U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0415 BLA

DEWEY RATLIFF	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
APPLETON & RATLIFF COAL CORPORATION	)	DATE ISSUED: 09/30/2015
	)	
and	)	
	)	
RELIANCE IN LIQUIDATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting the Claimant's Request for Modification, Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

H. Brett Stonecipher and Mark E. Yonts (Fogle Keller Purdy PLLC), Lexington, Kentucky, for employer/carrier.

Jeffrey S. Goldberg (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: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting the Claimant's Request for Modification, Awarding Benefits (2010-BLA-05320) of Administrative Law Judge Alice M. Craft with respect to a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (BLBA).[1] The administrative law judge found that claimant established at least twenty years of underground coal mine employment and that employer was properly named as the responsible operator. She adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718, and determined that claimant established the existence of simple and complicated pneumoconiosis arising out of coal mine employment, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Based on this determination, the administrative law judge granted claimant's request for modification pursuant to 20 C.F.R. §725.310, finding that to do so would render justice under the Act. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding that it is the properly designated responsible operator. In addition, employer argues that the administrative law judge improperly limited the evidence admitted on modification, and erred in discrediting Dr. Wheeler's negative x-ray interpretations concerning the existence of complicated pneumoconiosis. Claimant responds, asserting that employer is the responsible operator and urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), also responds, contending that the administrative law judge properly found that employer is the responsible operator. The Director further asks the Board to reject employer's arguments that the administrative law judge violated employer's due process rights in applying the

[1] Claimant filed his claim for benefits on September 17, 2001, which was denied by Administrative Law Judge Alan L. Bergstrom on July 20, 2009, because claimant did not establish that he was totally disabled due to a pulmonary or respiratory impairment. Director's Exhibits 2, 65. Claimant filed a request for modification on October 13, 2009, which was referred to the Office of Administrative Law Judges (OALJ) for a hearing on January 28, 2010. Director's Exhibits 66, 72. The claim was then remanded to the district director on November 15, 2010, to address the position of the Kentucky Insurance Guaranty Association (KIGA) that it cannot be held liable if employer and its carrier are unable to pay benefits. Director's Exhibit 74. The district director returned the claim to the OALJ on May 23, 2011, without any change in the status of the designated responsible operator. Director's Exhibit 75.

evidentiary limitations on modification, and hold that the administrative law judge's decision to discredit Dr. Wheeler's x-ray interpretations does not require remand.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[3] 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).

I. Responsible Operator

The administrative law judge initially found that no party contested the fact that employer is claimant's last coal mine employer for a cumulative period of one year. Decision and Order at 6. She then considered employer's argument that, because its insurer, Reliance Insurance Company, has been liquidated, the Black Lung Disability Trust Fund (Trust Fund) is liable for any benefits awarded. *Id*. The administrative law judge determined, however, that employer did not establish that it is unable to assume liability, or that payments by the Kentucky Insurance Guaranty Association (KIGA), which is now acting on employer's behalf, have exceeded the statutory limits on its liability. *Id*. Accordingly, the administrative law judge determined that employer is the properly designated responsible operator. *Id*.

Employer contends that, when an insurer is deemed insolvent, the Kentucky Insurance Guaranty Association Act (Kentucky Act) mandates that KIGA cannot cover insurance claims arising under the Longshore and Harbor Workers' Compensation Act (LHWCA), or involving insurance provided by a government or governmental agency. Employer reasons that, because portions of the BLBA are derived from the LHWCA, KIGA appropriately denied coverage of the present claim. Employer further maintains that, for the same reason, the exclusion of coverage for claims created by a legislative act applies to the present claim. Additionally, employer contends that the Trust Fund "is

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least twenty years of underground coal mine employment, that he has simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that his simple pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibits 3, 7. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

necessarily a *de jure* and *de facto* guarantor of operators' insurance policies," which absolves KIGA from liability in this case. Employer's Reply Brief at 3.

Claimant responds, asserting that employer is the properly designated responsible operator and that the administrative law judge correctly found that KIGA is not excluded from liability. The Director also responds, contending that employer's interpretation of the Kentucky Act is incorrect and that the administrative law judge properly found that employer is the responsible operator in this case.

After reviewing the parties' arguments and the relevant facts, we affirm the administrative law judge's determination that employer is the properly designated responsible operator, as it is supported by substantial evidence and is in accordance with law. By its terms, the Kentucky Act excludes "ocean marine insurance" that covers "loss, damage, or expense arising out of or incident to ownership, operation, chartering, maintenance, use, repair, or construction of any vessel, craft, or instrumentality in use in ocean or inland waterways . . . ." KY Rev. Stat. §304.36-050(10) (2006) (West). In contrast, insurance obtained to secure liability under the BLBA covers benefits payable based on a determination that the miner is totally disabled due to pneumoconiosis arising out of coal mine employment or that the miner's death was caused by pneumoconiosis arising out of coal mine employment. 20 C.F.R. §726.203(a), (c). The mere fact that the BLBA contains certain provisions also contained in the LHWCA does not alter the BLBA's status as a distinct statute that is not subject to the Kentucky Act's exclusion of coverage for "ocean marine insurance."[4] *See* KY Rev. Stat. §§304.36-030(1(f)), 304.36-050(10(c)).

There is also no merit to employer's argument that KIGA's liability is precluded by the exclusion from coverage of "[a]ny insurance provided, written, reinsured, or guaranteed by any government or governmental agencies." KY Rev. Stat. §304.36-030(1(h)) (2006) (West). In the current case, employer's insurance policy was provided by, and written for, a nongovernmental commercial entity pursuant to the BLBA's requirement that coal mine operators purchase insurance or qualify as a self-insurer. *See* 30 U.S.C. §933(a), as implemented by 20 C.F.R. §726.1(a), (b). Moreover, we are not

[4] Moreover, the Kentucky Act specifically states that "ocean marine insurance" includes "coverage written in accordance with" the Jones Act, the Longshore and Harbor Workers' Compensation Act (LHWCA), or any other "similar statutory enactment." KY Rev. Stat. 304.36-050(10(a)-(c)). As the Black Lung Benefits Act covers benefits arising from employment in coal mining, it is not "similar" to statutes like the Jones Act and LHWCA, which provide insurance arising from "ocean marine" activities as defined in the Kentucky Act. 30 U.S.C. §901; 20 C.F.R. §718.3; KY Rev. Stat. 304.36-050(10(a)-(c)).

persuaded that the Trust Fund's payment of benefits, when there is no viable responsible operator or insurer, is equivalent to the Trust Fund insuring, guaranteeing, or reinsuring a mine operator against liability for the payment of federal black lung benefits.[5] 26 U.S.C. §9501(d); 20 C.F.R. §725.495(a)(3); *see Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1214, 24 BLR 2-155, 2-159 (10th Cir. 2009). We affirm, therefore, the administrative law judge's rational finding that KIGA is not relieved from liability for benefits in this case.[6]

II. Limitation on the X-Ray Evidence Admitted on Modification

At the hearing on June 20, 2012, the administrative law judge granted employer's motion to substitute Dr. Wheeler's negative interpretation of the March 16, 2010 x-ray, for Dr. Broudy's interpretation of the same x-ray, which was positive for simple pneumoconiosis only. Hearing Transcript at 8, 10; Employer's Exhibit 3. Employer's

---

[5] The statute that created the Trust Fund provides, in pertinent part:

> (d) Amounts in the Black Lung Disability Trust Fund shall be available, as provided by appropriation Acts, for -
>
> (1) the payment of benefits under section 422 of the Black Lung Benefits Act in any case in which the Secretary of Labor determines that -
>
> . . . B) there is no operator who is liable for the payment of such benefits[.]

[6] Because we have rejected employer's argument that the Kentucky Insurance Guaranty Association Act (the Kentucky Act) applies to claims arising under the Black Lung Benefits Act, we need not address employer's allegation that the statutory limits of $300,000 per claimant, and $10,000,000 in aggregate for all claims against an insolvent insurer, preclude coverage by KIGA. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). We also reject employer's contention that the Board should follow *C.B. v. Larry Rose Coal*, 2005-BLA-06051 (Mar. 28, 2007), a decision in which an administrative law judge held that federal black lung claims are not covered by KIGA. This case is not helpful to employer, as the presiding administrative law judge merely cited the Kentucky Act, without identifying the specific provision upon which he relied, and provided no explanation of why the unnamed provision applied to federal black lung claims. To the extent that the administrative law judge incorrectly believed that KIGA is not liable "because benefits under the federal Black Lung Act are guaranteed by the Black Lung Disability Trust Fund," we have rejected that argument for the reasons set forth, *infra* at 4-5.

revised evidence summary form, submitted subsequent to the hearing, reflected this substitution. In her Decision and Order, the administrative law judge noted that employer did not designate Dr. Broudy's positive reading on its evidence summary form and, therefore, she did not include it in her weighing of the x-ray evidence under 20 C.F.R. §718.201(a)(1). Decision and Order at 29.

Employer argues that the administrative law judge erred in failing to consider Dr. Broudy's x-ray reading on modification. Employer maintains that, because 20 C.F.R. §725.310(b) limits the evidence on modification to only one additional x-ray interpretation, "it becomes so restrictive that it violates due process." Employer's Brief at 16 (unpaginated). Employer also alleges that this limitation does not acknowledge that, although a modification proceeding must be initiated within one year of the last decision, several years might have passed during the litigation of the case, making employer's evidence outdated. Employer further argues there is no rational justification for limiting the evidence permitted in a modification proceeding to half of that allowed in the initial proceeding. Finally, employer contends, in its reply brief, that the due process rights of a party are not "protected and advanced by placing an additional burden on them to prove good cause before substantive and relevant evidence can be submitted." Employer's Reply Brief at 5 n.4.

Employer's contentions are without merit. The United States Court of Appeals for the District of Columbia Circuit, and the Board, have held that the limitations on evidence set forth in 20 C.F.R. §§725.310(b) and 725.414, are valid.[7] *See Nat'l Mining*

[7] In its reply brief, employer argues that *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 873-74, 23 BLR 2-124, 2-180-81 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001) is not controlling, as this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, which has not addressed this issue. Employer also argues that the decision in *Nat'l Mining Ass'n* was flawed because it is irrational to impose a mandatory restriction on the admissibility of evidence when this issue has traditionally been committed to an administrative law judge's discretion. Contrary to employer's allegation, cases from other jurisdictions can be instructional and persuasive, especially when the court identifies comments made by the Director, Office of Workers' Compensation Programs (the Director), during the rulemaking process, relevant to the rationale underlying the limitations. *Nat'l Mining Ass'n*, 292 F.3d at 874, 23 BLR at 2-180-81. In comments accompanying the initial publication of the proposed evidentiary limitations, the Director explained that he "does not believe that there is a significant risk of the erroneous deprivation of private interests on either side if both the claimant and the party opposing entitlement are subject to similar limitations on the quantity of the evidence they may develop." 64 Fed. Reg. 54,965, 59,994 (Oct. 8, 1999). In addition, contrary to employer's argument, the limitations do not remove the administrative law judge's

Ass'n v. Dep't of Labor, 292 F.3d 849, 873-74, 23 BLR 2-124, 2-180-81 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001); *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (en banc). Employer is also incorrect in asserting that 20 C.F.R. §725.310(b) limits the modification decision to a single x-ray film. On modification, each party may submit one affirmative x-ray interpretation, which can be of an entirely new x-ray, and one rebuttal reading of the opposing party's affirmative x-ray. In addition, "each party may submit its full complement of medical evidence allowed by 20 C.F.R. §725.414, i.e., additional evidence to the extent the evidence already submitted in the claim proceedings is less than the full complement allowed." *Rose v. Buffalo Mining Co.*, 23 BLR 1-221, 1-227 (2007). Further, as indicated *supra*, parties may exceed the evidentiary limitations if they establish good cause for doing so. 20 C.F.R. §725.456(b)(1); *see* slip op. at 6-7 n.7.

In addition, as the Director explained in the preamble to the 2001 regulations, the limitation on modification evidence was added "to correspond to similar changes in §725.414," and to "ensure that claimant and the responsible operator have an equal opportunity to present the highest quality evidence to the factfinder." 65 Fed. Reg. 79,975, 79,976 (Dec. 20, 2000); *see Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 297, 23 BLR 2-430, 2-460 (4th Cir. 2007). We hold, therefore, that the administrative law judge properly excluded Dr. Broudy's interpretation of the March 16, 2010 x-ray on the ground that it exceeded the evidentiary limitations at 20 C.F.R. §725.310(b).

III. The Existence of Complicated Pneumoconiosis

A. 20 C.F.R. §718.304(a) – The X-ray Evidence

The record contains x-rays dated January 2, 2002, September 29, 2003, August 10, 2004, March 18, 2005, October 12, 2007, May 2, 2008, and March 16, 2010. Based on a consideration of the qualifications of the physicians who read the x-rays, and her decision to discredit Dr. Wheeler's readings, the administrative law judge found that the films dated January 2, 2002,[8] September 29, 2003, August 10, 2004, October 12, 2007, and

---

discretion, as he or she may still allow additional evidence to be admitted pursuant to 20 C.F.R. §725.456(b)(1), if good cause is shown.

[8] The administrative law judge stated that she did not credit Dr. Wheeler's negative interpretation of the January 2, 2002 x-ray, because "Dr. Wheeler's comments on various x-ray reports undermine the credibility of his x-ray interpretations as a whole." Decision and Order at 34.

May 2, 2008, are positive for simple pneumoconiosis. Decision and Order at 34-36; Director's Exhibits 11, 28, 49, 63. The administrative law judge determined that the August 10, 2004 x-ray was positive for simple pneumoconiosis, despite Dr. Wheeler's negative reading,[9] because:

> The Board has recently maintained that an administrative law judge may reject, as speculative and equivocal, the opinions of employer's experts, who exclude coal dust exposure as the cause for large opacities or masses identified by x-ray, and attribute the radiological findings to conditions, such as tuberculosis, histoplasmosis or cancer, if they fail to point to evidence in the record indicating that the miner suffers or suffered from any of the alternative diseases.

Decision and Order at 35 & n.66, *quoting Boyd v. Nicks Coal Co*., 2007-BLA-05503, slip op. at 6 (Dec. 22, 2011). The administrative law judge further determined that the March 18, 2005 x-ray is negative for pneumoconiosis. Decision and Order at 36; Director's Exhibit 34. With respect to the film dated March 16, 2010, the administrative law judge found that it is positive for both simple and complicated pneumoconiosis. Decision and Order at 36; Director's Exhibit 74; Employer's Exhibit 3. The administrative law judge concluded:

> I have determined that one x-ray is negative, and six x-rays are positive for pneumoconiosis. Pneumoconiosis is a progressive and irreversible disease. As a general rule, therefore, more weight is given to the most recent evidence. The most recent x-ray submitted in conjunction with this claim, dated March 16, 2010, is positive for both simple and complicated pneumoconiosis, with no credible and admissible negative interpretations. I find the overall weight of the x-ray evidence to be sufficient to establish the presence of both simple and complicated pneumoconiosis.

---

[9] In finding the August 10, 2004 x-ray negative for pneumoconiosis, Dr. Wheeler observed:

> Probable few small nodules in lower right apex and subapical and lateral periphery RUL [right upper lung] compatible with granulomatous disease, TB or possible histoplasmosis, unknown activity. Probable focal infiltrate or fibrosis lateral portion left mid lung and possible oval 1.5 cm mass between anterior ribs 5-6. Possible 2 cm mass RUL at level anterior rib 3 where it crosses posterior rib 6. Get CT scan for better evaluation.

Director's Exhibit 28-8.

Decision and Order at 37 (footnotes omitted).

Employer contends that the administrative law judge's citation to *Boyd* requires remand, as it is unable to confirm that the case exists. In addition, employer maintains that the administrative law judge erred in giving less weight to Dr. Wheeler's negative x-ray readings, as the treatment records and other evidence support his diagnosis of granulomatous disease. Employer cites the administrative law judge's reference to a biopsy report by Dr. Bensema, noting "hyalinized fibrotic granuloma within the nodule parenchyma," a CT scan by Dr. Narra showing "scattered calcified granulomatous lesions," a CT scan by Dr. West reflecting "previous granulomatous infection," and an x-ray reading by Dr. Rogers showing "mild fibronodular scarring in the apices, mainly on the right, consistent with the claimant's granulomatous disease." Director's Exhibit 49; Claimant's Exhibits 4, 6, 8, 10. Employer further asserts that "there could be little doubt that the official stance taken by the Director" questioning the credibility of Dr. Wheeler's x-ray readings, "tainted the [administrative law judge's] opinion of Dr. Wheeler to the point where her conclusions are now highly questionable."[10] Employer's Brief at 24-25 (unpaginated). Employer's allegations are without merit.

Employer acknowledges that "it appears the [administrative law judge] was probably relying on the Fourth Circuit decision in *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010)" when citing to *Boyd*. Employer's Brief at 21-22 (unpaginated). Thus, contrary to employer's argument, remand is not required on the basis that employer could not locate the decision in *Boyd*.[11]

[10] Employer notes that, in BLBA Bulletin 14-09, issued on June 2, 2014, the Director acknowledged a joint Center for Public Integrity and American Broadcasting Company News investigative report questioning the reliability of Dr. Wheeler's x-ray readings. Employer's Brief at 21-22 (unpaginated). Employer also indicates that in the BLBA Bulletin, the Director instructed district directors not to credit Dr. Wheeler's negative readings in the absence of persuasive evidence rehabilitating his readings. *Id.*

[11] The Board located the decision in *Boyd v. Nicks Coal Co.*, 2007-BLA-05503 (Dec. 22, 2011), by entering the Office of Workers' Compensation Programs docket number into the search function at the public website for the Office of Administrative Law Judges, which produced a link to the decision in PDF (portable document format). In *Boyd*, an administrative law judge discredited Dr. Wheeler's x-ray readings because he was the only physician who found that the claimant did not have simple pneumoconiosis, and there was no evidence to support his alternative diagnoses of tuberculosis and/or histoplasmosis. The Board affirmed the administrative law judge's Decision and Order awarding benefits. *Boyd v. Nicks Coal Co.*, BRB No. 12-0214 BLA (Jan. 24, 2013) (unpub.).

We also reject employer's assertion that the evidence summarized by the administrative law judge in her decision establishes that the present case is distinguishable from *Cox*, in which the court held that it is permissible to reject a physician's opinion excluding coal dust exposure as a cause of large opacities or masses, if the alternative diagnoses that the physician offers are not supported by the evidence of record. *Cox*, 602 F.3d at 287, 24 BLR at 2-286. The administrative law judge rationally determined that "[n]either the [c]laimant's treatment records, nor the credible evidence developed in connection with the claim, ultimately support any of the alternative causes suggested for the large opacities found in the 2010 x-ray."[12] Decision and Order at 42; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325-26 (6th Cir. 2002), cert. denied, 537 U.S. 1147 (2003).

Finally, there is no merit in employer's allegation that "there could be little doubt that the official stance taken by the Director . . . tainted the [administrative law judge's] opinion of Dr. Wheeler to the point where her conclusions are highly questionable." Employer's Brief at 24-25 (unpaginated). Employer does not identify any evidence to support its contention, nor does a review of the record reveal any such evidence. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992). Therefore, we affirm the administrative law judge's discrediting of Dr. Wheeler's negative x-ray interpretations, and her finding that the x-ray evidence is sufficient to establish the existence of both simple and complicated pneumoconiosis.

[12] In a report dated June 1, 2011, Dr. Bensema identified "hyalinized fibrotic granuloma within the nodal parenchyma" but also observed "[a]nthracosis . . . with refractile material compatible with silicates." Claimant's Exhibit 8. On March 15, 2007, Dr. Narra stated in the "impression" section of his report "[f]indings most likely on the basis of pneumoconiosis . . . . Other possibilities include . . . healed granulomatous infection." Director's Exhibit 49. On December 8, 2011, Dr. West identified areas reflecting previous granulomatous infection but also observed "[d]iffuse tiny interstitial parenchymal nodular opacities in a fairly random distribution in the mid to upper lungs . . . related to the pathologic biopsy diagnoses of coal worker[s'] pneumoconiosis." Claimant's Exhibit 8. In the September 5, 2007 x-ray Dr. West identified scarring consistent with previous granulomatous disease but also indicated that "there is a questionable 8 mm nodule in the lower right lung that looks new." Claimant's Exhibit 4. Therefore, contrary to employer's assertion, the evidence does not clearly support granulomatous disease as an alternative diagnosis that would exclude a diagnosis of coal workers' pneumoconiosis.

B. 20 C.F.R. §718.304(c) – The Medical Opinion and CT Scan Evidence

The administrative law judge credited Dr. Broudy's opinion, that claimant has simple clinical pneumoconiosis, because it is consistent with the evidence the physician reviewed, including an x-ray dated September 29, 2003, which Dr. Broudy mentioned in his March 17, 2010 report and interpreted as positive for simple pneumoconiosis. Decision and Order at 40; Employer's Exhibit 1. However, the administrative law judge determined that Dr. Broudy's opinion, that claimant is not suffering from complicated pneumoconiosis, was entitled to no weight, as his negative interpretation of the March 16, 2010 x-ray is not admissible, and he did not review any of the biopsies, CT scans, or other x-ray interpretations of record. Decision and Order at 40. The administrative law judge determined, therefore, that Dr. Broudy's opinion concerning complicated pneumoconiosis "was not sufficiently well[-]documented to credit that part of his opinion." *Id*.

Employer argues that "it is clear [that the administrative law judge] felt mandated to exclude Dr. Broudy's ILO [International Labour Organization] report from the 3/16/10 x-ray film from complete consideration, whether or not the record contained 'good cause' for considering this evidence." Employer's Brief at 18 (unpaginated). Employer also alleges that the administrative law judge was not precluded from considering Dr. Broudy's interpretation of the March 16, 2010 x-ray as part of his medical report, and should have considered it when weighing the evidence as a whole.

Initially, we decline to address employer's "good cause" argument because it was not raised before the administrative law judge. *See Schneider v. S. Ry. Corp.*, 822 F.2d 22, 24 (6th Cir. 1987); *Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-312 (2003). Pursuant to 20 C.F.R. §725.414(a)(3)(i), an x-ray interpretation mentioned in an admissible medical report must also be admissible. Based on the administrative law judge's determination that Dr. Broudy's reading of the March 16, 2010 x-ray was inadmissible under 20 C.F.R. §725.310(b), she acted within her discretion in omitting the portion of Dr. Broudy's medical report containing his x-ray interpretation from consideration. 20 C.F.R. §§725.310(b), 725.414(a)(3)(i), (d); *see Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108-109 (2006) (en banc), *aff'd on recon.*, 24 BLR 1-13 (2007).

As employer has raised no additional arguments relating to the administrative law judge's finding that claimant has established the existence of complicated pneumoconiosis, we affirm this determination, and the administrative law judge's accompanying finding that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.[13] We further affirm the

[13] The administrative law judge also found that, although the biopsy evidence did not confirm the presence of complicated pneumoconiosis, it confirmed that the large

administrative law judge's finding that claimant established, pursuant to 20 C.F.R. §725.310, a change in conditions, thereby providing a basis for modification of the denial of his claim.[14] *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-291, 2-296 (6th Cir. 1994).

Accordingly, the administrative law judge's Decision and Order Granting the Claimant's Request for Modification, Awarding Benefits is affirmed.

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
GREG J. BUZZARD
Administrative Appeals Judge

_____
JONATHAN ROLFE
Administrative Appeals Judge

---

opacities viewed on the March 16, 2010 x-ray were not malignancies. Decision and Order at 33. Similarly, the administrative law judge determined that the CT scan evidence, although not positive for complicated pneumoconiosis, did not contain any findings contradicting this diagnosis. *Id*. at 37.

[14] In addition, we affirm, as unchallenged on appeal, the administrative law judge's determination that granting claimant's request for modification is in the interest of justice. *See Skrack*, 6 BLR at 1-711.