BRB No. 99-0265 BLA

MELVIN C. LOONEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JEWELL SMOKELESS COAL CORPORATION	)	DATE ISSUED:
	)	
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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen Chartered), Washington, D.C., for employer.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (98-BLA-0311) of Administrative Law Judge Edward Terhune Miller 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). Claimant filed a duplicate claim on July 2, 1985.[1] In the initial Decision and Order, Administrative Law Judge E. Earl Thomas found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. In addressing the merits of the claim, Judge Thomas, after crediting claimant with

[1]Claimant initially filed a claim for benefits on August 21, 1980. Director's Exhibit 31. The district director denied the claim on June 5, 1981. *Id.* There is no indication that claimant took any further action in regard to his 1980 claim.

twenty-nine years of coal mine employment, found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Judge Thomas further found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Judge Thomas also found that the evidence was sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, Judge Thomas awarded benefits.[2]

By Decision and Order dated March 28, 1991, the Board affirmed Judge Thomas's finding that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *Looney v. Jewell Smokeless Coal Corp.*, BRB No. 88-4385 BLA (Mar. 28, 1991) (unpublished). The Board, however, vacated Judge Thomas's finding that the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) and remanded the case for further consideration. *Id.*

On remand, Judge Thomas found that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). Judge Thomas also found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, Judge Thomas denied benefits.

Claimant subsequently requested modification of his denied claim. Administrative Law Judge George A. Fath, after noting that claimant had not alleged any mistake in a determination of fact, found that claimant failed to demonstrate a change in conditions

[2]By Order dated February 27, 1989, the Board dismissed employer's appeal as untimely filed. *Looney v. Jewell Smokeless Coal Corp.*, BRB No. 88-4385 BLA (Feb. 27, 1989)(Order)(unpublished). Employer subsequently filed an appeal with the United States Court of Appeals for the Fourth Circuit. By Decision and Order dated December 22, 1989, the Fourth Circuit held that employer's appeal of Judge Thomas's Decision and Order was timely filed. *Jewell Smokeless Coal Corp. v. Looney*, 892 F.2d 366, 13 BLR 2-177 (4th Cir. 1989). The Fourth Circuit, therefore, remanded the case to the Board for its consideration of employer's appeal.

pursuant to 20 C.F.R. §725.310. Judge Fath, therefore, denied claimant's request for modification. By Decision and Order dated March 23, 1995, the Board remanded the case to Judge Fath to reconsider whether the newly submitted evidence was sufficient to establish the existence of complicated pneumoconiosis, thereby establishing a change in conditions pursuant to 20 C.F.R. §725.310. *Looney v. Jewell Smokeless Coal Corp.*, BRB No. 94-3701 BLA (Mar. 23, 1995) (unpublished). The Board also remanded the case to Judge Fath for a determination of whether there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. *Id.*

Due to Judge Fath's unavailability, Administrative Law Judge Edward Terhune Miller (the administrative law judge) reconsidered the claim on remand. The administrative law judge found that the evidence was sufficient to establish the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. The administrative law judge, therefore, found that claimant had established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge awarded benefits. By Decision and Order dated June 19, 1997, the Board, *inter alia*, vacated the administrative law judge's finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and instructed the administrative law judge, on remand, to review the evidence in its entirety in determining whether there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. *Looney v. Jewell Smokeless Coal Corp.*, BRB No. 96-1737 BLA (June 19, 1997) (unpublished).

On remand, the administrative law judge found that the evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge, therefore, found that claimant had established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Employer also argues that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Before addressing employer's contentions of errors, we note that the Board appears to have provided inconsistent remand instructions in its 1995 and 1997 decisions. In its 1995

decision, the Board clearly instructed the administrative law judge to address whether the newly submitted evidence was sufficient to establish the existence of complicated pneumoconiosis, a finding which would support a finding of a change in conditions pursuant to 20 C.F.R. §725.310. However, in its most recent decision, the Board instructed the administrative law judge to address whether all of the evidence of record was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, a finding which the Board characterized as supporting a finding of a mistake in a determination of fact pursuant to 20 C.F.R. §725.310.

Inasmuch as the record was devoid of any evidence of complicated pneumoconiosis at the time of the prior denial, a finding that the newly submitted evidence supports a finding of complicated pneumoconiosis would support a finding of a change in conditions pursuant to 20 C.F.R. §725.310, not a finding of a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Because the administrative law judge erred in finding the newly submitted evidence sufficient to establish the existence of complicated pneumoconiosis, *see* discussion, *infra*, we remand the case to the administrative law judge for reconsideration of whether the newly submitted evidence is sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, a finding which would support a finding of a change in conditions pursuant to 20 C.F.R. §725.310.

Employer argues that the administrative law judge committed numerous errors in finding the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to 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 examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

Employer contends that the administrative law judge erred in finding the newly submitted x-ray evidence sufficient to support a finding of complicated pneumoconiosis. In determining whether the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis, the administrative law judge acted within his discretion by according greater weight to the interpretations of claimant's most recent x-rays taken on March 25, 1993 and July 13, 1993.[3] *See Pate v. Alabama By-Products Corp.*, 6 BLR 1-636

[3]Employer contends that if the next most recent x-ray, a film dated March 14, 1992, were considered, a majority of the interpretations of claimant's most recent x-rays would be negative for pneumoconiosis. However, inasmuch as claimant's March 14, 1992 x-ray was

(1983); Decision and Order on Remand at 8-9; Claimant's Exhibits 2, 4-6; Employer's Exhibits 20, 23, 25. The administrative law judge also properly accorded greater weight to the interpretations rendered by B readers and/or Board-certified radiologists. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order on Remand at 8-9.

While the administrative law judge correctly stated that a majority of the best qualified physicians interpreted claimant's July 13, 1993 x-ray as positive for complicated pneumoconiosis,[4] the administrative law judge erred to the extent that he found that a majority of the best qualified readers interpreted claimant's March 25, 1993 x-ray as positive for complicated pneumoconiosis.

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over a year older than claimant's two most recent x-rays, the administrative law judge did not err in according greater weight to the interpretations of claimant's more recent March 25, 1993 and July 13, 1993 x-rays.

[4]Drs. Fisher and Bassali, each dually qualified as a B reader and Board-certified radiologist, interpreted claimant's July 13, 1993 x-ray as revealing the existence of complicated pneumoconiosis. Claimant's Exhibits 4, 5. Dr. Aycoth, a B reader, also interpreted this x-ray as positive for complicated pneumoconiosis. Claimant's Exhibit 6. Dr. J. Dale Sargent, a B reader, interpreted the x-ray as revealing a "questionable category A large opacity in the right upper lobe." Employer's Exhibit 25. Dr. Wheeler, a B reader and Board-certified radiologist, found no evidence of complicated pneumoconiosis on claimant's July 13, 1993 x-ray. Employer's Exhibit 23. Dr. Wheeler opined that an ill defined mass in the right upper lung was compatible with probable healed tuberculosis. *Id.*

Dr. Robinette, a B reader, interpreted claimant's March 25, 1993 x-ray as revealing complicated pneumoconiosis. Claimant's Exhibit 2. However, Dr. Wheeler, a B reader and Board-certified radiologist, interpreted claimant's March 25, 1993 x-ray as negative for complicated pneumoconiosis. Employer's Exhibit 20. Given the fact that the best qualified physician to render an interpretation of claimant's March 25, 1993 x-ray found it to be negative for complicated pneumoconiosis, the administrative law judge failed to explain why he considered this x-ray to be positive for complicated pneumoconiosis.[5] Consequently, we vacate the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) and remand the case for further consideration.

Employer also contends that the administrative law judge erred in his consideration of the CT scan evidence. CT scan evidence falls into the "other means" category of establishing complicated pneumoconiosis at 20 C.F.R. §718.304(c). *Melnick, supra*. The United States Court of Appeals for the Fourth Circuit recently clarified that even where some x-ray evidence indicates opacities that would satisfy the requirements of Section 718.304(a), if evidence is available that is relevant to an analysis under Section 718.304(c), then all of the evidence must be considered and evaluated to determine whether the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray. *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, BLR (4th Cir. 2000). The Fourth Circuit explicitly recognized that x-ray evidence can lose its force if other evidence affirmatively shows that the opacities are not there or are not what they seem to be, perhaps because of an intervening pathology. *Id.*

The record contains several interpretations of a July 13, 1993 CT scan. In a July 13, 1993 report, Dr. Kelly opined that while changes in the right upper lobe could represent a confluence of pneumoconiosis, he could not exclude the possibility of a neoplasm or acid fast disease. Employer's Exhibit 26. In a medical report dated July 20, 1993, Dr. J. Dale Sargent

[5]The administrative law judge also erred to the extent that he counted the number of readers rendering positive interpretations of claimant's two most recent x-rays. The number of x-ray interpretations, along with the readers' qualifications, dates of film, quality of film and the actual reading must be considered. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984); *see generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988). An administrative law judge should focus upon the weighing of positive and negative x-ray interpretations as opposed to counting the number of individual readers. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Rankin v. Keystone Coal Mining Corp.*, 8 BLR 1-54 (1985).

stated the July 13, 1993 CT scan confirmed "the presence of pin point interstitial infiltrates consistent with simple pneumoconiosis." However, Dr. Sargent did not address the nature of a 1.8 x 1 cm. non-calcified nodule in the right upper lobe. Employer's Exhibit 25.

Dr. Wheeler also interpreted claimant's July 13, 1993 CT scan. Dr. Wheeler diagnosed "[m]ultiple nodules and infiltrates or irregular fibrosis right upper lobe and apex compatible with tuberculosis of unknown activity, probably healed." Employer's Exhibit 17. Dr. Wheeler also found a 1.5 cm. nodule in the right middle lobe and an 8 mm. nodule in the left upper lobe compatible with granulomata. *Id.* Dr. Wheeler opined that:

> The peripheral location of this cluster of small masses in RUL and one in RML as well as one in upper right apex all favor healed TB. Lack of small symmetrical nodules in central portion both upper lobes makes silicosis or coal workers' pneumoconiosis very unlikely.

Employer's Exhibit 24.

Dr. Fishman also interpreted claimant's July 13, 1993 CT scan. Dr. Fishman opined that:

> The patient has several nodules in the lung including one in the right middle lobe on scan 33, one in the right upper lung on scan 26, and several smaller nodules together on scan 23. The pattern of these nodules shows they are non-calcified. The pattern is suggestive of an inflammatory process particularly those in the right upper lung if they have remained stable such as tuberculosis. Again, without densitometry or comparison films, one cannot exclude the possibility of carcinoma but by history, this is not suspected. There are areas of underlying emphysema noted. The thought of pneumoconiosis such as coal worker's pneumoconiosis or silicosis was considered but typically we would see more nodules in a more even distribution.

Employer's Exhibit 21.

In the instant case, the CT scan evidence arguably supports a finding that the opacities revealed on claimant's x-rays are not complicated pneumoconiosis, but are instead the result of another pathology, namely tuberculosis. None of the physicians who interpreted claimant's July 13, 1993 CT scan rendered a diagnosis supportive of a finding of complicated pneumoconiosis.

The administrative law judge failed to provide a credible basis for discrediting the opinions of Drs. Wheeler and Fishman that claimant's CT scan revealed the

presence of tuberculosis. The alj discredited the opinions of Drs. Wheeler and Fishman regarding the CT scan evidence because he found the record "devoid of evidence that the [c]laimant had or presently has tuberculosis...." Decision and Order on Remand at 9. However, the administrative law judge failed to properly address whether the CT scan evidence itself supported a finding of tuberculosis.

The administrative law judge further discredited Dr. Fishman's opinion, stating that:

> Dr. Fishman based his opinion regarding the existence of tuberculosis versus pneumoconiosis based solely on his examination of a single CT scan. Thus, his conclusion that the nature of the masses in Claimant's lungs is "suggestive" of tuberculosis rests on a rather limited foundation and is without the benefit of the other medical evidence of record, which is devoid of any indication that Claimant has or had pneumoconiosis [sic]. Accordingly, the opinion of Dr. Fishman is equivocal and is accorded little probative value.

Decision and Order on Remand at 10.

Inasmuch as CT scan evidence is an acceptable means of diagnosing the existence of complicated pneumoconiosis, *Melnick*, *supra,* the administrative law judge erred in discrediting Dr. Fishman's opinion because he failed to review other medical evidence.

Inasmuch as the administrative law judge erred in his consideration of the CT scan evidence, we remand the case to the administrative law judge with instructions to reconsider the relevance of the CT scan evidence pursuant to 20 C.F.R. §718.304(c).

Employer also contends that the administrative law judge erred in his consideration of the medical opinion evidence. Employer contends that the administrative law judge erred in discrediting Dr. Wheeler's opinion because the doctor's testimony "suggests a predisposition to find the existence of tuberculosis."[6]

[6]Our dissenting colleague contends that because the Board previously held that the administrative law judge reasonably questioned the reliability of Dr. Wheeler's opinion, *see Looney v. Jewell Smokeless Coal Corp.*, BRB No. 96-1737 BLA (June 19, 1997) (unpublished), this constitutes the law of the case and should govern the Board's determination. *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). We note that the law of the case doctrine is discretionary. *See Cale v. Johnson*, 861 F.2d 943, 947 (6th Cir. 1988). Moreover, the Board has held that it will adhere to its

See Decision and Order on Remand at 9. There is no evidence of record to support the administrative law judge's inference that Dr. Wheeler had a predisposition to diagnose tuberculosis. Although Dr. Wheeler, a Board-certified radiologist, indicated that he had, in the past year, seen approximately 800 cases involving patients with positive tuberculin tests, he noted that only approximately ten percent of these patients had evidence of either active or healed tuberculosis. Employer's Exhibit 27 at 6. Moreover, the fact that Dr. Wheeler has experience in the diagnosis of tuberculosis would appear to be a reason to accord greater, not less, weight to his opinion. Dr. Wheeler clearly explained the basis for his opinion that claimant did not suffer from complicated pneumoconiosis. *See* Employer's Exhibit 27 at 18-19, 36-43.

The administrative law judge also erred to the extent that he discredited Dr. Wheeler's opinion because it was "inconsistent with the Board's previous, and unchallenged finding, that claimant has established the existence of simple pneumoconiosis." Decision and Order on Remand at 9. Subsequent to the issuance of the administrative law judge's Decision and Order on Remand, the Fourth Circuit held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Thus, before discrediting Dr. Wheeler's opinion on this basis, the administrative law judge would have to reconsider whether the evidence of record establishes the existence of pneumoconiosis consistent with the Fourth Circuit's *Compton* decision.[7] Such

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initial decision when a case is on its second appeal unless there has been a change in the underlying factual situation; intervening controlling authority demonstrates the initial decision was erroneous; or the first decision was clearly erroneous and to let it stand would produce a manifest injustice. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989). Upon review, it is clear that the Board's affirmance in its 1997 Decision and Order of the administrative law judge's discrediting of Dr. Wheeler's opinion was "clearly erroneous." Because application of the law of the case doctrine would "work a manifest injustice" in the instant case, we hold that it is not controlling in regard to the administrative law judge's consideration of Dr. Wheeler's opinion.

[7]Dr. Wheeler actually interpreted claimant's July 13, 1993 x-ray as revealing a profusion of 0/1. Employer's Exhibit 23. While such a reading is considered insufficient to support a finding of pneumoconiosis, *see* 20 C.F.R. §102(b), it reflects that Dr. Wheeler considered the possibility that claimant's July 13, 1993 x-ray revealed the existence of simple

evidence would include the newly submitted medical evidence.

Furthermore, the administrative law judge, in discrediting Dr. Wheeler's opinion, noted the results of a negative skin test for tuberculosis. Decision and Order on Remand at 9. The administrative law judge, however, did not address Dr. Wheeler's comments regarding the significance of a skin test. During his deposition taken on July 22, 1993, Dr. Wheeler explained that the skin test (or tuberculin test) has limitations. Employer's Exhibit 27 at 20. Dr. Wheeler explained that a positive skin test indicates that a person at least had tuberculosis in the past. *Id.* However, when the test is negative, Dr. Wheeler explained that there is "an uncertainty factor." *Id.* Specifically, Dr. Wheeler noted that there can be false negatives. *Id.* Dr. Wheeler explained that there are a percentage of people with active tuberculosis who have no skin reaction. *Id.* Dr. Wheeler further stated that persons with very old tuberculosis can also have a negative skin test. *Id.*

Dr. Wheeler testified that the only definitive way to diagnose tuberculosis is through a sputum test or a tissue biopsy. *Id.* Given the availability and presumed accuracy of a sputum study, the administrative law judge inferred that employer "could have produced evidence it considered dispositive of the issue, if it had chosen to do so." Decision and Order on Remand at 9 n.7. The administrative law judge, therefore, gave "some weight to that negative inference." *Id.* The administrative law judge erred in making such a negative inference against employer since claimant presumably had the same opportunity to submit evidence of a sputum test in order to establish that he did not suffer from tuberculosis.

Employer also argues that the administrative law judge erred in finding the opinions of Drs. Ranavaya, Robinette and Sargent sufficient to establish the existence of complicated pneumoconiosis. Dr. Ranavaya diagnosed the existence of complicated pneumoconiosis based upon his interpretation of a March 14, 1992 x-ray. Although Dr. Ranavaya interpreted claimant's March 14, 1992 x-ray as revealing a size A large opacity, he further noted that he was unsure of its etiology. While Dr. Ranavaya indicated that the large opacity was "probably" due to complicated pneumoconiosis, he noted that other etiologies could not be ruled out. Claimant's Exhibit 3. Dr. Ranavaya suggested that further studies, including a high resolution CT scan, be conducted. *Id.* In a March 20, 1992 report, Dr. Ranavaya opined that claimant had radiological evidence of complicated pneumoconiosis. Director's Exhibit 83.

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pneumoconiosis.

On remand, the administrative law judge is instructed to reconsider whether Dr. Ranavaya's opinion is sufficient to support a finding of complicated pneumoconiosis. Moreover, we agree with employer that the administrative law judge erred in failing to consider whether several negative readings of the March 14, 1992 x-ray that Dr. Ranavaya relied upon in diagnosing complicated pneumoconiosis call into question the reliability of the doctor's conclusion.[8] *See Winters v. Director, OWCP*, 6 BLR 1-877 (1984); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983).

Similarly, Dr. Robinette's diagnosis of complicated pneumoconiosis was based upon his interpretation of claimant's March 25, 1993 x-ray. *See* Claimant's Exhibit 2. The administrative law judge failed to consider whether Dr. Wheeler's negative reading of the March 25, 1993 x-ray that Dr. Robinette relied upon in diagnosing complicated pneumoconiosis calls into question the reliability of the doctor's conclusion. *See Winters*, *supra*; *Arnoni*, *supra*; *White*, *supra*; Employer's Exhibit 20. The record reflects that while Dr. Robinette is a B reader, Dr. Wheeler is dually qualified as a B reader and Board-certified radiologist. *See* Director's Exhibit 50; Employer's Exhibit 6.

Employer also contends that the administrative law judge failed to account for the equivocal nature of Dr. Sargent's finding of complicated pneumoconiosis. In a report dated July 20, 1993, Dr. J. Dale Sargent opined that claimant was:

suffering from simple pneumoconiosis with a question of complicated

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[8]Dr. Ranavaya, in diagnosing complicated pneumoconiosis, relied upon his own interpretation of a March 14, 1992 x-ray. Claimant's Exhibit 3. Dr. Ranavaya is a B reader. Claimant's Exhibit 3. Drs. E. Nicholas Sargent, Navani, Wheeler and Scott, each dually qualified as a B reader and Board-certified radiologist, interpreted claimant's March 14, 1992 x-ray as negative for complicated pneumoconiosis. Director's Exhibits 86, 87; Employer's Exhibits 1, 7. Dr. Paranthaman, a B reader, also interpreted claimant's March 14, 1992 x-ray as negative for complicated pneumoconiosis. Director's Exhibit 88.

> pneumoconiosis raised because of a nodular lesion in his right upper lobe. At this point, I understand that the lesion has been present for some period of time and it is not calcified, therefore it is unlikely to be a granuloma. If the lesion had been shown to be progressing over the last year, then it could be a non-calcified granuloma, but also the possibility of complicated pneumoconiosis must be considered.
>
> Although it is unusual for simple pneumoconiosis of profusion 1/1 to be associated with category A large opacities this is not unheard of and without tissue correlation I can not absolutely exclude the possibility of a category A large opacity in this case. For this reason, I think we have to make a provisional diagnosis of complicated pneumoconiosis and on the basis of that finding alone would have to state that he should not resume coal mining employment, although he obtains [sic] the respiratory capacity to do any other job of similar exertional requirements not requiring other exposure.
>
> I would also recommend careful follow up of this lesion since if it begins to increase in size surgical resection will be indicated based on the possibility of neoplasm.

Employer's Exhibit 25.

On remand, the administrative law judge is instructed to reconsider whether Dr. Sargent's opinion is sufficient to support a finding of complicated pneumoconiosis.

Employer further contends that the administrative law judge failed to provide a basis for rejecting Dr. Stewart's opinion. We agree. Dr. Stewart reviewed the medical evidence. In a report dated July 2, 1993, Dr. Stewart opined that claimant did not suffer from coal workers' pneumoconiosis. Employer's Exhibit 13. Dr. Stewart is Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibit 14. The administrative law judge erred in failing to address the significance of Dr. Stewart's opinion.

Employer contends that the administrative law judge erred in finding that Dr. Fino's opinion that claimant did not suffer from complicated pneumoconiosis was outweighed by the contrary opinions of Drs. J. Dale Sargent and Ranavaya. The administrative law judge noted that Dr. Fino, unlike Drs. Sargent and Ranavaya, did not have the opportunity to examine claimant. However, there is no indication that Dr. Sargent or Dr. Ranavaya based their respective diagnoses of complicated pneumoconiosis on their physical examinations of

claimant. The administrative law judge also discredited Dr. Fino's opinion because Dr. Fino, unlike Dr. J. Dale Sargent, did not have the opportunity to review claimant's CT scan. Dr. J. Dale Sargent, however, did not render a definitive diagnosis of complicated pneumoconiosis. Dr. J. Dale Sargent merely noted that he could not "absolutely exclude the possibility of category A large opacity." Employer's Exhibit 25.

The administrative law judge, however, correctly stated that Dr. Fino did not review claimant's most recent medical evidence. Decision and Order on Remand at 10. While Dr. Fino noted that the majority of the x-ray interpretations did not show complicated pneumoconiosis, Employer's Exhibit 15, Dr. Fino did have the opportunity to review the interpretations of claimant's most recent x-ray, a film taken on July 13, 1993. As the administrative law judge properly found, a majority of the best qualified physicians interpreted claimant's July 13, 1993 x-ray as positive for complicated pneumoconiosis. Because Dr. Fino was not aware of this evidence, the administrative law judge properly accorded his opinion less weight.

In light of the numerous errors committed by the administrative law judge, we vacate the administrative law judge's finding that the newly submitted evidence is sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. On remand, the administrative law judge is instructed to reconsider whether the newly submitted evidence is sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, thereby establishing a change in conditions pursuant to 20 C.F.R. §725.310.

Modification may also be based upon a finding of a mistake in a determination of fact pursuant to 20 C.F.R. §725.310.[9] In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see also Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Although the administrative law judge found a mistake in a determination of fact, his finding was based upon a finding that the newly submitted evidence was sufficient to establish the existence of complicated pneumoconiosis. As previously

[9]The United States Court of Appeals for the Fourth Circuit has held that a party need not allege a specific error in order for an administrative law judge to find modification based upon a mistake in a determination of fact. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

noted, such a finding would support a finding of a change in conditions pursuant to 20 C.F.R. §725.310, not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Therefore, should the administrative law judge, on remand, find the evidence insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310, he must address whether there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The alj should address whether there was a mistake in a determination of fact regarding issues other than the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.

On remand, if the administrative law judge finds the evidence sufficient to establish modification pursuant to 20 C.F.R. §725.310, he must consider all of the evidence of record to determine whether claimant has established entitlement to benefits on the merits of the claim. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I would affirm the administrative law judge's determination that claimant established the existence of complicated pneumoconiosis, in light of *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, BLR (4th Cir. 2000). Moreover, I will demonstrate that there is no merit to the majority's allegations of error in the administrative law judge's decision. The court made plain in *Scarbro* that the issue before the administrative law judge is whether claimant has satisfied the specific statutory criteria to entitle him to the irrebuttable presumption of causation set forth in 3 U.S.C. §921(c)(3).[10]

[10]30 U.S.C. §921(c)(3) provides:

> If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be

Thus, there is an irrebuttable presumption that the miner's total disability or death was due to pneumoconiosis if (A) an x-ray of the miner's lungs shows an opacity greater than one centimeter; (B) a biopsy 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). The court explained that these different ways are intended to describe a single, objective condition. *Scarbro*, 220 F.3d at 255. That condition is frequently referred to as complicated pneumoconiosis. The court declared that medical definitions of complicated pneumoconiosis are irrelevant, the issue is whether the evidence satisfies the statutory criteria. Hence, the specific words of the statute must be carefully analyzed. The court explained that:

> "[b]ecause prong (A) sets out an entirely objective standard" i.e. an opacity on an x-ray greater than one centimeter–x-ray evidence provides the benchmark for determining what under prong (B) is a "massive lesion" and what under prong (C) is an equivalent diagnostic result reached by other means.

Scarbro, 220 F.3d at 256 (quoting *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999)).

The court emphasized that x-ray evidence which vividly displays opacities exceeding one centimeter does not lose its probative force if evidence under another prong is

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> expected to yield results described on clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be.

30 U.S.C. §921(c)(3).

The implementing regulation at 20 C.F.R. §718.304 essentially tracks the statute.

inconclusive or less vivid. The court advised that

> the x-ray evidence can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be, perhaps because of an intervening pathology, some technical problem with the equipment used, or incompetence of the reader.

Scarbro, 220 F.3d at 256.

Like the administrative law judge in *Scarbro*, the administrative law judge in the instant case found that claimant had established the existence of complicated pneumoconiosis by x-ray. As the majority recognizes, the administrative law judge reasonably looked at the reading of the last two x-rays taken in March and July of 1993, to determine whether claimant had established complicated pneumoconiosis.[11] The majority asserts, however, that

[11]Below is set forth in relevant part the administrative law judge's summary of the x-ray evidence, reflecting the x-ray date, the physician and his qualifications ("B" indicating B-reader and "R" indicating Board-certified radiologist), followed by the diagnosis:

3/25/93	Robinette B	1/2 A; complicated
3/25/93	Wheeler B/R	0/1
3/25/93	Mullens R	Diffuse nodular interstitial

"the administrative law judge erred to the extent that he found a majority of the best qualified readers interpreted claimant's March 25, 1993 x-ray as positive for complicated pneumoconiosis." *See* p.5, *supra*. A glance at the administrative law judge's opinion reflects that the majority has misrepresented it. The administrative law judge stated:

> Claimant's most recent x-rays, taken on March 25, 1993, and on July 13, 1993, demonstrate the onset of complicated pneumoconiosis. These x-rays are the most probative of Claimant's current condition since pneumoconiosis is a progressive, irreversible disease. The majority of the readers interpreted these x-rays as positive for complicated pneumoconiosis. Each of these readers is either a B-reader, board-certified radiologist or both. Dr. Wheeler is the only physician who read the two most recent x-rays as specifically negative for complicate pneumoconiosis. In fact, he concluded that Claimant did not have even simple pneumoconiosis (E-27).

		Lung consistent with silicosis; conglomerate masses
7/13/93	Fisher B/R	1/1 A
7/13/93	Bassali B/R	2/2 A; complicated
7/13/93	Aycoth B	2/2 A; complicated
7/13/93	Wheeler B/R	0/1; ill-defined mass right apex
7/13/93	Sargent B	1/1 questionable A

Decision and Order on Remand at 4.

Decision and Order on Remand at 8-9. The administrative law judge considered together the readings of these two x-rays which are close in time and observed that one radiologist, Dr. Wheeler, read both x-rays and stated that claimant did not have complicated pneumoconiosis. His reading of the July x-ray was definitively contradicted by three doctors and provisionally contradicted by one. Dr. Wheeler's reading of the March x-ray was definitively rejected by one doctor. Perhaps most significant is the fact that employer could find no doctor to agree with either of Dr. Wheeler's readings. The truth of the administrative law judge's statement, the "majority of the readers interpreted these x-rays as positive for complicated pneumoconiosis," cannot be denied. Decision and Order on Remand at 9.

The majority holds that the administrative law judge's analysis is improper because the administrative law judge considered the number of readings, citing *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The *Adkins* court found that the administrative law judge had erred in basing his finding on the opinions of two doctors who were not B readers, as opposed to the opinion of one doctor who was a "B" reader, merely because the "B" reader was out numbered. That is not what the administrative law judge was doing in the case at bar. The administrative law judge reasonably observed that Dr. Wheeler's opinion was disputed by five, different, highly qualified radiologists and that no doctor agreed with his opinion. Considered in this context, it becomes clear that Dr. Wheeler is isolated in his opinion and the fact that only one doctor disputes his reading of the March x-ray becomes insignificant. Obviously, substantial evidence supports the administrative law judge's determination that claimant established the existence of complicated pneumoconiosis by x-ray evidence. The majority has offered no explanation or analysis of this evidence which could conclude that the x-ray evidence did not show complicated pneumoconiosis. In vacating the administrative law judge's finding of complicated pneumoconiosis by x-ray, the majority has disregarded its statutory standard of review: the "findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. §921 (b)(3).

Since the administrative law judge properly found complicated pneumoconiosis established by x-ray evidence under prong (A), the issue becomes, according to the teaching of *Scarbro*, whether there is relevant evidence under prong (B), regarding massive lesions, or under prong (C), an equivalent diagnostic result, which "affirmatively shows that the opacities are not there or are not what they seem to be." *Scarbro*, 220 F.3d at 256. The only evidence relevant to this issue upon which employer relies is the CT scan evidence which would come under prong (C). Employer contends this evidence shows that claimant suffers from tuberculosis, not complicated pneumoconiosis.

The majority asserts both that "[n]one of the physicians who interpreted claimant's July 13, 1993 CT scan rendered a diagnosis supportive of a finding of complicated pneumoconiosis," *see* p.7, *supra*, and that the administrative law judge failed to provide a credible basis for discrediting the opinions of Drs. Wheeler and Fisherman that claimant's

CT scan revealed the presence of tuberculosis." *See* p.7, *supra*. Both statements are false.

The CT scan interpretations of both Dr. Sargent and Dr. Kelly are supportive of a diagnosis of complicated pneumoconiosis because both diagnosed an opacity greater than one centimeter, equivalent to a finding of complicated pneumoconiosis under prong (A). Dr. Sargent stated that the CT scan revealed a "1.8 x 1 cm non-calcified nodule in the right upper lobe." Employer's Exhibit 25 at 2 (unpaginated.) The doctor considered that this nodular lesion raised a question of complicated pneumoconiosis.[12] Employer's Exhibit 25 at 2 (unpaginated).

Dr. Kelly also identified a density in claimant's lung, "1.8 cm by 1 cm" and made a provisional diagnosis of pneumoconiosis. Employer's Exhibit 26. Of course, under *Scarbro* it matters not whether the doctor identifies the findings as simple or complicated pneumoconiosis, if the finding is of an opacity in excess of 1 cm it is complicated pneumoconiosis under the law. Thus, the CT scan interpretations of both Drs. Sargent and Kelly were supportive of a finding of complicated pneumoconiosis, as the administrative law judge correctly found.

The administrative law judge also properly discredited the CT scan interpretations of Drs. Wheeler and Fishman:

> Of those physicians reviewing Claimant's July 13, 1993, CT scan, only Drs. Wheeler and Fishman stated specifically that the masses in Claimant's [lungs] did not represent complicated pneumoconiosis. They opined, instead, that the masses were more consistent with tuberculosis. Furthermore, Dr. Wheeler admitted that, because the CT scan was not accompanied by printouts, it lacked "solid proof" of the existence of tuberculosis.

[12]The majority's assertion that the doctor did not address the nature of this lesion is false: "a question of complicated pneumoconiosis [is] raised because of the nodular lesion in his right upper lobe." *Id*.

> Since, as the Board has affirmed, the record is devoid of evidence indicating that the Claimant had or presently has tuberculosis or had been exposed to anyone suffering therefrom, this tribunal finds Dr. Wheeler's opinion to be inconsistent with the reliable and probative evidence of record. Accordingly, his opinion is not persuasive. Neither is Dr. Fishman's despite his qualifications. Dr. Fishman based his opinion regarding the existence of tuberculosis versus pneumoconiosis ... solely on his examination of a single CT scan. Thus, his conclusion that the nature of the masses in Claimant's lung is "suggestive" of tuberculosis rests on a rather limited foundation and is without the benefits of the other medical evidence of record, which is devoid of any indication that Claimant has or had [tuberculosis].[13] Accordingly, the opinion of Dr. Fishman is equivocal and is accorded little probative value.

Decision and Order on Remand at 9-10.

The majority observes that the opinions of Drs. Wheeler and Fishman, suggesting that claimant suffers from tuberculosis based upon a CT scan reading, were discredited by the administrative law judge because there was no evidence in the record that claimant was ever exposed to tuberculosis or diagnosed with tuberculosis by an examining physician. The majority states, however, that the "administrative law judge failed to properly address whether the CT scan evidence itself supported a finding of tuberculosis." *See* p.7, *supra*.

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[13]In a footnote, the administrative law judge observed:

> Furthermore, Dr. Wheeler stated that a "definite" diagnosis of tuberculosis can be made by performing a sputum study (E-27 at 20-21). Given the availability and presumed accuracy of such a test, this tribunal infers that Employer could have produced evidence it considered dispositive of the issue, if it had chosen to do so, and give some weight to that negative inference.

Decision and Order on Remand at 9 n.7.

The majority's suggestion that the administrative law judge should have drawn a negative inference from claimant's failure to produce evidence of the test is absurd since it is employer who is trying to prove claimant has tuberculosis and employer's expert who discussed the benefit of the test.

This statement is puzzling since the CT scan evidence of tuberculosis consists of the interpretations of Drs. Wheeler and Fishman. Moreover, the majority's determination that the administrative law judge did not provide a credible basis for discrediting these opinions is a reversal of the Board's prior decision, in which, as the administrative law judge correctly stated, the Board previously affirmed his discrediting of Dr. Wheeler's diagnosis on this basis. In its most recent decision the Board declared:

> We hold further that the administrative law judge's determination to discount Dr. Wheeler's opinion is rational and supported by substantial evidence. The administrative law judge correctly found that Dr. Wheeler is the only physician who read the two most recent x-ray films as showing only minimal pneumoconiosis, Employer's Exhibits 20, 23, and that Dr. Fishman is the only other physician of record who stated that claimant's CT scan revealed the presence of tuberculosis, Employer's Exhibit 21. Decision and Order on Remand at 10. Additionally, the administrative law judge correctly noted that the record is devoid of evidence indicating that claimant had or presently has tuberculosis or had been exposed to anyone suffering therefrom. *Id*. at 10-11. The administrative law judge further found that none of the physicians who examined claimant noted exposure by history, nor did they diagnose the presence of the disease. *Id.* Since the record lacked substantial evidence of the existence of tuberculosis, and because Drs. Sargent and Robinette disagreed with Dr. Wheeler's diagnosis of tuberculosis, the administrative law judge reasonably questioned the reliability of Dr. Wheeler's opinion.

Looney v. Jewell Smokeless Coal Corp., BRB No. 96-1737 BLA (June 19, 1997) (unpublished)(citations omitted).

Since the Board has affirmed the administrative law judge's determination to give less weight to Dr. Wheeler's opinion because there is no evidence of record to corroborate it, the administrative law judge's determination is now the law of the case.[14] And the administrative law judge's rationale applies with equal force to Dr. Fishman's diagnosis. In

[14]Since the administrative law judge proffered a valid reason to give less weight to Dr. Wheeler's diagnosis, it is unnecessary to determine the merit of any other reason provided. *See generally Doss v. Director, OWCP*, 53 F.3d 654, 19 BLR 2-183 (4th Cir. 1995); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

overruling its prior decision, the majority flagrantly disregards the law of the case doctrine, which provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). The Fourth Circuit has declared that:

> Under law of the case doctrine... the decision of an appellate court establishes the law of the case [and] it must be followed in all subsequent proceedings in the same case... unless: (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work a manifest injustice." (Internal quotations omitted) (citation omitted.)

United States v. Aramony, 166 F.3d 655, 661 (4th Cir. 1999), quoted in *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 203 F.3d 291, 303, 304 (4th Cir. 2000). The majority asserts, without explanation, that the rationale previously affirmed is now "clearly erroneous, even though the reasonableness of the administrative law judge's analysis is manifest. Hence, the administrative law judge properly gave less weight to the CT scan interpretations of Drs. Wheeler and Fishman than to the interpretations of Drs. Sargent and Kelly which were supportive of the diagnosis of complicated pneumoconiosis made by x-ray evidence.

Under *Scarbro*, the administrative law judge's award of benefits should be affirmed because the administrative law judge properly found under prong (A), that the x-ray evidence established that claimant had an opacity greater than one centimeter and under prong (C), that the credible CT scan evidence supported this finding. The court made clear in *Scarbro* that medical opinion evidence is relevant only insofar as it addresses the statutory criteria. The court explained that "to the extent there is a divergence between the medical and legal standards for complicated pneumoconiosis, we must apply the standard established by Congress." *Scarbro*, 220 F.3d at 257. Hence, the majority's remand of the case for reconsideration of medical opinion evidence which does not specifically address prong (A), (B) or (C) of Section 921(c)(3) is unnecessary because the evidence is irrelevant to the standard established by Congress. The irrelevant evidence which the majority directs the administrative law judge to consider on remand includes the opinions of Drs. Ranavaya, Robinette, Sargent and Stewart. Undoubtedly this direction will be doubly annoying to the administrative law judge, first, because *Scarbro* makes plain that the opinions at issue are irrelevant to a legal determination of complicated pneumoconiosis and second, because there was no error in the administrative law judge's prior discussion of this evidence.

First, the majority directs the administrative law judge to discuss the reliability of Dr.

Ranavaya's diagnosis of complicated pneumoconiosis based on the March 14, 1992 x-ray, because the weight of the evidence on that x-ray was negative for complicated pneumoconiosis. Because Dr. Ranavaya's opinion does not address either of the x-rays the administrative law judge properly relied upon to find complicated pneumoconiosis, it is not relevant under *Scarbro.* Furthermore, this criticism is bizarre in view of the majority's concession that the July, 1993 x-ray establishes complicated pneumoconiosis.[15] Moreover, the administrative law judge made clear that although the doctor diagnosed complicated pneumoconiosis by x-ray, he also considered a pulmonary function study, a blood gas study and a complete medical examination as well as other medical records submitted. Decision and Order on Remand at 5; Director's Exhibits 83, 89. In any event, the administrative law judge gave less weight to Dr. Ranavaya's opinion than to the opinions of Drs. Sargent and Robinette, which are more recent. Decision and Order on Remand at 10.

Second, the majority remands the case for reconsideration of Dr. Robinette's opinion because the "administrative law judge failed to consider whether Dr. Wheeler's negative reading [for complicated pneumoconiosis] of the March 1993 x-ray that Dr. Robinette relied upon in diagnosing complicated pneumoconiosis calls into question the reliability of the doctor's conclusion." *See* p.11, *supra*. This is irrelevant under *Scarbro* because the doctor's finding of an opacity greater than one centimeter, not his characterization of that findings nor his consideration of other evidence, determines whether claimant has established complicated pneumoconiosis under Section 921(c)(3). In any event, the record reflects that Dr. Wheeler's negative reading of the March 1993 x-ray could not reasonably call into question the credibility of Dr. Robinette's conclusion in view of the Board's previous affirmance of the administrative law judge's discounting of Dr. Wheeler's opinion because Dr. Wheeler was the only physician who read the two most recent x-rays as showing only minimal pneumoconiosis. *Looney v. Jewell Smokeless Coal Corp.*, BRB No. 96-1737 BLA (June 19, 1997) (unpublished). In view of that prior holding, it is irrational for the majority to direct the administrative law judge to consider whether Dr. Robinette's opinion is undermined by Dr. Wheeler's x-ray reading: the Board has already affirmed the administrative law judge's discounting Dr. Wheeler's opinion because he relied on that x-ray reading!

Third, the majority remands the case for reconsideration of Dr. Sargent's opinion.

[15]When the record is viewed as a whole, it suggests not that Dr. Ranavaya's interpretation was wrong, but rather, that it was more perceptive than that of the other doctors since the two subsequent x-rays clearly show the existence of complicated pneumoconiosis.

Again, this evidence is irrelevant because complicated pneumoconiosis in law is determined by scientific findings, not medical diagnosis. *Scarbro, supra*. Furthermore, the majority's direction for the administrative law judge to reconsider whether Dr. Sargent's "provisional diagnosis of complicated pneumoconiosis" supports a finding of complicated pneumoconiosis is incomprehensible since in its prior decision the Board specifically rejected employer's argument that Dr. Sargent's provisional diagnosis of complicated pneumoconiosis was too equivocal to credit as establishing complicated pneumoconiosis. *Looney v. Jewell Smokeless Coal Corp.*, BRB No. 96-1737 BLA (June 19, 1997) (unpublished). Citing *Justice v. Island Creek Coal Co.,* 11 BLR 1-91, 1-94 (1988), the Board previously held that the administrative law judge's determination to credit Dr. Sargent's diagnosis as support for the claim of complicated pneumoconiosis was a proper exercise of his discretion. *Id.* In overruling its prior decision, the majority again flagrantly disregards the law of the case doctrine. *See Arizona v. California*, *supra*. In addition, the majority exceeds the scope of its authority by failing to acknowledge the deference owed to the administrative law judge in interpreting medical opinions, which are inherently uncertain, as the Fourth Circuit observed in *Piney Mountain Coal Co. v. Mays,* 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999).

Fourth, the majority's direction to reconsider Dr. Stewart's opinion is an exercise in futility because Dr. Stewart's opinion contains no findings relevant to prong (A), (B) or (C) of Section 921(c)(3), nor does it address claimant's condition as it was revealed in the last x-ray. It is true that the administrative law judge did not discuss Dr. Stewart's opinion in his Conclusions of Law and Discussion part of his decision; that is because from his summary of Dr. Stewart's opinion, in the earlier part of his decision, it is clear that Dr. Stewart's opinion had no bearing on the merits of the claim. As the administrative law judge stated, Dr. Stewart found that there was insufficient evidence to diagnose pneumoconiosis, based upon the x-ray evidence. Decision and Order on Remand at 7; Employer's Exhibit 13. Since Dr. Stewart's report was prepared prior to the last x-ray examination, which definitively established complicated pneumoconiosis, as even the majority concedes, the doctor's opinion that claimant failed to establish the existence of simple pneumoconiosis by x-ray has no probative value. It was entirely reasonable for the administrative law judge to expect that a reader of his Decision and Order would understand from his summary of Dr. Stewart's opinion that it had no significance to the merits of the claim. When the administrative law judge's decision is considered as a whole, together with the record evidence in its entirely, it is clear that the many allegations of error are devoid of merit.

In sum, the administrative law judge correctly determined that the weight of the x-ray evidence established complicated pneumoconiosis, by applying the objective, scientific standard set forth in prong (A) of Section 921 (c)(3), *i.e.*, an opacity on an x-ray greater than one centimeter. The administrative law judge's finding was supported by the readings of five, highly qualified radiologists and disputed by only one, whose opinion the administrative

law judge properly discredited. The administrative law judge also considered the CT scan evidence under prong (C) of Section 921(c)(3), which provided an equivalent diagnostic result, showing an opacity greater than one centimeter and the administrative law judge correctly determined that the credible CT scan evidence supported the finding of complicated pneumoconiosis by x-ray. Thus, the administrative law judge properly considered all of the evidence relevant to a finding of complicated pneumoconiosis under Section 921(c)(3) and found that claimant had established complicated pneumoconiosis. *See Scarbro, supra*. Since none of employer's medical opinion evidence addresses the statutory standard, employer has offered no evidence to undermine claimant's x-ray evidence showing complicated pneumoconiosis. Because the administrative law judge's determination that claimant has established complicated pneumoconiosis pursuant to Section 921(c)(3)(A) is supported by substantial evidence, it should be affirmed. Accordingly, I would affirm the administrative law judge's Decision and Order awarding benefits.

I would likewise affirm the administrative law judge's determination that benefits should commence as of March, 1993, the first month in which the x-ray evidence established complicated pneumoconiosis.

REGINA C. McGRANERY
Administrative Appeals Judge