BRB No. 08-0159 BLA

C.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WEST VIRGINIA SOLID ENERGY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 11/25/2008
Employer-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 Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Laura Metcoff Klaus and W. William Prochot (Greenberg Traurig LLP), Washington, D.C. for employer.

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

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand Awarding Benefits (05-BLA-0018) of Administrative Law Judge Linda S. Chapman (the administrative law judge) on claimant's request for modification of the denial of a duplicate claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of

1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[1] This case has been before the Board previously.[2] In the most recent appeal filed by employer, the Board vacated the administrative law judge's findings that, because the newly submitted evidence established complicated pneumoconiosis, claimant established a material change in conditions and entitlement to benefits. The Board held that the administrative law judge failed to apply the proper standard in weighing the evidence relevant to the existence of complicated pneumoconiosis, and further erred in her consideration of the x-ray reading and medical report of Dr. Dahhan. [*C.S.*] *v. West Virginia Solid Energy, Inc.*, BRB Nos. 06-0402 BLA and 06-0402 BLA-A (Feb. 28, 2007)(unpub.). Consequently, the Board remanded the case for the administrative law judge to put the burden of proof on claimant, and to consider all relevant evidence prior to invocation of the irrebuttable presumption at 20 C.F.R. §718.304, per *Gray v. SLC Coal Co.*, 176 F.3d 382, 389, 21 BLR 2-615, 2-628-29 (6th Cir. 1999). The Board instructed the administrative law judge to consider the x-ray comments Dr. Dahhan made in his April 12, 2004 narrative report in conjunction with his "Category A" markings on the ILO form pursuant to Section 718.304(a); and, to reconsider the probative value of Dr. Dahhan's opinion pursuant to Section 718.304(c). The Board additionally stated that, if the administrative law judge again found entitlement to benefits established, the administrative law judge should then consider whether claimant established a mistake in fact pursuant to 20 C.F.R. §725.310 (2000), as that determination could affect the onset date of benefits. *See* 20 C.F.R. §725.503.

In the Decision and Order on Remand Awarding Benefits, the administrative law judge again found that the newly submitted evidence established invocation of the irrebuttable presumption at Section 718.304, and that claimant therefore established a material change in conditions since the previous denial. The administrative law judge then summarized the evidence previously submitted in the instant duplicate claim and

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2008). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of the regulation remains applicable, we will cite to the 2000 version of the Code of Federal Regulations.

[2] The instant claim, claimant's fourth, was filed on October 29, 1999. Director's Exhibit 1. The complete procedural history of this case, set forth in the Board's prior decisions in [*C.S.*] *v. West Virginia Solid Energy, Inc.*, BRB No. 01-0724 BLA (Apr. 25, 2002)(unpub.), [*C.S.*] *v. West Virginia Solid Energy, Inc.*, BRB No. 03-0236 BLA (Oct. 20, 2003)(unpub.), and [*C.S.*] *v. West Virginia Solid Energy, Inc.*, BRB Nos. 06-0402 BLA and 06-0402 BLA-A (Feb. 28, 2007)(unpub.) is incorporated herein by reference.

stated that, because she considered the claim in its entirety on the merits, the medical evidence "establishes that there was a mistake in fact in Judge Roketenetz's previous decision, in that [claimant] has established that he is entitled to the irrebuttable presumption of total disability due to pneumoconiosis under Section 718.304." Decision and Order on Remand at 11. Accordingly, the administrative law judge granted claimant's request for modification and awarded benefits beginning in October 1999.[3]

On appeal, employer asserts that the administrative law judge failed to comply with the Board's instructions on remand and again improperly shifted the burden of proof to employer to rule out complicated pneumoconiosis. Employer further asserts that the administrative law judge erred in her analysis of the x-ray, computerized tomography (CT) scan, and medical opinion evidence relevant to the existence of complicated pneumoconiosis, and in failing to explain her finding of a mistake in fact in the previous denial of the instant claim. Claimant responds, urging affirmance of the award of benefits. Employer filed a reply brief, reiterating its arguments on appeal and additionally asking that the case be reassigned. The Director, Office of Workers' Compensation Programs, has not filed a brief in this 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 supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant may establish modification by establishing either a change in conditions since the issuance of the previous denial or a mistake in a determination of fact in a previous denial. 20 C.F.R. §725.310(a) (2000). In considering whether a change in conditions has been established pursuant to Section 725.310 (2000), an administrative law judge is obligated to perform an independent assessment of the newly submitted

[3] Although the administrative law judge specifically stated she was awarding benefits beginning in "October 2001," the corresponding footnote indicates that she intended to use the date of the application as the date of onset of benefits. Decision and Order at 11 n.4.

evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. 20 C.F.R. §725.310 (2000); *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). In considering a request for modification of a duplicate claim (which has been denied based upon a failure to establish a material change in conditions), an administrative law judge must determine whether all of the evidence developed in the duplicate claim, including the new evidence submitted with the request for modification, is sufficient to support a material change in conditions. *See* 20 C.F.R. §725.309(d) (2000); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998); *Nataloni*, 17 BLR at 1-84. If the evidence is sufficient to establish a material change in conditions, the administrative law judge must then consider the merits of the duplicate claim. *Hess*, 21 BLR at 1-143. Claimant's previous claim was denied for failure to establish the presence of a totally disabling respiratory impairment. [*C.S.*] *v. West Virginia Solid Energy, Inc.*, BRB No. 01-0724 BLA (Apr. 25, 2002)(unpub.). Consequently, claimant was required to submit evidence establishing this element of entitlement to obtain review on the merits of his claim. *Hess*, 21 BLR at 1-143.

Section 411(c)(3) of the Act, 30 U.S.C. §923(c)(3), and its implementing regulation, 20 C.F.R. §718.304, provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (A) an x-ray of the miner's lungs shows an opacity greater than one centimeter that would be classified as Category A, B, or C; (B) a biopsy or autopsy shows massive lesions in the lung; or (C) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must consider all relevant evidence on this issue, i.e., evidence that supports a finding of complicated pneumoconiosis, as well as evidence that does not support a finding of complicated pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Gray*, 176 F.3d at 388-89, 21 BLR at 2-626-29; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (*en banc*).

Employer initially contends that the administrative law judge failed to follow the Board's remand instructions and improperly placed the burden of proof on employer to rule out complicated pneumoconiosis. Specifically, employer asserts:

> On remand, no less than in the original decision, the [administrative law judge] invoked a presumption of complicated pneumoconiosis based on the positive x-ray readings and then shifted the burden to WV Solid Energy to rebut it by "affirmatively" proving that the opacities were not there or not what they seemed to be. Thus, on remand, no less than in the original

> decision, the [administrative law judge] failed to weigh the evidence, like and unlike, prior to finding the disease established.

Employer's Brief at 14.

Employer's argument has merit. We previously remanded this case because the administrative law judge improperly shifted the burden of proof to employer to "persuasively establish" that the Category A x-ray opacities were not there or were not what they seemed to be. Yet on remand, the administrative law judge weighed the x-ray evidence and concluded that "[e]mployer has not introduced x-ray evidence sufficient to affirmatively show that the opacities of pneumoconiosis noted by Dr. Forehand and Dr. Barrett, as well as Dr. Dahhan, are not there, or that they are not what they seem to be." Decision and Order on Remand at 5. The administrative law judge then weighed the other evidence of record and found that Dr. Wheeler's CT scan interpretation was "not affirmative evidence sufficient to establish that the large opacities noted on x-ray are not there, or that they are due to an etiology other than pneumoconiosis;" and, Dr. Dahhan's medical opinion was poorly reasoned, because Dr. Dahhan based his opinion on pathology evidence that did not "rule out" the existence of complicated pneumoconiosis, and because Dr. Dahhan failed to discuss the more recent x-ray and CT scan findings of large opacities. Decision and Order on Remand at 6-8. Thus, although the administrative law judge eliminated the "persuasively establish" language from her decision on remand, as employer asserts, the administrative law judge imposed the same burden on employer. Employer's Brief at 13-14. Rather than consider, with the burden of proof on claimant, whether the weight of all relevant evidence establishes the existence of complicated pneumoconiosis before invoking the irrebuttable presumption, the administrative law judge weighed the x-ray evidence, and then required employer to "affirmatively show" or "establish" that the x-ray opacities were not there or were not what they seemed to be. As the burden of proof remains on claimant at all times, we vacate the administrative law judge's finding that claimant is entitled to the irrebuttable presumption at 20 C.F.R. §718.304, and her attendant finding that claimant established a material change in conditions at 20 C.F.R. 725.309(d) (2000).

We additionally find merit in employer's contention that, in evaluating the x-ray evidence at Section 718.304(a), the administrative law judge erred in finding that Dr. Dahhan's designation on the ILO form of a "Category A" opacity outweighs Dr. Dahhan's subsequent comments, indicating that he was uncertain as to the etiology of the mass. Employer's Brief at 18, Reply Brief at 7. In considering Dr. Dahhan's x-ray reading and comments, the administrative law judge determined that:

> Dr. Dahhan's ILO form contains no ambiguities: he clearly designated the presence of a large opacity that met the requirements for a [C]ategory A opacity, and he added no further comments on the section of the form

> available for narrative comments. Considering Dr. Dahhan's narrative report in this context, I interpret it to mean that while the mass Dr. Dahhan saw on x-ray is consistent with a large opacity, as defined on the ILO form, it was not possible to determine if it was caused by an etiology other than pneumoconiosis with x-ray alone. . . .
>
> I find that Dr. Dahhan's unequivocal designations on the ILO form for the April 3, 2004 x-ray qualify as a positive finding of a [C]ategory A large opacity. The statute does not require a "diagnosis" of the medical condition known as complicated pneumoconiosis; Dr. Dahhan's interpretation clearly meets the requirements of prong (A), as he has indicated that there is a process that shows up on x-ray as a [C]ategory A opacity of pneumoconiosis. Dr. Dahhan's indication that other diagnostic tools should be used to further assess the etiology of the mass does not detract from that designation. His narrative certainly does not suggest that he did not believe that the mass he designated as a [C]ategory A opacity was not there.

Decision and Order on Remand at 4-5. Contrary to the administrative law judge's analysis, the existence of complicated pneumoconiosis is not determined solely by the designation of Category A, B or C opacities on x-ray. Section 718.304 provides for invocation of the irrebuttable presumption if "such miner is suffering from a chronic dust disease of the lung" which, when diagnosed by x-ray, yields one or more opacities which would be classified as Category A, B or C. 20 C.F.R. §718.304; *Melnick*, 16 BLR at 1-33. Therefore, as employer asserts, the administrative law judge was required to consider Dr. Dahhan's x-ray reading and comments together, and determine whether Dr. Dahhan diagnosed claimant with a chronic dust disease of the lung that yielded a Category A x-ray opacity. Reply Brief at 7. Consequently, the administrative law judge must make this determination on remand. *Gray*, 176 F.3d at 389, 21 BLR 2-628-29.

Employer next asserts that the administrative law judge erred in her evaluation of the evidence pursuant to Section 718.304(c). Specifically, employer contends that the administrative law judge erred in discounting Dr. Dahhan's opinion because Dr. Dahhan mischaracterized the pathology evidence as negative for complicated pneumoconiosis, where none of the pathologists ruled out its existence. Employer's Brief at 20-21; Reply Brief at 7. Employer's contention has merit. Dr. Caffrey specifically found that claimant did not have complicated pneumoconiosis, and neither of the two other pathologists found complicated pneumoconiosis. Director's Exhibits 26, 32, 40. Also, under the circumstances of their opinions, as employer asserts, the fact the other pathologists failed to "rule out" a disease does not establish its presence. Employer's Brief at 21. Contrary to the administrative law judge's finding, therefore, Dr. Dahhan did not mischaracterize the pathology evidence. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 516, 22

BLR 2-62, 2-651-52 (6th Cir. 2003). Consequently, the administrative law judge must reconsider the probative value of Dr. Dahhan's opinion on remand.

We additionally find merit in employer's contention that the administrative law judge did not adequately comply with the Board's remand instruction to consider the probative value of Dr. Dahhan's opinion in light of his reliance on the pulmonary function and blood gas study evidence of no impairment. Employer's Brief at 17-18; Reply Brief at 4. Although the record reflects that the administrative law judge acknowledged that Dr. Dahhan based his opinion on evidence of no impairment, and that "there is no dispute that [claimant] did not have a respiratory impairment, disabling or otherwise," Decision and Order on Remand at 8, the administrative law judge did not indicate what weight she accorded to this evidence. On remand, therefore, the administrative law judge must consider and explain the weight accorded to the objective study evidence. *Gray*, 176 F.3d at 389, 21 BLR 2-628-29.

We further find merit in employer's contention that the administrative law judge's determination to credit Dr. Forehand's diagnosis of complicated pneumoconiosis is at odds with her assessment of the biopsy evidence. Employer's Brief at 20. The administrative law judge found Dr. Forehand's diagnosis of complicated pneumoconiosis to be "precise" and "well-reasoned" because Dr. Forehand ruled out tuberculosis as an etiology for the large masses and nodularities in claimant's lungs. Decision and Order on Remand at 6. In so finding, however, the administrative law judge did not consider the fact that Dr. Forehand's diagnosis was based, in part, on biopsy evidence that did not contain a diagnosis of complicated pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). On remand, therefore, the administrative law judge must reconsider and explain the weight accorded to the biopsy evidence, as well as Dr. Forehand's diagnosis of complicated pneumoconiosis.[4] *Gray*, 176 F.3d at 389, 21 BLR 2-628-29; *see also Hess*, 21 BLR at 1-143.

[4] Although the dissent states that Dr. Dubilier diagnosed interstitial fibrosis with nodular anthracosilicosis based on a 1.5 centimeter mass, Dr. Dubilier's report states:

> [T]here is a centrally caseating grayish white nodule that is 1.5 cm in diameter. . . . about which there is a histiocytic and granulomatous type response. Away from this mass there is interstitial fibrosis with anthracos [*sic*] and within these areas of fibrosis, polarizable material compatible with silicates.

Director's Exhibit 26. Consequently, Dr. Dubilier's diagnosis of interstitial fibrosis with nodular anthracosilicosis was separate from his description of the mass. Moreover, as the

We reject, however, employer's argument that it was irrational for the administrative law judge to find that Dr. Forehand's opinion rebutted Dr. Wheeler's CT scan interpretations where Dr. Forehand did not read the CT scan. Employer's Brief at 20. Although employer correctly asserts that Dr. Forehand did not interpret the CT scans, Dr. Forehand opined that claimant did not have tuberculosis. The administrative law judge credited Dr. Forehand's opinion on this point, over Dr. Wheeler's opinion that the January 25, 2004 and July 2, 2004 CT scans were compatible with tuberculosis, because:

> [Dr. Forehand] pointed to the fact that [claimant] had never been exposed to tuberculosis, he had no symptoms of tuberculosis, there was no record that he had ever been treated for tuberculosis, his skin tests were negative, there was no x-ray evidence of tuberculosis, and the biopsies of his lung and lymph node tissue were negative for tuberculosis.

Decision and Order on Remand at 6. Substantial evidence supports this finding. Contrary to employer's assertion, therefore, the administrative law judge rationally concluded that Dr. Forehand's opinion rebutted Dr. Wheeler's CT scan interpretations. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *see also Gray*, 176 F.3d at 389, 21 BLR at 2-628-29.

Therefore, because the administrative law judge failed to apply the proper standard in weighing the evidence relevant to the existence of complicated pneumoconiosis, and further erred in her consideration of the x-ray, biopsy, and medical opinion evidence, we vacate the administrative law judge's findings that claimant established a material change in conditions and that therefore, he established a basis for modification and established his entitlement to benefits under the Act. *Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Gray*, 176 F.3d at 389, 21 BLR at 2-628-29.

On remand, the administrative law judge must reconsider all relevant evidence within the instant duplicate claim, including the evidence that was submitted prior to claimant's request for modification, pursuant to Section 718.304(a)-(c). Thus, after determining whether Dr. Dahhan diagnosed claimant with a chronic dust disease of the lung in interpreting the April 3, 2004 x-ray, the administrative law judge must determine whether the x-ray evidence as a whole supports a finding of complicated pneumoconiosis at Section 718.304(a). The administrative law judge must also determine whether the biopsy evidence is supportive of a finding of complicated pneumoconiosis under Section

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administrative law judge noted, Dr. Fino explained that because the mass was caseating, it could not be pneumoconiosis. Decision and Order on Remand at 11; Director's Exhibit 46 at 10.

718.304(b). And, the administrative law judge must determine whether the objective study, CT scan, and medical opinion evidence is supportive of a finding of complicated pneumoconiosis at Section 718.304(c). The administrative law judge must then weigh the evidence from each category together, and determine whether the weight of the evidence, as a whole, establishes the existence of complicated pneumoconiosis pursuant to Section 718.304. *See Gray*, 176 F.3d at 389, 21 BLR 2-628-29; *see also Hess*, 21 BLR at 1-143.

Lastly, we find merit in employer's assertion that the administrative law judge failed to explain her finding, pursuant to Section 725.310 (2000), of a mistake in fact in the previous denial. Employer's Brief at 21; Reply Brief at 9. Although the administrative law judge noted what evidence was before the previous administrative law judge, as employer states, "it is not clear how [the administrative law judge] came to the conclusion" that a mistake in fact was established. Reply Brief at 9. Consequently, if the administrative law judge again finds, on remand, that claimant is entitled to benefits, she must reconsider Judge Roketenetz's previous decision for a mistake in fact and explain her findings.[5]

[5] In remanding this case, we note that, nine months after the issuance of the Board's previous decision in 06-0402 BLA/A, which vacated the award of benefits, claimant's counsel filed an itemized statement requesting a fee for services performed before the Board in that appeal. 20 C.F.R. §802.203. Employer filed objections to the fee petition. That fee petition remains pending. However, claimant's counsel is entitled to an attorney's fee only if there has been a successful prosecution of the claim before the Board. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993). Because we vacated the award of benefits in 06-0402 BLA/A, and we have again vacated the administrative law judge's award of benefits on remand, there has not been a successful prosecution of this claim before the Board. Consequently, we deny counsel's fee petition at this time.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur:

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JUDITH S. BOGGS
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to again vacate the administrative law judge's decision and to remand the case for further consideration. I believe that a fair reading of the administrative law judge's opinion reveals no reversible error. I disagree with the majority's determination that the administrative law judge again misallocated the burden of proof. I agree with the majority, however, in holding that the administrative law judge erred in counting Dr. Dahhan's x-ray interpretation as a Category A opacity. Nevertheless, that error is harmless, as the administrative law judge properly found that even if she were to disregard Dr. Dahhan's reading, "the preponderance of the interpretations by the most highly qualified interpreters establishes that [claimant] has a condition that shows up as a category A opacity on x-ray." Decision and Order on Remand at 5. The remaining allegations of error in the administrative law judge's analysis of the opinions of Drs. Dahhan and Forehand and in her finding of a mistake of fact in Judge Roketenetz's opinion are devoid of merit.

First, a careful reading of the administrative law judge's decision reveals that she did not again misallocate the burden of proof. To indicate that the administrative law judge repeated her prior error, employer has seized upon language in the administrative law judge's decision on remand which appeared in the administrative law judge's prior decision. But claimant's careful analysis of the administrative law judge's decision in light of the Board's remand instructions, and the Fourth Circuit's teaching in *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 257, 22 BLR 2-93,

2-103 (4th Cir. 2000), demonstrates that employer's contention is baseless. Claimant's straightforward analysis is clear and persuasive:

> In her initial Decision and Order, the ALJ stated that if a claimant "meets the congressionally defined condition" of complicated pneumoconiosis, he is entitled to an irrebuttable presumption of total disability due to pneumoconiosis unless other "affirmative evidence. . . . persuasively establishes" that the claimant does not in fact have complicated pneumoconiosis. The Board found that the ALJ, in this passage "appear[ed] to have improperly shifted the burden of proof" to the Employer. The Board thus remanded the case "for consideration of all relevant evidence *prior* to the invocation of the irrebuttable presumption at Section 718.304." The Board stated: "The administrative law judge must, however, weigh together the evidence at subsection (a), (b) and (c) [of Section 718.304] before determining whether invocation of the irrebuttable presumption has been established." The ALJ did what the Board ordered. She analyzed the relevant evidence before deciding whether to invoke the irrebuttable presumption of total disability:
>
> > Therefore, inasmuch as the other evidence does not affirmatively show that the opacities are not there, or are not what they seem to be, the Claimant's x-ray evidence under prong (A) and CT scan evidence under prong (C) does not lose force. Consequently, Section 21 (c)(3) and the implementing regulations at 20 C.F.R. §718.304 compel me to invoke the irrebuttable presumption that Mr. S. is totally disabled due to pneumoconiosis.

Claimant's Brief at 26-27 (citations omitted; emphasis and brackets in original). Thus, the administrative law judge did exactly what the Board instructed her to do, she considered all relevant evidence and weighed together the evidence under the relevant prongs of the statute, 30 U.S.C. §§921 (c)(3)(A), (C), before invoking the irrebuttable statutory presumption in accordance with the teaching of *Scarbro.* Analysis of her decision reveals that the charge of misallocation is unfounded.

I agree, however, with my colleagues that the administrative law judge erred in determining that Dr. Dahhan's x-ray interpretation supported a finding of a Category A opacity. But that error is harmless because substantial evidence supports the administrative law judge's alternative finding that, without consideration of Dr. Dahhan's reading, the preponderance of the interpretations by the most highly qualified readers establishes a Category A opacity on x-ray. It is noteworthy that employer does not

attempt to dispute this holding. It could not do so.[6] Employer has persuaded the majority to focus on the administrative law judge's error in considering Dr. Dahhan's second x-ray interpretation as a finding of a Category A opacity, notwithstanding the uncertainty expressed in his report, and by focusing on this error, the majority has lost sight of the big picture, stated in the administrative law judge's alternative finding, that the weight of the x-ray evidence establishes a Category A opacity.

Also, in directing the administrative law judge to reconsider Dr. Dahhan's report stating that claimant does not have complicated pneumoconiosis, the majority has failed to consider the administrative law judge's decision in its entirety. In his report, Dr. Dahhan stated his conclusion and the rationale for that conclusion:

> [Claimant] did not have complicated coal workers' pneumoconiosis. All of the pathologists that reviewed his pathological material concluded that the data revealed no evidence of complicated coal workers' pneumoconiosis, but rather only [the] simple variety; this finding is confirmed by the fact that the patient has normal spirometry, normal lung volumes, normal diffusion capacity and normal blood gases at rest and after exercise.

Employer's Exhibit 7 at 3.

The administrative law judge determined to accord Dr. Dahhan's opinion no weight because it was poorly reasoned and unsupported by the objective evidence of record. The administrative law judge explained that she found the report to be poorly reasoned because the doctor had relied upon pathology evidence which was almost six years old and he had mischaracterized that evidence. The majority has determined that the administrative law judge erred in finding the doctor had mischaracterized the pathology evidence. The record reflects that Dr. Dahhan did, as the administrative law judge said, mischaracterize the pathology evidence because none of the pathologists stated, as Dr. Dahhan said, the "conclu[sion] that the data revealed no evidence of complicated coal workers' pneumoconiosis, but rather only [] simple variety . . . ." Employer's Exhibit 7 at 3. A 1999 pathology report reflects, *inter alia,* a finding of a

[6] The record contains two x-rays taken four months apart. The first x-ray was interpreted by a dually qualified reader and by a B reader as showing a category A opacity. It was also interpreted by Dr. Dahhan, a B reader, as showing only simple pneumoconiosis. The second x-ray was read by two dually qualified doctors and by Dr. Dahhan. One of the dually qualified doctors diagnosed a Category A opacity, the other diagnosed simple pneumoconiosis. Dr. Dahhan's reading stated a finding of a Category A opacity, but in a subsequent report he indicated that finding was questionable and recommended a CT scan of the chest for further assessment.

grayish white nodule that is 1.5 centimeters in diameter, which was diagnosed, as "[i]nterstitial fibrosis with nodular anthracosilicosis." Director's Exhibit 26. In his report dated January 28, 2004, Dr. Forehand cited this finding as "Biopsy-proven complicated coal workers' pneumoconiosis." Director's Exhibit 75 at 6, 18. Thus, the record provides strong support for the administrative law judge's determination that Dr. Dahhan mischaracterized the pathology evidence. In overturning this finding the majority relies not on the record, but on employer's mischaracterization of the pathology evidence. Furthermore, the majority's determination to second-guess the administrative law judge's interpretation of the medical evidence exceeds its statutory authority. *See* 20 C.F.R. §802.301(a).

The majority has succumbed to yet another siren-song contention of employer: that it is not reasonable for the administrative law judge to credit Dr. Forehand's opinion of complicated pneumoconiosis, based in part on biopsy evidence, when she has found that the pathology reports did not contain a diagnosis of complicated pneumoconiosis. The administrative law judge plainly made the point that the reports did not "rule[] out complicated pneumoconiosis." Decision and Order on Remand at 7. The administrative law judge did not rely upon Dr. Forehand's analysis of the biopsy evidence which would fall under prong (B) of the statute. She determined that claimant had established the existence of complicated pneumoconiosis with x-ray evidence under prong (A), and CT scan evidence under prong (C). The administrative law judge credited Dr. Forehand's x-ray interpretation of complicated pneumoconiosis, as a B reader, and she credited his opinion that claimant does not suffer from tuberculosis based on testing and other objective evidence of record. Employer's allegation of error in the administrative law judge's crediting of Dr. Forehand's opinion is entirely specious.

Furthermore, even if the administrative law judge had erred in finding that Dr. Dahhan had mischaracterized the biopsy evidence, she provided another, valid reason for criticizing his reliance upon the biopsy evidence to support his finding that claimant does not suffer from complicated pneumoconiosis: the biopsy evidence was too old to rebut the x-ray and CT scan evidence of complicated pneumoconiosis. The biopsy evidence was obtained in 1999 and in 2000. The x-ray and CT scan evidence was obtained in 2004. Hence, the administrative law judge properly determined that the doctor's reliance on the biopsy evidence to rebut the x-ray and CT scan evidence was unreasonable. Yet the majority overlooks this indisputably valid reason for discrediting Dr. Dahhan's reliance on the biopsy evidence and directs the administrative law judge to reconsider Dr. Dahhan's opinion in light of employer's version of the pathology evidence.

The majority also overlooks another valid reason the administrative law judge provided for discrediting Dr. Dahhan's opinion: although he was well aware of the x-ray and CT scan evidence of complicated pneumoconiosis, he did not discuss it at all when he provided his reasons for believing claimant does not have complicated

pneumoconiosis. This is a second basis to question the creditability of his opinion. *See Yogi Mining Co. v. Fife*, 159 Fed.Appx. 441, slip op. at 7-8 (4th Cir., Dec. 7, 2005)(unpub.).

Instead of acknowledging the undeniable validity of the administrative law judge's criticism of Dr. Dahhan's opinion, the majority again pursues a red herring raised by employer: holding that the administrative law judge did not indicate the weight she accorded to evidence that claimant did not have a respiratory impairment, which was the second reason Dr. Dahhan provided for finding that claimant did not have complicated pneumoconiosis.

First, it should be obvious, that if the doctor deliberately refuses to discuss the positive evidence of complicated pneumoconiosis, his opinion lacks credibility, as the administrative law judge found, and no reasons offered in support of his opinion can compensate for that deficiency. Second, as the administrative law judge pointed out, the lack of respiratory impairment does not undermine claimant's x-ray and CT scan interpretations of complicated pneumoconiosis. Employer has not demonstrated otherwise. The administrative law judge thereby properly applied the Fourth Circuit's teaching in *Scarbro*: when the medical and legal standards on complicated pneumoconiosis diverge, the court must apply the standards established by Congress. 220 F.3d at 257, 22 BLR at 2-103. Furthermore, the United States Supreme Court observed in *Usery v. Turner Elkhorn Mining Co.*, that Congress had considered evidence that complicated pneumoconiosis may be present without impairment. 428 U.S. 1, 7 n.4, 3 BLR 2-36, 2-38 n.4 (1976). Thus, the administrative law judge was not obligated to accord any weight to Dr. Dahhan's opinion based on a lack of a pulmonary impairment.

The majority's determination to vacate the administrative law judge's decision, with direction for her to reconsider Dr. Dahhan's x-ray interpretation and opinion, is supported by neither reason nor law. The allegations of error reflect a combination of misrepresentation of the evidence and a distortion of the administrative law judge's decision. Review of the administrative law judge's decision belies the charge that the administrative law judge misallocated the burden of proof. The administrative law judge recognized that her consideration of Dr. Dahhan's second x-ray reading could be disputed and she made the alternative finding that without consideration of that reading, claimant had established complicated pneumoconiosis by the preponderance of x-ray evidence. Neither the majority nor employer has attempted to dispute that finding. Instead, employer has persuaded the majority to concentrate on specious arguments about the administrative law judge's discrediting of Dr. Dahhan's opinion, and to ignore the fact that she discredited it, *inter alia*, because he refused to discuss the x-ray and CT scan evidence of complicated pneumoconiosis of which he was well aware. That, alone, is sufficient reason for finding the doctor's opinion incredible.

Finally, employer's contention that the administrative law judge violated the Administrative Procedure Act in failing to identify Judge Roketenetz's mistake of fact is frivolous. The finding of complicated pneumoconiosis is a finding of a material change from the prior denial and a mistake in the determination of the ultimate fact of entitlement to benefits in Judge Roketenetz's decision. Because modification is available based upon "mere[] further reflection on the evidence initially submitted," a mistake of fact analysis is not necessary. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). It is sufficient if the decision under review reflects that the prior decision was mistaken in the ultimate fact, entitlement. *See Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942, 954-55, 22 BLR 2-46, 2-67-68 (6th Cir. 1999); *see also* 65 Fed. Reg. 79920 (Dec. 20, 2000). The administrative law judge observed that evidence in the record before Judge Roketenetz included three x-ray interpretations of Category A opacities, as well as an anthracosilicotic nodule 1.5 centimeters in diameter. Decision and Order on Remand at 10. She concluded that because the weight of the evidence establishes the existence of complicated pneumoconiosis, Judge Roketenetz had been mistaken in finding that claimant did not have complicated pneumoconiosis. That is sufficient.

Accordingly, I would affirm the administrative law judge's decision awarding benefits.[7]

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REGINA C. McGRANERY
Administrative Appeals Judge

[7] I agree with the majority that the date for commencement of benefits should be modified to October, 1999, the date of filing of the duplicate claim.