BRB No. 05-0170 BLA

KENNETH L. ATKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	DATE ISSUED: 10/13/2005
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 of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

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

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (00-BLA-0348) of Administrative Law Judge Stuart A. Levin 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). This case involving a duplicate claim pursuant to 20 C.F.R. §725.309(d)(2000) is before the Board for the third time.

Claimant's prior claim for benefits was denied because he did not establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 36. In claimant's current, duplicate claim, the administrative law judge found that the medical evidence developed since the final denial of claimant's prior claim established the existence of complicated pneumoconiosis, entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Consequently, the administrative law judge found that a material change in conditions was established as required by 20 C.F.R. §725.309(d)(2000), and he awarded benefits.

Upon consideration of employer's appeal, the Board held that the administrative law judge did not adequately resolve the conflicting x-ray evidence regarding the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *Atkins v. Westmoreland Coal Co*., BRB No. 01-0318 BLA (Jan. 18, 2002)(unpub.)(McGranery, J., dissenting). The Board held that although the administrative law judge credited Dr. DePonte's "Category A" large opacity reading because Dr. DePonte was the only physician to have read a series of x-rays simultaneously, the administrative law judge "did not adequately explain why the opportunity to read different x-rays simultaneously provided Dr. Deponte's x-ray readings additional probative value or weight" over those of several Board-certified radiologists and B-readers who had also read multiple x-rays as revealing no Category A, B, or C large opacities. [2002] *Atkins*, slip op. at 8. The Board therefore vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.304(a) and remanded the case for him to reweigh the x-ray readings and fully explain his findings. The Board held further that the administrative law judge did not consider all relevant evidence when he refused to consider medical opinions that claimant does not have complicated pneumoconiosis because he has no respiratory or pulmonary impairment. *Atkins*, slip op. at 9. Consequently, the Board vacated the administrative law judge's findings under 20 C.F.R. §718.304 and remanded the case for him to reconsider the medical opinions in determining whether the existence of complicated pneumoconiosis was established.

On remand, the administrative law judge again gave "greatest weight" to Dr. DePonte's x-ray readings because Dr. DePonte "was the only one to review simultaneously the series of x-rays." [2002] Decision and Order at 10. In further explanation of his finding, the administrative law judge observed that Dr. Wiot's and Dr. Wheeler's "memories of Claimant's past x-rays is a less reliable basis for determining what a series of x-rays may reveal than Dr. DePonte's simultaneous review of the actual x-ray in the series." [2002] Decision and Order at 11. The administrative law judge concluded that "the record establishes the presence of a large abnormality in claimant's

right upper lobe, . . . classifiable as pneumoconiosis, large opacity, category A," pursuant to 20 C.F.R. §718.304(a). [2002] Decision and Order at 12. Pursuant to Section 718.304(c), the administrative law judge declined to consider and weigh the medical opinions that claimant has no impairment. The administrative law judge awarded benefits.

Upon review of employer's appeal, the Board held that the administrative law judge did not adequately explain his resolution of the conflicting x-ray readings. *Atkins v. Westmoreland Coal Co*., BRB No. 02-0877 BLA (Sep. 9, 2003)(McGranery, J., dissenting). The Board noted that both Drs. DePonte and Wheeler had read several x-rays and agreed that the mass in claimant's right upper lung was stable, but reached differing conclusions as to what the stability meant diagnostically. Dr. DePonte concluded that the stability of the lesion was "consistent with a benign process" and "likely represent[ed] a conglomerate mass of pneumoconiosis," Director's Exhibit 19, while Dr. Wheeler viewed the lesion's stability, coupled with its unilateral nature and the fact that it was unassociated with any simple pneumoconiosis, as reflecting healed tuberculosis. Employer's Exhibit 11 at 16, 40. In this context, the Board indicated that it was "unable to discern the significance of [the administrative law judge's] observation that Dr. Wheeler's and Dr. Wiot's memories may be a less reliable basis for determining what a series of x-rays may reveal, considering that Dr. Wheeler observed and commented on the same lesion stability that Dr. DePonte detected in her simultaneous review of the x-rays." [2003] *Atkins*, slip op. at 6. The Board additionally held that the administrative law judge did not explain how he weighed the readings of Board-certified Radiologists and B-readers Drs. Scott, Kim, Spitz, Shipley, Binns, Gogineni, and Baek, who read several x-rays as negative both for any changes of simple pneumoconiosis and for any large opacities of complicated pneumoconiosis. [2003] *Atkins*, slip op. at 7-8. Finally, the Board again instructed the administrative law judge to consider and weigh the medical opinion evidence that claimant does not have complicated pneumoconiosis. [2003] *Atkins*, slip op. at 6-7. Consequently, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.304 and remanded the case to him for further consideration.

On remand, the administrative law judge accorded greater weight to Dr. DePonte's "Category A" large opacity x-ray reading. He explained that he found "Dr. DePonte's reading of several x-ray films simultaneously" more persuasive because "numerous physicians indicated on their x-ray reports that comparison films would be useful in assessing the changes seen in . . . Claimant's . . . right upper lung," and because "Dr. Wiot also stated at his deposition that reviewing a series of x-rays simultaneously is always better than reviewing one x-ray film." Decision and Order on Remand at 2. The administrative law judge found that "[w]hile other physicians read several of the x-ray films, they did not do so simultaneously as recommended by Dr. Wiot and other physicians in the record." Decision and Order on Remand at 2. Additionally, the

administrative law judge discounted the negative readings for complicated pneumoconiosis because the readers of those x-rays did not diagnose simple pneumoconiosis, a conclusion "at odds with the finding of simple pneumoconiosis which was made in the initial claim for benefits and . . . affirmed by the Board in the earlier proceedings." Decision and Order on Remand at 2-3. Further, the administrative law judge gave "less weight" to the negative readings attributing the x-ray changes in the right upper lung to tuberculosis or cancer because there was no evidence that the miner was treated for tuberculosis or developed cancer. Decision and Order on Remand at 3. The administrative law judge discounted the medical opinions that claimant does not have complicated pneumoconiosis because they did not diagnose simple pneumoconiosis, "a finding contrary to the findings established in this case." Decision and Order on Remand at 3. The administrative law judge therefore found that claimant established the existence of complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304(a), and establishing a material change in conditions pursuant to Section 725.309(d)(2000). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence regarding the existence of complicated pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds to one issue raised by employer. The Director agrees in part with employer's argument that the administrative law judge erroneously gave preclusive effect in this claim to the finding of simple pneumoconiosis that was made in the miner's prior, denied claim.

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

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R.

§725.309(d)(2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d)(2000), the administrative law judge must consider all of the new evidence to determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). If so, claimant has established a material change in conditions and the administrative law judge must then determine whether all of the record evidence, old and new, supports a finding of entitlement. *Id*.

Section 411(c)(3)(A) of the Act, implemented by Section 718.304(a) 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)(A); 20 C.F.R. §718.304(a). The Fourth Circuit court 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, 2-561-62 (4th Cir. 1999). In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 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); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

Pursuant to 20 C.F.R. §718.304(a), employer contends that the administrative law judge erred in giving less weight to the x-ray readings that were negative for complicated pneumoconiosis. The record contains thirty-three readings of four new chest x-rays. Seven readings classified an abnormality in the upper lobe of claimant's right lung as a Category A large opacity, twenty-five readings indicated that no large opacities were present and classified the right upper lobe abnormality as healed tuberculosis or possibly

cancer, and one reading described acute infiltrate in the right upper lobe.[1] Of the positive readings for complicated pneumoconiosis, four were rendered by Board-certified radiologists and B-readers and three were by B-readers. Of the negative readings for complicated pneumoconiosis, twenty were rendered by Board-certified radiologists and B-readers and five were by B-readers.

Employer contends that the administrative law judge erred by giving less weight to the negative readings for complicated pneumoconiosis because the readers did not diagnose simple pneumoconiosis, "at odds with the finding of simple pneumoconiosis which was made in the initial claim for benefits and . . . affirmed by the Board in the earlier proceedings." Decision and Order at Remand at 2-3. Employer argues that the administrative law judge erroneously applied the doctrine of collateral estoppel to the finding of simple pneumoconiosis made in the miner's prior claim, because the law for determining the existence of pneumoconiosis was changed in the interim by *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), while the Director states that collateral estoppel was inapplicable in this claim because the finding of simple pneumoconiosis was not essential to the denial of the miner's prior claim for failure to establish total disability.

For collateral estoppel to apply, claimant must establish, inter alia, that the issue determined in the prior proceeding was a critical and necessary part of the judgment in the prior proceeding.[2] *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219, 224 (4th

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[1] The April 19, 1999 x-ray received three readings positive for simple pneumoconiosis that also noted the presence of a Category A large opacity, and seven negative readings. The May 3, 1999 x-ray received one negative "0/1" reading for simple pneumoconiosis that also noted the presence of a Category A large opacity, and five negative readings. The August 17, 1999 x-ray received three readings positive for simple pneumoconiosis that also noted the presence of a Category A large opacity, six negative readings, and one reading not classified under the ILO system. The September 28, 1999 x-ray received seven readings negative for both simple pneumoconiosis and large opacities.

[2] All of the elements necessary for the application of collateral estoppel are that: (1) the issue sought to be precluded is identical to one previously litigated; (2) the issue was actually determined in the prior proceeding; (3) the issue was a critical and necessary part of the judgment in the prior proceeding; (4) the prior judgment is final and valid; and (5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(*en banc*).

Cir. 1998); *Hughes v. Clinchfield Coal Co*., 21 BLR 1-134, 1-137 (1999)(*en banc*). As the Director notes, the finding of the existence of simple pneumoconiosis in claimant's prior claim was not essential to the judgment denying benefits. *Hughes*, 21 BLR at 1-137. Additionally, review of the record in the current claim reflects that employer contested the existence of pneumoconiosis and the administrative law judge did not find that the existence of simple pneumoconiosis was established. Director's Exhibit 37. Consequently, the administrative law judge erred in discrediting the negative readings for complicated pneumoconiosis because they conflicted with a finding that the existence of simple pneumoconiosis had been established.

Employer contends further that the administrative law judge substituted his opinion for that of the physicians when he discounted the negative readings for complicated pneumoconiosis attributing the right upper lobe abnormality to either tuberculosis or cancer because there was no evidence that claimant was treated for tuberculosis or developed cancer. Employer points to the testimony of Dr. Wheeler explaining that nine out of ten people with tuberculosis self-cure without treatment if their immune systems are normal. Employer's Exhibit 11 at 20, 36. Dr. Wheeler explained further that tuberculosis leaves scars visible on x-rays when it is untreated or undertreated, but leaves little or no scarring when treated. Employer's Exhibit 11 at 36-37. Review of the administrative law judge's Decision and Order does not disclose how he weighed this testimony when he concluded that the lack of evidence of treatment for tuberculosis undercut the negative readings for complicated pneumoconiosis. Because the administrative law judge did not consider relevant expert testimony and explain the weight accorded to it, we are unable to affirm his alternative rationale for discounting the negative x-ray readings. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998).

Employer argues that the administrative law judge did not adequately explain his rationale for crediting Dr. DePonte's "Category A" x-ray reading over the contrary readings by other Board-certified radiologists and B-readers. We agree. Previously, we instructed the administrative law judge to explain his conclusion that Dr. DePonte's opportunity to read the May 3, 1999 x-ray simultaneously with those taken on January 22, 1996 and December 3, 1997 enhanced her ability to detect the presence of complicated pneumoconiosis over that of the other Board-certified radiologists and B-readers who read several x-rays as negative for both simple and complicated pneumoconiosis. On remand, the administrative law judge explained that he found Dr. DePonte's simultaneous reading more persuasive because several physicians had indicated a need for comparison films and because Dr. Wiot testified that it is preferable to read a series of x-rays. But this is the same rationale the administrative law judge gave in his initial decision issued on October 30, 2000, a rationale we held was inadequate to explain the weight accorded to the conflicting readings by radiological experts. [2000] Decision and Order at 9-10; [2002] *Atkins*, slip op. at 8. As a result, we are unable to

determine whether substantial evidence supports the administrative law judge's finding because he has not provided an adequate rationale for crediting Dr. DePonte's x-ray reading over those rendered by other Board-certified radiologists and B-readers who read multiple x-rays as negative for large opacities of complicated pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65-66 (4th Cir. 1992).

Moreover, the record reflects that the physicians who read the x-rays as negative for complicated pneumoconiosis recommended comparison films in order to determine whether the right upper lung lesion was granulomatous disease, tuberculosis, or cancer. Dr. DePonte made a comparison and concluded that the lesion she saw on the May 3, 1999 x-ray was present on earlier films and thus was stable, a factor that tended to rule out cancer and in her view made the lesion more likely a conglomerate mass of pneumoconiosis. Director's Exhibit 19. As we noted in our prior decision, Dr. Wheeler observed the same lesion stability and interpreted its diagnostic significance as tending to confirm healed tuberculosis. Employer's Exhibit 11 at 16, 40. The administrative law judge's rationale for crediting Dr. DePonte's x-ray reading does not resolve this conflict in the evidence. *See Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989). Consequently, we must vacate the administrative law judge's finding pursuant to Section 718.304(a) and remand this case him to reconsider the x-ray readings with full explanation of the relative weight accorded to the conflicting readings. *Lester,* 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Adkins*, 958 F.2d at 52, 16 BLR at 2-65-66.

Pursuant to Section 718.304(c), employer contends that the administrative law judge did not provide a valid rationale for discounting the medical opinions of Drs. Castle, Chillag, Dahhan, Fino, and Jarboe that claimant does not have complicated pneumoconiosis. On remand, the administrative law judge summarily gave "less weight" to these opinions because he found them "based, in part, on findings that Claimant does not have pneumoconiosis," which ran "contrary to findings established in this case." Decision and Order on Remand at 3. This finding is flawed for the same reason discussed above. The finding of the existence of simple pneumoconiosis in the miner's prior, denied claim lacks preclusive effect in this claim, *Hughes*, 21 BLR at 1-137, and the administrative law judge did not find the existence of simple pneumoconiosis established in this claim. Additionally, contrary to the administrative law judge's analysis, the record reflects that Drs. Dahhan and Jarboe diagnosed simple pneumoconiosis. Employer's Exhibit 10 at 5, 7; Employer's Exhibit 13 at 15. Therefore, we must vacate the administrative law judge's finding pursuant to Section 718.304(c) and instruct him to reconsider the medical opinion evidence. Because we have vacated the finding of complicated pneumoconiosis, the administrative law judge should reconsider the issue of the onset date, if reached.

Employer argues that this case should be referred to a different administrative law judge on remand because the case has reached the point of administrative gridlock.

Employer's Brief at 21-22. Reluctantly we find merit in employer's request that the case be reassigned. The administrative law judge in his third decision has again not adequately explained his rationale for crediting and discrediting evidence. Thus, we conclude that "review of this claim requires a fresh look at the evidence . . . ." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-343 (4th Cir. 1998); *see* 20 C.F.R. §§802.404(a), 802.405(a).

Accordingly, the administrative law judge's Decision and Order on Remand is vacated and the case is remanded to the Office of Administrative Law Judges for reassignment and 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

McGRANERY, J., dissenting:

I respectfully dissent from the majority's decision. I would affirm the administrative law judge's decision awarding benefits. When confronted with forty-nine interpretations of seven x-rays by well qualified experts with conflicting opinions, it would have been easy for the administrative law judge to throw up his hands and say he was unable to conclude which party's evidence was more persuasive, therefore claimant had failed to carry his burden of proof and benefits must be denied. But the conscientious administrative law judge resisted that temptation, heeding the teaching of the United States Court of Appeals for the Fourth Circuit in *Underwood v. Elkay Mining, Inc.,* 105 F.3d 946, 950-951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997):

> In *Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992), we pointed out that in considering expert opinions, merely "counting heads" with the

> underlying presumption that two expert opinions *ipso facto* are more probative than one is a hollow endeavor and contributes little when weighing evidence. *Id*. at 52. While we recognized that merely counting heads is not the appropriate manner for an ALJ to weigh numerous and diverse opinions, we did not suggest that two or three independent, qualified opinions were necessarily of less probative value than one. In weighing opinions, the ALJ is called upon to consider their quality. Thus, the ALJ should consider the qualifications of the experts, the opinions' reasoning, their reliance on objectively determinable symptoms and established science, their detail of analysis, and their freedom from irrelevant distractions and prejudices.

The administrative law judge has consistently explained that he gives greatest weight to Dr. DePonte's readings over those of other dually qualified radiologists because she was able to read several films simultaneously. For that reason hers was the best informed interpretation. The administrative law judge relied upon evidence in the record to make that determination:

> Thus, the bases for crediting Dr. DePonte's simultaneous x-ray readings are statements made by physicians on the x-ray films and at depositions as included in the record [indicating simultaneous interpretation is more helpful in assessing changes]. While other physicians read several of the x-ray films, they did not do so simultaneously as recommended by Dr. Wiot and other physicians in the record.

[2004] Decision and Order at 2. The majority asserts this is the same explanation which it has previously held to be inadequate. That is true. It is difficult to understand why the majority considers the explanation inadequate when it is so well supported by expert evidence in the record. Furthermore, the advantage is demonstrated in Dr. DePonte's report: she initially interpreted the May 3, 1999 film as s/p 0/1 Category A, and that the opacity in the right upper lobe may represent pneumoconiosis or scarring or carcinoma. [2000] Decision and Order at 5. Upon seeing the 1999 film together with films from 1996 and 1997, and observing that the opacity was present without change, she was able to arrive at a definitive opinion: it represented a "conglomerate mass of pneumoconiosis." *Id*. Accordingly there is abundant support in the record for the administrative law judge's determination to give greatest weight to Dr. DePonte's interpretations.

The record also supports the administrative law judge's determination to discount the negative interpretations of Drs. Wheeler, Castle, Chillag, Dahhan, and Fino. In particular, the majority faults the administrative law judge for not resolving the conflict in the evidence between Dr. Wheeler's interpretation and Dr. DePonte's, since, like Dr. DePonte, Dr. Wheeler observed the opacity's stability. Contrary to the majority's

assertion, the administrative law judge did resolve the conflict while recognizing Dr. Wheeler's expertise in interpreting x-rays for both tuberculosis and pneumoconiosis. [2000] Decision and Order at 6, 10. The administrative law judge stated:

> Although Dr. Wheeler seems certain that the abnormality is not complicated pneumoconiosis, he bases this on the fact that the opacity is only in the right upper lobe whereas complicated pneumoconiosis is always symmetrical. Dr. Wiot's testimony, however, indicates this is not necessarily the case although it often is.

[2000] Decision and Order at 10. Thus, the administrative law judge discounted Dr. Wheeler's negative interpretation because Dr. Wheeler excluded a diagnosis of pneumoconiosis for a reason which is questionable.[3] Furthermore, Dr. Wheeler's opinion conflicts with the medical science underlying the statute which requires a finding of only one large opacity to diagnose complicated pneumoconiosis. *See* 30 U.S.C. §921(c)(3). The law is clear that a "physician's opinion based on a premise 'antithetical' to the Act is not probative." *Lane v. Union Carbide Corp.*, 105 F.3d 166, 173, 21 BLR 2-34, 2-46 (4th Cir. 1997). Moreover, at issue in these cases is whether the legal definition is satisfied, not the medical definition. The Fourth Circuit has declared: "to the extent there is a divergence between the medical and legal standards for complicated pneumoconiosis, we must apply the standard established by Congress." *Eastern Associated Coal Corp. v. Director, OWCP,* [*Scarbro*], 220 F.3d 250, 258, 22 BLR 2-93, 2-103 (4th Cir. 2000).

Because the administrative law judge is mindful of the Fourth Circuit's teaching in *Scarbro*, he properly discounted the opinions of Drs. Castle, Chillag, Dahhan, and Fino who required a finding of a pulmonary or respiratory impairment to diagnose complicated pneumoconiosis.[4] Although a respiratory impairment may be relevant to a medical finding of complicated pneumoconiosis, it has no relevance to a legal finding under the statute or the regulation. As the administrative law judge correctly observed, "using the

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[3] Dr. Wheeler testified:

> I think it's very unlikely that this could be a pneumoconiosis of any sort. Bilaterality is one of the hallmarks of any pneumoconiosis.

Employer's Exhibit 11 at 17.

[4] The majority and employer also fault the administrative law judge for discounting Dr. Jarboe's opinion diagnosing simple but not complicated pneumoconiosis. It was inconclusive as it was based on only a partial review of the medical evidence of record. Dr. Jarboe's opinion does not figure prominently in employer's brief on appeal or in the administrative law judge's consideration of the evidence.

failure to show total disability under §718.204 as a basis for concluding that complicated pneumoconiosis does not exist, would in effect, turn the §718.304 presumption into a rebuttable presumption." [2000] Decision and Order at 10. Thus, the administrative law judge's discounting of these medical opinions demonstrates a proper application of the statute, regulations, and caselaw.[5] Accordingly, I would affirm the administrative law judge's decision on second remand awarding benefits.

The majority's determination that the Board and the administrative law judge have reached an impasse is, I believe, correct. In my opinion that is due to the Board's failure to give due deference to the administrative law judge's role in weighing the medical evidence and its misapprehension of the relevant law. Given the majority's instructions, the new administrative law judge will be left with little choice other than to deny benefits. When the Board affirms that decision, claimant can obtain review in the Fourth Circuit. I would hope that the court, as it has done before, would reverse the Board and remand the case with instructions to reinstate the administrative law judge's initial decision. *See Sykes v. Director, OWCP*, 812 F.2d 890, 894, 10 BLR 2-95, 2-99 (4th Cir. 1987).

REGINA C. McGRANERY
Administrative Appeals Judge

[5] The majority misreads the administrative law judge's decision when it states that he applied the doctrine of collateral estoppel to reject the opinions of physicians who interpreted the x-rays as showing granulomatous disease, tuberculosis, or cancer but not complicated pneumoconiosis. He said that because they had also failed to find simple pneumoconiosis, their interpretations are less credible since simple pneumoconiosis had been established in the first claim and that finding had been affirmed by the Board. [2004] Decision and Order at 3. The administrative law judge did not purport to apply the doctrine of collateral estoppel, he spoke of "[c]ommon sense . . . ." [2004] Decision and Order at 3. He simply made on observation. He had thoroughly discussed his reasons for discounting the opinions of employer's experts in his two prior decisions.