BRB No. 10-0444 BLA

STEVE J. JOHNSTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOUBLE BONUS COAL COMPANY	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 04/29/2011
	)	
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 on Initial Claim Awarding Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

William P. Margelis and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, 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 McGRANERY, Administrative Appeals Judges:

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Initial Claim Awarding Benefits (2008-BLA-06010) of Administrative Law Judge Robert B. Rae rendered on a claim filed on September 11, 2007, pursuant to 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). The administrative law judge credited claimant with twenty-one years of coal mine employment and adjudicated this claim under the regulations at 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of complicated pneumoconiosis and therefore invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in weighing the x-ray and medical opinion evidence regarding the existence of complicated pneumoconiosis. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has indicated that he will not file a substantive response to employer's appeal. The Director, however, contends that if the Board does not affirm the award of benefits, the case should be remanded for consideration pursuant to the recent amendments to the Act.

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.[1] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

In this case, the administrative law judge noted that "the parties do not dispute that the medical evidence clearly establishes at least simple pneumoconiosis," pursuant to 20 C.F.R. §718.202(a), and further found that employer "has failed to rebut the presumption

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

that [c]laimant's pneumoconiosis arose from his greater than ten years of coal mine employment," pursuant to 20 C.F.R. §718.203(b). Decision and Order at 16. However, the administrative law judge determined that "[b]ecause none of the [pulmonary function tests] or [arterial blood gas studies] have [sic] produced values that qualify under the regulations for disability and the preponderance of the medical opinions establish [sic] that [c]laimant probably retains the pulmonary capacity to return to his work in the mines, the crux of this case rests on whether [c]laimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304."[2] *Id*.

Section 411(c)(3) of the Act, implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers 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 that 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. 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 conflicts 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, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (*en banc*).

In addressing whether claimant established the existence of complicated pneumoconiosis, based on the x-ray evidence at 20 C.F.R. §718.304(a), the administrative law judge considered twelve readings of four x-rays dated October 31, 2007, March 5, 2008, August 23, 2008 and November 13, 2008. Decision and Order at 5, 17-18. The October 31, 2007 x-ray was read by Dr. Rasmussen, a B reader, and Dr. DePonte, a Board-certified radiologist and B reader, as positive for simple and complicated pneumoconiosis, while Dr. Scott, also a Board-certified radiologist and B reader, read the same film as positive for simple pneumoconiosis, but negative for

[2] We affirm, as unchallenged by employer on appeal, the administrative law judge's finding that claimant established twenty-one years of coal mine employment. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

complicated pneumoconiosis.[3] Director's Exhibit 11; Claimant's Exhibit 10; Employer's Exhibit 1. In resolving the conflict in the readings of the October 31, 2007 x-ray, the administrative law judge found that "the weight of the evidence favors a diagnosis of complicated pneumoconiosis." Decision and Order at 17.

The March 5, 2008 x-ray was read by Dr. DePonte and Dr. Alexander, a Board-certified radiologist and B reader, as positive for simple and complicated pneumoconiosis. Claimant's Exhibits 4, 9. The x-ray was also read by Dr. Scott and Dr. Scatarige, a Board-certified radiologist and B reader, as positive for simple pneumoconiosis, but negative for complicated pneumoconiosis. Employer's Exhibits 2, 10. The administrative law judge considered this x-ray to be in equipoise. Decision and Order at 17.

The August 23, 2008 x-ray was read as positive for simple and complicated pneumoconiosis by Dr. DePonte, while Dr. Scott interpreted the same film as positive for simple pneumoconiosis, but negative for complicated pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 3. The administrative law judge stated:

> These doctors have equivalent credentials and both marked the film quality down to 2. Both doctors saw r/q nodulation in all six lung zones. Dr. DePonte observed this evidence at a profusion of 3/3 and Dr. Scott observed it as 2/2. Dr. DePonte again diagnosed complicated pneumoconiosis[,] based on the presence of a Category B opacity. Dr. Scott gave a number of "possible" diagnoses, including [tuberculosis], MAC, fungal disease, histoplasmosis, sarcoid[osis], silicosis, or [coal workers' pneumoconiosis]. Because Dr. Scott's opinion of the etiology of the x-ray evidence is equivocal in nature[,] I find that it is entitled to less weight than Dr. DePonte's opinion, which gives only one specific diagnosis.

Decision and Order at 17-18. Thus, the administrative law judge considered the August 23, 2008 x-ray to be positive for complicated pneumoconiosis. *Id*. at 18.

Lastly, the November 13, 2008 x-ray was read by Dr. DePonte as positive for simple and complicated pneumoconiosis, while Dr. Scott read the film as positive for simple pneumoconiosis, but negative for complicated pneumoconiosis. Claimant's Exhibit 3; Employer's Exhibit 4. The administrative law judge noted that Dr. Scott's opinion with respect to the November 13, 2008 x-ray is "just as equivocal as his opinion regarding [c]laimant's August 23, 2008 x-ray" and found that Dr. Scott's negative

[3] Dr. Gaziano read the October 31, 2007 film for quality purposes only. Director's Exhibit 11.

reading of the November 13, 2008 x-ray was also entitled to less weight than the positive reading by Dr. DePonte of that film. *Id*. The administrative law judge then concluded that claimant established complicated pneumoconiosis based on the x-ray evidence at 20 C.F.R. §718.304(a). *Id*.

Employer argues on appeal that the administrative law judge erred in failing to explain how he resolved the conflict among the readings of the October 31, 2007 x-ray. We disagree. The administrative law judge specifically noted that, while the October 31, 2007 x-ray was read as both positive and negative for complicated pneumoconiosis by Drs. DePonte and Scott, equally qualified radiologists, it was also read by Dr. Rasmussen as positive for complicated pneumoconiosis. Noting that Dr. Rasmussen was a B reader and has "a renowned degree of experience conducting black lung examinations," the administrative law judge gave credit to the two positive readings by Drs. DePonte and Rasmussen over the one contrary, negative reading by Dr. Scott. Decision and Order at 17. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the October 31, 2007 x-ray is positive for complicated pneumoconiosis.[4] *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

Employer, however, asserts correctly that the administrative law judge erred in rejecting, as equivocal, Dr. Scott's readings of the August 23, 2008 and November 13, 2008 x-rays. Contrary to the administrative law judge's analysis, although Dr. Scott listed numerous possible etiologies for claimant's radiological findings, he specifically marked the ILO classification forms for these x-rays as showing no parenchymal abnormalities consistent with pneumoconiosis, which would be classified as Category A,

[4] We also reject employer's assertion that the administrative law judge erred in finding that the October 31, 2007 x-ray was positive for complicated pneumoconiosis because Dr. Rasmussen identified a Category A large opacity while Dr. DePonte identified a Category B large opacity. Contrary to employer's contention, the administrative law judge permissibly found that this x-ray was positive for complicated pneumoconiosis, despite the fact that the readings were not uniformly classified with respect to the category of the large opacity. The regulation at 20 C.F.R. §718.102(b) specifically provides that an x-ray may establish the existence of pneumoconiosis if it is classified as Category 1, 2, 3, A, B, or C. 20 C.F.R. §718.102(b). Additionally, complicated pneumoconiosis may be established based on an x-ray classified as showing a large opacity, Category A, B, or C. *See* 20 C.F.R. §718.304(a); *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000).

B or C. Employer's Exhibits 3, 4. Because Dr. Scott unequivocally opined that the August 23, 2008 and November 13, 2008 x-rays do not show any large opacities for complicated pneumoconiosis, we vacate the administrative law judge's award of benefits and remand this case for further consideration of Dr. Scott's negative readings, and for the administrative law judge to reconsider whether claimant has satisfied his burden to establish the existence of complicated pneumoconiosis, based on the x-ray evidence at 20 C.F.R. §718.304(a).

Pursuant to 20 C.F.R §718.304(c), the administrative law judge also considered the medical opinions of Drs. Baker, Agarwal, Rasmussen, Castle and Hippensteel, as to the existence of complicated pneumoconiosis.[5] The administrative law judge found that Dr. Baker's diagnosis of complicated pneumoconiosis was entitled to no weight because it was based on Dr. Baker's own reading of the August 23, 2008 x-ray as positive for complicated pneumoconiosis, which was not part of the record. Decision and Order at 19. The administrative law judge also found that Dr. Agarwal's opinion, that claimant has complicated pneumoconiosis, "adds little to the existing record," since Dr. Agarwal relied solely on Dr. DePonte's x-ray reading of a Category B opacity to diagnose complicated pneumoconiosis. *Id*. The administrative law judge credited Dr. Rasmussen's opinion, that claimant has complicated pneumoconiosis, as reasoned and documented. *Id*. In contrast, the administrative law judge considered Dr. Castle's diagnosis of complicated pneumoconiosis to be "so intertwined with evidence that I cannot consider," that it was entitled to little weight. *Id*. at 20. The administrative law judge also rejected Dr. Hippensteel's opinion, that claimant does not have complicated pneumoconiosis, finding that he expressed views in this case that are inconsistent with the regulations implementing the Act. *Id*. Thus, the administrative law judge found, based on Dr. Rasmussen's opinion, that claimant established the existence of complicated pneumoconiosis by medical opinion evidence at 20 C.F.R. §718.304(c). *Id*. at 21. Based on his review of all of the evidence, the administrative law judge further determined that claimant satisfied his burden to establish the existence of complicated pneumoconiosis and was entitled to invocation of the irrebuttable presumption. *Id*.

Contrary to employer's assertion on appeal, the administrative law judge specifically found that Dr. Rasmussen addressed "the discrepancies between [c]laimant's condition and his presentation" and properly credited Dr. Rasmussen's explanation that claimant's normal pulmonary function tests are not necessarily inconsistent with complicated pneumoconiosis, as respiratory impairment is not always associated with the disease. Decision and Order at 19; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-

[5] The record does not contain any biopsy evidence for consideration pursuant to 20 C.F.R. §718.304(b).

23 (4th Cir. 1997); *Clark*, 12 BLR at 1-151. Thus, we affirm the administrative law judge's finding that Dr. Rasmussen's opinion is reasoned and documented as to the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). *See Clark*, 12 BLR at 1-151.

Employer also asserts that the administrative law judge erred in giving Dr. Castle's opinion less weight, on the ground that it was based on evidence that was not of record. We disagree. Employer does not dispute the administrative law judge's finding that Dr. Castle based his opinion, that claimant does not have complicated pneumoconiosis, on his own negative reading of the March 5, 2008 x-ray, or that the reading was inadmissible because it exceeded the evidentiary limitations at 20 C.F.R. §725.414.[6] Employer's Brief in Support of Petition for Review at 16. Employer maintains, however, that because Dr. Castle's x-ray interpretation is identical to Dr. Scott's reading of the same film, and Dr. Scott's reading was admitted into the record, the administrative law judge had no rational basis for discrediting Dr. Castle's opinion. *Id*.

Contrary to employer's argument, the administrative law judge has broad discretion in considering what weight to assign to a medical opinion that is based on evidence that exceeds the evidentiary limitations, and is not otherwise admissible. If an administrative law judge determines that a physician relied upon inadmissible evidence, he has several available options, including: excluding the report, redacting the objectionable content, asking the physician to submit a new report, or factoring in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinion is entitled. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-242 n.15 (2007) (*en banc*); *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting).

In considering the impact of Dr. Castle's review of inadmissible evidence, the administrative law judge noted:

> [Dr. Castle's] opinion[,] rendered on March 14, 2008[,] discounted the possibility of complicated [coal workers' pneumoconiosis] because of inconsistencies between the two x-ray readings he had considered at that time: his and that of Dr. Rasmussen. By the time of his April 2009 deposition[,] Dr. Castle had reviewed additional medical evidence – some of which is admitted in the record and some of which is not – but still

[6] Dr. Castle examined claimant on March 5, 2008 and read the x-ray obtained in conjunction with his examination as negative for complicated pneumoconiosis. Director's Exhibit 12.

> affirmed that he "stood by what he had read [his] film as." Dr. Castle testified extensively about what appeared on [c]laimant's numerous x-ray readings, commenting that he believed some of the doctors in the case whose credentials for reading x-rays are better than his own were mistaken in diagnosing complicated [coal workers' pneumoconiosis], which he believed was really the axillary coalescence of smaller nodules. Dr. Castle testified that in his review of [c]laimant's x-ray readings, he simply looked for whether the readings of other doctors corroborated his reading.

Decision and Order at 19-20. The administrative law judge further noted that "when asked if he agreed with Dr. DePonte's positive interpretation of the November 13, 2008 film, Dr. Castle clarified again that he . . . stood by 'what [he] read the film as[,]' referring to the x-ray reading he conducted in his examination." Decision and Order at 12, *quoting* Employer's Exhibit 9. Thus, because the administrative law judge reasonably found that Dr. Castle's opinion was inextricably "intertwined" with his inadmissible x-ray reading, we affirm the administrative law judge's decision to accord Dr. Castle's opinion less weight at 20 C.F.R. §718.304(c). Decision and Order at 20; *see Keener*, 23 BLR at 1-242 n.15; *Clark*, 12 BLR at 1-151.

However, we agree with employer that the administrative law judge erred in his treatment of Dr. Hippensteel's opinion, that claimant does not have complicated pneumoconiosis. Dr. Hippensteel reviewed claimant's medical records and prepared a consultative report dated March 25, 2009. Employer's Exhibit 7. Dr. Hippensteel noted that "it is not expected that complicated pneumoconiosis, especially of category B type, would be associated with so little respiratory impairment as was found in [claimant] on multiple examinations." *Id*. He further noted that "findings on chest x-rays associated with his minimal alteration in lung function are more likely to be related to granulomatous disease as suggested by Dr. Scott[,] since granulomatous disease does not usually create a condition of progressive fibrosis that is as likely to affect function as progressive massive fibrosis from coal workers' pneumoconiosis." *Id*. In a supplemental report dated May 8, 2009, Dr. Hippensteel opined that the positive readings, by Dr. Pathak of the October 31, 2005 x-ray and by Dr. DePonte of the March 5, 2008 x-ray, show a "profusion progression of five minor categories in less than three years." Employer's Exhibit 13. Dr. Hippensteel stated that, "Dr. Liddell showed in his extensive study of coal miners that progression of x-ray changes back in the days when coal dust limits were higher than they are now, usually progressed at a rate of one minor category every five years." *Id*. Dr. Hippensteel opined that claimant's "rapid progression of x-ray changes . . . is too rapid to be secondary to coal workers' pneumoconiosis, even though a component of coal workers' pneumoconiosis as a cause for some of these abnormalities is not excluded." *Id*.

In weighing Dr. Hippensteel's opinion, the administrative law judge stated:

> The regulations implementing the Act have specifically discredited the position that rapid progression of pathology seen on x-rays is inconsistent with a diagnosis of [coal workers' pneumoconiosis], which can be both latent and progressive. *See* 65 Fed. Reg. at 79,970 (Dec. 20, 2000). Dr. Hippensteel has specified no other basis for advancing a diagnosis of granulomatous disease over a diagnosis of pneumoconiosis. While his opinion is fairly unequivocal, I do not find it to be reasonably supported by the record, which contains [c]laimant's personal and family treatment history for [coal workers' pneumoconiosis] but is void of any mention of granulomatous disease or histoplasmosis. Therefore, I find that the opinion of Dr. Hippensteel is entitled to less weight because it is not sufficiently supported by the record.

Decision and Order at 20.

Employer argues that the administrative law judge has improperly given claimant a presumption in this case that his pneumoconiosis is latent and progressive and, in turn, erred in summarily rejecting Dr. Hippensteel's explanation that claimant's rapid progression of opacities over a short period of time is more consistent with granulomatous disease than complicated pneumoconiosis.[7] We agree. Employer is correct that the Department of Labor does not take the position that simple or complicated pneumoconiosis is always progressive, only that it may be progressive. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004). The administrative law judge has failed to discuss, with any specificity, the portion of the preamble that conflicts with Dr. Hippensteel's opinion, nor does he identify the science relied upon by the Department of Labor that is in dispute with Dr. Hippensteel's opinion. We conclude, therefore, that the administrative law judge's summary finding, that Dr. Hippensteel's opinion is inconsistent with the regulations, fails to satisfy the requirements of the Administrative Procedure Act (APA), which provides that every adjudicatory decision must be

[7] The administrative law judge also discounted Dr. Hippensteel's opinion because he did not examine claimant, and employer asserts that this was error. The Fourth Circuit, however, has held that, while an administrative law judge may not discredit a physician's opinion solely because the physician did not examine the miner, it is one factor that may be taken into account in determining the weight to accord the evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533-34, 21 BLR 2-323, 2-336-37 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 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) and U.S.C. §932(a). Thus, we vacate the administrative law judge's credibility determination with regard to Dr. Hippensteel's opinion and remand this case for further consideration of the medical opinion evidence pursuant to 20 C.F.R. §718.304(c).[8]

In summary, we instruct the administrative law judge on remand to determine whether claimant has established the existence of complicated pneumoconiosis, based on the x-ray and medical opinion evidence pursuant to 20 C.F.R. §718.304(a), (c). Thereafter, the administrative law judge must weigh all of the relevant evidence in determining whether claimant has established, pursuant to 20 C.F.R. §718.304, that he is entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis. *The Daniels Co. v. Mitchell*, 479 F.3d 321, 337, 24 BLR 2-1, 2-28 (4th Cir. 2007); *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34. In rendering his findings on remand, the administrative law judge must explain his credibility determinations in accordance with the APA.

Additionally, if claimant does not establish entitlement pursuant to 20 C.F.R. §718.304, the administrative law judge must also consider this case in light of the 2010 amendments to the Act. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

Based on the filing date of this claim, the administrative law judge must consider whether claimant is entitled to invocation of the Section 411(c)(4) presumption. If the

[8] The administrative law judge also gave less weight to Dr. Hippensteel's opinion because claimant's medical records are "void of any mention of granulomatous disease or histoplasmosis." Decision and Order at 20. In reconsidering the weight to accord Dr. Hippensteel's opinion, we instruct the administrative law judge to address employer's argument that, "the fact that the [c]laimant was never treated for granulomatous disease does not necessarily mean he did [or does] not have granulomatous disease." Employer's Brief in Support of Petition for Review at 19.

administrative law judge finds that claimant has established invocation of the presumption at Section 411(c)(4), he should then consider whether employer has satisfied its burden to rebut the presumption. On remand, the administrative law judge should allow for the submission of evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lamar*, 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). Any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

_____
ROY P. SMITH
Administrative Appeals Judge

McGRANERY, J., dissenting:

I respectfully dissent from the majority's decision to vacate the award of benefits in this case, which is based on the administrative law judge's finding that the evidence establishes the existence of complicated pneumoconiosis pursuant to 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. My review of the record reveals that remand of the case is unnecessary because the administrative law judge properly considered the evidence, including Dr. Scott's x-ray readings and Dr. Hippensteel's medical opinion. Accordingly, I would affirm the administrative law judge's award of benefits.

First, the majority errs in holding that the administrative law judge improperly discredited, as equivocal, Dr. Scott's reading of the x-rays dated August 23, 2008 and November 13, 2008. The majority writes:

> Contrary to the administrative law judge's analysis, although Dr. Scott listed numerous possible etiologies for claimant's radiological findings, he specifically marked the ILO classification forms for these x-rays as showing no parenchymal abnormalities consistent with pneumoconiosis, which would be classified as Category A, B or C. Employer's Exhibits 3, 4. Because Dr. Scott unequivocally opined that the August 23, 2008 and November 13, 2008 x-ray do not show any large opacities for complicated pneumoconiosis, we vacate the administrative law judge's award of benefits.

Slip op. at 5-6. Essentially, the majority maintains that the administrative law judge may not find equivocal an opinion "list[ing] numerous possible etiologies for claimant's radiological findings" if the opinion is unequivocal about the absence of complicated pneumoconiosis. Slip op. at 5. The majority's analysis contravenes the teaching of the United States Court of Appeals for the Fourth Circuit, as well as past Board decisions, and defies common sense. Just one year ago, in *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010), the Fourth Circuit upheld the administrative law judge's discrediting of employer's doctors' x-ray interpretations as equivocal. The administrative law judge in *Cox* had explained:

> These interpretations are equivocal, in that they do not make a diagnosis or an "objective determination," but instead speculate on the various possible etiologies for the abnormalities or masses that they acknowledge are there.

Cox, 602 F.3d at 286, 24 BLR at 2-285. The administrative law judge's analysis of Dr. Scott's reading of the August 23, 2008 x-ray is the same as that of the administrative law judge in *Cox*. In this case, the administrative law judge stated:

> Dr. Scott gave a number of "possible" diagnoses, including TB, MAC, fungal disease, histoplasmosis, sarcoid[osis], silicosis, or [coal workers' pneumoconiosis]. Because Dr. Scott's opinion of the etiology of the x-ray evidence is equivocal in nature[,] I find that it is entitled to less weight than Dr. DePonte's opinion, which gives only one specific diagnosis.

Decision and Order at 17-18. The administrative law judge similarly discounted Dr. Scott's reading of the November 13, 2008 x-ray, because it was essentially identical to his reading of the August 23, 2008 x-ray. *Id*. at 18.

The Fourth Circuit observed in *Cox* that it had previously affirmed "the BRB's approval of a very similar analysis" by the same administrative law judge in another case. *Cox*, 602 F.3d at 287, 24 BLR at 2-286. The court stated:

> In *Barker v. Westmoreland Coal Co.*, BRB No. 03-0553 BLA (May 28, 2004), as here, the ALJ similarly rejected the opinions of several of the same experts that presented evidence in this case, including Drs. Wheeler, Scott, Scatarige, and Hippensteel. As in this case, the doctors opined in *Barker* that the opacities present in the claimant's medical evidence were due to diseases other than pneumoconiosis.

Id. The Fourth Circuit's summary of the evidence makes manifest that employer's doctors always state unequivocally that claimant's abnormalities are not due to complicated pneumoconiosis. In *Cox* and *Barker*, both the Fourth Circuit and the Board affirmed the administrative law judge's findings that these x-ray readings by employer's doctors, which provided possible etiologies for claimant's abnormalities, were equivocal and, therefore, properly discounted. The administrative law judge's analyses in *Barker* and *Cox* are indistinguishable from the administrative law judge's analysis in the case at bar.

The majority misses the point entirely when it holds that Dr. Scott's opinion is not equivocal because he unequivocally states that claimant does not have complicated pneumoconiosis. Like the readings properly discredited as equivocal by the administrative law judge in *Cox* and in *Barker,* Dr. Scott could identify only possible etiologies of the abnormalities he saw. Dr. Scott's insistence that the abnormalities were not complicated pneumoconiosis does not alter the fact that he equivocated on what the abnormalities were.

The Fourth Circuit explained in *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), what an employer must do, where, as here, claimant has offered x-ray evidence of complicated pneumoconiosis. The court stated that "[such] evidence can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be . . . ." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. In *Cox*, the Fourth Circuit made clear that an opinion that excludes the existence of complicated pneumoconiosis does not constitute affirmative evidence sufficient to undermine claimant's x-ray evidence of complicated pneumoconiosis if the opinion offers speculative diagnoses, unsupported by the record. *Cox*, 602 F.3d at 287, 24 BLR at 2-286. Thus, the administrative law judge's determination to discredit Dr. Scott's x-ray readings as equivocal accords with law and with reason. The majority's decision to vacate the administrative law judge's determination contravenes both law and reason.

Second, the majority errs in vacating the administrative law judge's analysis of the medical opinion evidence because he assigned less weight to Dr. Hippensteel's opinion pursuant to 20 C.F.R. §718.304(c). The record reflects that the administrative law judge properly rejected Dr. Hippensteel's opinion because he correctly found that Dr. Hippensteel expressed views on the progressive nature of pneumoconiosis that were inconsistent with science cited by the Department of Labor in the preamble to the regulations regarding the latent and progressive nature of pneumoconiosis. Decision and Order at 20. An administrative law judge may properly discount a doctor's opinion based on medical science that the Department of Labor has determined is not "in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature." *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *see also Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001).

It is clear from a review of Dr. Hippensteel's report that he excluded coal dust exposure as the cause for claimant's radiographic findings because the "x-ray changes . . . [were] too rapid to be secondary to coal workers' pneumoconiosis . . . ." Employer's Exhibit 13. The majority believes that the administrative law judge has given claimant a presumption that his pneumoconiosis is latent and progressive, hence, the majority holds that the administrative law judge must further explain his decision to assign Dr. Hippensteel's opinion less weight. The majority fails to recognize, however, that by ruling out claimant's coal mine employment as the cause of claimant's rapid radiographic changes, Dr. Hippensteel has placed a limit on the rate of progression that may be attributable to coal dust exposure, even though the Department of Labor has placed no limit on the rapidity by which a miner's pneumoconiosis may advance in time.

In this case, the administrative law judge observed correctly that "[t]he regulations implementing the Act have specifically discredited the position that rapid progression of pathology seen on x-rays is inconsistent with a diagnosis of [coal workers' pneumoconiosis], which can be both latent and progressive." Decision and Order at 20, *citing* 65 Fed. Reg. 79,970 (Dec. 20, 2000) (the Department of Labor noted that "Seaton and colleagues reported a cohort of miners who had a rapid progression of radiologic findings resembling silicosis, despite a relatively low total coal dust exposure"). Accordingly, the record reflects that the administrative law judge properly analyzed Dr. Hippensteel's opinion in light of the medical science credited by the Department of Labor. It is also noteworthy that the administrative law judge properly found that Dr. Hippensteel's opinion on causation is not supported by the record, as claimant's "personal and family treatment history is void of any mention of granulomatous disease or histoplasmosis." Decision and Order at 20. I would affirm, therefore, the administrative law judge's finding that Dr. Hippensteel's opinion is entitled to less weight. S*ee* 20 C.F.R. §718.201(c); *National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002) (NMA); *see also* 65 Fed. Reg. 79,937-79,945,

79,968-79,977; *Lane*, 105 F.3d at 173, 21 BLR at 2-46; *Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005); *Summers*, 272 F.3d at 483 n.7; 22 BLR at 2-281 n.7.

In sum, analysis of the administrative law judge's findings in light of the applicable law demonstrates that the administrative law judge properly exercised his discretion in making credibility determinations regarding Dr. Scott's x-ray readings and Dr. Hippensteel's medical opinion. In vacating these findings, the majority has exceeded its authority and violated both law and reason.

Because the administrative law judge has rationally considered all of the evidence in this case, and permissibly exercised his discretion in assessing the credibility of the medical experts, I would affirm the administrative law judge's conclusion that claimant is entitled to the irrebuttable presumption at 20 C.F.R. §718.304, and affirm the award of benefits.

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REGINA C. McGRANERY
Administrative Appeals Judge