

BRB No. 09-0837 BLA

VIVIAN COBB)	
(Widow of CECIL COBB, SR.))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 09/30/2010
)	
WESTMORELAND COAL)	
CORPORATION)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Addendum Decision and Order Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Francesca Tan and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (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.

PER CURIAM:

Employer appeals the Addendum Decision and Order Awarding Benefits¹ (2008-BLA-6005) of Administrative Law Judge Linda S. Chapman, with respect to a survivor's claim filed on November 9, 2007, 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).² After crediting the miner with thirty-nine years of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that claimant established that the miner had complicated pneumoconiosis arising out of his coal mine employment and, therefore, established invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

Employer argues that the administrative law judge did not properly weigh the medical evidence regarding the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. Claimant and the Director, Office of Workers' Compensation Programs (the Director), have declined to file a response brief in this appeal.

By Order dated June 29, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.³ *Cobb*

¹ The administrative law judge initially issued a Decision and Order on August 19, 2009, that she mistakenly captioned as "Denying Benefits." This Addendum Decision and Order, issued on August 31, 2009, corrected the caption as a Decision and Order Awarding Benefits.

² Claimant is the widow of the miner, Cecil Cobb, Sr., who died on August 18, 2007. Director's Exhibit 7.

³ Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4)), reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under Section 411(c)(4), if a survivor establishes that the miner had at least fifteen years of coal mine employment and suffered from a totally disabling respiratory impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. Section 422(l) of the Act, as amended, which permits a qualified survivor of a miner who filed a successful claim for benefits to be automatically entitled to survivor's benefits, without the burden of reestablishing entitlement, is not applicable in the current claim as there is no evidence that the miner was previously awarded benefits.

v. Westmoreland Coal Corp., BRB No. 09-0837 BLA (June 29, 2010)(unpub. Order). The Director and employer have responded.

The Director states that Section 1556 will not affect this case if the Board affirms the administrative law judge's award of benefits. However, the Director further asserts that, if the Board does not affirm the administrative law judge's findings, remand for consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4), is required, as the present claim was filed after January 1, 2005, and the administrative law judge credited the miner with more than fifteen years of coal mine employment. Employer indicates that the recent amendments may affect this claim, based on the filing date and claimant's coal mine employment history. Therefore, employer indicates that due process requires the claim to be remanded for the development of evidence addressing the new standards created. Additionally, employer argues that retroactive application of the amendments is unconstitutional because it denies the operator due process and constitutes an unconstitutional taking of private property.

To determine whether this case must be remanded for consideration of invocation of the rebuttable presumption of death due to pneumoconiosis, we will first address employer's allegations of error regarding the administrative law judge's findings at 20 C.F.R. §718.304.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or if claimant establishes invocation of the irrebuttable presumption of death due to pneumoconiosis. 20 C.F.R. §§718.205(c)(2), (4), 718.304.

⁴ The record reflects that the miner's coal mine employment was in Virginia. Director's Exhibits 3, 5. 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*).

Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); see *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1992); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-901 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

I. The Relevant Evidence

A. The X-Ray Evidence

Pertinent to 20 C.F.R. §718.304(a), the record contains two interpretations of a January 17, 1995 x-ray. Drs. Scott and Kim, dually qualified as Board-certified radiologists and B-readers, interpreted the x-ray as negative for pneumoconiosis. Employer's Exhibit 2. The administrative law judge noted that both of these interpretations were negative and found that the other x-ray evidence contained in the miner's treatment records did not contain findings of coal workers' pneumoconiosis. Decision and Order at 13; Director's Exhibits 9, 10, 11.

B. The Autopsy Evidence

Relevant to 20 C.F.R. §718.304(b), the record contains Dr. Sides's report of his autopsy of the miner's right lung and a report by Dr. Oesterling, based on a review of the autopsy slides and additional records. Director's Exhibit 8; Employer's Exhibit 1. In his gross description, Dr. Sides identified a 2.6 centimeter-in-diameter nodular mass of dense gray-black tissue in the upper lobe and a 2.0 centimeter nodule in the main bronchus in the middle lobe. Director's Exhibit 8. In addition, Dr. Sides noted diffuse areas of focal gray-black discoloration and diffuse mild to moderate emphysematous change. *Id.* In his microscopic examination, Dr. Sides determined that the 2.6 centimeter mass was composed of areas of dense collagenous fibrosis with haphazardly arranged collagen bundles. *Id.* Dr. Sides found that some of the particles were birefringent under polarized light, which he stated was consistent with silica, and identified the pigment as consistent with coal dust. *Id.* Dr. Sides explained that the 2.0 centimeter nodule was consistent with complicated or advanced coal workers' pneumoconiosis. *Id.* Dr. Sides also identified areas of focal emphysema and an area of acute pneumonitis. *Id.*

In his report dated November 11, 2008, Dr. Oesterling reviewed tissue slides, the autopsy report and the death certificate. Employer's Exhibit 1. Dr. Oesterling diagnosed micronodular interstitial coal workers' pneumoconiosis. Employer's Exhibit 1. In addition, he found two areas that "appear to represent hilar and intrapulmonary lymph nodes that do show reaction to coal dust." *Id.* However, Dr. Oesterling opined that these structures did not represent complicated pneumoconiosis because lymph nodes do not

participate in gaseous exchange and, therefore, have no functional impact on the miner's respiratory impairment. *Id.* Dr. Oesterling stated that the miner's primary chronic respiratory disease was panacinar pulmonary emphysema, which is unrelated to coal dust exposure. *Id.* Dr. Oesterling further determined that the miner's pneumonic process was aggressive and had become blood borne, which Dr. Oesterling indicated caused the miner's death. *Id.* Dr. Oesterling stated that, although there was no evidence of carcinoma in the lung sections selected by the prosector, the miner's pneumonia was suggestive of the type "seen in patients with metastatic malignancies due to the partial paralysis of the immune system." *Id.*

C. The CT Scan Evidence

The record also contained seven interpretations of five CT scans, which are relevant to 20 C.F.R. §718.304(c). Dr. Scott, a Board-certified radiologist and B reader, reviewed a CT scan dated February 17, 2005, and identified masses that measured approximately four centimeters in both upper lungs. Employer's Exhibit 5. However, Dr. Scott attributed the masses to granulomatous disease, like histoplasmosis, tuberculosis, or nontuberculous mycobacterial infection, and did not find any evidence of simple or complicated pneumoconiosis. *Id.* In addition, Dr. Sparks, whose qualifications are not in the record, read a September 11, 2006 CT scan and found "nodules [that] may represent occupational pneumoconiosis with the large lesions representing progressive massive fibrosis." Director's Exhibit 9. Dr. Sparks also stated that "neoplasm cannot be totally excluded." *Id.* Dr. Lepsch, whose qualifications are also not in the record, reviewed a CT scan dated October 7, 2006, and found "spiculated masses in both upper lungs" that suggest progressive massive fibrosis, but could also represent neoplasm. Director's Exhibit 10. Dr. Scott interpreted the same CT scan and did not find any evidence of simple or complicated pneumoconiosis. Employer's Exhibit 5. Dr. Lepsch reviewed a March 6, 2007 CT scan and identified "progressive massive fibrosis secondary to silicosis or coal [workers'] pneumoconiosis." Director's Exhibit 10. Based on a reading of the same scan, Dr. Scott again determined that there was no evidence of simple or complicated pneumoconiosis. Employer's Exhibit 5. Dr. Jain, whose qualifications are not in the record, reviewed a March 26, 2007 CT scan and identified "[l]arge mass-like lesion[s]" that she found were "suspicious for neoplasms," but could be related to "infective/inflammatory etiology, granulomatous infection or progressive pulmonary fibrosis." Director's Exhibit 11.

D. Additional Medical Reports

The record also contains the death certificate and the medical opinions of Drs. Winegar, Spagnolo, and Hippensteel. On the death certificate, Dr. Winegar, the miner's treating physician, indicated that the immediate cause of the miner's death was progressive respiratory failure due to metastatic carcinoma to the lung and colon cancer.

Director's Exhibit 7. He identified coal workers' pneumoconiosis and chronic obstructive lung disease as other significant conditions contributing to death. *Id.* In a letter, dated October 18, 2007, Dr. Winegar stated that he began treating the miner in 2005 and that the miner died on August 18, 2007, in hospice care due to end stage colon cancer and end stage chronic obstructive pulmonary disease (COPD). Director's Exhibit 9. Dr. Winegar indicated that the miner had a history of severe COPD and coal workers' pneumoconiosis and that recent x-rays showed interstitial fibrosis and lobular changes consistent with pneumoconiosis. *Id.* He noted that the limited autopsy of the miner's lung revealed findings of complicated pneumoconiosis and emphysema. *Id.* Therefore, it was Dr. Winegar's opinion that the miner had "extensive" coal workers' pneumoconiosis. *Id.*

Based on a review of the miner's medical records, Dr. Spagnolo prepared a report, dated March 21, 2009, in which he concluded that coal dust exposure did not play any role in the miner's respiratory impairment. Employer's Exhibit 3. Instead, Dr. Spagnolo opined that the miner's death was due to "progressive cancer with a terminal lung infection secondary to his compromised immunity caused by both the prednisone and his cancer." *Id.* Dr. Spagnolo noted that the 1995 x-ray interpretations by the radiologists from John Hopkins did not reveal any evidence of pneumoconiosis. *Id.* In addition, Dr. Spagnolo found that, while the autopsy revealed evidence of limited simple pneumoconiosis, the normal physical and laboratory findings were consistent with Dr. Oesterling's determination that the two large nodules were in the miner's lymph nodes and did not support a diagnosis of complicated pneumoconiosis or progressive massive fibrosis. *Id.* In his deposition on May 6, 2009, Dr. Spagnolo reiterated his conclusions and added that it is likely that the miner's death was due to a lung infection. Employer's Exhibit 7 at 12-14, 38, 44.

Dr. Hippensteel prepared a report, dated March 27, 2009, based on a review of the medical records, and concluded that the miner did not have complicated coal workers' pneumoconiosis and that his simple pneumoconiosis did not cause or hasten his death. Employer's Exhibit 4. Rather, Dr. Hippensteel stated that the miner's death was "thought to be" secondary to metastatic colon cancer. *Id.* Dr. Hippensteel noted that Dr. Winegar did not perform any pulmonary function tests on the miner, even though he determined that the miner had severe lung disease. *Id.* Dr. Hippensteel also indicated that, while nodules were seen on the CT scans, "radiologists who read the chest CT scans found x-rays that did not show large opacities." *Id.* Dr. Hippensteel maintained that the fact that the autopsy was performed on only one lung decreased its value and did not resolve the question of whether the miner had metastatic cancer in his lungs. *Id.* In addition, Dr. Hippensteel agreed with Dr. Oesterling, that the enlarged lymph nodes were not indicative of complicated pneumoconiosis, because the latter disease involves a process that affects the lung parenchyma, not the lymph nodes. *Id.* In his deposition on May 4, 2009, Dr. Hippensteel stated that the miner had rheumatoid arthritis, which can affect the

lungs because it causes vascular impairment in the body tissues and can be a common cause of diffusion impairment and interstitial lung disease. Employer's Exhibit 6 at 13-14.

II. The Administrative Law Judge's Findings

The administrative law judge initially determined that the x-ray evidence did not contain findings of coal workers' pneumoconiosis. Decision and Order at 13. The administrative law judge then reviewed the CT scan interpretations by Drs. Sparks, Jain and Lepsch. The administrative law judge noted that the physicians identified large masses that could be due to progressive pulmonary fibrosis, although other conditions, like cancer, could not be ruled out. *Id.* at 14.

The administrative law judge turned next to a consideration of the autopsy evidence, noting that it confirmed Dr. Winegar's assessment, that the miner had extensive coal workers' pneumoconiosis. Decision and Order at 14. The administrative law judge determined that both Dr. Sides and Dr. Oesterling identified large nodules, but differed as to whether these nodules supported a diagnosis of complicated pneumoconiosis. Relying on the Board's decision in *D.S. [Sisk] v. Westmoreland Coal Co.*, BRB No. 07-1000 BLA (Sept. 30, 2008)(unpub.), the administrative law judge determined that Dr. Oesterling's opinion, that the location of the nodules in the miner's lymph nodes ruled out a diagnosis of complicated pneumoconiosis, was based on the medical criteria for diagnosing complicated pneumoconiosis, which are not congruent with the legal criteria.⁵ *Id.*

The administrative law judge further determined that Dr. Hippensteel concurred that the miner's x-rays and CT scans showed densities in both upper lobes consistent with large opacities because they were larger than one centimeter in diameter. Decision and Order at 16. In addition, the administrative law judge noted that Dr. Scott described masses of approximately four centimeters in both upper lungs on the miner's CT scans. *Id.* Further, the administrative law judge indicated that Dr. Spagnolo concurred that the autopsy revealed evidence of simple pneumoconiosis and that Dr. Spagnolo relied on Dr. Oesterling's determination that the two larger nodules were not complicated pneumoconiosis. *Id.*

⁵ In *D.S. [Sisk] v. Westmoreland Coal Co.*, BRB No. 07-1000 BLA (Sept. 30, 2008)(unpub.), the Board held that the administrative law judge, in making his findings regarding complicated pneumoconiosis, erred in neglecting to consider a pathology report with a description of a "black lymph node [one centimeter] in aggregate," or a pathology report describing lymph nodes with severe anthracosis-silicosis. *Sisk*, slip op. at 4-5.

The administrative law judge then stated that the larger nodules described by Drs. Sides and Oesterling were reflected on the miner's more recent x-rays and CT scans. Decision and Order at 16. In support of this finding, the administrative law judge referenced Dr. Sparks' interpretation of the miner's September 11, 2006 CT scan, in which he described a mass in both of the miner's upper lobes. *Id.* The administrative law judge concluded that the medical evidence was sufficient to establish that the miner had "a disease process in his lungs that, on autopsy, was found to be consistent with simple pneumoconiosis, with at least two masses that exceeded [two centimeters] in diameter, and which were large enough to appear on his x-rays and CT scans as opacities of at least one centimeter in diameter." *Id.* The administrative law judge indicated that she did not credit the opinions of Drs. Oesterling, Spagnolo, and Hippensteel because, although they acknowledged the larger masses, they concluded that they did not represent complicated pneumoconiosis because they did not meet the medical criteria. *Id.*

The administrative law judge concluded, based upon her weighing of the evidence under 20 C.F.R. §718.304(a)-(c), that the autopsy evidence, as supported by the x-ray and CT scan findings, satisfied claimant's burden of establishing that the miner had complicated pneumoconiosis at 20 C.F.R. §718.304. *Id.* The administrative law judge further found that claimant was entitled to the presumption that the miner's complicated pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(b) and that employer did not rebut it. *Id.* Therefore, the administrative law judge awarded benefits. *Id.*

III. Arguments on Appeal

Employer contends that the administrative law judge did not properly weigh the medical evidence at 20 C.F.R. §718.304. Specifically, employer asserts that the administrative law judge violated the Administrative Procedure Act (APA) 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a), by not providing findings of fact, or conclusions of law, concerning the x-ray and CT scan evidence. In addition, employer argues that the administrative law judge did not make the required equivalency determination between the CT scan and autopsy findings and the x-ray evidence. Employer also maintains that the administrative law judge erred in not adequately explaining why she gave more weight to Dr. Sides's diagnosis of complicated pneumoconiosis over Dr. Oesterling's contrary opinion. Employer states that the administrative law judge, in finding that the autopsy evidence was supported by the more recent x-rays and CT scans, misstated Dr. Oesterling's opinion and improperly relied on Dr. Sparks' interpretation of the September 11, 2006 CT scan.

Further, employer argues that the administrative law judge's reliance on an unpublished Board decision as authority was in error because it does not support the

proposition that a diagnosis of anthracosis in lymph node tissue conclusively establishes pneumoconiosis. In addition, employer notes that subsequent to *Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989), cited by the Board in *Sisk*, the court held that an equivalency analysis is required when determining whether the diagnosis of complicated pneumoconiosis by autopsy is sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis. Employer's Brief at 29-30, citing *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000). Lastly, employer asserts that the administrative law judge's consideration of the medical opinion evidence was irrational and contrary to law because she did not adequately explain her reasons for crediting the opinions of Drs. Winegar and Sides over the opinions of Drs. Oesterling, Spagnolo, and Hippensteel.

We hold that employer's contentions have merit. Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of death due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, when diagnosed by (a) 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. However, 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 that pneumoconiosis is not present, resolve any conflict, and make a finding of fact. *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Additionally, 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 appear as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Scarbro*, 220 F.3d at 255-56, 22 BLR at 2-100; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999).

We agree with employer that the administrative law judge did not explicitly make a determination as to whether the x-ray evidence established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a) and failed to explain her findings, in violation of the APA. Further, even assuming that the administrative law judge did not find the existence of complicated pneumoconiosis established at 20 C.F.R. § 718.304(a), based on her determination that none of the x-rays in evidence included findings of coal workers'

pneumoconiosis, the administrative law judge did not explain her subsequent determination that the more recent x-rays supported her conclusion that the miner had complicated pneumoconiosis. *See* Decision and Order at 16. Therefore, on remand, the administrative law judge must render an explicit finding as to whether the x-ray evidence is sufficient to establish the existence of complicated pneumoconiosis and explain her findings in compliance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Employer is also correct in alleging that the administrative law judge did not properly weigh the autopsy evidence at 20 C.F.R. §718.304(b). The administrative law judge acknowledged that Dr. Sides and Dr. Oesterling reached different conclusions upon microscopic examination of tissue removed during the autopsy of the miner's right lung, but she did not resolve the relevant conflict between their opinions; namely, Dr. Oesterling's view that, contrary to Dr. Sides's finding, the lesions were in the miner's lymph nodes, rather than lung tissue involved in respiration.⁶

In addition, we agree with employer that the administrative law judge mischaracterized Dr. Oesterling's opinion by stating that he found "two nodules or masses, exceeding [two centimeters] in diameter, with findings consistent with pneumoconiosis." Decision and Order at 15. While Dr. Oesterling acknowledged that the autopsy evidence showed micronodular interstitial coal workers' pneumoconiosis with mild interstitial pigmentation in other fields, he clearly stated that the two larger areas represented hilar and intrapulmonary lymph nodes, which were not evidence of progressive massive fibrosis or complicated pneumoconiosis. Employer's Exhibit 1.

Employer is also correct in maintaining that the administrative law judge did not properly apply the Board's holding in *Sisk*. The Board cited *Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1985) and *Bueno v. Director, OWCP*, 7 BLR 1-337 (1984), for the proposition that a diagnosis of anthracosis of the hilar lymph nodes may constitute a diagnosis of pneumoconiosis, as anthracosis appears in the definition of pneumoconiosis set forth in 20 C.F.R. §718.202. The Board further indicated, however, that whether a disease process in the hilar or parenchymal lymph nodes constituted pneumoconiosis was a question of fact for the administrative law judge to resolve in light of the evidence presented. Furthermore, the administrative law judge did not consider that in this case, unlike *Sisk*, no physician made an explicit finding of

⁶ The administrative law judge relied on *D.S.[Sisk] v. Westmoreland Coal Co.*, BRB No. 07-1000 BLA (Sept. 30, 2008)(unpub.) for this assertion. In *Sisk*, the Board held that the administrative law judge, in making his findings regarding complicated pneumoconiosis, did not consider a pathology report with a description of the miner's right lymph node as "black lymph node [one centimeter] in aggregate," or a pathology report describing lymph nodes with severe anthracosis-silicosis. *Sisk*, slip op. at 4-5.

anthracosis in the lymph nodes, as Dr. Sides did not mention the miner's lymph nodes in his autopsy report and Dr. Oesterling stated that the lymph nodes showed "marked fibrosis due to impregnation with coal dust," but opined that it was not representative of complicated pneumoconiosis. Employer's Exhibit 1, Director's Exhibit 8.

Because the administrative law judge did not properly resolve the conflict between the opinions of Drs. Sides and Oesterling, did not accurately characterize the evidence or applicable precedent, and did not adequately explain her findings, we must vacate her determination that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). *See Wojtowicz*, 12 BLR at 1-165; *Fitch v. Director, OWCP*, 9 BLR 1-45 (1986); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985) On remand, the administrative law judge must reconsider the autopsy evidence, resolve the conflict in the physicians' opinions, and explain her credibility determinations in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

The administrative law judge must also reconsider the equivalency determination that she made between the autopsy and CT scan evidence and the x-ray evidence. *See Scarbro*, 220 F.3d at 255-56, 22 BLR at 2-100. In support of her finding that the autopsy evidence was sufficient to establish the existence of complicated pneumoconiosis, the administrative law judge cited Dr. Scott's CT scan interpretations and Dr. Hippensteel's observation that the CT scan readings included diagnoses of densities exceeding one centimeter in diameter. Decision and Order at 16; Employer's Exhibits 5, 6 at 18. However, the administrative law judge did not reconcile the latter evidence with the statements by Drs. Hippensteel and Scott that the CT scans were not consistent with complicated pneumoconiosis. Further, the equivalency determination requires medical evidence establishing that the masses would appear on an x-ray, not a CT scan, as greater than one centimeter in diameter. *Scarbro*, 220 F.3d at 255-56, 22 BLR at 2-100. Therefore, on remand, the administrative law judge must make such determinations when assessing whether claimant has established the existence of complicated pneumoconiosis under 20 C.F.R. §718.304. *Id.*

We also agree with employer that the administrative law judge did not make an explicit finding as to whether the CT scan evidence was sufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c). While the administrative law judge summarized the CT scan evidence at the beginning of her decision, she did not resolve the conflict among the interpretations or determine whether the CT scan evidence, as a whole, was sufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c). Therefore, we vacate the administrative law judge's determination that complicated pneumoconiosis was established at 20 C.F.R. §718.304 based, in part, on the CT scan evidence and remand the case for further consideration. On remand, the administrative law judge must consider the CT scan evidence, resolve any inconsistencies in the interpretations, make the requisite

equivalency determination and explain her findings, in compliance with the APA. *Scarbro*, 220 F.3d at 255-56, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243-44, 22 BLR at 2-561-62; *Wojtowicz*, 12 BLR at 1-165.

In addition, we find merit in employer's argument that the administrative law judge did not properly weigh the medical opinions of Drs. Winegar, Spagnolo and Hippensteel. The administrative law judge discredited the opinions of Drs. Spagnolo and Hippensteel on the sole basis that they did not believe that the masses identified in the miner's lungs were complicated pneumoconiosis because they did not interfere with lung function. *See* Decision and Order at 31. Because this determination was based on the administrative law judge's finding at 20 C.F.R. §718.304(b), which we have vacated, we also vacate the administrative law judge's determinations regarding the medical opinions of Drs. Spagnolo and Hippensteel.

When addressing these opinions on remand, the administrative law judge must consider that the relevant inquiry under 20 C.F.R. §718.304(c) concerns whether "when diagnosed by means other than" the method set forth in 20 C.F.R. §718.304(a) and (b), the disease would be "a condition which would be reasonably expected to yield the results described" in 20 C.F.R. §718.304(a). 20 C.F.R. §718.304(c); *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561-62. Because Drs. Winegar, Spagnolo and Hippensteel reviewed x-ray interpretations, autopsy findings and CT scan readings rendered by other physicians, their conclusions regarding the significance of this evidence should be considered under the subsection applicable to that evidence. In determining the weight to be accorded to the conflicting medical evidence pursuant to Section 718.304(a)-(c), the administrative law judge must consider "the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *Sterling Smokeless Coal Company v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

IV. Conclusion

A. Invocation of the Irrebuttable Presumption

In summary, the administrative law judge must consider the relevant evidence under each subsection at 20 C.F.R. §718.304(a)-(c) to determine whether claimant has established that the miner had complicated pneumoconiosis. If the administrative law judge finds that invocation has been established under one or more, but not all subsections, she must weight the relevant evidence together to determine if invocation of the irrebuttable presumption of death due to pneumoconiosis has been conclusively demonstrated. *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gollie*, 22 BLR at 1-311; *Melnick*, 16 BLR at 1-33-34; 20 C.F.R. §§718.205, 718.304. In addition, when

determining whether the irrebuttable presumption has been invoked by either the autopsy or CT scan evidence, she must determine whether the diagnosed condition would appear as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Scarbro*, 220 F.3d at 255-56, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243-44, 22 BLR at 2-561-62.

Lastly, if the administrative law judge finds that claimant has proven that the miner had complicated pneumoconiosis, she must determine whether the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007).

B. Application of the Amendments to the Act

If the administrative law judge determines that claimant has not established invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304, she must consider whether claimant has established invocation of the rebuttable presumption of death due to pneumoconiosis under Section 411(c)(4), 30 U.S.C. §921(c)(4). If the administrative law judge finds that claimant is entitled to the presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether employer has rebutted the presumption. The administrative law judge, on remand, should allow for the submission of additional evidence by the parties to address the change in law. The submission of any additional evidence must be consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, its admission must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1). Additionally, because the administrative law judge has not yet considered this claim under the amendment to Section 411(c)(4) of the Act, we decline to address, as premature, employer's argument that the retroactive application of that amendment to this claim is unconstitutional.

Accordingly, the administrative law judge's Addendum Decision and Order Awarding Benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge