BRB No. 09-0152 BLA

T.F.A.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ROBINSON PHILLIPS COAL COMPANY	)	
	)	DATE ISSUED: 09/11/2009
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (05-BLA-6235) of Administrative Law Judge Linda S. Chapman 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 involves a subsequent claim filed on July 23, 2004[1] and is before the Board for the second time. In the initial decision, the

[1] Claimant's prior claim, filed on September 28, 2000, was denied by the district director on November 30, 2000 because claimant did not establish any of the elements of entitlement. Director's Exhibit 1.

administrative law judge, after crediting claimant with thirteen years of coal mine employment,[2] found that the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309. In her consideration of the merits of claimant's 2004 claim, the administrative law judge found that the evidence established the existence of complicated pneumoconiosis, thereby entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge also found that claimant was entitled to the presumption that his complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b) and that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board held that the administrative law judge erred in admitting Dr. Alexander's October 16, 2006 medical report[3] as claimant's rehabilitative evidence under 20 C.F.R. §725.414. *T.F.A. v. Robinson Phillips Coal Co.*, BRB No. 07-0552 BLA (Apr. 25, 2008) (unpub). Because the administrative law judge specifically relied on Dr. Alexander's inadmissible report in finding that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§725.309, 718.202(a), and 718.304, and remanded the case for further consideration.[4] *Id.*

On remand, the administrative law judge again found that the new evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), thereby establishing a change in an applicable condition of entitlement since the date upon which

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

[3] In his October 16, 2007 medical report, Dr. Alexander refuted the negative interpretations of a September 27, 2004 x-ray rendered by Drs. Scott and Wheeler. Claimant's Exhibit 7. Dr. Alexander also refuted Dr. Wiot's negative interpretation of a December 16, 2004 CT scan. *Id.*

[4] In vacating the administrative law judge's finding pursuant to 20 C.F.R. §718.304, the Board held that the administrative law judge committed additional error, including impermissibly shifting the burden of proof to employer to disprove the existence of complicated pneumoconiosis. *T.F.A. v. Robinson Phillips Coal Co.*, BRB No. 07-0552 BLA (Apr. 25, 2008) (unpub).

the prior denial became final. 20 C.F.R. §725.309. In considering the merits of claimant's 2004 claim, the administrative law judge again found that the evidence establishes the existence of complicated pneumoconiosis, thereby establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge also found that claimant is entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R §718.203(b) and that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the new evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer, therefore, contends that the administrative law judge erred in finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Employer also argues that the administrative law judge erred in finding that the evidence establishes the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

Section 725.309(d)

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he did not establish that he suffered from pneumoconiosis or that he was totally disabled by a

respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing either that he suffers from pneumoconiosis or that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3).

Employer contends that the administrative law judge erred in finding that the new medical opinion evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[5] In considering whether the new medical opinion evidence establishes the existence of pneumoconiosis, the administrative law judge reviewed the reports of Drs. Ranavaya, Zaldivar and Castle. In a report dated September 27, 2004, Dr. Ranavaya diagnosed pneumoconiosis based on a history of occupational coal dust exposure and a positive x-ray interpretation. Director's Exhibit 14. In a report dated July 21, 2005, Dr. Zaldivar also diagnosed coal workers' pneumoconiosis based on x-ray and CT scan evidence. Claimant's Exhibit 2. Conversely, Dr. Castle, in a July 27, 2006 report, opined that claimant "most likely does not suffer from simple coal workers' pneumoconiosis." Employer's Exhibit 7. The administrative law judge also considered the CT scan evidence in conjunction with the medical opinion evidence.[6] *Id.* at 2-4.

Finding that Dr. Ranavaya's diagnosis of pneumoconiosis was based, in part, upon a positive x-ray interpretation that is called into question by the administrative law judge's finding that the x-ray evidence is in equipoise, and therefore does not support a finding of pneumoconiosis, the administrative law judge found Dr. Ranavaya's opinion

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[5] The administrative law judge found that the new evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). Decision and Order on Remand at 2.

[6] The record contains seven interpretations of two CT scans taken on December 16, 2004 and July 6, 2005. Dr. Rieser interpreted the December 16, 2004 CT scan as "consistent with old granulomatous disease as well as pneumoconiosis." Employer's Exhibit 14. Dr. Alexander diagnosed this CT scan as revealing Category A complicated pneumoconiosis and "probable anthrosilicosis." Claimant's Exhibit 1. Dr. Wiot, however, interpreted the same CT scan as revealing no evidence of pneumoconiosis. Employer's Exhibit 1.

Dr. Zaldivar interpreted claimant's July 6, 2005 CT scan as revealing evidence of simple and complicated pneumoconiosis. Claimant's Exhibit 2. Dr. Cordell opined that this CT scan reveals changes consistent with occupational pneumoconiosis. Claimant's Exhibit 3. By contrast, Drs. Wheeler and Wiot opined that there is no evidence of pneumoconiosis and that the abnormalities seen are consistent with granulomatous disease. Employer's Exhibits 1, 10.

entitled to diminished weight. Decision and Order on Remand at 2. The administrative law judge also accorded less weight to Dr. Castle's opinion, that claimant "most likely" does not have coal workers' pneumoconiosis, because he found that the doctor's opinion was based upon an incomplete review of the available medical evidence. *Id.*

The administrative law judge also addressed Dr. Zaldivar's diagnosis of pneumoconiosis, stating that:

> Dr. Zaldivar examined [claimant] at the [e]mployer's request, and administered testing, including pulmonary function and arterial blood gas tests, and an x-ray. He concluded that the medical evidence justified a diagnosis of both simple and complicated pneumoconiosis. Dr. Zaldivar relied on the results of [claimant's] x-ray, which he found showed both simple and complicated pneumoconiosis, category A, and his CT scan, which produced results compatible with both simple and complicated pneumoconiosis. Dr. Cordell, the radiologist who performed the CT scan at Dr. Zaldivar's request, also noted changes consistent with occupational pneumoconiosis, as well as an area of conglomerate fibrosis in the right upper lobe, and a smaller area of conglomerate fibrosis in the left upper lobe.

Decision and Order on Remand at 2-3.

In considering whether the medical opinion evidence establishes the existence of pneumoconiosis, the administrative law judge stated:

> I credit the conclusions of Dr. Miller, Dr. Zaldivar, and Dr. Rieser over the conclusions of Dr. Castle, Dr. Wiot, and Dr. Wheeler. I find the reports by these physicians are well-reasoned and supported by the objective medical evidence of record, and I accord them significant weight. But, as discussed above, Dr. Castle's conclusions are based on an incomplete review of the available medical evidence, and Dr. Wheeler did not provide any rationale for his conclusory statements. I find that [claimant] has established by a preponderance of the medical opinion evidence that he has pneumoconiosis.

Decision and Order on Remand at 4.

Employer argues that the administrative law judge erred in not addressing whether the CT scan evidence, considered by itself, establishes the existence of pneumoconiosis. We agree. The United States Court of Appeals for the Fourth Circuit, has held that an administrative law judge must consider all relevant evidence together in determining whether claimant has established the existence of pneumoconiosis pursuant to 20 C.F.R.

§718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Consequently, the CT scan evidence must be considered pursuant to 20 C.F.R. §718.202(a). Although the administrative law judge referred to the conflicting interpretations of claimant's December 16, 2004 and July 6, 2005 CT scans, she failed to address whether the CT scan evidence supports a finding of pneumoconiosis. Consequently, we remand the case to the administrative law judge to resolve the conflicting CT scan evidence and to determine whether it supports a finding of pneumoconiosis.[7] After making this determination, the administrative law judge should address the significance of her finding in regard to the x-ray and medical opinion evidence.

Employer also argues that the administrative law judge erred in her consideration of Dr. Castle's opinion. The administrative law judge accorded less weight to Dr. Castle's opinion because the doctor had not been "provided with all of the available [x-ray] interpretations for review." Decision and Order on Remand at 3. Specifically, the administrative law judge found that Dr. Castle had not reviewed Dr. Miller's positive interpretations of claimant's September 27, 2004 and July 6, 2005 x-rays. *Id.* Because Dr. Castle based his conclusions "on an incomplete review of the available medical evidence," the administrative law judge accorded less weight to his opinion that claimant "most likely" did not have pneumoconiosis. *Id.* However, because Dr. Miller rendered his x-ray interpretations after Dr. Castle completed his July 27, 2006 report, Dr. Castle could not have reviewed this evidence. Moreover, the administrative law judge failed to explain how Dr. Castle's failure to consider this evidence undermines his opinion, where the administrative law judge found that the x-ray evidence, as a whole, is in equipoise, and, therefore, does not support a finding of pneumoconiosis.[8] *Milburn Colliery Co. v.*

[7] Employer also argues that the administrative law judge failed to address the equivocal nature of Dr. Rieser's CT scan interpretation. Employer's contention has merit. The administrative law judge failed to address whether Dr. Rieser's interpretation of the December 16, 2004 CT scan as "certainly consistent with old granulomatous disease *as well as* coalminers [sic] pneumoconiosis" is too equivocal to support a finding of pneumoconiosis. Employer's Exhibit 14 (emphasis added); *see U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

[8] The administrative law judge permissibly found that Dr. Ranavaya's diagnosis of pneumoconiosis is not well reasoned because it was based, in part, upon a positive x-ray interpretation that is called into question by the administrative law judge's finding that the x-ray evidence is "essentially in equipoise," and therefore does not support a finding of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order on Remand at 2.

Hicks, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

The administrative law judge also erred in stating that Dr. Castle, while relying upon Dr. Rieser's interpretation of the December 16, 2004 CT scan as being consistent with granulomatous disease, did not mention that Dr. Rieser concluded that the CT scan findings are also consistent with pneumoconiosis. Contrary to the administrative law judge's characterization, Dr. Castle specifically noted that Dr. Rieser reported that the December 16, 2004 CT scan revealed findings that are "certainly consistent with old granulomatous disease *as well as coalminers* [sic] *pneumoconiosis*." Employer's Exhibit 7 at 4 (emphasis added). Consequently, the administrative law judge's finding, that Dr. Castle did not mention that Dr. Rieser interpreted claimant's CT scan as being consistent with pneumoconiosis, is not supported by substantial evidence. See 33 U.S.C. §921(b)(3); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Employer also argues that the administrative law judge erred in his consideration of Dr. Zaldivar's opinion. We agree. The administrative law judge failed to provide any explanation for his finding that Dr. Zaldivar's opinion, that claimant suffered from pneumoconiosis, is "well-reasoned and supported by the objective medical evidence of record."[9] Decision and Order on Remand at 4; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

We also agree with employer's contention that the administrative law judge erred in failing to consider Dr. Wiot's deposition testimony pursuant to 20 C.F.R. §718.202(a)(4). Employer designated Dr. Wiot's deposition testimony as one of its affirmative medical opinions.[10] An administrative law judge is required to consider all

[9] The administrative law judge noted that Dr. Zaldivar based his diagnosis of pneumoconiosis on his interpretations of claimant's x-ray and CT scan. Dr. Zaldivar interpreted both the x-ray and CT scan, each taken on July 6, 2005, as positive for simple and complicated pneumoconiosis. Claimant's Exhibit 2. The administrative law judge noted that Dr. Cordell also interpreted the July 6, 2005 CT scan as consistent with occupational pneumoconiosis. Decision and Order on Remand at 2. However, the administrative law judge failed to reconcile Dr. Zaldivar's reliance upon positive x-ray evidence with her own finding that the weight of the x-ray evidence is "in equipoise," and therefore does not support a finding of pneumoconiosis. Moreover, as previously discussed, the administrative law judge has not addressed whether the CT scan evidence supports a finding of pneumoconiosis.

[10] During an October 30, 2006 deposition, Dr. Wiot noted that he had interpreted a July 6, 2005 x-ray and two CT scans taken on December 16, 2004 and July 6, 2005. Dr. Wiot opined that neither the x-ray nor the CT scans reveal findings related to coal dust

relevant evidence in the record.[11] *See* Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In light of the above-referenced errors, we vacate the administrative law judge's finding that the new medical opinion evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). On remand, when reconsidering whether the new medical opinion evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

On remand, should the administrative law judge find that the new medical opinion evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), she must weigh all of the relevant new evidence together pursuant to 20 C.F.R. §718.202(a), before determining whether the evidence establishes the existence of pneumoconiosis. *See Compton*, 211 F.3d at 211, 22 BLR at 2-174.

In light of our decision to vacate the administrative law judge's finding that the new evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §725.309. On remand, should the administrative law judge find that the new evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), claimant will have established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. The administrative law judge would then be required to consider claimant's 2004 claim on the merits, based on a weighing of all of the evidence of record, including the evidence that was submitted in connection with claimant's 1995 claim. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

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exposure. Employer's Exhibit 4 at 25-26. Dr. Wiot opined that the changes are consistent with "a post-inflammatory process." *Id.* at 26.

[11] The administrative law judge also erred in weighing Dr. Miller's x-ray interpretations along with the medical opinion evidence at 20 C.F.R. §718.202(a)(4). Dr. Miller did not submit a medical opinion in this case.

Complicated Pneumoconiosis

Although this case must be remanded for the administrative law judge's consideration of whether claimant has established a change in an applicable condition of entitlement under 20 C.F.R. §725.309, in the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis, and is, therefore, entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis set out at 20 C.F.R. §718.304.[12]

Under Section 411(c)(3) of the Act, 30 U.S.C. §923(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (A) an x-ray of the miner's lungs shows an opacity greater than one centimeter that would be classified as Category A, B, or C; (B) a biopsy or autopsy shows massive lesions in the lung; or (C) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 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 any conflict, and make a finding of fact. *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).

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

[12] In this case, the administrative law judge found that there "is no evidence to establish that [claimant] has a totally disabling respiratory impairment." Decision and Order on Remand at 4; *see* 20 C.F.R. §718.204(b). The administrative law judge noted, *inter alia*, that claimant's pulmonary function and arterial blood gas studies are non-qualifying, and that the examining physicians have concluded that claimant is capable, from a respiratory standpoint, of performing his previous coal mine work. *Id.* Consequently, in order to qualify for benefits, claimant must establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.

1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

In *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), the Fourth Circuit held that a single piece of relevant evidence could support an administrative law judge's finding that the irrebuttable presumption was successfully invoked "if that piece of evidence outweighs conflicting evidence in the record." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. The Fourth Circuit further explained:

> Thus, even where some x-ray evidence indicates opacities that would satisfy the requirements of prong (a), if other x-ray evidence is available or if evidence is available that is relevant to an analysis under prong (b) or prong (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. Of course, if the x-ray evidence vividly displays opacities exceeding one centimeter, its probative force is not reduced because the evidence under some other prong is inconclusive or less vivid. Instead, the x-ray evidence can lose force only if other evidence affirmatively shows 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, 22 BLR at 2-101 (case citation omitted).

On remand, the administrative law judge initially considered whether claimant had established a condition of such severity that it would produce one or more opacities greater than one centimeter in diameter on x-ray. Finding that every physician who reviewed claimant's x-rays[13] and CT scans[14] noted the presence of a disease process in

[13] The administrative law judge considered only the newly submitted x-ray evidence of record. This evidence consists of nine interpretations of two x-rays taken on September 27, 2004 and July 6, 2005. Dr. Alexander, a Board-certified radiologist and B reader, interpreted the September 27, 2004 x-ray as showing Category A complicated pneumoconiosis. Director's Exhibit 25. Dr. Ranavaya, a B reader, and Dr. Miller, a dually qualified reader, interpreted this x-ray as positive for simple pneumoconiosis only. Director's Exhibit 14; Claimant's Exhibit 5. By contrast, Drs. Scott and Wheeler interpreted this x-ray as negative for both simple and complicated pneumoconiosis. Employer's Exhibits 2, 3. Both physicians noted fibrosis in the miner's upper lungs. *Id.*

claimant's lungs, and that two of the physicians diagnosed Category A complicated pneumoconiosis, the administrative law judge determined that claimant established the existence of an opacity measuring greater than one centimeter on x-ray. Because none of employer's physicians established that the abnormalities were not due to pneumoconiosis, the administrative law judge determined that "the preponderance of the newly submitted medical evidence points to coal dust exposure as the etiology for [claimant's] radiographic abnormalities."[15] Decision and Order on Remand at 10. In discounting the evidence favorable to employer, the administrative law judge stated:

> I find the opinions of [Drs. Scatarige, Wiot, and Wheeler] who attributed [claimant's x-ray/CT scan] abnormality to tuberculosis or granulomatous

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Dr. Zaldivar, a B reader, interpreted the July 6, 2005 x-ray as showing Category A complicated pneumoconiosis. Claimant's Exhibit 2. Dr. Miller interpreted this x-ray as positive for simple pneumoconiosis only. Claimant's Exhibit 6. By contrast, Drs. Wiot and Scatarige interpreted this x-ray as negative for both simple and complicated pneumoconiosis. Employer's Exhibits 1, 5. However, Dr. Wiot noted the presence of abnormalities consistent with old granulomatous disease, and Dr. Scatarige noted the presence of nodular opacities that "favor TB or histoplasmosis." Employer's Exhibit 1

[14] As previously noted, the record contains seven interpretations of two CT scans, taken on December 16, 2004 and July 6, 2005. Dr. Rieser interpreted the December 16, 2004 CT scan as showing a ten millimeter nodule in the left upper lobe, and numerous bilateral nodules. Employer's Exhibit 14. Dr. Rieser noted findings consistent with both old granulomatous disease and simple pneumoconiosis. *Id*. Dr. Alexander read this scan as showing a large opacity in the right lung, which he classified as Category A, complicated pneumoconiosis. Claimant's Exhibit 1. Dr. Wiot, however, interpreted this scan as revealing no evidence of pneumoconiosis. Dr. Wiot opined that there are multiple irregular nodules consistent with granulomatous disease. Employer's Exhibit 1.

Dr. Cordell interpreted the July 6, 2005 CT scan as showing findings consistent with simple pneumoconiosis. Claimant's Exhibit 3. Dr. Zaldivar also read the July 6, 2005 CT scan as showing nodular densities in the upper and mid zones compatible with simple pneumoconiosis, and masses in the left and right upper zones compatible with complicated pneumoconiosis. Claimant's Exhibit 2. Drs. Wheeler and Wiot read the July 6, 2005 CT scan as showing no evidence of pneumoconiosis, simple or complicated. Employer's Exhibits 1, 10. Dr. Wheeler noted several masses greater than one centimeter, which he attributed to granulomatous disease. Employer's Exhibit 10.

[15] There is no biopsy evidence for consideration at 20 C.F.R. §718.304(b).

> disease to be speculative, and not supported by the objective evidence of record. The record contains no evidence that [claimant] was exposed to causative agents other than coal dust, such as asbestos or tuberculosis. Nor are there any treatment records indicating that claimant was ever diagnosed with or treated for tuberculosis, granulomatous disease, or any other pulmonary impairment that would produce opacities on an x-ray. The disease history reported by [claimant] in his Department of Labor examination with Dr. Ranavaya reflects no history of these ailments. Again, I find that the preponderance of the newly submitted medical evidence points to coal dust exposure as the etiology of [claimant's] radiographic abnormalities.

Decision and Order on Remand at 10.

The administrative law judge discounted Dr. Castle's consultative opinion, that claimant does not have complicated pneumoconiosis, as "unhelpful" because Dr. Castle did not consider Dr. Miller's x-ray interpretations, diagnosing simple pneumoconiosis, and because Dr. Castle based his opinion on normal objective study evidence, which the administrative law judge found is "not relevant to the question of whether [claimant] has established the statutory condition known as complicated pneumoconiosis." *Id*. at 11. Stating that she had "weighed all of the evidence together," the administrative law judge then concluded that claimant satisfied his burden of proof. *Id*.

We agree with employer that the administrative law judge again improperly shifted the burden of proof to employer to establish that the x-ray and CT scan interpretations diagnosing Category A opacities are incorrect. Rather than requiring claimant to establish the existence of complicated pneumoconiosis, the administrative law judge presumed that the abnormalities seen on claimant's x-rays and CT scans are complicated pneumoconiosis, and required employer to disprove this presumption. Despite the Board's prior instruction that she not require employer to establish that the large opacities are either not there or are not related to pneumoconiosis, *T.F.A.*, slip op. at 10, the administrative law judge, on remand, discounted the x-ray and CT scan interpretations of Drs. Scatarige, Wiot and Wheeler for failing to establish a definite alternative etiology for the masses seen thereon. The administrative law judge also discounted Dr. Castle's medical opinion for failing to prove that the abnormalities seen on claimant's x-rays and CT scans are not complicated pneumoconiosis. Contrary to the administrative law judge's analysis, claimant bears the burden of establishing entitlement to benefits and bears the risk of nonpersuasion if his evidence does not establish a requisite element of entitlement. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. Because the administrative law judge impermissibly shifted the burden of proof to employer to disprove the existence of pneumoconiosis, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.304. On remand, the administrative law

judge must evaluate the evidence with an understanding that an x-ray or CT scan interpretation that unequivocally finds no pneumoconiosis or no Category A, B, or C opacities, is not equivocal as to the existence of pneumoconiosis

Employer also contends that the administrative law judge improperly characterized all of the x-ray and CT scan evidence as supporting a finding of a large opacity or mass in claimant's lungs. We agree. In weighing the x-ray and CT scan evidence on remand, the administrative law judge stated:

> I find that [claimant] has established that he has a process in his lungs that appears as an opacity of one centimeter or greater on x-ray. I rely on the interpretations by Dr. Alexander and Dr. Zaldivar, who designated not only the presence of simple pneumoconiosis, but also the presence of category A [] opacities. While the x-ray interpretations by Dr. Wheeler, Dr. Scott, and Dr. Scatarige do not include findings of category A [] opacities, neither do they contradict the presence of the masses that are the subject of Dr. Alexander's and Dr. Zaldivar's [diagnoses of complicated pneumoconiosis]. Indeed, the most recent [CT scan] interpretations by Dr. Wheeler clearly confirm the presence of these masses, although he did not ascribe these masses to pneumoconiosis or coal dust exposure. Thus, there is no question that the masses exist; the difference in opinion relates to their etiology.
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> As far as equivalency determinations, Dr. Alexander is the only physician who indicated that the masses he saw on the CT scan qualified as a [C]ategory A opacity. But I find that his determination is supported by the reports from Dr. Rieser and Dr. Zaldivar, who did not specifically designate [C]ategory A opacities, but nevertheless described large masses or corresponding processes on their review of the CT scans. Dr. Wheeler also described several masses in the right and left lungs, although he did not indicate their size.
>
> Weighing the x-ray and CT scan evidence, I find that [claimant] has established that he has a process in his lungs that appears as an opacity of one centimeter or greater on x-ray.

Decision and Order on Remand at 7-9.[16]

[16] The administrative law judge subsequently stated that she relied on the x-ray and CT scan interpretations of "Dr. Alexander, *Dr. DePonte, and Dr. Patel*." Decision

Contrary to the administrative law judge's findings, the x-ray interpretations of Drs. Wheeler, Scott, Scatarige, and Wiot do not support a finding of a one centimeter or greater mass or opacity. Employer's Brief at 26. Although Drs. Wheeler, Scott, Scatarige, and Wiot noted the presence of abnormalities in claimant's lungs, none of these physicians measured or noted the size of any of the abnormalities seen on claimant's x-rays. Employer's Exhibits 1-3, 5. Further, all of these physicians unequivocally stated that there were no Category A, B, or C opacities. *Id*. The administrative law judge erred in failing to consider each x-ray interpretation independently in order to determine whether it supported a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Consequently, on remand, the administrative law judge must reconsider the x-ray evidence at 20 C.F.R. §718.304(a), and must render an explicit finding as to whether the September 27, 2004 x-ray supports a finding of complicated pneumoconiosis, whether the July 6, 2005 x-ray supports a finding of complicated pneumoconiosis, and whether the x-ray evidence as a whole supports a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(a).

In its prior decision, the Board explained that "[i]n order to establish complicated pneumoconiosis based on a CT scan, the physician must diagnose a condition of such severity that it would produce opacities 'greater' than a one centimeter opacity, classified as Category A, B, or C, on an x-ray." *T.F.A.*, slip op. at 12. In this case, Dr. Wheeler interpreted the July 6, 2005 CT scan as showing "no pneumoconiosis." Employer's Exhibit 10. Consequently, contrary to the administrative law judge's finding, Dr. Wheeler's CT scan interpretation cannot support a finding of Category A opacities. 20 C.F.R. §718.304(c). Moreover, because Dr. Rieser did not make an equivalency determination, his CT scan interpretation also does not support a diagnosis of Category A opacities. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. The administrative law judge erred in her consideration of the CT scan evidence by failing to consider each CT scan interpretation independently in order to determine whether it supported a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). Consequently, on remand, the administrative law judge must reconsider the CT scan interpretations pursuant to 20 C.F.R. §718.304(c), and must render an explicit finding as to whether the December 16, 2004 CT scan supports a finding of complicated pneumoconiosis, whether the July 6, 2005 CT scan supports a finding of complicated pneumoconiosis, and whether the CT scan evidence as a whole supports a finding of complicated pneumoconiosis under 20 C.F.R. §718.304(c).

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and Order on Remand at 9 (emphasis added). The administrative law judge's reference to the interpretations of Drs. DePonte and Patel appears to be a typographical error.

Employer also argues that the administrative law judge erred in her consideration of Dr. Castle's opinion. Although the administrative law judge accurately observed that Dr. Castle did not review Dr. Miller's positive x-ray interpretations, the significance of the administrative law judge's observation is unclear, given the fact that Dr. Miller did not diagnose complicated pneumoconiosis and the administrative law judge found the x-ray evidence to be in equipoise as to the existence of simple pneumoconiosis. Further, although the administrative law judge accurately observed that the statutory definition of pneumoconiosis and invocation of the irrebuttable presumption are not conditioned on the existence of a respiratory impairment, this fact alone is not a valid basis upon which to reject Dr. Castle's opinion. Dr. Castle's opinion is not predicated exclusively on the absence of a respiratory impairment. Rather, Dr. Castle cited the absence of any respiratory impairment as one factor which mitigates against a finding of complicated pneumoconiosis. Dr. Castle also relied upon x-ray interpretations, other objective studies, and clinical examinations. *See* Employer's Exhibit 7. The administrative law judge, therefore, erred in failing to consider the totality of Dr. Castle's rationale for excluding a diagnosis of complicated pneumoconiosis. *See* 20 C.F.R. §718.304(c); *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101.

We, therefore, vacate the administrative law judge's finding that the evidence establishes the existence of complicated pneumoconiosis and remand the case to the administrative law judge for reconsideration of all relevant evidence pursuant to 20 C.F.R. §718.304. On remand, should the administrative law judge find the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) and/or (c), the administrative law judge must weigh all of the relevant evidence pursuant to the standard set out in *Scarbro*.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge