BRB Nos. 09-0574 BLA
and 09-0575 BLA

GERALDINE YOUNG (o.b.o. and Widow of ROY D. YOUNG)	)	
Claimant-Respondent	)	
v.	)	
ISLAND CREEK COAL COMPANY/ CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 09/23/2010
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harman and Douglas A. Smoot (Jackson Kelly PLLC), West Virginia, for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (08-BLA-5185 and 08-BLA-5186) of Administrative Law Judge Michael P. Lesniak awarding benefits on a subsequent miner's claim[1] and a survivor's claim[2] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*))(the Act).[3] The administrative law judge credited the miner with 18.9 years of coal mine employment based on the parties' stipulation, and adjudicated these claims pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the new x-ray evidence established the existence of simple and complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), (2), (4) and 718.304(a)-(c). Consequently, the administrative

[1] The miner filed his first claim in 1973. It was finally denied on November 7, 1980. He filed his second claim (a duplicate claim) in 1985. It was finally denied on May 14, 1985. He filed this claim (a subsequent claim) on March 3, 2001.

[2] The miner died on October 9, 2006, while his claim was pending before the Office of Administrative Law Judges. Claimant, the widow of the miner, filed her survivor's claim on January 10, 2007.

[3] In response to the Board's Order allowing supplemental briefing on the applicability of the recent amendments to the Act, the Director, Office of Workers' Compensation Programs (the Director), submits that the amendments do not apply to the miner's claim, but are applicable to the survivor's claim, so that a remand for further consideration of the survivor's entitlement under the Section 411(c)(4) presumption would be required *only* if the Board does not affirm the award of survivor's benefits. 30 U.S.C. §921(c)(4). Should remand be required, the Director states that the administrative law judge must be instructed to allow submission of additional evidence relevant to the Section 411(c)(4) presumption.

Claimant responds, asserting that remand is unnecessary if the award of benefits is affirmed. Alternatively, claimant asserts that, if the Board remands the case, the administrative law judge should not be instructed to allow submission of additional evidence on the issue of total disability on the survivor's claim.

Employer agrees that the amendments do not apply to the miner's claim. However, employer asserts that the amendments "may" apply to the survivor's claim because the evidence "may demonstrate" that the miner had a totally disabling respiratory impairment, and, therefore, that "a question of law exists as to how the amendments apply" to complicated pneumoconiosis, where no other finding of impairment has been made. Employer's Response of June 15, 2010 at 1-2, 4.

law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, the administrative law judge found that the evidence established complicated pneumoconiosis, thereby establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge also found that the evidence established that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits in the miner's claim. With respect to the survivor's claim, the administrative law judge found that the evidence established the existence of simple and complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.304, thereby establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge also found that the evidence established that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits in the survivor's claim.

On appeal, employer challenges the administrative law judge's finding, in the miner's claim, that the evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), (b) and (c). Employer also challenges the administrative law judge's finding, in the survivor's claim, that the evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b) and (c). Claimant responds, urging affirmance of the administrative law judge's award of benefits in both claims. The Director, Office of Worker's Compensation Programs (the Director), has declined to file a response brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 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 in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

[4] The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 5 at 2. 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*).

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). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). The miner's prior claim was denied because the evidence was insufficient to establish the existence of pneumoconiosis or that the miner was totally disabled due to pneumoconiosis. Consequently, in order to establish a change in an applicable condition of entitlement, claimant had to submit new evidence establishing one of these elements. 20 C.F.R. §725.309(d)(2), (3); *see generally Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227, 2-235-237 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis or death due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*). Additionally, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999).

Initially, we will address employer's contentions in the miner's claim. Employer contends that the administrative law judge erred in finding that the x-ray evidence was

sufficient to establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). Specifically, employer argues that the administrative law judge erroneously characterized the x-ray interpretations of Drs. Wheeler, Wiot, Bellotte, and Kim as "equivocal," given that they unequivocally found that complicated pneumoconiosis was not present and attributed the nodules and x-ray changes to various probable etiologies, such as tuberculosis or granulomatous disease. Employer asserts that the administrative law judge erred in considering of the physicians' comments, as the ILO x-ray form is not designed for a physician to explain why x-rays are consistent with one condition or another. Employer maintains that the administrative law judge improperly shifted the burden of proof to employer to "rule out" the existence of complicated pneumoconiosis by affirmatively proving that the abnormal masses, consistently identified by the interpreting physicians of record, are due to a process other than pneumoconiosis. Employer also argues that the administrative law judge selectively and improperly analyzed the evidence, failed to consider the evidence in its entirety, and failed to adequately discuss his findings, as required under the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).[5]

The record consists of thirty-three interpretations of sixteen x-rays dated from 1979 to 2005.[6] Although the administrative law judge noted the x-rays that were read as positive for complicated pneumoconiosis, he also noted that a greater number of the x-ray interpretations were read as negative for pneumoconiosis. Nevertheless, the administrative law judge stated that "the conflicting interpretations of one x-ray should be evaluated to determine whether the individual x-ray is negative or positive" and that "[c]onflicts between x-rays should then be weighed in context to determine whether there is pneumoconiosis." Decision and Order at 32. The administrative law judge then considered the comments of the physicians who interpreted the x-rays, and noted that it was significant that all of the physicians who read x-rays in this case found evidence of abnormalities in the miner's lungs. However, the administrative law judge stated that "[w]hile the physicians who found the miner's x-rays negative for complicated pneumoconiosis offered various etiologies for the masses found in the miner's upper

[5] The 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), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[6] Dr. Gaziano, a B reader, read the August 20, 2001 x-ray for quality only. Miner's Director's Exhibit 15.

lungs, they failed to explain why the x-rays were consistent with granulomatous or tuberculosis, and not complicated pneumoconiosis." *Id*.

In finding that the reports of Drs. Wheeler, Wiot, Bellotte, and Kim were equivocal regarding the source of the nodules in the miner's lung, the administrative law judge stated:

> [T]he physicians who found the miner's more recent x-rays negative for pneumoconiosis were unable to offer more than "probable" etiologies for the x-ray changes. Dr. Wiot suggested post-inflammatory disease or old granulomatous disease, Drs. Wheeler and Kim suggested old granulomatous disease, and Dr. Bellotte suggested granulomatous, tuberculosis, or cancer.

Id. The administrative law judge also considered the other physicians' findings of coal workers' pneumoconiosis, the miner's coal mine dust exposure history, and the miner's medical history. Further, in considering the treatment records and autopsy evidence, the administrative law judge stated:

> [T]he miner's extensive treatment records do not provide any evidence that he was treated for granulomatous disease or tuberculosis. The records show that the miner was exposed to tuberculosis as a child; however, the miner testified that he was tested many times as a child, as were [sic] his family, but that only his brother and mother were treated for tuberculosis. In addition, the miner underwent a tuberculosis skin test which was interpreted as negative for the disease. While the physicians agree that a tuberculosis skin test cannot rule out the presence of the disease, a negative test also does not support a positive diagnosis of tuberculosis. Finally, as discussed below, the miner's autopsy evidence does not support a finding of tuberculosis, granulomatous, or lymphoma within the miner's lung tissue.

Id. at 32-33.

Contrary to the administrative law judge's analysis, claimant bears the burden of establishing entitlement to benefits and bears the risk of non-persuasion if his evidence does not establish a requisite element of entitlement. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1146, 17 BLR at 2-118. Hence, because the burden of proof rests with claimant to establish the existence of complicated pneumoconiosis, the mere fact that a physician has not identified a definitive alternate source for the x-ray findings does not undermine a negative x-ray interpretation. *Lester*, 993 F.2d at 1146, 17 BLR at 2-118; *see also Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994).

In this case, the administrative law judge found that the positive interpretations of complicated pneumoconiosis by Drs. Cohen, Alexander, Patel, and Bassali were "more credible" than the negative interpretations of the disease by Drs. Wheeler, Wiot, Bellotte and Kim, because he found that the interpretations by the latter physicians were speculative, as they did not provide a definitive diagnosis for the etiology of the masses seen on the miner's x-rays. As noted above, the regulation at Section 718.304(a) provides invocation of the irrebuttable presumption if "such miner is suffering from a chronic dust disease of the lung" which, when diagnosed by x-ray, yields one or more opacities which would be classified as Category A, B or C. 20 C.F.R. §718.304; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145, 17 BLR at 2-117; *Melnick*, 16 BLR at 1-33. Because Drs. Wheeler, Wiot and Kim unequivocally diagnosed no parenchymal abnormalities consistent with pneumoconiosis on the ILO classification form, thereby indicating that the miner did not suffer from complicated pneumoconiosis, we hold that the administrative law judge impermissibly shifted the burden of proof to employer to disprove the presence of complicated pneumoconiosis. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1146, 17 BLR at 2-118. Consequently, we vacate the administrative law judge's finding that the x-ray evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), and remand the case for further consideration of the x-ray evidence in accordance with the APA.

Furthermore, because the administrative law judge's weighing of the autopsy evidence, the CT scan evidence, and the medical opinion evidence was based on his faulty evaluation of the x-ray evidence,[7] we also vacate the administrative law judge's findings at 20 C.F.R. §718.304(b) and (c). Consequently, we vacate the administrative law judge's finding that the evidence established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.

On remand, when considering the medical opinion evidence, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See generally Milburn Colliery Co. v. 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).

[7] The administrative law judge stated, "[t]o the extent that Dr. Spagnolo's opinion on the presence of complicated pneumoconiosis relied on x-ray and CT scan interpretations which I found equivocal, and an autopsy report which I felt was poorly reasoned, I give his opinion less weight." Decision and Order at 37.

At the outset, however, the administrative law judge must determine whether the new evidence establishes a change in an applicable condition of entitlement at 20 C.F.R. §725.309 by establishing one of the elements of entitlement that was previously decided against claimant, namely, that the miner had pneumoconiosis and a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. *White v. New White Coal Co.*, 23 BLR 1-1 (2004). If the administrative law judge finds that the new evidence establishes a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, then he must consider the evidence on the merits at 20 C.F.R. Part 718.

Turning to the survivor's claim, employer contends that the administrative law judge erred in finding that the evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b) and (c). To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[8] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence establishes, *inter alia*, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Bill Branch*

[8] Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.
> (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
> (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

Coal Corp. v. Sparks, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *Anderson*, 12 BLR at 1-112; *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

At Section 718.304, the administrative law judge stated, "[a]lthough I have combined the evidence submitted in the living miner [sic] and survivor's claims into one summarized section, as detailed above, I have considered only the evidence submitted in conjunction with the survivor's claim in making a decision regarding the survivor's rights to benefits under the Act." Decision and Order at 40. The administrative law judge then found that the x-ray evidence was insufficient to establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), as none of the x-ray readings showed complicated pneumoconiosis related to coal mine dust exposure. However, the administrative law judge found that the evidence was sufficient to establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b) and (c). In weighing the medical evidence at 20 C.F.R. §718.304(c), the administrative law judge relied on his flawed evaluation of the x-ray evidence in the miner's claim. The administrative law judge specifically stated, "[t]o the extent that Dr. Spagnolo's opinion on the presence of complicated pneumoconiosis relied on x-ray and CT scan interpretations which I found equivocal, and the autopsy report which I felt was poorly reasoned, I give his opinion less weight." Decision and Order at 43. Based on the administrative law judge's determination that the opinions of Drs. Renn and Spagnolo were outweighed by Dr. Rasmussen's contrary opinion, the administrative law judge found that the evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(c). Further, based on the administrative law judge's weighing of all of the evidence at 20 C.F.R. §718.304(a)-(c), the administrative law judge found that the evidence established invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304.

Because the administrative law judge's weighing of the autopsy evidence, the CT scan evidence, and the medical opinion evidence was based on his faulty evaluation of the x-ray evidence in the miner's claim, we vacate the administrative law judge's findings at 20 C.F.R. §718.304(b) and (c) in the survivor's claim. Consequently, we vacate the administrative law judge's finding that the evidence established invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304, and remand the case for further consideration of the evidence in accordance with the APA.

If reached, on remand, the administrative law judge must also consider whether claimant is entitled to the presumption at Section 411(c)(4) of the Act, as her survivor's claim was filed after January 1, 2005 and the administrative law judge credited the miner

with 18.9 years of coal mine employment based on the parties' stipulation.[9] 30 U.S.C. §921(c)(4). If the administrative law judge finds that claimant is entitled to the presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether employer has rebutted the presumption by establishing that the miner did not have pneumoconiosis or that his "respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." *Id*. On remand, the administrative law judge must allow for the submission of additional evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Further, any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, the proponent of this evidence must establish good cause for its admission. 20 C.F.R. §725.456(b)(1).

We, therefore, vacate the administrative law judge's award of benefits in both the miner's and the survivor's claims. Nevertheless, for the sake of judicial economy, we address employer's contentions regarding the administrative law judge's findings at 20 C.F.R. §718.304(b) and (c).

We find merit in employer's objections to the administrative law judge's determination to credit the medical opinions of Drs. Rasmussen[10] and Cohen[11] over those

[9] Because the miner was not in payment status pursuant to a final award of benefits at the time of his death, inasmuch as the miner's claim is still pending, claimant is not entitled to derivative benefits. 30 U.S.C. §932(*l*).

[10] Dr. Rasmussen, who performed the Department of Labor evaluation, diagnosed complicated pneumoconiosis by x-ray evidence, inconsistent with lymphoma or tuberculosis, and found it "medically reasonable that the miner had coal workers' pneumoconiosis due to coal mine employment, with severe progressive impairment of lung function and a chronic totally disabling respiratory disease due to both coal mine employment and smoking, with changes classic for complicated pneumoconiosis but not for tuberculosis or lymphoma. Miner's Director's Exhibits 55, 57; Claimant's Exhibit 2; Decision and Order at 17-20, 43. Based on his review of additional medical records, in an August 6, 2008 report, he opined that pneumoconiosis contributed significantly towards hastening the miner's death from respiratory failure. Claimant's Exhibit 2; Decision and Order at 20.

[11] Dr. Cohen diagnosed coal workers' pneumoconiosis that progressed to Category B complicated pneumoconiosis, and disabling obstructive lung disease for which coal

of Drs. Bellotte,[12] Renn[13] and Spagnolo under Section 718.304(b), (c).[14] The administrative law judge discredited Dr. Bellotte's medical opinion of September 25, 2001, in part, because Dr. Bellotte did not consider the most recent and probative x-ray or CT scan evidence. Decision and Order at 37. Similarly, the administrative law judge discredited Dr. Renn's opinion that the miner's x-ray changes favored an old tubercular infection and that old tubercular scarring, unlike an active infection, cannot be specifically distinguished at autopsy, in part, because the miner had no diagnosis of tuberculosis by history or on autopsy. *Id*. at 43. Finally, the administrative law judge discredited Dr. Spagnolo's diagnosis of simple, but not complicated, pneumoconiosis unrelated to the miner's death, in part, because Dr. Spagnolo relied on x-ray and CT scan interpretations that were determined to be equivocal or poorly reasoned. *Id*. at 37, 43. Conversely, the administrative law judge credited the medical opinions of Drs. Cohen

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dust exposure and smoking were "significantly contributory." Miner's Director's Exhibit 55; Decision and Order at 25-26.

[12] Dr. Bellotte stated that there was sufficient evidence to justify a diagnosis of coal workers' pneumoconiosis, and that "these changes may be related to coal dust exposure." Miner's Director's Exhibit 16; Decision and Order at 20-21, 37-38. Subsequently, he opined that the miner had a significant respiratory impairment, attributable to chronic obstructive pulmonary disease (COPD) due to smoking and old tuberculosis infection resulting in granulomatous disease. *Id*. He found that the miner's total disability was not caused, in whole or in part, by coal workers' pneumoconiosis. *Id*.

[13] Dr. Renn initially diagnosed chronic bronchitis, emphysema due to smoking, and simple and complicated pneumoconiosis. He found total disability from a respiratory standpoint, but did not address the cause of the total disability. Miner's Director's Exhibits 55, 56; Decision and Order at 22-23. Subsequently, he stated that the miner does not have complicated pneumoconiosis, but has lymphoma, bronchitis and emphysema due to smoking, as well as "old pulmonary granulomatous disease due to childhood tuberculosis." *Id*. Dr. Renn described his previous opinion as "just erroneous," and stated that he is "quite satisfied with [his] recent appreciation of [the miner's] diseases, particularly the extent of the lymphoma." *Id*.

[14] Dr. Spagnolo reviewed medical records, found no x-ray or CT scan evidence of pneumoconiosis, and stated that the pneumoconiosis observed pathologically had no significant effect on lung function. Miner's Director's Exhibit 5; Widow's Director's Exhibit 5. He diagnosed emphysema due to smoking that was "far too limited in terms of its association with pneumoconiosis that was present to have caused any significant problems." Miner's Director's Exhibit 9; Widow's Director's Exhibit 10; Decision and Order at 26-28.

and Rasmussen on the issue of complicated pneumoconiosis based, in part, on the probative weight assigned to their x-ray diagnoses of complicated pneumoconiosis. *Id*. at 37-38, 43.

We initially address employer's assertion that the administrative law judge improperly credited the May 6, 2004 CT scan because the identity or credentials of the interpreting physician are unknown. While we agree with claimant that Dr. Durham appears to be the "unnamed physician" referenced by the administrative law judge as providing an interpretation of the May 6, 2004 CT scan, *see* Claimant's Exhibits 3 at 3-4; 15 at 33; Miner's Director's Exhibit 55 at 33-34, 168, the administrative law judge did not identify the qualifications of any of the physicians interpreting the CT scans, *see* Decision and Order at 9-10, 33-34; *see also* Employer's Brief at 11-12. Thus, the administrative law judge, on remand, must address the relative qualifications of the respective physicians in his weighing of the CT scan evidence. *See Akers*, 131 F.3d at 441, 21 BLR at 2-275-76 (recognizing that professional qualifications are indicators of the reliability of medical opinions).

We next address employer's challenge to the administrative law judge's evaluation of the autopsy evidence,[15] and his determination to credit Dr. Green's[16] diagnosis of complicated pneumoconiosis over the contrary opinions of Drs. Zhang, Oesterling,[17] and

[15] In the death certificate, Dr. Harpold, who was the miner's attending physician during his final hospitalization, listed the immediate cause of death as "sepsis (gram negative)." Miner's Director's Exhibit 58-A; Widow's Director's Exhibit 7; Decision and Order at 10-11. He listed COPD, non-Q wave myocardial infarction, and renal failure as "other significant conditions contributing to death but not resulting in the underlying cause given as immediate cause of death." *Id*.

[16] Dr. Green found both simple and complicated pneumoconiosis, and progressive massive fibrosis, based on two massive lesions measuring 1.7 by 1.8 cm, and 2.0 by 0.7 cm, comprising silicotic and coal dust nodules containing large amounts of black pigment, and he ruled out tuberculosis or lymphoma. Claimant's Exhibit 3; Decision and Order at 41-42. Dr. Green also diagnosed emphysema "undoubtedly contributed" to by smoking and coal dust exposure, and stated that the miner had "severe simple coal workers' pneumoconiosis at autopsy as well as two lesions of progressive massive fibrosis." Claimant's Exhibit 3 at 5. Dr. Green opined that the lesions were "classical for progressive massive fibrosis," and noted that none of the x-ray interpretations attributing the condition to scars, lung cancer, tuberculosis or granulomas was substantiated at autopsy. Claimant's Exhibit 3 at 6.

[17] Dr. Oesterling found macronodules of coal workers' pneumoconiosis measuring up to 8 mm. in size, and testified at deposition that the lung tissue showed "a significant

Naeye.[18] Employer asserts that the administrative law judge erred in giving "less weight" to the opinion of Dr. Zhang, the autopsy prosector, because the doctor's "opinion was unclear concerning whether complicated pneumoconiosis should be diagnosed with a one centimeter or a two centimeter lesion at autopsy." Employer's Brief at 12-13; Decision and Order at 11, 42. Employer contends that Dr. Zhang, who stated that pneumoconiosis did not play a substantial and contributing role in the miner's death, "understands the size requirements for diagnosing progressive massive fibrosis and that his findings in [the miner] of lesions or nodules between .5 to 1 centimeter do not meet such requirements."[19]

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form of coal workers' pneumoconiosis," but disagreed with Dr. Green's diagnosis of progressive massive fibrosis, because the lesions identified by Dr. Green would have to be 2 cm. to constitute progressive massive fibrosis. Widow's Director's Exhibit 8; Decision and Order at 12-13, 41. Dr. Oesterling diagnosed micronodular and macronodular coal workers' pneumoconiosis, moderately severe panlobular pulmonary emphysema, and "bronchopneumonia which is beginning to complicate the passive congestion which is present," and stated that the miner's chemotherapy treatment would have suppressed his immune system. He identified "progressive ischemic heart disease as the primary precipitating factor in the miner's demise, Miner's Employer's Exhibit 1; Widow's Director's Exhibit 1; Decision and Order at 12, and opined that coal workers' pneumoconiosis was "not a factor in his lifetime symptomology which was caused by panlobular pulmonary emphysema unrelated to coal dust exposure." Widow's Director's Exhibit 8; Decision and Order at 12-13.

[18] Dr. Naeye found coal workers' pneumoconiosis but did not diagnose complicated pneumoconiosis, or discuss any other abnormalities. Employer's Exhibit 3.

[19] Dr. Zhang diagnosed simple pneumoconiosis but did not diagnose complicated pneumoconiosis or progressive massive fibrosis. He found nodules measuring from .5 to 1 cm., stating that simple and complicated pneumoconiosis is differentiated by the size of the nodules, "such that complicated pneumoconiosis might be diagnosed by the presence of [a] 1 cm nodule but sometimes a 2 cm nodule is required." Decision and Order at 41, Miner's Director's Exhibit 58-A; Widow's Director's Exhibit 8; Director's Exhibit 22 at 10, 13.

Dr. Zhang testified:

> Right. We usually give two diagnosis [sic], one is simple coal workers' pneumoconiosis and the second is complicated, which is considered to be a progressive, massive fibrosis. The – I guess the nodule, the nodules that we see, the difference between the complicated versus the simple is a matter of size of the nodule. And some texts – textbooks will say that it is a one

Employer's Brief at 13. Dr. Zhang used the word "sometimes" with respect to diagnosing the presence of complicated pneumoconiosis, based on the size of a nodule. Because the word "sometimes" allows for different interpretations, the administrative law judge, on remand, should further clarify his assessment of Dr. Zhang's testimony regarding the criterion for the size of the nodule that the doctor used for diagnosing the presence of complicated pneumoconiosis. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Additionally, employer argues that the administrative law judge erred in discrediting Dr. Oesterling's pathology report because Dr. Oesterling did not offer an etiology for the massive lesions identified on the interpretations of the miner's most recent x-rays and CT scans. Employer maintains that Dr. Oesterling's report was designated as an autopsy report, based on slides and autopsy findings, rather than a medical report, based on x-rays and CT scans. Employer also argues that the administrative law judge erred in discrediting Dr. Oesterling's pathology report because Dr. Oesterling did not offer an explanation as to what size lesion would be required to diagnose complicated pneumoconiosis.

In considering Dr. Oesterling's report at Section 718.304(c), the administrative law judge found:

> Dr. Oesterling noted the presence of a "relatively low level" of micro and macro nodules of coal worker's pneumoconiosis. He did not offer an etiology for the massive lesions identified on the miner's most recent x-rays and CT scans. He did not offer an explanation as to what size lesion would be required to diagnose complicated pneumoconiosis, stating only that there was no coalescence of nodules to "indicate progressive massive fibrosis."

Decision and Order at 35.

> centimeter. Sometimes - we actually use two centimeters in size to define whether this is qualified to be a progressive, massive fibrosis.

Director's Exhibit 22 at 10. Dr. Zhang also testified:

> He has coal macules within the lung, some of the macules are big enough to be defined as nodules, you know, between .5 to 1 centimeter in size, so, we look at it and that meet [sic] the criteria for diagnosis of simple coal workers' pneumoconiosis.

Id. 13.

Contrary to the administrative law judge's finding, Dr. Oesterling testified concerning the lesion size required for a diagnosis of complicated pneumoconiosis, and specifics as to the lesions identified on the miner's slides.[20] *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Thus, the administrative law judge, on remand, must clarify his credibility determinations regarding Dr. Oesterling's report. *Wojtowicz*, 12 BLR at 1-165.

Finally, employer asserts that the administrative law judge erred in discrediting Dr. Naeye's opinion because Dr. Naeye did not offer an opinion on the issue of complicated pneumoconiosis. Employer's Brief at 13-14. The administrative law judge observed that, although Dr. Naeye found simple pneumoconiosis, he did not diagnose complicated pneumoconiosis, or indicate whether he "saw any evidence of lung masses, tuberculosis, lymphoma, granulomatous, or any other abnormalities."[21] Decision and Order at 41. The administrative law judge therefore stated, "[p]resumably [Dr. Naeye's] silence on the issue means that he did not find evidence of complicated pneumoconiosis, but his failure to discuss the large lesions and nodules identified in detail by [Dr.] Oesterling and Dr. Green, and to some extent Dr. Zhang, render Dr. Naeye's opinion questionable." *Id*. at 42. While an administrative law judge may give less weight to a physician's opinion for failure to discuss factors noted by the other medical experts of record, the administrative law judge, on remand, must provide a more comprehensive explanation of his evaluation of the medical opinion of Dr. Naeye. *Wojtowicz*, 12 BLR at 1-165.

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[20] Dr. Oesterling opined: "[I]n order to diagnose progressive massive fibrosis (PMF) by pathology, the miner would need to have 2 cm lesions in his lungs, though he acknowledged that 'Dr. Green, as some pathologists do, now accepts complicated coal workers' pneumoconiosis[,] a 1 cm measurement[,] as also being a hallmark for progressive massive fibrosis.'" Decision and Order at 13; Widow's Director's Exhibit 8. Dr. Oesterling stated: "there has been some attempt to equate progressive massive fibrosis, which is the most severe form of the disease process, with complicated coal workers' pneumoconiosis, a radiographic diagnosis, where you are talking about a minimum requirement of a centimeter in dimension. The initial criteria, and they are still followed by good pulmonary pathologists…is still 2 centimeters.... So that I feel much more comfortable when I see lesions of that size causing progressive massive fibrosis, and I think that's a very significant disease, versus, some of the, quote, complicated coal workers' pneumoconiosis which is a one centimeter lesion." *Id*.

[21] Dr. Naeye concluded: "The lung tissues reveal the findings of mild, simple coal workers' pneumoconiosis. Nowhere is it severe enough to have caused significant impairments in lung function, disability or to have had any role in this man's death." Employer's Exhibit 3.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from my esteemed colleagues' decision vacating the administrative law judge's Decision and Order–Awarding Miner's Benefits and Awarding Survivor's Benefits, and remanding the case for reconsideration. I would instead affirm the administrative law judge's decision in all respects. The majority believes that the administrative law judge shifted the burden of proof in his weighing of the x-ray and medical opinion evidence, and that his ultimate conclusions were not supported by substantial evidence. To the contrary, I find no error in the administrative law judge's weighing of the evidence, and his determination that the most probative evidence established both simple and complicated pneumoconiosis under 20 C.F.R. §§718.202(a)(1), (2), (4), and 718.304.

In my view, employer's various assignments of error are unfounded. At the outset, the administrative law judge found it significant that all of the physicians of record who read the x-ray evidence found abnormalities in the miner's lungs. Moreover, he specifically indicated that he did not rely on numerical weight in finding an evidentiary "preponderance" of the x-ray evidence demonstrating the existence of simple and complicated pneumoconiosis. Noting that "the greater number of the x-ray interpretations were read as negative for pneumoconiosis," he credited the positive complicated pneumoconiosis interpretations of Drs. Cohen, Alexander, Patel and Bassali

as "more credible," Decision and Order at 32-33 n.18, because the contrary narrative interpretations provided by Drs. Wheeler, Wiot, Bellotte and Kim, indicating "probable etiologies," were unsupported in the record. In this respect, I note that, contrary to employer's assertion, an administrative law judge is only precluded from considering narrative information included in ILO forms where the information refers to the *source* of an identified pneumoconiosis. Since the x-ray interpretations by Drs. Wheeler, Wiot, Bellotte and Kim were *negative* for pneumoconiosis, the administrative law judge validly considered their additional narrative explanations, s*ee* 20 C.F.R. §718.202(a)(1); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999), and permissibly questioned the probative value of their interpretations that identified tuberculosis, granulomatous disease or lymphoma as the abnormalities on x-ray.[22]

Faced with conflicting x-ray evidence on the issue of whether the opacities constitute pneumoconiosis, or some other condition, the administrative law judge evaluated the physicians' interpretations in their entirety, and found that those of Drs. Wheeler, Wiot, Bellotte and Kim were unpersuasive. Specifically, while Drs. Wheeler, Wiot, Bellotte and Kim offered various etiologies, neither the autopsy evidence nor the miner's medical histories, supports a finding of tuberculosis, granulomatous disease, or lymphoma. Contrary to employer's argument, therefore, the administrative law judge did not improperly require employer to offer affirmative evidence that establishes that the acknowledged masses are due to a process other than pneumoconiosis, or to identify an alternate etiology. He did not merely accept a single positive x-ray interpretation demonstrating an opacity larger than one centimeter, and then shift the burden to employer to affirmatively rule out the presence of complicated pneumoconiosis. Either of those approaches would have violated the mandate of *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000). In sum, the administrative law judge did not require employer to prove an alternative diagnosis; rather, he explained why the medical opinions urged by employer were *less credible* in light of the miner's occupational and medical histories, extensive treatment records, and autopsy evidence, none of which supported a diagnosis of any etiology other than coal worker's pneumoconiosis. In so doing, the administrative law judge exercised his discretion to determine that the record fails to support the etiologies of tuberculosis and granulomatous disease proffered by Drs. Wheeler, Wiot, Bellotte and Kim for the opacities that all the physicians agree are present. Rather, he found that the positive x-ray interpretations of Drs. Cohen, Alexander and Patel were more persuasive, and, therefore, concluded that the preponderance of the x-ray evidence demonstrated the existence of simple and complicated pneumoconiosis. *Id*. at 33. Substantial evidence supports his

[22] For example, Dr. Wiot stated that the granulomatous disease, possible tumor, and bronchiectasis, are not coal workers' pneumoconiosis and are unrelated to coal mine employment. Miner's Director's Exhibit 56.

determination, and nothing in the administrative law judge's manner of arriving at his conclusion is either improper or inconsistent with *Scarbro*. In my opinion, employer is asking the Board to reweigh the x-ray evidence, which the Board is not empowered to do.

I have reached the same conclusion with respect to the evaluation of the medical opinion evidence under Section 718.202(a)(2), (a)(4) and, ultimately, at Section 718.304. Again, the administrative law judge provided permissible and well-explained reasons why he discounted the medical opinions of Drs. Bellotte, Renn and Spagnolo. First, he considered that Dr. Bellotte initially diagnosed complicated pneumoconiosis, then opined that the miner's condition might be unrelated to coal dust exposure and, finally, diagnosed coal workers' pneumoconiosis. Moreover, the administrative law judge observed that Dr. Bellotte failed to consider the most recent x-ray or CT scan evidence. The administrative law judge's determination to discount the opinion as inconsistent is clearly denoted, well-grounded, and amply supported by the record.

Similarly, Dr. Renn's medical evidence proved internally inconsistent, and was discounted accordingly. While first attributing the lesions in the miner's lungs to emphysema, he later opined that they were due to lymphoma, despite noting that the non-Hodgkins type lymphoma identified would not typically be found in lungs. Moreover, the lung pathology evidence ultimately provided no support for his diagnosis of lymphoma. Further, while Dr. Renn next attributed the miner's lung condition to tuberculosis, neither the autopsy report nor the treatment records bear this out. The administrative law judge also discounted Dr. Spagnolo's medical opinion, that the miner did not suffer from complicated pneumoconiosis, because of its reliance on the physician's own negative interpretations of the x-ray and CT scan evidence, and an autopsy report that the administrative law judge found to be poorly reasoned. Decision and Order at 37. Since the administrative law judge specifically determined that the more probative x-ray and CT scan evidence supported a finding of complicated pneumoconiosis, this was rational. In the face of varying, indeed evolving, medical opinions based on suppositions that are devoid of support in the record, the administrative law judge quite reasonably deemed those opinions unsatisfactory. In my view, therefore, the administrative law judge rationally assessed discrete factors detracting from the reliability and persuasive value of the multiple medical theories regarding the cause of the miner's lung condition, as inconsistent or inconclusive medical opinions may be accorded less weight. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 391, 21 BLR 2-639, 2-652-653 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

By comparison, the administrative law judge accorded some weight to Dr. Rasmussen's diagnosis of complicated pneumoconiosis, in conjunction with his explanation that the findings were inconsistent with lymphoma or tuberculosis. He assigned more weight to Dr. Cohen's medical opinion, because the physician's diagnosis

of both simple and complicated pneumoconiosis accorded with the administrative law judge's own assessment of the x-ray and CT scan evidence. In particular, the administrative law judge accepted Dr. Cohen's explanation that the miner's medical records were inconsistent with a diagnosis of tuberculosis, and, significantly, that the pattern of the x-ray evidence was consistent with pneumoconiosis rather than tuberculosis. In so doing, he exercised his prerogative, as fact-finder, to accept the medical theory that seemed to him most logically consistent with the body of evidence before him.

In dissenting from the majority, I am mindful that the adequacy of the administrative law judge's explanations respecting his credibility choices is tested only *deferentially*, and that it must be affirmed if supported by substantial evidence or such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Massey v. Peabody Coal Co*., No. 09-1589, slip op. at 7 (4th Cir. July 6, 2010), *aff'g* BRB No. 08-0467 BLA (Mar. 3, 2009)(unpub.), citing *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998), *quoting Consolidated Edison v. NLRB*, 305 U.S. 197, 59 S.Ct. 206 (1938). It is axiomatic that reasonable minds may, and do, differ. Happily, therefore, we are not taxed with sifting the evidence: that exercise is reserved to the discretion of the administrative law judge as fact-finder. *See Stiltner v. Island Creek Coal Co*., 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). Instead, we are directed by the United States Supreme Court "to uphold decisions that rest within the realm of rationality; a reviewing court has no license to 'set aside an inference merely because it finds the opposite conclusion more reasonable or because it questions the factual basis.'" *See Piney Mountain Coal Co. v. Mays*, 176 F.3d at 753, 756**,** 21 BLR 2-587, 591 (4th Cir 1999), citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971). We are advised that "to overturn the ALJ we would have to rule *as a matter of law* that no 'reasonable mind' could have interpreted and credited the doctor[s' opinions] as the ALJ did." *Id.*, 176 F.3d at 764**,** 21 BLR at 2-606 (italics added).

Doubtless other rational constructions could be gleaned from the welter of medical opinions and theories presented here. For my part, I am satisfied that the administrative law judge has fairly, and searchingly, reviewed the evidence in this matter, and that his factual findings are neither unlawful nor insubstantially supported, nor contrary to *Scarbro*. Indeed, I am led to the conclusion that the administrative law judge's credibility findings and ultimate determinations respecting entitlement are adequately and clearly explained, and soundly based on the record. Accordingly, because "[t]he APA does not require explanations for explanations for explanations, *ad infinitum*," *Massey*, No. 09-1589, slip op. at 7, I am unprepared to endorse a remand for purposes of further

clarification. I would affirm the award of benefits in both the miner's and the survivor's claims.

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BETTY JEAN HALL
Administrative Appeals Judge