BRB Nos. 11-0542 BLA
and 11-0542 BLA-A

ELSIE T. LESTER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
HARD TIMES MINING, INCORPORATED	)	DATE ISSUED: 05/29/2012
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Elsie T. Lester, Big Rock, Virginia, *pro se*.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

Before: SMITH, HALL and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, and employer cross-appeals, the Decision and Order on Remand Denying Benefits (2006-BLA-6036) of Administrative Law Judge Linda S. Chapman, rendered on a subsequent claim filed on August 30, 2004,[1] pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C.

[1] Claimant filed an initial claim on June 2, 1997, which was denied for failure to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant

§§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).[2] This case is before the Board for the second time. The Board previously affirmed the administrative law judge's finding that claimant established twenty-seven years of coal mine employment but vacated her award of benefits and her specific finding that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *Lester v. Hard Times Mining, Inc.*, BRB No. 09-0368 BLA, slip op. at 3 n. 3, 5-7 (Dec. 2, 2009) (McGranery, J., concurring and dissenting) (unpub.), *recon. denied*, (July 20, 2010) (unpub. Order). The Board held, *inter alia*, that the administrative law judge erred in according greater weight to Dr. Miller's positive reading of a July 6, 2006 x-ray on the ground that it was the most recent x-ray with an ILO classification[3] by a radiologist dually qualified as a Board-certified radiologist and B reader. *Id*. at 6. Because the x-rays in this case are separated by only a short period of time, the Board held that the administrative law judge did not give proper consideration to the fact that the February 1, 2006 x-ray had two negative readings for complicated pneumoconiosis, in accordance with the ILO classification system, and that one of the readings was by Dr. Alexander, a dually qualified radiologist. *Id*. Additionally, the Board held that the administrative law judge erred in concluding that Dr. Alexander's reading of an earlier June 8, 2004 x-ray, as showing "possible" Category A opacities, was supportive of a finding of complicated pneumoconiosis, without addressing the equivocal nature of that reading. *Id*. at 7. The Board vacated the administrative law judge's finding at 20 C.F.R. §718.304(a), and remanded the case for further consideration of whether claimant established the existence

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filed a second claim on September 27, 1999, which was denied because the district director determined that, while the existence of pneumoconiosis was established, claimant failed to prove total disability. Director's Exhibit 2. Claimant took no further action until he filed his current subsequent claim.

[2] Congress recently adopted amendments to the Act, which became effective on March 23, 2010, and apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. 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 amendments are not applicable to this claim, as it was filed prior to January 1, 2005.

[3] Pursuant to 20 C.F.R. §718.102(b), "[a] chest X-ray to establish the existence of pneumoconiosis shall be classified as Category 1, 2, 3, A, B, or C, according to the International Labour Organization Union Internationale Contra Cancer/Cincinnati (1971) International Classification of Radiographs of the Pneumoconioses (ILO-U/C 1971)[.]" 20 C.F.R. §718.102(b).

of complicated pneumoconiosis and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[4] *Id*. at 7, 9.

In her Decision and Order on Remand, issued on April 27, 2011, the administrative law judge determined that the new evidence failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, or total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge found that claimant was unable to demonstrate a change in an applicable condition of entitlement under 20 C.F.R. §725.309, and she denied benefits.

On appeal, claimant challenges the denial of his claim. Employer responds, urging affirmance of the denial of benefits. In its cross-appeal, employer asserts that the administrative law judge erred in finding that the x-ray evidence is in equipoise as to the existence of complicated pneumoconiosis and that she erred in not giving controlling weight to Dr. Hippensteel's opinion, that claimant does not have complicated pneumoconiosis. The Director, Office of Workers' Compensation Programs, has declined to file a brief, unless specifically requested to do so by the Board.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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.[5] 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).

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

[4] The Board also vacated the administrative law judge's finding with regard to the date for commencement of benefits and instructed her to reconsider the evidence relevant to this issue, in accordance with 20 C.F.R. §725.503(b). *Lester v. Hard Times Mining, Inc.*, BRB No. 09-0368 BLA, slip op. at 9 (Dec. 2, 2009) (McGranery, J., concurring and dissenting) (unpub.), *recon. denied*, (July 20, 2010) (unpub. Order).

[5] Because claimant's last coal mine employment was in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 6.

since the date upon which the order denying the prior claim became final."[6] 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 "shall be limited to those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). As claimant's prior claim was denied because claimant failed to establish total disability, he was required to establish this element in order to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3).

I. Total Disability -- 20 C.F.R. §718.204(b)

A miner shall be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability shall be established by pulmonary function studies showing values equal to, or less than, those in Appendix B, blood gas studies showing values equal to or less than those set forth in Appendix C, by evidence establishing cor pulmonale with right-sided congestive heart failure, or if a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv).

On remand, the administrative law judge reconsidered whether claimant established a change in an applicable condition of entitlement by proving that he is totally disabled. The administrative law judge noted that she outlined the evidence relevant to the issue of total disability in her prior decision and incorporated her prior finding that the evidence failed to establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). Decision and Order on Remand at 2-3; January 22, 2009 Decision and Order at 14-15. Therefore, we will review the administrative law judge's findings on total disability, as outlined in her prior decision.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found that there are four newly submitted pulmonary function studies, dated April 23, 2004, October 18, 2004, February 1, 2006 and October 26, 2006. Director's Exhibits 12, 15; Employer's Exhibits 1, 4. The administrative law judge noted that both Dr. Hippensteel, the physician who administered the February 1, 2006 pulmonary function study, and Dr. Fino, the physician who administered the October 26, 2006 pulmonary function study,

[6] In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

indicated that they "were not able to obtain valid pulmonary function study results . . . ." 2009 Decision and Order at 14. Because the April 23, 2004 and October 18, 2004 pulmonary function studies did not produce values that qualify for total disability under the regulatory criteria,[7] the administrative law judge permissibly concluded that claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2)(i). *Id*.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge noted that there are four newly submitted arterial blood gas studies. She found that the blood gas studies dated October 18, 2004 and December 1, 2005 were qualifying for total disability and that the studies dated February 1, 2006 and October 26, 2006 were non-qualifying. *See* 2009 Decision and Order at 14. Director's Exhibit 12; Claimant's Exhibit 3; Employer's Exhibits 1, 4. Because the administrative law judge permissibly credited "the more recent test results," as they are more probative of claimant's current condition, we affirm her finding that claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2)(ii). *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); Wilt *v. Wolverine Mining Co* ., 14 BLR 1-70 (1990); *Sexton v. Southern Ohio Coal Co*., 7 BLR 1-411 (1984); 2009 Decision and Order at 14. Additionally, pursuant to 20 C.F.R. §718.204(b)(2)(iii), since the administrative law judge correctly found that the record does not contain any evidence of cor pulmonale with right-sided congestive heart failure, we affirm her finding that claimant is unable to establish total disability pursuant to that subsection. 2009 Decision and Order at 14.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Hippensteel, Forehand and Fino, along with claimant's treatment records. 2009 Decision and Order at 14-15. The administrative law judge found that Dr. Hippensteel opined that claimant was not totally disabled from a respiratory or pulmonary perspective, based on pulmonary function and arterial blood gas testing, but that claimant was totally disabled by his brain tumor. 2009 Decision and Order at 15; Employer's Exhibits 1, 11. In contrast, Dr. Forehand opined that claimant does have a totally disabling respiratory impairment. 2009 Decision and Order at 15; Director's Exhibit 12. In weighing the conflicting evidence, the administrative law judge permissibly assigned controlling weight to Dr. Hippensteel's opinion, on the grounds that it was "well reasoned and supported by the objective medical evidence," and less weight to Dr. Forehand's opinion, because she found that he "did not consider the entirety of the medical evidence." 2009 Decision and Order at 15; *see Milburn Colliery Co. v. Hicks*,

[7] A "qualifying" pulmonary function or arterial blood gas study yields values that are equal to or less than the appropriate values set out in the Tables at 20 C.F.R. Part 718, Appendices B and C. *See* 20 C.F.R. §718.204(b)(2)(i).

138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

With respect to Dr. Fino, the administrative law judge found that, while he summarized the results of the pulmonary function and arterial blood gas testing, he "did not address the question of whether [claimant] was disabled, from a pulmonary standpoint, from returning to his previous coal mining job." 2009 Decision and Order at 15. Moreover, the administrative law judge found that "[a]lthough [claimant's] treatment records reflect treatment for shortness of breath and other respiratory problems, none of [claimant's] physicians provided any opinion one way or the other regarding [claimant's] respiratory capacity." *Id*. at 15. Thus, we affirm the administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(iv). *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

II. Complicated Pneumoconiosis -- 20 C.F.R. §718.304(a)

The administrative law judge also considered whether claimant established total disability and a change in an applicable condition of entitlement, by proving the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. Section 411(c)(3) of the Act, 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). *See* 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. Rather, 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 Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *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).

On remand, the administrative law judge initially noted that the evidence, "when considered in isolation under independent subsections of 20 C.F.R. §718.304(a), (b), (c), is not sufficient to establish the presence, *or absence*, of complicated pneumoconiosis." Decision and Order on Remand at 3. Pursuant to 20 C.F.R. §718.304(a), the administrative law judge stated:

> [T]here are five ILO interpretations of four x-rays, with Dr. Forehand, a B reader, and Dr. Miller, who is dually qualified (as a Board-certified radiologist and B reader), reporting simple pneumoconiosis with a category A or B opacity. Dr. Hippensteel, who is a B reader, and Dr. Alexander, who is dually qualified, read [claimant's] February 1, 2006 x-ray as showing simple pneumoconiosis, but no complicated pneumoconiosis. Dr. Alexander also read the June 8, 2004 x-ray as showing simple pneumoconiosis, and a "possible" category A opacity. I find that the designations of category A or B opacities of pneumoconiosis are essentially in equipoise.

Decision and Order on Remand at 3. The administrative law judge also discussed x-ray readings from Drs. Fino and Patel that were not recorded on ILO forms. Decision and Order on Remand at 3; Employer's Exhibit 4. The administrative law judge noted that, while Dr. Fino read an October 18, 2004 x-ray as positive for simple pneumoconiosis (2/2) and also identified a large mass or lesion, he did not "indicate whether there was a category A, B or C opacity." Decision and Order on Remand at 3. Similarly, the administrative law judge found that, while Dr. Patel identified large densities on hospitalization x-rays dated December 13, 2003 and December 19, 2003, Dr. Patel did not indicate whether the opacities were greater than one centimeter in diameter. *Id.*; *see* Employer's Exhibit 2. The administrative law judge concluded that the x-ray evidence, overall, did not establish that claimant has a process in his lungs that appears on x-ray as a density larger than one centimeter in diameter, due to pneumoconiosis. Decision and Order on Remand at 4.

Although the administrative law judge found that the x-ray evidence was insufficient to establish the existence of complicated pneumoconiosis, she has not satisfied her obligation to explain the weight accorded to the conflicting evidence and provide the basis for her findings of fact and conclusions of law, as required by the Administrative Procedure Act (APA).[8] Specifically, the administrative law judge appears

[8] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 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.

to base her finding that claimant does not have complicated pneumoconiosis on a head count of the total number of positive and negative readings for complicated pneumoconiosis by dually qualified radiologists and B readers. If this is the basis for the administrative law judge's finding, it does not take into account that all of the negative readings for complicated pneumoconiosis were of one x-ray, or that, of the four x-rays of record, two x-rays have uncontradicted readings that are positive for complicated pneumoconiosis, one x-ray has uncontradicted readings that are negative, and one x-ray may be considered equivocal as to the presence of absence of complicated pneumoconiosis.[9] Because the administrative law judge has not adequately explained the weight accorded to the individual x-rays, we vacate her finding that claimant failed to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 148-149, 11 BLR 2-1, 2-8 (1987); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Pursuant to 20 C.F.R. §718.304(b), the administrative law judge noted that claimant underwent bronchoscopies on November 22, 2003, November 29, 2005 and December 5, 2005, in the course of treatment for multiple bilateral lung nodules.[10] Decision and Order on Remand at 3-8; Employer's Exhibits 2, 3; Claimant's Exhibit 4. The administrative law judge found that, while the November 29, 2005 bronchoscopy "included findings of focal anthracosis," all of the bronchoscopies were taken to exclude a malignancy. Decision and Order on Remand at 7 n.5. Because the administrative law judge correctly observed that the biopsy reports "do not make any diagnosis of

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§919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[9] The June 8, 2004 x-ray was read by Dr. Alexander, dually qualified as a Board-certified radiologist and B reader, as showing "possible" Category A complicated coal workers' pneumoconiosis. Director's Exhibit 15. The October 18, 2004 x-ray was read by Dr. Forehand, a B reader, as positive for complicated pneumoconiosis, Category A. Director's Exhibit 12. The February 1, 2006 x-ray was read by Dr. Hippensteel, a B reader, and Dr. Alexander as negative for complicated pneumoconiosis. Employer's Exhibit 1; Claimant's Exhibit 2. The July 6, 2006 x-ray was read by Dr. Miller, dually qualified as a Board-certified radiologist and B reader, as positive for complicated pneumoconiosis. Claimant's Exhibit 1.

[10] The administrative law judge also noted in her original decision that claimant had a bronchoscopy on June 24, 2005, which showed no malignant cells. Decision and Order at 9.

complicated pneumoconiosis," we affirm her finding that claimant did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). *Id*. at 7.

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge reviewed claimant's medical records from Buchanan General Hospital and Wellmont Bristol Regional Medical Center, indicating that claimant has "been followed since 2003 in connection with persistent densities in his lungs," and underwent multiple CT scans and bronchoscopies in order to diagnose the etiology of those densities. Decision and Order on Remand at 4; *see* Director's Exhibit 15; Claimant's Exhibit 8. The administrative law judge found that a November 18, 2003 CT scan showed a 1.6 by 2.3 centimeter density, consistent with either pulmonary massive fibrosis (PMF) or a malignancy. Decision and Order on Remand at 4; Director's Exhibit 15. The administrative law judge also found that a May 4, 2005 CT scan was interpreted by Dr. Patel as showing two large masses, with the largest measuring 4.7 by 5.6 centimeters, consistent with "possible PMF formation or malignancy." Decision and Order on Remand at 4; Employer's Exhibit 2. Additionally, she found that an October 18, 2006 CT scan was read by Dr. Patel as showing larger speculated densities in the upper lobes and smaller densities in the lower lobes that were not seen previously, which he opined could be due to a difference in the machine or a progression of claimant's lung disease. Decision and Order on Remand at 6. She further noted that Dr. Patel diagnosed "[e]xtensive changes in the lungs, probably complicated pneumoconiosis showing progression," but also stated that an "[a]ssociated malignancy would be extremely difficult to exclude due to the extensive nature of this disease." Employer's Exhibit 6; *see* Decision and Order on Remand at 6.

The administrative law judge found that Dr. Patel "at times suggested that the abnormalities on [claimant's] x-rays *could* represent changes due to dust exposure, or are 'most likely' due to complicated coal workers' pneumoconiosis with progressive massive fibrosis." Decision and Order on Remand at 7-8 (emphasis added). However, she noted that by 2006, "Dr. Patel reported that [claimant's] x-rays showed worsening changes of an uncertain etiology." *Id*. The administrative law judge further noted that in a discharge summary dated December 6, 2005, Dr. McKinney opined that claimant's bilateral nodules "*could possibly* be pneumoconiosis." *Id.*

In considering the totality of the hospital records and CT scans, the administrative law judge permissibly found that claimant failed to establish the existence of complicated pneumoconiosis as "none of [claimant's] physicians, or the radiologists who read his x-rays and CT scans, *unequivocally* attributed the large densities in his lungs to pneumoconiosis or coal dust exposure" and therefore none of the physicians "*definitively* diagnosed him with complicated pneumoconiosis." Decision and Order on Remand at 8 (emphasis added); *see Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Justice v. Island Creek Coal Co*., 11 BLR 1-91 (1988).

The administrative law judge also considered Dr. Fino's November 21, 2006 medical report. The administrative law judge noted that Dr. Fino was concerned that the CT scan findings of slowly increasing bilateral large opacities represented complicated pneumoconiosis, as opposed to a malignancy. Decision and Order on Remand at 7. The administrative law judge found that "the only basis for his diagnosis of complicated pneumoconiosis was that the bilateral opacities were slowly increasing in size" and could not be due to a malignancy, or else claimant would have already died. *Id*. at 9. Contrary to the administrative law judge's finding, however, Dr. Fino's diagnosis of complicated pneumoconiosis was based on his physical examination of claimant, his understanding that claimant had a history of twenty-nine years in underground coal mine employment, and a review of claimant's hospitalization records, chest x-ray reports, CT scan reports, pulmonary function and arterial blood gas results, and the office notes of Dr. Patel. Employer's Exhibit 4. Furthermore, Dr. Fino personally interpreted chest x-rays dated October 18, 2004 and October 26, 2004 and a CT scans obtained in conjunction with his examination dated October 18, 2006. *Id*. Dr. Fino opined, based on all of the evidence presented, that claimant's bilateral large opacities are due to complicated pneumoconiosis, as opposed to a malignancy. *Id*. Although Dr. Fino indicated it would be "helpful to review old CT scans," he did not permit the lack of such information to deter him from providing a definitive diagnosis:

> I would note that, at the present time and if the above-referenced records represent all of the information available to me, I must conclude that simple coal workers' pneumoconiosis and complicated pneumoconiosis are present.

Employer's Exhibit 4.[11] Because the administrative law judge mischaracterized Dr. Fino's opinion and did not give it proper consideration, we vacate the administrative law judge's determination, pursuant to 20 C.F.R. §718.304(c), that Dr. Fino's opinion is insufficient to support a finding that claimant has complicated pneumoconiosis. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984).

As a final matter, we hold that the administrative law judge erred in concluding that Dr. Forehand's opinion, that claimant has complicated pneumoconiosis, which is based on his reading of an October 18, 2004 x-ray and claimant's history of coal mine employment, is "not sufficient to establish that the large densities in [claimant's] lungs are *due to pneumoconiosis*." Decision and Order on Remand at 9 (emphasis added).

[11] The administrative law judge should consider the fact that any CT scans of record that were not provided to Dr. Fino were interpreted as negative for a malignancy and, therefore, do not detract from his opinion that claimant has complicated pneumoconiosis.

Contrary to the administrative law judge's finding, the ILO classification form completed by Dr. Forehand specifically provided for the identification of large opacities consistent with pneumoconiosis, and Dr. Forehand check-marked the box indicating that claimant has parenchymal abnormalities consistent with pneumoconiosis, with a large opacity, Category A. Director's Exhibit 12. Moreover, in his report, he identified the October 18, 2004 x-ray as showing coal worker's pneumoconiosis. If credited, Dr. Forehand's x-ray reading is sufficient to support a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Furthermore, since claimant has at least ten years of coal mine employment, he is entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203.

To summarize, we vacate the administrative law judge's findings at 20 C.F.R. §718.304(a), (c), and the denial of benefits. On remand, the administrative law judge must reweigh the x-ray evidence and the medical opinions of Drs. Fino, Hippensteel and Forehand to determine whether claimant has established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), (c). *See Mullins*, 484 U.S. at 148-149, 11 BLR at 2-8; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. The administrative law judge must also weigh the evidence of complicated pneumoconiosis against the contrary evidence, and reach a determination as to whether claimant has satisfied his overall burden to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100*; Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33; *Wojtowicz*, 12 BLR at 1-165. The administrative law judge must also determine whether claimant's complicated pneumoconiosis, if established, arose out of coal mine employment at 20 C.F.R. §718.203, prior to finding that he is entitled to the irrebuttable presumption of total disability due to pneumoconiosis. *Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007). If the presumption is invoked, the administrative law judge must follow the Board's prior instruction that she reconsider the evidence relevant to the date for commencement of benefits, in accordance with 20 C.F.R. §725.503(b). *See Lester*, BRB No. 09-0368 BLA, slip op. at 9. In rendering all of her findings on remand, the administrative law judge must explain the basis for her conclusions in accordance with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is 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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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge