BRB No. 08-0231 BLA

J.M.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COLONY BAY COAL COMPANY	)	DATE ISSUED: 11/26/2008
	)	
and	)	
	)	
PEABODY INVESTMENTS, INCORPORATED	)	
	)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (06-BLA-5225) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) awarding benefits on a 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). The administrative law judge

accepted the parties' stipulation of "29.3 years in coal mine employment,"[1] Decision and Order at 2, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge also found that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Alternatively, the administrative law judge found that the evidence established the presence of complicated pneumoconiosis and, thereby, established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Employer additionally challenges the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Further, employer challenges the administrative law judge's finding that the arterial blood gas study evidence established total disability at 20 C.F.R. §718.204(b)(2)(ii). Employer also challenges the administrative law judge's finding that the medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv). In addition, employer challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Lastly, employer challenges the administrative law judge's finding that the evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a).[2] Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this appeal.[3]

[1] The record indicates that claimant was employed in the coal mining industry in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[2] Employer filed a brief in reply to claimant's response brief, reiterating its prior contentions.

[3] Because the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3) and his findings that the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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 (1989).

EXISTENCE OF SIMPLE PNEUMOCONIOSIS
Section 718.202(a)(1)

Employer initially contends that the administrative law judge erred in finding that the x-ray evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The administrative law judge considered eight interpretations of six x-rays dated June 25, 1991, February 23, 2004, March 9, 2005, March 14, 2005,[4] January 4, 2006, and April 3, 2007. Dr. Daniel, who is neither a B reader nor a Board-certified radiologist, classified the profusion of the small opacities of the June 25, 1991 x-ray as 2/2. Claimant's Exhibit 14. Similarly, Dr. Cappiello, who is dually qualified as a B reader and a Board-certified radiologist, classified the profusion of the small opacities of the February 23, 2004 x-ray as 2/3. Director's Exhibit 12. Dr. Zaldivar, who is a B reader, classified the profusion of the small opacities of March 9, 2005 x-ray as 3/3 and the size of the large opacities as Category 0. Claimant's Exhibit 15. Dr. Scatarige, who is dually qualified, classified the profusion of the small opacities of the March 9, 2005 x-ray as 1/2 and classified the size of the large opacities as Category 0. Director's Exhibit 19. While Dr. Rasmussen, who is a B reader, classified the profusion of the small opacities of the March 14, 2005 x-ray as 2/2 and the size of the large opacities as Category A, Director's Exhibit 17, Dr. Wheeler, who is dually qualified, classified the profusion of the small opacities of this x-ray as 0/1 and the size of the large opacities as Category 0, Director's Exhibit 22. Dr. Zaldivar, who is a B reader, classified the profusion of the small opacities of the January 4, 2006 x-ray as 3/3, and the size of the large opacities as Category 0. Claimant's Exhibit 15. Lastly, Dr. Smith, who is dually qualified, classified the profusion of the small opacities of the April 3, 2007 x-ray as 3/2 and the size of the large opacities as Category A. Claimant's Exhibit 17.

[4] Dr. Gaziano, who is a B reader, read the March 14, 2005 x-ray for quality only. Director's Exhibit 18.

The administrative law judge next considered x-rays dated November 25, 1998, March 22, 1999, January 3, 2000, March 29, 2000, April 29, 2003, and May 26, 2006 from claimant's medical treatment records. Dr. Patel, who is dually qualified, found that the November 25, 1998 and March 22, 1999 x-rays showed simple pneumoconiosis. Claimant's Exhibit 9. Further, Dr. Patel found that the January 3, 2000 x-ray showed a slight progression of pneumoconiosis. *Id*. In addition, Drs. Patel and Doyle found that the March 29, 2000 x-ray showed pneumoconiosis.[5] *Id*. Dr. Setliff found that the April 29, 2003 x-ray showed that coal workers' pneumoconiosis was a possibility. *Id*. Lastly, Dr. Ramas found that the May 26, 2006 x-ray showed coal workers' pneumoconiosis. Claimant's Exhibit 3.

The administrative law judge then considered the medical treatment records of Dr. Boustani and the reports of Drs. Zaldivar, Tuteur, and Wheeler.[6] In an August 30, 2002 report, Dr. Boustani observed findings consistent with pneumoconiosis. Claimant's Exhibit 8. In reports dated May 16, 2005 and March 29, 2007, Dr. Zaldivar diagnosed simple coal workers' pneumoconiosis. Director's Exhibit 21; Employer's Exhibit 1. Similarly, in a report dated March 26, 2007, Dr. Tuteur diagnosed pneumoconiosis. Employer's Exhibit 2. By contrast, in a report dated March 19, 2007, Dr. Wheeler found that coal workers' pneumoconiosis was "most unlikely." Employer's Exhibit 4. The administrative law judge found that Dr. Boustani's treatment notes were persuasive. Decision and Order at 6. The administrative law judge also found that Dr. Tuteur's opinion was well-reasoned and well-supported by Dr. Boustani's medical records. *Id*. at 5-6. Consequently, the administrative law judge found that Dr. Wheeler's opinion that claimant does not have radiographic evidence of pneumoconiosis was outweighed by the contrary opinions of Drs. Boustani and Tuteur. *Id*. at 6.

Employer argues that the administrative law judge erred in failing to consider the B reader and/or Board-certified radiologist status of the readers. As noted above, the February 23, 2004, March 9, 2005, January 4, 2006, and April 3, 2007 x-rays were read only as positive for pneumoconiosis by physicians who are B readers and/or Board-certified radiologists.[7] Director's Exhibits 12, 19; Claimant's Exhibit 15, 17. However,

[5] In the March 29, 2000 x-ray report, Dr. Patel classified the profusion of the small opacities as 3/3. Claimant's Exhibit 9.

[6] The administrative law judge noted that "[a]ll the physicians agreed that [c]laimant's chest x-ray films and CT lung scans show some changes." Decision and Order at 5. However, the administrative law judge found that "[t]hey disagree as to whether the changes noted are due to pneumoconiosis or to some other cause, possibly tuberculosis, histoplasmosis or rheumatoid lung." *Id*.

[7] While Dr. Daniel read the June 25, 1991 x-ray as positive for pneumoconiosis,

the March 14, 2005 x-ray was read as both positive for pneumoconiosis and negative for pneumoconiosis. Director's Exhibits 17, 22. Specifically, Dr. Rasmussen, who is a B reader, read the March 14, 2005 x-ray as positive for pneumoconiosis, while Dr. Wheeler, who is dually qualified as a B reader and a Board-certified radiologist, read this x-ray as negative for pneumoconiosis. *Id*. Section 718.202(a)(1) requires that an administrative law judge resolve conflicts in x-ray readings by considering the radiological qualifications of the readers of the x-rays. 20 C.F.R. §718.202(a)(1). In this case, the administrative law judge acknowledged the B reader and Board-certified radiologist status of the readers of the x-rays. Decision and Order at 4-5. However, the administrative law judge did not consider the qualifications of the physicians in resolving the conflicting x-ray readings.[8] Rather, the administrative law judge found that the positive x-ray readings were well supported by the medical treatment records. The administrative law judge further found that "these positive readings outweigh the readings and reports which concluded [that] the radiographic changes are due to some other cause." Decision and Order at 6. Thus, we hold that the administrative law judge erred in failing to consider the radiological qualifications of the physicians in resolving the conflicting x-ray evidence.[9]

Employer also argues that the administrative law judge erred in giving greater weight to the opinions of the treating physicians than to the readings of the radiologists. As discussed, *supra*, the administrative law judge found that Dr. Wheeler's opinion that

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he is not a B reader or a Board-certified radiologist. Claimant's Exhibit 14.

[8] While an administrative law judge may accord greater weight to the x-ray readings by physicians who are dually qualified as B readers and Board-certified radiologists, he is not required to do so. *Webber v. Peabody Coal Co*., 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007)(*en banc*). Nonetheless, the administrative law judge must clarify his consideration of the physicians' radiological credentials.

[9] As noted by employer, Dr. Wheeler is an associate professor of radiology at the Johns Hopkins Medical Institutions. Employer's Exhibits 1, 12. In addition to considering the B reader and Board-certified status of a reader as required by Section 718.201(a)(1), an administrative law judge may rely on a reader's academic qualifications in radiology and his involvement in the B reader program as bases for according greater weight to the readings rendered by that reader. *Harris v. Old Ben Coal Co*., 23 BLR 1-98 (2006)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Nevertheless, an administrative law judge is not obligated to do so. *Worhach*, 17 BLR at 1-108. Thus, on remand, the administrative law judge may consider Dr. Wheeler's credentials as a professor of radiology.

pneumoconiosis was not present radiographically was outweighed by the medical treatment records and Dr. Tuteur's opinion. The administrative law judge also found that the positive x-ray readings were supported by the medical treatment records. Consequently, the administrative law judge found that the positive x-ray readings outweighed the x-ray readings and reports that concluded that the radiographic changes were due to a cause other than pneumoconiosis. Contrary to the administrative law judge's findings, a doctor's status as a treating or examining physician is not relevant to the administrative law judge's weighing of the x-ray evidence at Section 718.202(a)(1). *Alley v. Riley Hall Coal Co.*, 6 BLR 1-376 (1983). Moreover, while the administrative law judge must ultimately weigh all the evidence together at 20 C.F.R. §718.202(a)(1)-(4), *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000), medical opinion evidence is not relevant to the administrative law judge's weighing of the x-ray evidence at Section 718.202(a)(1). *Compare* 20 C.F.R. §718.202(a)(1) *with* 20 C.F.R. §718.202(a)(4). Thus, the administrative law judge erred in giving greater weight to the medical treatment records and Dr. Tuteur's opinion at Section 718.202(a)(1).

In view of the foregoing, we vacate the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), and remand the case for reconsideration of the x-ray evidence thereunder.

Section 718.202(a)(4)

Employer next contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the medical treatment records of Drs. Boustani, Caldwell, Doyle, Mehta, and Saikali, the reports of Drs. Zaldivar, Tuteur, Rasmussen, and Wheeler, and the CT scans of Drs. Daniel, Dehgan, Patel, Ramas, Schlarb, Scott, Zaldivar, and Wheeler. In reports dated May 16, 2005 and March 29, 2007, Dr. Zaldivar diagnosed simple coal workers' pneumoconiosis. Director's Exhibit 21; Employer's Exhibit 1. In a report dated March 26, 2007, Dr. Tuteur rendered a differential diagnosis of coal workers' pneumoconiosis or rheumatoid lung, or both. Employer's Exhibit 2. In reports dated March 22, 2005, March 13, 2007, and April 9, 2007, Dr. Rasmussen diagnosed clinical pneumoconiosis and legal pneumoconiosis. Director's Exhibit 17; Claimant's Exhibits 1, 18. In a March 19, 2007 report, Dr. Wheeler opined that coal workers' pneumoconiosis was most unlikely.[10] Employer's Exhibit 4.

[10] Dr. Wheeler's opinion regarding the existence of pneumoconiosis was based on x-rays and CT scans. Employer's Exhibit 4. Dr. Wheeler observed that "[t]he calcified granulomata in this case are most likely from healed histoplasmosis but theoretically could be from healed TB." *Id.*

In considering the medical treatment records, the medical reports, and the CT scans together, the administrative law judge noted that the treating physicians consistently diagnosed pneumoconiosis. Decision and Order at 12. In addition, the administrative law judge noted that the CT scan reports by claimant's treating physicians unanimously found the presence of pneumoconiosis. *Id*. However, the administrative law judge also noted that the CT scan report by Dr. Scott found that the changes were tuberculosis. *Id*. Further, the administrative law judge noted that the CT scan report by Dr. Wheeler found that the changes were not coal workers' pneumoconiosis. *Id*. Moreover, the administrative law judge stated that the serial review of x-rays and CT scans by Dr. Wheeler found that the changes were tuberculosis or healed histoplasmosis. *Id*. The administrative law judge then found that the conclusions of Drs. Wheeler and Scott were outweighed by the medical treatment records. *Id*. at 12-13.

Employer argues that the administrative law judge erred in mechanically giving greater weight to the medical treatment records, based on the status of claimant's treating physicians. The criteria set forth in 20 C.F.R. §718.104(d)(1)-(4) for consideration of a treating physician's opinion are applicable to medical evidence developed after January 19, 2001, the effective date of the amended regulations. Section 718.104(d) requires the officer adjudicating the claim to "give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). Although the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5). Moreover, in *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that although the opinions of treating and examining physicians deserve special consideration, there is no rule that a treating or examining physician must be accorded greater weight than the opinions of other physicians. *Held*, 314 F.3d at 187-8, 22 BLR at 2-571.

In the instant case, the administrative law judge gave more weight to the medical treatment records than to the contrary opinions of Drs. Tuteur, Wheeler and Scott. The administrative law judge specifically stated:

> I find Dr. Wheeler's and Dr. Scott's conclusions that [c]laimant has possible tuberculosis to be outweighed by the other medical evidence of record. I find in particular, the negative tuberculosis test result reported by [c]laimant's treating physician persuasive. In addition, I find persuasive the

> fact that none of the treating physicians mention the possible diagnoses of tuberculosis or histoplasmosis in any of the extensive medical records but they consistently and unanimously diagnose pneumoconiosis. Under these circumstances, I find the conclusions of Drs. Wheeler and Scott outweighed by the other evidence of record.

Decision and Order at 12-13.

The administrative law judge further stated:

> Dr. Tuteur reasoned that the potential diagnosis for the changes seen on x-ray and CT lung scan could be pneumoconiosis or rheumatoid lung. Dr. Tuteur stated that a biopsy was necessary to determine which diagnosis was appropriate. The treatment records admitted [into the] record do not include results of a biopsy, but they do include notations that findings of rheumatoid lung are not present. In addition, as noted above, they consistently over many years conclude that coal workers' pneumoconiosis is the appropriate diagnosis for changes seen on the chest x-ray and CT lung scans.

Id. at 13.

As employer argues, however, the administrative law judge did not adequately explain why he gave more weight to the medical treatment records than to the contrary opinions of Drs. Tuteur, Wheeler and Scott. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for further consideration of the medical opinion evidence thereunder. On remand, when considering the medical opinion evidence, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments,[11] and the sophistication of, and bases for, their opinions. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

[11] The administrative law judge noted that the treating physicians' diagnoses of pneumoconiosis were based on x-ray readings, CT scan interpretations, negative tuberculosis skin test results, numerous medical examinations, and pulmonary testing. Decision and Order at 12. However, as employer argues, the record does not contain the actual results of a negative tuberculosis skin test.

Employer additionally asserts that because the administrative law judge's summary of the x-ray evidence did not list each of the x-rays that Dr. Wheeler reviewed, the administrative law judge erred in failing to consider all of Dr. Wheeler's x-ray readings. In a March 19, 2007 report, based on his review of five chest x-rays and four CT scans, Dr. Wheeler found that a diagnosis of coal workers' pneumoconiosis was "most unlikely." Employer's Exhibit 4. In considering Dr. Wheeler's report, the administrative law judge stated:

> Dr. P. Wheeler, a [B]oard certified radiologist and B-reader, also read a series of 5 chest x-ray films taken between May 15, 1997 and January 4, 2006 as well as four CT lung scans. Dr. Wheeler reported these x-ray films showed a progression of nodular infiltrates and development of calcified granulomata. Dr. Wheeler concluded these changes were not due to coal workers' pneumoconiosis because coal workers' pneumoconiosis is usually symmetrical in the center of a patient's lungs while these nodules appeared more in the periphery of [c]laimant's lungs. In addition, Dr. Wheeler stated the changes were in [c]laimant's lungs and pleura which is not consistent with coal workers' pneumoconiosis.

Decision and Order at 5.

As the trier-of-fact, the administrative law judge has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Because Dr. Wheeler's opinion was based on his collective review of x-rays and CT scans, we hold that it was not inherently unreasonable for the administrative law judge to only acknowledge that Dr. Wheeler's opinion was based, in part, on five x-rays taken between May 15, 1997 and January 4, 2006. *Kuchwara*, 7 BLR at 1-170. Moreover, Dr. Wheeler did not individually identify each of the five x-rays he reviewed in his report. Thus, we reject employer's assertion that the administrative law judge erred in failing to consider all of Dr. Wheeler's x-ray readings.

However, the administrative law judge should have considered whether Dr. Wheeler's opinion was based on inadmissible evidence. As noted above, Dr. Wheeler's opinion was based, in part, on five x-ray readings. During an April 16, 2007 deposition, Dr. Wheeler noted that he reviewed five x-rays dated May 15, 1997, June 29, 2000, March 9, 2005, March 14, 2005, and January 4, 2006. Employer's Exhibit 12 (Dr. Wheeler's Deposition at 20). The record does not contain the May 15, 1997 and June 29, 2000 x-rays. The pertinent regulations provide that each x-ray mentioned in a medical report must be admissible under Section 725.414(a)(2)-(3) or Section 725.414(a)(4), which provides for the admission of hospital and treatment records. 20 C.F.R. §725.414(a)(2)(i), (3)(i). However, the applicable regulations are silent as to what an

administrative law judge should do when evidence that exceeds the evidentiary limitations is referenced in an otherwise admissible medical opinion. Thus, the disposition of this issue is committed to an administrative law judge's discretion. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004) *(en banc)*. Consequently, an administrative law judge should not *automatically* exclude medical opinions without first ascertaining what portions of the opinions are tainted by review of inadmissible evidence. *Id*. If the administrative law judge finds that the opinion is tainted, he is not required to exclude the report or testimony in its entirety. *Id*. Rather, the administrative law judge may redact the objectionable content, ask the physician to submit new reports, or simply factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which the physician's opinion is entitled. *Harris*, 23 BLR at 1-108; *Dempsey*, 23 BLR at 1-67. Thus, on remand, the administrative law judge must determine whether Dr. Wheeler's opinion was tainted by inadmissible evidence and, if so, the weight that should be accorded to Dr. Wheeler's opinion as a result of his reliance on this evidence.

Section 718.202(a)(1)-(4)

Further, on remand, the administrative law judge must weigh all of the evidence together at 20 C.F.R. §718.202(a)(1)-(4) to determine whether the evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *Compton*, 211 F.3d at 211, 22 BLR at 2-174.

TOTAL DISABILITY
Section 718.204(b)(2)(ii)

Employer also contends that the administrative law judge erred in finding that the arterial blood gas study evidence established total disability at 20 C.F.R. §718.204(b)(2)(ii). The record consists of six arterial blood gas studies dated July 9, 2003, May 18, 2004, March 9, 2005, March 14, 2005, January 4, 2006, and December 13, 2006. The July 9, 2003 and May 18, 2004 studies yielded nonqualifying[12] values at rest. Director's Exhibit 8; Claimant's Exhibit 7. Similarly, the March 9, 2005 study yielded non-qualifying values at rest and during exercise. Director's Exhibit 21. While the March 14, 2005 and January 4, 2006 studies yielded nonqualifying values at rest, the same studies yielded qualifying values during exercise. Director's Exhibit 17; Employer's Exhibit 1. Lastly, the December 13, 2006 study yielded nonqualifying values

[12] A "qualifying" 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, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

at rest. Claimant's Exhibit 2. Based on the qualifying values yielded by the recent arterial blood gas studies during exercise, the administrative law judge found that the evidence established total disability at Section 718.204(b)(2)(ii). Decision and Order at 14.

Employer argues that the administrative law judge erred in failing to consider all of the arterial blood gas study evidence. The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge did not specifically identify or discuss the arterial blood gas study evidence. *Brewster v. Director, OWCP*, 7 BLR 1-120, 1-123 (1984). Rather, the administrative law judge merely noted that "[w]hile the pulmonary function study results and 'at rest' blood gas study results are non-qualifying, the recent exercise blood gas study results demonstrate qualifying values." Decision and Order at 14. Further, the administrative law judge did not adequately explain why he found that the recent arterial blood gas studies that yielded qualifying values during exercise outweighed the arterial blood gas studies that yielded nonqualifying values at rest and during exercise. *Wojtowicz*, 12 BLR at 1-165. Consequently, we vacate the administrative law judge's finding that the arterial blood gas study evidence established total disability at 20 C.F.R. §718.204(b)(2)(ii), and remand the case for reconsideration of the arterial blood gas studies in accordance with the APA.

Section 718.204(b)(2)(iv)

Employer further contends that the administrative law judge erred in finding that the medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the reports of Drs. Zaldivar, Tuteur, and Rasmussen. In a May 16, 2005 report, Dr. Zaldivar opined that the mild restriction for vital capacity and total lung capacity has not resulted in an impairment. Director's Exhibit 21. Further, in a March 29, 2007 report, Dr. Zaldivar opined that from a pulmonary standpoint claimant was capable of doing his last coal mine job of driving a truck and helping to move fifty pounds of explosives. Employer's Exhibit 1. In a March 26, 2007 report, Dr. Tuteur observed that "[p]ulmonary function studies present the classic findings and progression of an interstitial pulmonary process including a mild restrictive abnormality and mild impairment of gas exchange during exercise." Employer's Exhibit 2. Dr. Tuteur then explained that "the relative unimportance of pulmonary impairment contributing to exercise intolerance is highlighted both by a PaO2 that is still within normal range despite the fact that it falls during exercise and an essentially normal maximum consumption of oxygen during exercise (VO2 Max)." *Id*. Dr. Tuteur opined that "it must be recognized that based on the most contemporaneously

relevant data assessing maximum oxygen consumption, there is no impairment, at least as late as 2006." *Id*. Dr. Tuteur further opined that "the minor degree of impairment of a mild restrictive abnormality and minor inefficiencies of gas exchange during exercise are insufficient to limit exercise from a cardiopulmonary standpoint." Employer's Exhibit 2. By contrast, in reports dated March 14, 2005, March 13, 2007 and April 9, 2007, Dr. Rasmussen opined that claimant has a disabling lung disease caused by coal dust exposure. Director's Exhibit 17; Claimant's Exhibits 1, 18. Dr. Rasmussen further opined that claimant has "significant and disabling loss of lung function and does not retain the pulmonary capacity to perform his last regular coal mine job." Director's Exhibit 17.

The administrative law judge found that Dr. Rasmussen's opinion was well supported by the exercise blood gas study results. The administrative law judge also found that the opinions of Drs. Tuteur and Zaldivar were inconsistent with the actual pulmonary function test results and did not contain an adequate explanation for their conclusions. The administrative law judge specifically stated:

> Dr. Zaldivar did not adequately explain how he reached this conclusion that [c]laimant could perform heavy labor over an 8 hour workday in light of the fact that [c]laimant had to cease the physical activity on exercise testing after only two minutes of exercise and had qualifying values under the regulations. Dr. Zaldivar characterized these values as "normal" which is also confusing since the values which are qualifying under the regulations for establishing disability or very near to qualifying are not usually characterized as "normal." Similarly, Dr. Tuteur characterized [c]laimant's qualifying values as indicative of impairment but not indicative of disability. Dr. Tuteur did not explain why [c]laimant could perform his usual coal mine employment with a pulmonary impairment nor did he explain why qualifying values did not constitute a disability.

Decision and Order at 14-15. Consequently, the administrative law judge concluded that Dr. Rasmussen's opinion outweighed the contrary opinions of Drs. Tuteur and Zaldivar.

Employer argues that because claimant worked as a truck driver regularly over a substantial period of time, the administrative law judge erred in finding that claimant's usual coal mine work was that of a driller. The administrative law judge noted that claimant was laid off from his job as a driller in 2002, but was called back to work as a truck driver in April 2003.[13] Further, the administrative law judge stated that "[d]uring

[13] Claimant testified that he was laid off as a driller on December 31, 2002 and called back to work as a reclamation truck driver on April 2, 2003, which he did until February 6, 2004. Hearing Transcript at 27.

the last ten months of his employment as a truck driver, [c]laimant did not do extra jobs, such as shoveling coal or dirt; his supervisor and his co-workers took care of him because of his breathing difficulties." Decision and Order at 3. Hence, after noting that "[c]laimant testified he performed lighter work [as a truck driver] during the last few months of his employment because his supervisor and co-workers were taking care of him in light of his breathing difficulties," Decision and Order at 15 n.3, the administrative law judge concluded that claimant's usual coal mine work was that of a driller and required heavy labor.[14]

Contrary to the administrative law judge's finding, the record does not establish that that claimant's latest job was not his usual coal mine work because claimant changed his job due to a respiratory inability to do his usual coal mine work. *Pifer v. Florence Mining Co*., 8 BLR 1-153, 1-155 (1985); *Daft v. Badger Coal Co*., 7 BLR 1-124, 1-127 (1984). Claimant testified that because he had breathing problems while working as a driller, his superintendent made allowances like refraining from putting him on the powder crew and his co-workers took care of the shoveling for him. Hearing Transcript at 24, 26. Claimant also indicated that his co-workers took care of him while he worked as a truck driver by letting him stay in the truck when he was asked to do other things. Hearing Transcript at 38. However, claimant did not testify that he was given the job of reclamation truck driver because of his breathing problems. Rather, claimant testified that he drove a reclamation truck when he was called back to work because the mine was shutting down and there was no more drilling. Hearing Transcript at 25. Thus, because claimant did not change jobs because of a respiratory inability to do his usual coal mine work, *Pifer*, 8 BLR at 1-155; *Daft*, 7 BLR at 1-127, we hold that the administrative law judge erred in finding that claimant's usual coal mine work was that of a driller.

Nonetheless, the administrative law judge's total disability determination was not based on his finding that claimant's usual coal mine work was that of a driller. In finding that the evidence established total disability at Section 718.204(b)(2)(iv), the administrative law judge found that Dr. Rasmussen's disability opinion outweighed the contrary opinions of Drs. Zaldivar and Tuteur. In a March 14, 2005 report, Dr. Rasmussen indicated that he was familiar with claimant's last coal mine employment as a truck driver and opined that claimant does not retain the pulmonary capacity to perform his last regular coal mine job. Director's Exhibit 17. In the section of the report for last coal mine employment, Dr. Rasmussen noted:

[14] The administrative law judge stated that "[w]hen working as a drill-operator, [c]laimant spent on average two days a week shoveling coal between one to five hours at a time." Decision and Order at 3.

> Driving truck and doing reclamation work. He climbed in and out of the cab. He also occasionally was required to help load holes, carry 50# explosive bags 25-50 feet. He shoveled to fill the holes. Thus, he did some heavy manual labor.

Director's Exhibit 17. Thus, because the administrative law judge's total disability determination was based on Dr. Rasmussen's disability opinion, rather than a comparison of a physician's assessment of claimant's condition with the requirements of his usual coal mine work, we hold that the administrative law judge's error in finding that claimant's usual coal mine work was that of a driller was harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer also argues that substantial evidence does not support the administrative law judge's weighing of the conflicting medical opinions. As discussed, *supra*, the administrative law judge found that the opinions of Drs. Tuteur and Zaldivar were inconsistent with the actual pulmonary function test results and did not contain an adequate explanation for their conclusions. Contrary to the administrative law judge's finding, the March 9, 2005 and January 4, 2006 pulmonary function studies by Dr. Zaldivar yielded nonqualifying values. Director's Exhibit 21. Moreover, the administrative law judge found that the pulmonary function studies yielded nonqualifying values at Section 718.204(b)(2)(i). Thus, because the administrative law judge's mischaracterization of the pulmonary function study evidence had an adverse effect on his consideration of the disability opinions of Drs. Zaldivar and Tuteur, the administrative law judge erred in weighing the conflicting medical opinions of Drs. Zaldivar, Tuteur, and Rasmussen. *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

Employer additionally asserts that the administrative law judge erred in failing to consider the qualifications of Drs. Zaldivar and Tuteur. In summarizing the medical opinion evidence, the administrative law judge noted that Dr. Tuteur is a Board-certified pulmonologist and Drs. Rasmussen and Zaldivar are pulmonary specialists. Decision and Order at 5, 8, 9. However, while Drs. Zaldivar and Tuteur are Board-certified in internal medicine and pulmonary disease, Director's Exhibit 21; Employer's Exhibits 1, 2, Dr. Rasmussen is Board-certified in internal medicine, Claimant's Exhibit 20. Moreover, as employer argues, the administrative law judge did not address the comparative credentials of the respective physicians. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Consequently, we hold that the administrative law judge erred in weighing the conflicting medical opinion evidence on this basis.

In view of the foregoing, we vacate the administrative law judge's finding that the medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration of the medical opinion evidence thereunder. If reached, on remand, when considering the medical opinion evidence, the administrative

law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Section 718.204(b)(2)(i)-(iv)

Further, if reached on remand, the administrative law judge must weigh together all of the evidence of disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), like and unlike, to determine whether the evidence establishes total disability at 20 C.F.R. §718.204(b). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

TOTAL DISABILITY DUE TO PNEUMOCONIOSIS
Section 718.204(c)

Employer additionally contends that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Dr. Rasmussen opined that legal pneumoconiosis materially contributed to claimant's disabling lung disease. Director's Exhibit 17. By contrast, Dr. Zaldivar opined that claimant does not have an impairment caused by his coal workers' pneumoconiosis. Director's Exhibit 21. Dr. Tuteur opined that claimant does not have a pulmonary impairment caused by coal workers' pneumoconiosis. Employer's Exhibit 2. Based on Dr. Rasmussen's opinion, the administrative law judge found that claimant established total disability due to pneumoconiosis at Section 718.204(c).

Employer argues that substantial evidence does not support the administrative law judge's finding that Dr. Rasmussen's opinion established total disability due to pneumoconiosis at Section 718.204(c). The administrative law judge only considered Dr. Rasmussen's opinion at Section 718.204(c). In considering Dr. Rasmussen's opinion, the administrative law judge stated:

> Furthermore, since I have found pneumoconiosis is established, I also find Dr. Rasmussen's opinions regarding the etiology of [c]laimant's pulmonary disability to be the most persuasive. Therefore, even if the irrebuttable presumption were not applicable to this claim, I find [c]laimant has established total disability due to pneumoconiosis by the exercise blood gas studies and persuasive medical opinion reports of Dr. Rasmussen.

Decision and Order at 15.

While an administrative law judge is not required to accept evidence that he determines is not credible, he nonetheless must address and discuss all of the relevant evidence of record. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984). Consequently, the administrative law judge erred in failing to consider the disability causation opinions of Drs. Zaldivar and Tuteur. *McCune*, 6 BLR at 1-988. Further, as noted above, the APA, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz*, 12 BLR at 1-165. In this case, the administrative law judge did not adequately explain why he found that Dr. Rasmussen's disability causation opinion was the most persuasive opinion at Section 718.204(c). *Wojtowicz*, 12 BLR at 1-165. Moreover, because arterial blood gas studies are not diagnostic of the etiology of a respiratory impairment, *Tucker v. Director, OWCP*, 10 BLR 1-35, 1-41 (1987), the administrative law judge erred in finding that "[c]laimant has established total disability due to pneumoconiosis by the exercise blood gas studies and persuasive medical opinion reports of Dr. Rasmussen." Decision and Order at 15.

Furthermore, because we vacate the administrative law judge's findings that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), we also vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). On remand, the administrative law judge must consider all the evidence regarding whether claimant's total respiratory disability is due to pneumoconiosis at 20 C.F.R. §718.204(c),[15] *Robinson*

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[15] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> > (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> >
> > (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

v. Pickands Mather and Co., 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990), and fully explain the rationale for his conclusions, *Wojtowicz*, 12 BLR at 1-165.

IRREBUTTABLE PRESUMPTION OF TOTAL DISABILITY DUE TO PNEUMOCONIOSIS

Finally, employer contends that the administrative law judge erred in finding that the evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304. Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(1), 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 or autopsy, 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 automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *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*). Additionally, the Fourth Circuit has held that "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999).

Section 718.304

Employer argues that the administrative law judge erred in finding that the x-ray evidence established complicated pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge considered the interpretations of the March 14, 2005 and April 3, 2007 x-rays. Dr. Rasmussen, who is a B reader, classified the size of the large opacities of the March 14, 2005 x-ray as Category A, Director's Exhibit 17, while Dr. Wheeler, who is dually qualified as a B reader and a Board-certified radiologist, classified the size of the large opacities of this x-ray as Category 0, Director's Exhibit 22.

Dr. Smith, who is dually qualified,[16] classified the size of the large opacities of the April 3, 2007 x-ray as Category A. Claimant's Exhibit 17.

In addition to the March 14, 2005 and April 3, 2007 x-rays, the administrative law judge also considered CT scans and medical opinions. In weighing together the x-rays, the CT scans, and the medical opinion evidence, the administrative law judge stated:

> Dr. Wheeler's analysis that the changes are due to tuberculosis are accorded less weight for reasons set forth above. The physicians all agree that some new progressive changes have appeared on the most recent x-ray and CT lung scans. Dr. Zaldivar states that these are areas of confluence and not conglomeration. In contrast, Dr. Rasmussen concluded the changes were evidence of complicated pneumoconiosis, [C]ategory A. Dr. Rasmussen's conclusion is well supported by [c]laimant's treatment records, including the most recent x-ray reading by Dr. Smith, a B-reader, who also reported complicated pneumoconiosis, large opacity A. The most recent CT lung scans as part of [c]laimant's treatment also agree that complicated pneumoconiosis is present, including the lung scan reports by Drs. Schlarb, Daniel and Ramas (CX 16, 4, and 3). While none of these reports include the equivalency findings necessary to establish complicated pneumoconiosis by other means under Section 718.304(c), they lend strong support to the x-ray readings of complicated pneumoconiosis by Drs. Rasmussen and Smith. As such, I find the x-ray readings of Drs. Rasmussen and Smith outweigh the contrary opinion of Dr. Zaldivar.[17]

Decision and Order at 14.

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[16] In summarizing the x-ray evidence at Section 718.202(a)(1), the administrative law judge noted that Dr. Smith was dually qualified as a B reader and a Board-certified radiologist. Decision and Order at 5. However, in considering the x-ray at Section 718.304, the administrative law judge indicated that Dr. Smith was only a B reader. *Id*. at 14. The record reveals that Dr. Smith is a B reader and a Board-certified radiologist. Claimant's Exhibit 20.

[17] During an April 18, 2007 deposition, Dr. Zaldivar opined that claimant does not have complicated pneumoconiosis. Employer's Exhibit 11 (Dr. Zaldivar's Deposition at 20). Dr. Zaldivar observed that there was coalescence because several nodules came together that could not be distinguished from each other, and it did not reach a one centimeter stage. Employer's Exhibit 11 (Dr. Zaldivar's Deposition at 20-21).

Employer argues that substantial evidence does not support the administrative law judge's finding that the x-ray readings of Drs. Rasmussen and Smith are supported by the CT scans of Drs. Schlarb, Daniel and Ramas. In a March 9, 2005 CT scan report, Dr. Schlarb diagnosed findings that were compatible with coal workers' pneumoconiosis. Claimant's Exhibit 16. Dr. Schlarb observed innumerable small to medium sized rounded nodular opacities that were scattered throughout both lungs, areas of pleural thickening, and areas of more confluent consolidation with larger opacities within the upper portion of both lungs. *Id*. In an April 14, 2005 CT scan report, Dr. Daniel diagnosed findings that were consistent with developing complicated pneumoconiosis with associated pleural thickening. Claimant's Exhibit 4. Dr. Daniel observed that a pattern of opaque densities throughout the lung zones were consistent with a pneumoconiosis condition and/or a previous granulomatous inflammation. *Id*. Dr. Daniel also observed developing conglomerate pneumoconiosis densities in both upper lobes, as there was some coalescence of the opaque densities identified bilaterally. *Id*. In a May 26, 2006 CT scan report, Dr. Ramas diagnosed complicated pneumoconiosis. Claimant's Exhibit 3. Dr. Ramas observed patchy opacities in both upper lobes which were likely early conglomerate masses, and an ill-defined opacity in the lingula. *Id*. Because Drs. Schlarb, Daniel, and Ramas did not diagnose a condition that would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray, we hold that the administrative law judge erred in finding that the CT scans supported a finding of complicated pneumoconiosis at Section 718.304. *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561.

In addition, as employer argues, the administrative law judge erred in failing to consider all the x-ray readings at Section 718.304. *McCune*, 6 BLR at 1-988. The administrative law judge only considered the readings of the March 14, 2005 and April 3, 2007 x-rays by Drs. Rasmussen, Wheeler, and Smith. However, the record also consists of readings of x-rays dated June 25, 1991, February 23, 2004, March 9, 2005, March 14, 2005, January 4, 2006, and April 3, 2007, as well as readings of x-rays dated November 25, 1998, March 22, 1999, January 3, 2000, March 29, 2000, April 29, 2003, and May 26, 2006 from claimant's medical treatment records. Furthermore, as discussed, *supra*, the administrative law judge erred in failing to consider the radiological qualifications of the physicians in resolving the conflicting x-ray evidence. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

In view of the foregoing, we vacate the administrative law judge's finding that the evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304, and remand the case for further consideration of all the evidence thereunder. *See Perry v. Mynu Coals, Inc*., 469 F.3d 360, 23 BLR 2-374 (4th Cir. 2006); *Scarbro*, 220 F.3d 250, 22 BLR 2-93; *see also Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007)(holding that the miner must also establish that his complicated pneumoconiosis arose out of coal mine employment).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the administrative law judge's decision awarding benefits and remand this case for reconsideration. At the outset, I would affirm the administrative law judge's finding that complicated pneumoconiosis was established by x-ray evidence at 20 C.F.R. §718.304(a) and that claimant was therefore entitled to the irrebuttable presumption that his pneumoconiosis was totally disabling at Section 411(c)(3) of the Act, 30 U.S.C. §411(c)(3), as implemented by 20 C.F.R. §718.304.

In finding that complicated pneumoconiosis was established at Section 718.304(a), the administrative law judge noted that Dr. Smith, a dually qualified reader, interpreted an April 3, 2007 x-ray as showing conglomerate pneumoconiosis with a large Category A opacity and Dr. Rasmussen, a B reader, interpreted an x-ray dated March 14, 2005 as showing a large Category A opacity of complicated pneumoconiosis. In contrast, the administrative law judge noted that while Dr. Wheeler, a dually qualified reader, acknowledged that the March 14, 2005 x-ray showed changes which could be large opacities, he stated that they were probably due to tuberculosis or histoplasmosis since the opacities were in the apices of the lungs. Regarding the April 3, 2007 x-ray, Dr. Zaldivar, a B reader, found that while there was a coalescence of several nodules, they were separate for the most part and there was no evidence of conglomeration or evidence of complicated pneumoconiosis. The administrative law judge accorded less weight to Dr. Wheeler's analysis that the changes seen on x-ray were due to tuberculosis or

histoplasmosis, rather than complicated pneumoconiosis, because claimant had tested negative for tuberculosis by his treating physician and the extensive medical record did not contain a diagnosis of tuberculosis or histoplasmosis by any other treating physician, while pneumoconiosis was consistently and unanimously diagnosed.

Further, the administrative law judge noted that all of the physicians agreed that some new progressive changes had appeared on the most recent x-ray and CT scans. The administrative law judge noted that Dr. Rasmussen's finding of a Category A opacity was better supported by claimant's treatment records and the most recent x-ray by Dr. Smith showing a large Category A opacity of complicated pneumoconiosis, than was Dr. Zaldivar's interpretation that the x-ray showed a confluence of opacities, not a conglomeration showing complicated pneumoconiosis. The administrative law judge further found that the most recent CT scans also showed complicated pneumoconiosis. The administrative law judge noted that while the CT scans did not make the requisite equivalency findings to establish complicated pneumoconiosis at Section 718.304(c), they nonetheless provided strong support to the findings of complicated pneumoconiosis on x-ray by Drs. Rasmussen and Smith. In sum, therefore, the administrative law judge concluded that complicated pneumoconiosis was established at Section 718.304(a) based on x-ray evidence and that claimant was therefore entitled to the irrebuttable presumption of totally disabling pneumoconiosis.

I would reject employer's arguments as they are no more than a request that the Board reweigh the evidence, a role outside our scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Specifically, contrary to employer's argument, the administrative law judge was not required to accord greater weight to Dr. Wheeler's x-ray interpretation because he was a professor of radiology. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993). Further, contrary to employer's argument, the administrative law judge could consider the treating physician status of the physician in weighing the medical opinion evidence and could look at all the evidence of record in determining whether it supported the x-ray evidence of complicated pneumoconiosis. *See Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Consequently, the administrative law judge's finding of complicated pneumoconiosis is affirmable. *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000). Claimant is entitled to the irrebuttable presumption of totally disabling pneumoconiosis and is therefore entitled to benefits.[18] Thus, I will not discuss my strong disagreement with the majority's holding that the administrative law judge erred in finding that simple

[18] Employer has not challenged the administrative law judge's finding that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. 718.203(b).

pneumoconiosis, total disability and disability causation were established at 20 C.F.R. §§718.202(a) and 718.204(b) and (c).

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BETTY JEAN HALL
Administrative Appeals Judge