BRB No. 02-0709 BLA

CHARLES E. COOPER
)
Claimant-Respondent)
)
v.)
)
WESTMORELAND COAL)
DATE ISSUED: 07/31/2003

COMPANY)
)
Employer-Petitioner)
)
DIRECTOR, OFFICE OF)
WORKERS= COMPENSATION)
PROGRAMS, UNITED STATES)
DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order B Awarding Benefits of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

James M. Talbert-Slagle (Legal Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Barry H. Joyner (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order B Awarding Benefits (99-BLA-1032) of Administrative Law Judge Richard E. Huddleston (the administrative law judge) on a request for modification of the denial of a duplicate claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. '901 *et seq.* (the Act).[2] The administrative law judge found that claimant established modification under 20 C.F.R. '725.310 (2000) by proving a mistake in a determination of fact in the prior denial of benefits. Specifically, the administrative law judge found that Administrative Law Judge Levin, in his Decision and Order dated May 5, 1998, had incorrectly concluded that the August 9, 1996 x-ray did not show that claimant has complicated pneumoconiosis. The administrative law judge also found that claimant established a material change in conditions at 20 C.F.R. '725.309 (2000) since the prior claim, by establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. '718.304. The administrative law judge further found, based on his consideration of all the record evidence on the merits of the claim, that claimant established invocation of the irrebuttable presumption provided at 20 C.F.R. '718.304. Accordingly, benefits were awarded. The administrative law judge also determined that claimant was entitled to benefits as of September 12, 1989. Decision and Order at

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[1] Claimant=s original application for benefits, filed in 1985, was denied by Administrative Law Judge Clement J. Kichuk in his September 12, 1989 Decision and Order, based on claimant=s failure to establish total disability under 20 C.F.R. '718.204(c) (2000). Director=s Exhibit 33. The Board affirmed this denial of benefits in *Cooper v. Westmoreland Coal Co.*, BRB No. 89-3189 BLA (Mar. 28, 1991)(unpublished). *Id.* Claimant took no further action on this claim, and filed a second claim on July 18, 1996. By Decision and Order dated May 5, 1998, Administrative Law Judge Stuart A. Levin denied benefits, finding that claimant failed to establish total disability under 20 C.F.R. '718.204(c) (2000), or to establish entitlement to the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. '718.304 (2000). Judge Levin thus determined that claimant did not establish a material change in conditions under 20 C.F.R. 725.309(d) (2000) since the prior denial (March 1991). Claimant appealed to the Board. On July 22, 1998, claimant requested that his appeal be withdrawn. Director=s Exhibit 53. The Board granted claimant=s request and dismissed the appeal by Order dated July 28, 1998. Director=s Exhibit 54. On September 2, 1998, claimant sought modification of the prior denial and submitted new evidence purporting to show that claimant has complicated pneumoconiosis. Director=s Exhibit 55. A hearing was held before Administrative Law Judge Richard E. Huddleston, who awarded benefits in his June 13, 2002 Decision and Order that is the subject of the instant appeal.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

32.[3]

On appeal, employer contends that the administrative law judge erred in finding that claimant established invocation of the irrebuttable presumption at 20 C.F.R. ' 718.304 and in finding that benefits are payable from September 12, 1989. The Director, Office of Workers= Compensation Programs (the Director), responds, and agrees with employer=s argument that the administrative law judge erred in failing to consider whether a preponderance of the evidence shows that claimant had complicated pneumoconiosis in 1985 and in failing to consider whether there is evidence that claimant did not have the disease at a later date. The Director also contends that the administrative law judge erroneously relied on evidence of complicated pneumoconiosis that predates the May 5, 1998 prior denial. The Director thus urges the Board to remand the case for redetermination of the date from which benefits are payable. Claimant responds, and urges the Board to affirm the decision below.

The Board=s scope of review is defined by statute. If the administrative law judge=s findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

20 C.F.R. ' 718.304(a): Interpretation of August 9, 1996 X-Ray by Dr. Wiot

Employer contends that the administrative law judge erred in reviewing the x-ray interpretations of the August 9, 1996 x-ray.

[3] In the AOrder@ section of the Decision and Order, however, the administrative law judge ordered employer to pay claimant benefits commencing October 1, 1985. The administrative law judge subsequently issued an Errata dated June 24, 2002, correcting the Order and directing employer to pay benefits commencing September 12, 1989.

[4] The administrative law judge noted that Judge Levin, in his May 5, 1998 Decision and Order denying benefits, credited the x-ray readings rendered by the dually qualified physicians to determine that the August 9, 1996 x-ray was negative for the existence of large opacities. The administrative law judge noted, however, that the record before him now contained two x-ray interpretations of the August 9, 1996 x-ray that were submitted subsequent to Judge Levin=s decision, namely the interpretations rendered by Drs. Kim and Wiot, both of whom are Board-certified radiologists and B readers. The administrative law judge accorded greater weight to Dr. Wiot=s finding of Category B large opacities, explaining that while both Dr. Wiot and Dr. Kim are dually qualified, Dr. Wiot=s credentials are Asuperior to the other Board Certified Radiologists, as he was instrumental in developing the B reader program itself.@ Decision and Order at 29. The administrative law judge also weighed Dr. Wheeler=s reading of the August 9, 1996 x-ray showing no large opacities, an oval 1 x 2cm mass or scar or pleural fibrosis and noting A[p]eripheral upper lobe disease favors TB over pneumoconiosis,@ Director=s Exhibit 27. The administrative law judge found that Dr. Wheeler=s opinion regarding the cause of the mass Adoes not negate its compatibility with an opacity of 1cm or greater as required by [20 C.F.R.] '718.304(a). It is also equivocal as to the cause of the mass, as indicated by his opinion that >[p]eripheral upper lobe disease favors TB over pneumoconiosis.@ Decision and Order at 28. Addressing Dr. Gaziano=s reading of the August 9, 1996 x-ray, finding Category A large opacities and indicating Abilateral apical density rule out T.B. Need see M.D.,@ Director=s Exhibit 13, the administrative law judge stated, A[h]owever, there is no evidence in the record to indicate that the Claimant has ever been diagnosed with or treated for tuberculosis.@ Decision and Order at 29. The administrative law judge concluded that Aupon further reflection of the readings of the August 9, 1996 x-ray, giving great weight to the opinion of Dr. Wiot, I find that the film is positive for complicated pneumoconiosis.@ Decision and Order at 29.

Employer contends that the administrative law judge summarily accorded greater weight to Dr. Wiot=s interpretation of the August 9, 1996 x-ray. Employer=s contention lacks merit. The administrative law judge specifically found that Dr. Wiot=s credentials were Asuperior to the other Board Certified Radiologists, as he was instrumental in developing the B reader program itself.@ Decision and Order at 29. The administrative law judge thereby rationally gave great weight to Dr. Wiot=s x-ray interpretation because of his superior radiological qualifications. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Clark v. Karst-Robbins Coal Co.*, 8 BLR 1-344

[4] The record contains nine interpretations of the August 9, 1996 x-ray. Drs. Gaziano and Ranavaya, both B readers, and Dr. Wiot, a Board-certified radiologist and B reader, each interpreted the August 9, 1996 x-ray film as positive for simple pneumoconiosis and noted either Category A or Category B large opacities. Director=s Exhibits 13, 14; Claimant=s Exhibit 6. Dr. Francke, a Board-certified radiologist and B reader, and Dr. Castle, a B reader, each read the x-ray as positive for simple pneumoconiosis. Director=s Exhibits 12, 24. Drs. Wheeler, Scott, and Kim, Board-certified radiologists and B readers, and Dr. Fino, a B reader, each read the August 9, 1996 x-ray as negative for pneumoconiosis. Director=s Exhibits 27, 42.

(1985).

20 C.F.R. ' 718.304(a): Interpretation of August 9, 1996 X-Ray by Drs. Gaziano and Wheeler

Employer argues that the administrative law judge irrationally determined that Dr. Wheeler=s interpretation of the August 9, 1996 x-ray [5] supported Dr. Wiot=s reading. Employer asserts that the administrative law judge ignored Dr. Wheeler=s opinion that the characteristics of the mass seen on the x-ray are inconsistent with pneumoconiosis, and that he erroneously found equivocal Dr. Wheeler=s explanation that peripheral upper lobe disease favors tuberculosis over pneumoconiosis.

[5] Dr. Wheeler classified the August 9, 1996 x-ray as negative, 0/1 qs, and found no large opacities. Director=s Exhibit 27. He noted:

> Few small nodules and linear scars in periphery upper lobes compatible with TB unknown activity, probably healed. Probable few tiny calcified granulomata in periphery RUL. Healed right rib fractures and right mid clavicle. Oval 1 x 2 CM mass or scar or pleural fibrosis in lateral portion right upper chest between anterior ribs -2-3 / Compare to old films or get CT scan. Peripheral upper lobe disease favors TB over pneumoconiosis.

Id.

Employer=s contention, that the administrative law judge disregarded Dr. Wheeler=s indication that A[p]eripheral upper lobe disease favors TB over pneumoconiosis,@ lacks merit. Rather, the administrative law judge determined that this opinion rendered by Dr. Wheeler was equivocal, Decision and Order at 28-29. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). We find merit, however, in employer=s contention that the administrative law judge erred in discrediting the opinions of Drs. Wheeler and Gaziano, that the August 9, 1996 x-ray shows or may show tuberculosis, insofar as the administrative law judge found that Athere is no evidence in the record to indicate that the Claimant has ever been diagnosed with or treated for tuberculosis.@ Decision and Order at 29. The record contains medical interpretations of numerous x-rays and the May 19, 1998 CT scan in which the interpreting physician found tuberculosis or healed tuberculosis or changes consistent with tuberculosis or healed tuberculosis. *See e.g.* Director=s Exhibits 25, 28, 29, 60, 64, 79, 84; Employer=s Exhibits 1, 6, 13, 19. While the administrative law judge correctly indicated that there is no evidence showing that claimant has ever been treated for tuberculosis, he erroneously found no evidence showing that claimant has ever been diagnosed with tuberculosis.[6] Consequently, we hold that the administrative law judge=s weighing of these x-ray interpretations by Drs. Wheeler and Gaziano cannot stand, and we further remand the case. On remand, the administrative law judge is instructed to clarify his characterization of the record and to reweigh the readings of the August 9, 1996 x-ray by Drs. Wheeler and Gaziano.

20 C.F.R. '718.304(a): Interpretation of August 9, 1996 X-Ray by Dr. Francke

Employer asserts that the administrative law judge failed to weigh Dr. Francke=s interpretation of the August 9, 1996 x-ray. Employer is correct. The administrative law judge did not weigh Dr. Francke=s interpretation of the August 9, 1996 x-ray, Director=s Exhibit 12, except to note that Judge Levin had credited Dr. Francke=s interpretation, along with similar interpretations of the August 9, 1996 x-ray rendered by other dually qualified physicians, in finding that the x-ray evidence did not demonstrate complicated pneumoconiosis. Decision and Order at 28. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, recognized that the administrative law judge must weigh all relevant evidence to determine whether claimant has complicated pneumoconiosis, just as the administrative law judge has a duty to weigh all relevant evidence to determine whether claimant has established the existence of pneumoconiosis pursuant to *Compton. Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-100-101 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243-244, BLR (4th Cir. 1999). The administrative law judge=s omission constitutes reversible error. 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) and U.S.C. '932(a).

[6] Moreover, the administrative law judge, by stating that there is no evidence that claimant has ever been diagnosed with or treated for tuberculosis, appears to require that employer prove an etiology for the abnormalities seen on x-ray, a burden of proof which employer does not have. *See* 20 C.F.R. '718.304.

20 C.F.R. ' 718.304(a): Interpretations of August 9, 1996 X-Ray by Drs. Wheeler, Fino, and Scott

Employer next contends that the administrative law judge summarily dismissed the negative interpretations of the August 9, 1996 x-ray rendered by Drs. Wheeler, Fino, and Scott. The administrative law judge found:

> Further, I note that the opinions of Dr. Wheeler, Dr. Fino and Dr. Scott, that the Claimant does not even have simple pneumoconiosis, are inconsistent with the findings made by Judge Kichuk, affirmed by the Benefits Review Board, and not disturbed herein, that the Claimant suffers from simple pneumoconiosis.

Decision and Order at 29. Employer notes that Dr. Fino, in his 1999 and 2000 consulting medical opinions, Employer=s Exhibits 4, 18, assumed the existence of simple pneumoconiosis.

Contrary to employer=s contention, the administrative law judge did not commit reversible error in discrediting the negative readings of the August 9, 1996 x-ray rendered by Drs. Wheeler, Fino and Scott on the basis that they run counter to the facts in this case. Employer withdrew its controversion of the issues of the existence of pneumoconiosis arising from claimant=s coal mine employment, at the March 14, 1989 hearing held before Judge Kichuk, 1989 Hearing Transcript at 67-68. Director=s Exhibit 33 at 39 (Judge Kichuk=s September 12, 1989 Decision and Order Denying Benefits at 5). The administrative law judge acknowledged this fact in his Decision and Order. Decision and Order at 8, 30, 31.[7] The administrative law judge further found that the August 9, 1996 x-ray actually demonstrated Athe presence of large opacities@ and thus Judge Kichuk=s prior finding constituted a mistake in a determination of fact under 20 C.F.R. ' 725.310 (2000). The administrative law judge properly considered the import of the x-ray evidence relevant to the existence of *simple* pneumoconiosis in determining whether the x-ray evidence was sufficient to establish that claimant has complicated pneumoconiosis. *See Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979). Accordingly, the administrative law judge acted rationally when he indicated that he was not persuaded by the negative readings of the August 9, 1996 x-ray because they run counter to the fact that claimant has pneumoconiosis, a fact to which employer in 1989 withdrew its challenge. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Further, contrary to employer=s argument, the administrative law judge=s discrediting of these

[7] The administrative law judge incorrectly indicated, however, that the Board affirmed Judge Kichuk=s finding of the existence of pneumoconiosis. Rather, the Board noted that Judge Kichuk found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to employer=s stipulation. *Cooper v. Westmoreland Coal Co.*, BRB No. 89-3189 BLA (March 28, 1991)(unpublished).

negative x-rays readings is not compromised by the fact that Dr. Fino assumed the existence of pneumoconiosis. Dr. Fino found no evidence of any pulmonary abnormality due to claimant=s inhalation of coal mine dust and indicated, A[t]his is true even if I assume that this man has medical or legal pneumoconiosis.@ Employer=s Exhibit 18. Dr. Fino thereby assumed the existence of pneumoconiosis only for purposes of expressing an opinion on the cause of claimant=s condition.

20 C.F.R. ' 718.304: Dr. Castle

Employer argues that the administrative law judge ignored Dr. Castle=s Arepeated finding,@ in his x-ray interpretations and medical opinion, that claimant has simple pneumoconiosis but not complicated pneumoconiosis. Employer=s Brief at 6. Employer states that A[d]espite the fact that Dr. Castle does not have the same qualifications as Dr. Wiot, his extensive qualifications are of record (DE 78, 44) and were not considered and weighed by the Administrative Law Judge.@ *Id.* Employer contention has merit. The administrative law judge did not indicate what weight he accorded to Dr. Castle=s positive for simple pneumoconiosis reading of the August 9, 1996 x-ray. Director=s Exhibit 24. We, therefore, further remand the case for the administrative law judge to weigh Dr. Castle=s x-ray reading and medical opinion. APA, *supra*.

20 C.F.R. ' 725.309 (2000): Invocation at 20 C.F.R. ' 718.304(a) to Establish a Material Change in Conditions

Employer alleges reversible error in the administrative law judge=s finding that claimant established complicated pneumoconiosis under 20 C.F.R. ' 718.304 and thus established a material change in conditions under 20 C.F.R. ' 725.309 (2000). The administrative law judge initially determined that the x-ray evidence is negative for complicated pneumoconiosis prior to October 1, 1985. The administrative law judge then discussed the composition of the x-ray evidence following that date, considering its chronology and the readers= qualifications, specifically noting Dr. Wiot=s findings of large opacities. Decision and Order at 30-31. The administrative law judge indicated that he was not persuaded by the readings rendered by highly qualified physicians, including B readers and Board-certified radiologists, who did not find the presence of large opacities. The administrative law judge, as he did in considering this evidence on modification, accorded less weight to the negative x-ray readings rendered by Drs. Wheeler, Scott, Kim, Fino, Shipley, Spitz, Dahhan, and Castle because they run contrary to the fact, established in 1989, that claimant has simple pneumoconiosis. *See* discussion, *supra* at p.7. The administrative law judge next stated:

> Additionally, a number of physicians have read films as revealing tuberculosis. However, there is no medical evidence that the Claimant has ever been tested as positive for tuberculosis, or that he has ever been treated for tuberculosis. Therefore, the opinions that the masses seen on the Claimant=s chest x-ray could be tuberculosis

> are speculative, and are not consistent with the absence of any other medical evidence that the Claimant has, or has ever had, or has ever been treated for tuberculosis.

Decision and Order at 31. The administrative law judge further found that readings that claimant=s lungs show a Alung mass compatible with fibrosis,@ which is larger than 1cm, support a finding of complicated pneumoconiosis under 20 C.F.R. ' 718.304. The administrative law judge found that Dr. Wheeler=s reading of the February 19, 1996 film, showing an oval 1.5 x 4-5cm mass compatible with fibrosis Ais a diagnosis of a large opacity of at least category A size.@ Decision and Order at 31.

Employer, challenging the administrative law judge=s finding at 20 C.F.R. ' 725.309 (2000) that the x-ray evidence shows that claimant has developed complicated pneumoconiosis and thus established a material change in his condition since the prior denial, argues that the administrative law judge summarily accorded great weight to Dr. Wiot=s opinion and, conversely, summarily discredited the negative x-ray readings of Drs. Wheeler, Scott, Kim, Fino, Shipley, Spitz and Dahhan which, employer asserts, show the absence of any large opacity. Employer further argues that the administrative law judge failed to recognize that Dr. Castle interpreted claimant=s x-rays as positive for simple pneumoconiosis, and misinterpreted Dr. Wheeler=s x-ray readings as showing complicated pneumoconiosis where Dr. Wheeler attributed claimant=s x-ray abnormalities to tuberculosis.

We find merit in employer=s argument that the administrative law judge erred in according less weight to the negative x-ray readings of Drs. Wheeler, Scott, Kim, Fino, Shipley, Spitz, and Dahhan. As previously discussed, *see* discussion, *supra* at p. 8, the record contains medical interpretations of numerous x-rays and the May 19, 1998 CT scan in which the interpreting physician found tuberculosis or healed tuberculosis or changes consistent with tuberculosis or healed tuberculosis. *See e.g.* Director=s Exhibits 25, 28, 29, 60, 64, 79, 84; Employer=s Exhibits 1, 6, 13, 19. Thus, while the administrative law judge correctly indicated that there is no evidence showing that claimant has ever been treated for tuberculosis, he erroneously found no evidence showing that claimant has, or has ever had, tuberculosis.

Further, employer correctly contends that the administrative law judge failed to indicate what weight he gave to Dr. Wiot=s x-ray readings in finding that the x-ray evidence establishes complicated pneumoconiosis and thus a material change in conditions at 20 C.F.R. ' 725.309 (2000), *see* Decision and Order at 30-31. APA, *supra*. Employer also correctly argues that the administrative law judge erred in including Dr. Castle in the group of physicians who found that claimant did not have simple pneumoconiosis, namely Drs.

Wheeler, Scott, Kim, Fino, Shipley, Spitz, and Dahhan. Dr. Castle actually interpreted several newly submitted x-rays as positive for simple pneumoconiosis. Director=s Exhibits 23A, 24, 63, 78. Based on the foregoing errors, we further remand this case. On remand, the administrative law judge is instructed to clarify his assessment of the relevant x-ray evidence of record and to reweigh this evidence regarding claimant=s burden to establish a material change in conditions at 20 C.F.R. ' 725.309 (2000).

20 C.F.R. ' 725.309 (2000): Invocation at 20 C.F.R. ' 718.304(c) to Establish a Material Change in Conditions

Employer argues that the administrative law judge erroneously credited the CT scan interpretations of Drs. Alexander and Cohen as showing that claimant has complicated pneumoconiosis. The administrative law judge, considering the conflicting interpretations of the May 19, 1998 CT scan,[8] found that none of the CT scan interpretations relied upon by

[8] Drs. Wheeler and Scott, both B readers and Board-certified radiologists, found healed tuberculosis. Director=s Exhibits 60, 64.

Dr. Kim, a B reader and Board-certified radiologist, found a 2cm irregular nodule in the right upper lobe and a 2cm irregular mass in the left upper lobe. Dr. Kim indicated that these findings in both upper lobes are compatible with old healed tuberculosis. Employer=s Exhibit 6.

Dr. Fishman found a nearly 2cm lesion in the right upper lobe and a 2.5 to 3 cm lesion in the left upper lobe. He indicated that the pattern suggested an inflammatory process such as tuberculosis or histoplasmosis. Dr. Fishman added:

> Conglomerate masses in pneumoconiosis such as silicosis is considered but typically the masses are more central and there is more scarring and parenchymal fibrosis in the lung. Also, the nodularity we are seeing is not very significant and the mid and lower lung zones appear unremarkable. This would make it less likely. I therefore favor that this probably represents an inflammatory etiology like TB. If old films are available for comparison, this would be very helpful.

Employer=s Exhibit 13.

Dr. Patel, a B reader and Board-certified radiologist, and Dr. Alexander, a B reader

employer reflects a finding of simple pneumoconiosis, the existence of which has been established in this case. The administrative law judge found that the CT scan readings of Drs. Kim and Fishman Aare equivalent of an x-ray opinion that the Claimant has opacities of at least 1cm in size, if not greater, within the meaning of [20 C.F.R] '718.304(c).@ Decision and Order at 32. The administrative law judge then addressed the fact that Drs. Patel, Alexander and Cohen read the CT scan as showing complicated pneumoconiosis. The administrative law judge specifically found that Dr. Alexander is the only physician to read the CT scan who is Board-certified in nuclear medicine as well as in radiology, and is also a B reader. The administrative law judge stated, ADr. Alexander found the CT scan revealed AComplicated Coal Worker=s (sic) Pneumoconiosis, category A, p/q, 2/2, ax, fr. No evidence of healed tuberculosis.@ Decision and Order at 32. The administrative law judge thus found that a preponderance of the evidence establishes the existence of complicated pneumoconiosis, Aand the equivalent of an x-ray that the Claimant has opacities of at least 1cm in size, if not greater, within the meaning of [20 C.F.R.] '718.304(c).@ Decision and Order at 32. The administrative law judge further indicated that upon his consideration of all the evidence of record, the preponderance of the evidence establishes that claimant has x-ray evidence of large opacities of complicated pneumoconiosis, of at least category A. The administrative law judge thus found claimant entitled to the irrebuttable presumption provided at 20 C.F.R. '718.304. Decision and Order at 32.

Employer argues that Drs. Alexander and Cohen purport to classify the large opacities seen on the May 19, 1998 CT scan using the International Labour Organization (ILO) classification system whereas, employer asserts, the ILO classification system is not properly used for evaluating findings resulting from CT scans. Employer thus argues that the CT scan interpretations of Drs. Alexander and Cohen are not credible and, to the extent the

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who is Board-certified in radiology and in nuclear medicine, both found Category A opacities and complicated pneumoconiosis. Director=s Exhibit 55, Claimant=s Exhibit 1. Dr. Patel did not include any measurements of the large opacities he classified as Category A and complicated pneumoconiosis, Director=s Exhibit 55, whereas Dr. Alexander specifically found that the maximum diameter of the right upper zone large opacity is 20mm and the maximum diameter of the left upper zone large opacity is 30mm, Claimant=s Exhibit 1.

Dr. Cohen, a B reader, read the CT scan as showing bilateral large opacities measuring between 2.5cm and 3cm Ain the largest dimensions,@ and found that the CT scan was consistent with simple and complicated pneumoconiosis. Claimant=s Exhibit 4. Dr. Cohen, in the Roentgenographic Interpretation form attached to his narrative medical report, classified these findings as 2/1 qp simple pneumoconiosis with Category A large opacities. *Id.*

administrative law judge relied on these interpretations, his weighing of the CT scan evidence cannot be affirmed. Employer also asserts that the administrative law judge failed to consider and weigh the relative qualifications of the physicians who read the CT scan evidence.

Substantial evidence in the record, including the CT scan interpretations by Drs. Alexander, Patel, and Cohen, supports the administrative law judge=s finding that the weight of the CT scan evidence shows that claimant has complicated pneumoconiosis. The administrative law judge, in weighing the conflicting CT scan interpretations of record, properly found that Dr. Alexander is the *only* physician who read the May 19, 1998 CT scan who is board-certified in nuclear medicine as well as in radiology. *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987). The administrative law judge=s reliance on the CT scan interpretations by Drs. Alexander, Cohen, and Patel is consistent with existing law. 20 C.F.R. '718.304(c); *Scarbro, supra*; *Melnick, supra*. We, therefore, affirm the administrative law judge=s finding that the weight of the CT scan evidence shows that claimant has complicated pneumoconiosis.

20 C.F.R. '725.503: Date From Which Benefits Are Payable

Employer contends that the administrative law judge=s determination that benefits are payable as of September 12, 1989 cannot stand as it predates the July 18, 1996 filing date of the instant duplicate claim. The Director responds, asserting that a claimant can properly establish a date from which benefits are payable that predates the filing date of his duplicate claim (though a claimant could not, in a duplicate claim, obtain benefits for any period before the denial of his prior claim.) The Director cites to comments pertaining to the newly promulgated regulation at 20 C.F.R. '725.503, which indicate that a claimant may prove that benefits are payable as of a date that falls before the date he filed his application for benefits. 65 Fed. Reg. 80012 (December 20, 2000).

The newly promulgated regulation at 20 C.F.R. '725.503(d)(2) distinguishes, in a claim in which benefits are awarded pursuant to 20 C.F.R. '725.310, that the date from which benefits are payable is determined depending on whether claimant establishes a mistake in fact or a change in conditions. For a mistake in fact, the regulation indicates that benefits are payable beginning with the month of onset of total disability due to pneumoconiosis, or, if that fact cannot be determined, then benefits are payable as of the month in which the claim was filed. For a change in conditions, benefits are payable as of the month of onset of total disability due to pneumoconiosis, provided that no benefits are payable for any month prior to the effective date of the most recent denial of the claim by a district director or administrative law judge. 20 C.F.R. '725.503(d)(2).

The administrative law judge, in his Decision and Order B Awarding Benefits, found that claimant established a mistake in a determination of fact under 20 C.F.R. ' 725.310 (2000), and a material change in conditions under 20 C.F.R. ' 725.309 (2000) by establishing that he has complicated pneumoconiosis. The administrative law judge determined, based on the fact that claimant established a material change in conditions under 20 C.F.R. ' 725.309 (2000), that benefits are payable from September 12, 1989, the date of Judge Kichuk=s Decision and Order denying benefits in the original claim. The administrative law judge did not additionally discuss the import of the fact that claimant established a mistake in a determination of fact under 20 C.F.R. ' 725.310 (2000). Consequently, we vacate the administrative law judge=s determination that benefits are payable from September 12, 1989 and further remand the case.

Employer next contends that the administrative law judge did not determine the date from which benefits are payable by applying a preponderance of the evidence standard. Employer asserts that the administrative law judge failed to consider all the readings of the October 1, 1985 x-ray. Employer also argues that the evidence shows that claimant did not have complicated pneumoconiosis subsequent to September 1989. The Director agrees with employer=s argument that the administrative law judge failed to determine the date from which benefits are payable by the preponderance of the evidence standard. The Director, citing *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), further argues that it was error for the administrative law judge to rely on evidence of complicated pneumoconiosis that predates Judge Kichuk=s May 5, 1998 prior denial of the instant claim.

Employer=s contention has merit. Employer correctly contends that the administrative law judge did not determine the date from which benefits commence by applying a preponderance of the evidence standard, and must do so on remand. Further, as the Director correctly argues, it was error for the administrative law judge to rely on evidence of complicated pneumoconiosis that predates Judge Kichuk=s May 5, 1998 denial of the instant claim. *See Rutter, supra*.

In light of the foregoing, if on remand, the administrative law judge again awards benefits, he is instructed to consider the relevant evidence to determine the date from which benefits are payable pursuant to 20 C.F.R. ' 718.503(d)(2), if reached.

Accordingly, the administrative law judge=s Decision and Order B Awarding Benefits is vacated in part, 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

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge