
	)	
BITUMINOUS CASUALTY CORPORATION	)	DATE ISSUED: 05/31/2011
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Ann Marie Scarpino (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-5093) of Administrative Law Judge Alice M. Craft, rendered on a subsequent claim[1] filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). In a Decision and Order dated April 26, 2010, the administrative law judge credited claimant with 8.68 years of coal mine employment[2] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the newly submitted x-ray and medical opinion evidence was sufficient to establish that claimant has complicated pneumoconiosis and, thus, the administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Based on her review of the entire record, the administrative law judge determined that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

[1] Claimant filed an initial claim for benefits on February 12, 1991, which was denied by the district director on July 31, 1991, because claimant failed to establish that his pneumoconiosis arose out of coal mine employment or that he was totally disabled. Director's Exhibit 1. Claimant filed a second claim on May 18, 1998, which was also denied by the district director on September 17, 1998, for the same reasons. Director's Exhibit 2. Claimant took no action with regard to the denial of his claim, until he filed the current subsequent claim on December 8, 2006. Director's Exhibit 4.

[2] Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). The administrative law judge determined that because claimant did not have fifteen years of coal mine employment, he was not entitled to the Section 411(c)(4) presumption.

On appeal, employer contends that the administrative law judge erred in denying its motion to compel claimant to undergo a computerized tomography (CT) scan. Employer also argues that the administrative law judge failed to weigh all of the relevant evidence on the issue of complicated pneumoconiosis, and that she erred in her consideration of the x-rays, the CT scan evidence and the medical opinions of Drs. Dahhan and Forehand. Additionally, employer asserts that the administrative law judge erred in giving claimant a presumption that his pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203, to which he is not entitled. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, asserting that the administrative law judge properly denied employer's motion to compel a CT scan. Employer has filed a reply to each of the briefs filed by claimant and the Director, reiterating its arguments on appeal.

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc*., 380 U.S. 359 (1965).

I. Motion to Compel a CT Scan

We first address employer's argument that the administrative law judge abused her discretion in refusing to compel claimant to undergo a CT scan. Employer's Brief in Support of Petition for Review at 16-17. The relevant procedural history is as follows. Claimant underwent an examination on January 30, 2007, with Dr. Forehand, at the request of the Department of Labor (DOL). Dr. Forehand interpreted an x-ray on that date as showing complicated pneumoconiosis and a bilateral upper lobe mass. Director's Exhibit 11. Dr. Forehand sent claimant for a CT scan on that same day, which was read by a radiologist, Dr. Antoun, as showing a 2.5/3.5 centimeter density "suggestive of possible fibrosis." *Id*. Dr. Antoun indicated that the CT scan, read in correlation with an x-ray obtained earlier the same day and claimant's work history, was compatible with coal workers' pneumoconiosis. *Id*.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibits 1, 2.

At the hearing held on August 28, 2008, employer advised the administrative law judge that it had not been able to obtain the January 30, 2007 CT scan for rereading.[4] The administrative law judge granted employer's request that the record be held open for forty-five days, post-hearing, in order for employer to obtain the CT scan and for the parties to submit evidence, as necessary. Hearing Transcript at 40-41.

Employer subsequently proffered Dr. Abramowitz's re-reading of the CT scan. Dr. Abramowitz indicated that there was a 2 centimeter irregular density in the right upper lobe, "which may be secondary to granulomatous disease or [a] large opacity of occupational pneumoconiosis," but he also stated that a "superimposed neoplastic process could not be excluded." Employer's Exhibit 6. Dr. Abramowitz recommended a follow-up CT scan to determine whether there was a "benign or malignant process" in claimant's lungs. *Id*. On October 30, 2008, employer filed a motion requesting that claimant be ordered to undergo an additional CT scan. In support of the motion, employer argued that, based on Dr. Abramowitz's comments, an additional CT scan was necessary to determine whether claimant has complicated pneumoconiosis or a malignancy. *See* Employer's October 30, 2008 Motion for Claimant to Have a CT Scan at 2.

By Order dated November 4, 2008, the administrative law judge admitted Dr. Abramowitz's reading of the January 30, 2007 CT scan into the record as Employer's Exhibit 6. By Order dated November 17, 2008, the administrative law judge denied employer's motion to compel a CT scan, noting that claimant "objects because submission to another CT scan may be hazardous to his health, the Employer has not cited to any governing law which would require [claimant] to undergo a CT scan, and CT scans are not among the objective methods of testing found in the regulations for a complete pulmonary evaluation." November 17, 2008 Order, *citing* 20 C.F.R. §725.406.

Employer argues on appeal that the administrative law judge irrationally concluded that it is not entitled to a CT scan, on the ground that the regulation at 20 C.F.R. §725.406 does not specifically list CT scans among the tests required for DOL to meet its obligation to provide claimant with a complete pulmonary evaluation. Employer notes that the parties are given regulatory authority to submit CT scans, pursuant to 20 C.F.R. §718.107, which states:

> The results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis, the sequelae of pneumoconiosis or

[4] The record reflects that employer made several attempts to obtain the CT scan prior to the hearing. Director's Exhibits 23, 26, 27, 29.

> a respiratory or pulmonary impairment, may be submitted in connection with a claim and shall be given appropriate consideration.

20 C.F.R. §718.107. Employer also maintains that, regardless of "[w]hether or not [20 C.F.R. §]725.406 requires DOL to obtain a CT scan, DOL developed CT scan evidence in this case" and, thus, because the administrative law judge "relied in part on this CT scan proof to buttress her finding [that claimant has complicated pneumoconiosis]," she erred in denying employer's motion to compel. Employer's Brief in Support of Petition for Review at 17. Additionally, employer contends that the administrative law judge erred by not considering whether claimant was correct in asserting that an additional CT scan would be harmful to his health, given the specific facts of this case.

The Director responds to employer's arguments, asserting that employer has failed to demonstrate how it has been prejudiced by the administrative law judge's denial of its motion to compel, given the fact that it was not deprived of the opportunity to submit rebuttal evidence, in accordance with 20 C.F.R. §725.414(a)(3)(ii). The Director contends that what employer actually seeks to obtain and submit is evidence in support of its affirmative case, but employer has failed to show why it is entitled to force claimant to have an additional CT scan, when there is no evidence of record that the additional CT scan would definitively resolve whether claimant has cancer or complicated pneumoconiosis.

An administrative law judge is empowered to conduct formal hearings and is given broad discretion in resolving procedural matters. *See Dempsey v. Sewell Coal Corp*., 23 BLR 1-47 (2004) (*en banc*); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989) (*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). Thus, a party seeking to overturn an administrative law judge's disposition of a discovery request must prove that the administrative law judge's action represented an abuse of his or her discretion. *Clark*, 12 BLR at 1-153.

Based on our review of the administrative law judge's Order, the evidence of record and the arguments presented on appeal, we conclude that the administrative law judge reasonably denied employer's motion to compel a CT scan, and that employer has not demonstrated prejudicial error or an abuse of discretion. The administrative law judge correctly found that there is no direct regulatory authority for compelling a CT scan. The regulation at 20 C.F.R. §725.414(a)(3)(i) sets forth the specific type of *affirmative evidence*, which employer is entitled to *obtain* in a case:

> The responsible operator . . . *shall be entitled to obtain and submit, in support of its affirmative case*, no more than two chest [x]-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one

> report of an autopsy, no more than one report of each biopsy, and no more than two medical reports.

20 C.F.R. §725.414(a)(3)(i) (emphasis added).[5] Although employer relies on 20 C.F.R. §718.107, to support its contention that it is entitled to obtain a CT scan, that regulation provides the parameters for responding to the *submission* of other medical tests not addressed by 20 C.F.R. §718.414, but it does not give employer any specific right to procure a CT scan, as opposed to submitting a reading of a CT scan that has already been performed, as affirmative or rebuttal evidence. *See* 20 C.F.R. §718.107. We agree with the Director that employer "cites to no authority that would compel the [administrative law judge] to require [claimant] to undergo additional testing merely because a physician opines that such tests would be useful in obtaining more diagnostic information." Director's Brief at 2-3.

Employer also has failed to demonstrate how it has been prejudiced, since the administrative law judge allowed employer to obtain a rebuttal reading of the January 30, 2007 CT scan, in accordance with the evidentiary limitations set forth at 20 C.F.R. §725.414(a)(3)(ii), which state, in pertinent part:

> In any case in which the claimant has submitted the results of other testing pursuant to 20 C.F.R. §718.107, the responsible operator shall be entitled to submit one physician's assessment of each piece of such evidence in rebuttal.

20 C.F.R. §725.414(a)(3)(ii). Thus, as employer has not shown an abuse of discretion by the administrative law judge, we affirm her decision to deny employer's motion to compel. *See Dempsey*, 23 BLR at 1-62; *Clark*, 12 BLR at 1-152; *Morgan*, 8 BLR at 1-491.

II. Elements of Entitlement

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that

[5] Employer cites *Old Ben Coal Company v. Director, OWCP* [*Hilliard*], 292 F.2d 533, 23 BLR 2-249 (7th Cir. 2002) for the proposition that claimant has not satisfied his burden to provide a reasonable excuse for not complying with employer's discovery request. In *Hilliard*, however, the widow refused to sign an authorization to release the miner's autopsy slides for review. Because the regulations specifically provide that employer has the right to obtain an autopsy slide review pursuant to 20 C.F.R. §725.414(a)(3)(i), the facts of *Hillard* are distinguished from the facts of this case.

his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, because claimant's prior claim was denied because he failed to prove that his pneumoconiosis arose out of coal mine employment and that he is totally disabled by a respiratory or pulmonary impairment, he had to submit new evidence to prove one of these elements in order to satisfy the requirements of 20 C.F.R. §725.309. *See White*, 23 BLR at 1-3.

A. Complicated Pneumoconiosis

The administrative law judge found that claimant satisfied his burden to prove a change in an applicable condition of entitlement, and his entitlement to benefits, by establishing that he suffers from complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 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. 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. *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered five newly submitted readings of two x-rays, dated January 30, 2007 and September 6, 2007. Decision and Order at 7. There were three readings of the January 30, 2007 x-ray, one of which is Dr. Barrett's quality reading. Director's Exhibit 12. Dr. Forehand, a B reader, read this x-ray as positive for simple and complicated pneumoconiosis, 2/1, q/p, Category A. Director's Exhibit 11. Dr. DePonte, a Board-certified radiologist and B reader, also read the January 30, 2007 x-ray as positive for simple and complicated pneumoconiosis, 2/2, q/t, Category A, while Dr. Wheeler, a Board-certified radiologist and B reader, read the same x-ray as negative for pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 1. There was one reading of the September 6, 2007 x-ray by Dr. Dahhan, a B reader, which was positive for simple pneumoconiosis, 2/2, q/q, but negative for complicated pneumoconiosis. Employer's Exhibit 3.

In weighing the x-ray evidence, the administrative law judge mistakenly referenced the September 6, 2007 x-ray as dated February 6, 2007. Employer's Exhibit 3. The administrative law judge stated that she considered the two x-rays to be "essentially contemporaneous" as they "were taken within one week of one another." Decision and Order at 18. The administrative law judge found that the January 30, 2007 x-ray was positive for complicated pneumoconiosis because it was read by "two well-qualified readers." *Id.* She further noted:

> Despite Dr. Wheeler's credentials, the reliability of his opinion is undermined, because he is the only reader to have found one of the Claimant's x-rays to be negative for pneumoconiosis, and because his comments that the Claimant is young, and government agencies began controlling dust levels in mines in the early 1970s, cast doubt on his objectivity – they represent speculation on his part about the amount of dust the Claimant was exposed to, and his susceptibility to the injurious effects of coal dust.

Id.

In contrast, the administrative law judge found that the September 6, 2007 x-ray was negative for complicated pneumoconiosis, based on Dr. Dahhan's sole negative reading of that film. Decision and Order at 18-19. Considering the two x-rays together, the administrative law judge determined that the findings of complicated pneumoconiosis on the January 30, 2007 x-ray by Dr. DePonte, a dually-qualified radiologist, outweighed "Dr. Dahhan's B-reading of the February x-ray finding only simple pneumoconiosis." *Id*. The administrative law judge then noted that, "both readings of the CT scan, which found a large density in the right upper lung, also support the findings of complicated pneumoconiosis on the January x-ray." *Id*. The administrative law judge concluded that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R.

§718.304(a).[6] The administrative law judge also found that claimant established complicated pneumoconiosis based on the medical opinion evidence at 20 C.F.R. §718.304(c). Thus, she concluded that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Weighing all of the record evidence together, the administrative law judge concluded that claimant satisfied his burden to establish complicated pneumoconiosis. The administrative law judge further found that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203 and, thus, found that he was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis.

Employer contends that the administrative law judge improperly relied on a numerical count of the positive x-ray readings in finding that claimant established the existence of complicated pneumoconiosis, and that she erroneously stated that the CT scan evidence was supportive of a finding that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a).

Contrary to employer's contention, the administrative law judge did not resolve the conflicting readings of the January 30, 2007 x-ray by engaging in mere "number counting." Employer's Brief in Support of Petition for Review at 10. The administrative law judge took the respective qualifications of the physicians into account, and reasonably determined that the x-ray was positive for pneumoconiosis, based on the weight of the evidence.[7] *Staton v. Norfolk and Western Railway Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F. 2d 314, 17 BLR 2-77 (6th Cir. 1993); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-152; Decision and Order at 18. Moreover, the administrative law judge had discretion to assign Dr. Wheeler's negative reading less weight because she questioned whether his negative reading was influenced by his personal opinion regarding the amount of claimant's dust exposure. Decision and Order at 18.

[6] The record does not contain any biopsy evidence for consideration pursuant to 20 C.F.R. §718.304(b).

[7] Employer also contends that the administrative law judge "ignored that Drs. Forehand and DePonte did not explain the bases for their diagnoses. They just checked boxes." Employer's Brief in Support of Petition for Review at 11. However, the regulation at 20 C.F.R. §718.102(b) specifically provides that an x-ray may establish the existence of pneumoconiosis if it is classified as Category 1, 2, 3, A, B, or C. *See* 20 C.F.R. §718.102(a). Additionally, complicated pneumoconiosis may be established based on an x-ray classified as showing a large opacity, Category A, B, or C. *See* 20 C.F.R. §718.304(a). Therefore, these interpretations were sufficient, in and of themselves, to establish complicated pneumoconiosis.

However, because the administrative law judge misstated the dates of the x-rays, and based on our decision to remand this case on other grounds, discussed *infra*, we vacate the administrative law judge's findings that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), so that she may address whether a six month difference, as opposed to a one week difference, in the dates of the x-rays has any effect on the weight she accords the conflicting x-ray evidence.

Pursuant to 20 C.F.R. §718.304(c), we agree with employer that the administrative law judge erred in concluding that the CT scan evidence supported her finding of complicated pneumoconiosis, as she did not consider whether the physicians who interpreted the CT scans made the appropriate equivalency evaluation. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the administrative law judge should perform equivalency determinations to make certain that, regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999). Thus, we vacate the administrative law judge's reliance on the CT scan evidence to find the existence of complicated pneumoconiosis established.

Furthermore, pursuant to 20 C.F.R. §718.107(b), employer makes a valid argument that the administrative law judge erred in stating that she inferred, "from the context in which the January 30, 2007 CT scan was taken[,] that well qualified physicians found the CT scan to be a reliable basis for assisting in reaching an appropriate diagnosis of [claimant's] lung condition." Decision and Order at 9. Employer notes that this inference was not supported by the record, as "Dr. Abramowitz questioned the reliability of the test from a technical standpoint and Dr. Antoun stated that the CT scan was not dispositive in demonstrating the disease." Employer's Brief in Support of Petition for Review at 12. Furthermore, employer is correct in maintaining that specific evidence must be introduced into the record by DOL or claimant, as the "party submitting the test or procedure pursuant to [20 C.F.R. §]718.107(b) bears the burden to demonstrate that the test or procedure is medically acceptable." *Id*., *citing Dempsy v. Sewell Coal Co.*, 23 BLR 1-47 (2004). On remand, we instruct the administrative law judge to address the equivalency requirement and employer's arguments as to the reliability of the CT scan evidence, and explain the basis for her findings, relevant to 20 C.F.R. §718.107(b). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Employer also argues that the administrative law judge erred in concluding that Dr. Forehand's opinion supports a finding of complicated pneumoconiosis under 20 C.F.R. §718.304(c), as his diagnosis of complicated pneumoconiosis was based solely on his interpretation of claimant's January 30, 2007 x-ray. Contrary to employer's argument, however, the administrative law judge permissibly concluded that Dr. Forehand's opinion was based on the totality of his examination of claimant, and was

also supported by the positive x-ray evidence for complicated pneumoconiosis. However, we agree with employer that the administrative law judge should address on remand, what significance if any, to give to the non-qualifying pulmonary function and arterial blood gas study evidence. Thus, we also vacate the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c), and remand this case for further consideration.

B. Causal Relationship.

The administrative law judge noted that because claimant worked less than ten years in coal mine employment, he could not avail himself of the presumption, at 20 C.F.R. §718.203, that his pneumoconiosis arose out of coal mine employment. The administrative law judge stated:

> Nonetheless, Drs. Fritzhand, Westerfield, Broudy, Forehand, and Dahhan all said the Claimant had pneumoconiosis due to his history of coal mine employment. Dr. Forehand specifically stated that 8.68 years of exposure to coal dust was sufficient to cause the disease. Drs. Forehand, DePonte, Dahhan, Thrale, Gordonson, Rubenstein, Sargent, Westerfield and Broudy all identified opacities of coal workers' pneumoconiosis on the [c]laimant's x-rays. Although the opinions of Drs. Antoun and Abramowitz were stated more equivocally, both said the abnormalities they saw on the Claimant's CT scan could be due to coal workers' pneumoconiosis. Only Dr. Wheeler did not believe the Claimant has pneumoconiosis. *The Employer has not offered evidence sufficient to rebut the presumption.*

Decision and Order at 20 (emphasis added).

Employer argues that the administrative law judge erred in failing to properly explain the basis for his finding at 20 C.F.R. §718.203. We agree. Because claimant has less than ten years of coal mine employment, he has the burden to establish that his *complicated* pneumoconiosis arose out of his coal mine employment. *See Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007). Employer correctly asserts that the administrative law judge merely "listed the doctors who found that [claimant] had any type of pneumoconiosis and assumed that they found the diagnosed condition was related to [claimant's] former coal mine employment." Employer's Brief in Support of Petition for Review at 15. The administrative law judge did not distinguish between those physicians who diagnosed *complicated* pneumoconiosis due to coal dust exposure and those who diagnosed only *simple* pneumoconiosis arising out of coal mine employment. The administrative law judge also erred in citing to positive readings for simple pneumoconiosis by Drs. Tharle, Gordonson, Rubenstein, Sargent, Westerfield and Broudy, to support her finding at 20 C.F.R. §718.203, as these radiologists did not

address, on the ILO classification form, the etiology of the pneumoconiosis they identified. Director's Exhibits 1, 2.

Employer also correctly asserts that only Dr. Forehand has specifically related claimant's complicated pneumoconiosis to his 8.68 years of coal mine employment. Because the administrative law judge has not addressed whether Dr. Forehand's opinion is reasoned and documented on the issue of causal relationship, we vacate her finding at 20 C.F.R. §718.203, and remand this case for further consideration. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In summary, we vacate the administrative law judge's finding that claimant established complicated pneumoconiosis and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On remand, the administrative law judge must reweigh the x-rays, the CT scan evidence and medical opinions relevant to the issue of complicated pneumoconiosis, and determine whether claimant has met his burden of proving that he has the condition described in 20 C.F.R. §718.304 by a preponderance of the evidence. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 33-34. If claimant is found to have complicated pneumoconiosis, the administrative law judge must render new findings at 20 C.F.R. §718.203, as to whether the complicated pneumoconiosis arose out of coal mine employment, before concluding that claimant is entitled to the irrebuttable presumption. If claimant is unable to establish invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304, the administrative law judge must further consider whether claimant established entitlement under 20 C.F.R. §§718.202(a), 718.203, and 718.204(b), (c).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part and the case is remanded 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