BRB No. 09-0375 BLA

ROBERT L. WYATT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RANGER FUEL CORPORATION	)	DATE ISSUED: 01/27/2010
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (03-BLA-6253) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) awarding benefits on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Federal

[1] Claimant filed his first claim on April 5, 1988. Director's Exhibit 1. It was finally denied by a claims examiner on September 15, 1988 because the evidence did not establish that claimant was totally disabled by pneumoconiosis. *Id*. Claimant filed his second claim (a duplicate claim) on July 3, 1990. *Id*. On May 18, 1993, Administrative Law Judge Edward Terhune Miller issued a Decision and Order denying benefits because the evidence did not establish that claimant was totally disabled from a respiratory or pulmonary impairment or that he was totally disabled due to pneumoconiosis and, thus, the evidence did not establish a material change in conditions. *Id*. Claimant filed this

Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case is before the Board for the third time.[2] Pursuant to the last appeal filed by employer, the Board affirmed the administrative law judge's finding that the new x-ray evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The Board also affirmed the administrative law judge's finding that, under *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the new evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a). However, the Board vacated the administrative law judge's finding that the new evidence established the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) and, thus, it vacated his finding that the new evidence established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The Board instructed the administrative law judge to consider all of the new x-ray evidence to determine whether the presence of complicated pneumoconiosis was established at Section 718.304(a). The Board also instructed the administrative law judge to weigh together all of the new evidence relevant to the presence or absence of complicated pneumoconiosis at Section 718.304, if he found that the new x-ray evidence established the presence of complicated pneumoconiosis. Further, the Board rejected employer's contention that the administrative law judge erred in declining to credit the two CT scan readings, which he found were in equipoise, over the conventional x-rays with regard to the presence of complicated pneumoconiosis. Lastly, in view of its disposition of the case at Section 718.304, the Board vacated the administrative law judge's finding that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *R.W.* [*Wyatt*], BRB No. 07-0276 BLA (Dec. 21, 2007)(unpub.).

On remand, the administrative law judge found that the new x-ray evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), thereby establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the new x-ray evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). Employer also contends that the administrative law judge erred in failing to

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claim on August 21, 2001. Director's Exhibit 3.

[2] The full procedural history of this case is set forth in the Board's decisions in *Wyatt v. Ranger Fuel Corp*., BRB No. 05-0371 BLA (Jan. 30, 2006)(unpub.), and *R.W.* [*Wyatt*] *v. Ranger Fuel Corp*., BRB No. 07-0276 BLA (Dec. 21, 2007)(unpub.).

weigh together all the new evidence in finding the presence of complicated pneumoconiosis. Lastly, employer contends that the Board should assign the case to a different administrative law judge on remand. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because the evidence did not establish that claimant was totally disabled from a respiratory or pulmonary impairment or that he was totally disabled due to pneumoconiosis. Consequently, in order to establish a change in an applicable condition of entitlement, claimant had to submit new evidence establishing one of these elements. 20 C.F.R. §725.309(d)(2), (3); *see generally Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227, 2-235-237 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis 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

[3] The record indicates that claimant was last employed in the coal mining industry in West Virginia. Director's Exhibits 1, 4. Accordingly, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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

Employer initially contends that the administrative law judge erred in finding that the new x-ray evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). Specifically, employer argues that the administrative law judge erred in according greater weight to x-ray readings of Drs. Patel, DePonte, Willis, and Alexander, than to the contrary x-ray readings of record, as "[he] failed to explain his rationale for concluding the x-ray evidence established the existence of complicated pneumoconiosis." Employer's Brief at 7. Employer maintains that the administrative law judge violated the requirements of the Administrative Procedure Act (APA).

The administrative law judge considered the nine interpretations of five x-rays dated October 29, 2001,[4] March 13, 2002, August 31, 2002, November 5, 2002, and February 13, 2003. Dr. Patel, a B reader and a Board-certified radiologist, read the October 29, 2001 x-ray as 2/2 for small opacities and Category A for large opacities, Director's Exhibit 18, while Dr. Wheeler, a B reader and a Board-certified radiologist, read the same x-ray as 0/1 for small opacities and Category 0 for large opacities, Employer's Exhibit 7. Dr. Zaldivar, a B reader, read the March 13, 2002 x-ray as 3/2 for small opacities and Category 0 for large opacities. Director's Exhibit 13. Dr. DePonte, a B reader and a Board-certified radiologist, read the August 31, 2002 x-ray as 2/3 for small opacities and Category A for large opacities, Director's Exhibit 21; Claimant's Exhibit 2, while Dr. Wheeler, a B reader and a Board-certified radiologist, read the same x-ray as 0/1 for small opacities and Category 0 for large opacities, Employer's Exhibit 7.

[4] Dr. Binns, a B reader and a Board-certified radiologist, read the October 29, 2001 x-ray for quality only, classifying its readability as quality 2. Director's Exhibit 19.

Dr. Alexander, a B reader and a Board-certified radiologist, read the February 13, 2003 x-ray as 3/2 for small opacities and Category A for large opacities, Director's Exhibit 18, while Dr. Wheeler, a B reader and a Board-certified radiologist, read the same x-ray as 0/1 for small opacities and Category 0 for large opacities, Employer's Exhibit 7.

In weighing the conflicting x-ray evidence at Section 718.304(a),[5] the administrative law judge stated:

> Taking into consideration the readers' qualifications, the dates of the films, and the quality of the films, I find that the x-ray evidence establishes the presence of complicated pneumoconiosis. I give the most weight to the physicians who are both [B]oard certified radiologists and B-readers. I find that Dr. Zaldivar's credentials as a B-reader, without the additional [B]oard certification as a radiologist, render his interpretations less probative than the interpretations made by dually qualified readers.

Decision and Order on Remand at 5.

The administrative law judge also gave less probative value to Dr. Zaldivar's reading of the March 13, 2002 x-ray than to the other x-ray readings because its readability was classified as quality 3, while the readability of the other x-rays was classified as either quality 1 or 2. The administrative law judge additionally gave less weight to Dr. Wheeler's readings of the October 29, 2001, August 31, 2002, and February 31, 2004 x-rays "as his interpretations are inconsistent with the record as a whole and specifically with the medical opinion evidence." *Id*. The administrative law judge then gave greater weight to the readings of Drs. Patel, DePonte, Willis, and Alexander, based on his evaluation of the readings by dually-qualified radiologists. Hence, based on his finding that "the four more probative x-rays[] show category 'A' opacities," *id*. (footnote omitted), the administrative law judge found that the preponderance of the x-ray evidence established the presence of complicated pneumoconiosis.

[5] The administrative law judge noted, "[w]eighing the x-ray evidence on a strictly numerical basis, there are more x-ray interpretations that did not diagnose complicated pneumoconiosis [than] there are interpretations positive for complicated pneumoconiosis." Decision and Order on Remand at 4. Nevertheless, the administrative law judge stated that "an administrative law judge is not required to defer to the numerical superiority of x-ray evidence," *id*., and he stated that "[t]he number of x-ray interpretations, along with the readers' qualifications, dates of film, quality of film and the actual reading must be considered," *id*. at 5.

Employer argues that the administrative law judge erred in failing to explain why he gave greater weight to Dr. Willis's reading of the November 5, 2002 x-ray than to Dr. Wiot's reading of the same x-ray. As noted above, both Dr. Willis and Dr. Wiot read the November 5, 2002 x-ray. The administrative law judge gave greater weight to Dr. Willis's finding that the x-ray showed the presence of complicated pneumoconiosis than to Dr. Wiot's contrary x-ray finding. The administrative law judge stated, "[i]n evaluating the interpretations of the dually-qualified readers, I give the most weight to the interpretations of Drs. Patel, DePonte, Willis, and Alexander." Decision and Order on Remand at 5. Like Dr. Willis, Claimant's Exhibit 4, Dr. Wiot is dually qualified as a B reader and a Board-certified radiologist, Director's Exhibit 14. However, Dr. Wiot is also a professor of radiology at the University of Cincinnati. Director's Exhibit 14. Furthermore, as argued by employer, Dr. Crisalli testified that Dr. Wiot assisted in the development of the ILO classification system. Employer's Exhibit 12 (Dr. Crisalli's Deposition at 34). The administrative law judge, however, did not consider Dr. Wiot's academic credentials or his expertise in the ILO classification system. *See generally Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006)(*en banc*) (McGranery and Hall, JJ., concurring and dissenting) (holding administrative law judge may rely on a reader's academic qualifications in radiology and his involvement in the B reader program as bases for according greater weight to the readings rendered by that reader); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Ally v. Riley Hall Coal Co.*, 6 BLR 1-376 (1983)(recognizing administrative law judge may find that C readers are better qualified than B readers).

The APA, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge did not explain why he found that Dr. Willis's x-ray reading outweighed Dr. Wiot's contrary x-ray reading, based on their respective qualifications. *Wojtowicz*, 12 BLR at 1-165. Consequently, the administrative law judge erred in giving greater weight to Dr. Willis's reading of the November 5, 2002 x-ray merely because Dr. Willis is a dually-qualified radiologist, given Dr. Wiot's comparable qualifications.[6]

[6] On remand, in addition to considering the physicians' qualifications as B readers and Board-certified radiologists, the administrative law judge should also consider their qualifications as C readers, their credentials as professors in radiology, and their expertise in the ILO classification system, when weighing the x-ray readings at Section 718.304(a). *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006)(*en banc*) (McGranery and Hall, JJ., concurring and dissenting); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Ally v. Riley Hall Coal Co.*, 6 BLR 1-376 (1983).

Employer also argues that the administrative law judge erred in failing to explain why he credited Dr. Willis's reading of the November 5, 2002 x-ray, as the doctor's comments in a narrative regarding this reading were equivocal. Employer maintains that Dr. Willis's comments indicated that the doctor "was less than certain" that the November 5, 2002 x-ray showed complicated pneumoconiosis. Employer's Brief at 8. Dr. Willis, in his report, classified the large opacities on the November 5, 2002 x-ray as Category A. In his narrative report of the November 5, 2002 x-ray, Dr. Willis stated that "[t]here are large opacities of size [A] in the perihilar regions bilaterally." Claimant's Exhibit 4. However, Dr. Willis further stated that "[i]t would be helpful to compare the current films with the old studies to attempt to confirm stability of the areas of confluent disease in the perihilar regions to excluded (sic) developing underlying mass." *Id*. In his decision, the administrative law judge noted only that "Dr. Willis, a [B]oard certified radiologist and B-reader, read the November 5, 2002, x-ray as category 'A' complicated pneumoconiosis." Decision and Order on Remand at 4. However, the administrative law judge did not consider Dr. Willis's comments concerning the large opacities that he found on the November 5, 2002 x-ray. Thus, because the administrative law judge did not consider whether Dr. Willis's comments undermined his x-ray finding that the November 5, 2002 x-ray showed complicated pneumoconiosis, *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991) (*en banc*), we hold that the administrative law judge erred in failing to explain why he credited Dr. Willis's reading of the November 5, 2002 x-ray at Section 718.304(a). *U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

Employer also argues that the administrative law judge erred in giving no weight to Dr. Zaldivar's reading of the March 13, 2002 x-ray. Contrary to employer's assertion, the administrative law judge properly gave less weight to Dr. Zaldivar's reading of the March 13, 2002 x-ray than to the contrary readings of the other x-rays by physicians who are B readers and Board-certified radiologists, because "Dr. Zaldivar's credentials as a B-reader, without the additional [B]oard certification as a radiologist, render his interpretations less probative than the interpretations made by a dually qualified reader." *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).[7]

[7] The administrative law judge also gave less weight to Dr. Zaldivar's reading of the March 13, 2002 x-ray because it was the only x-ray classified as quality 3, as the other x-rays of record were classified as quality 1 or 2. However, while Dr. Zaldivar noted a higher quality reading for the March 13, 2002 x-ray than the quality readings for the other x-rays, Dr. Zaldivar did not classify this x-ray as unreadable. *Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984). Thus, the administrative law judge erred in failing to provide an adequate explanation for discounting Dr. Zaldivar's reading of the March 13, 2002 x-ray, based on its quality classification.

Employer additionally argues that the administrative law judge erred in failing to consider Dr. Wheeler's credentials. We agree. In his summary of the x-ray evidence, the administrative law judge acknowledged that Dr. Wheeler was dually qualified as a B reader and a Board-certified radiologist. Decision and Order on Remand at 4. However, in weighing the conflicting x-ray evidence, the administrative law judge did not consider that Dr. Wheeler was a dually-qualified radiologist. The administrative law judge stated that "Dr. Wheeler was the only physician who read the x-rays as negative for any form of pneumoconiosis even though four dually qualified readers, two B-readers, and all of the medical reports unanimously found simple clinical pneumoconiosis." *Id*. at 5. Furthermore, as employer asserts, the administrative law judge did not consider that Dr. Wheeler is a professor of radiology at The Johns Hopkins Hospital Medical Institutions. Employer's Exhibits 1, 7. Thus, we hold that the administrative law judge erred in failing to consider Dr. Wheeler's credentials.

Employer further argues that the administrative law judge erred in giving less weight to Dr. Wheeler's readings of the October 29, 2001, August 31, 2002, and February 13, 2003 x-rays because he found that they were "inconsistent with the record." Employer's Brief at 10. Employer maintains that Dr. Wheeler was not the only physician who found no complicated pneumoconiosis because Drs. Zaldivar and Wiot found that the x-rays they read showed no complicated pneumoconiosis and Drs. Zaldivar and Crisalli opined that claimant does not have complicated pneumoconiosis. In considering the x-ray evidence at Section 718.304(a), the administrative law judge stated, "I also give Dr. Wheeler's readings less weight as his interpretations are inconsistent with the record as a whole and specifically with the medical opinion evidence." Decision and Order on Remand at 5. Although Section 718.304 does not provide alternative means of establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis, the pertinent regulation requires the administrative law judge to first evaluate the evidence in each category and then weigh together the categories at Sections 718.304(a), (b), and (c), prior to invocation. *See* 20 C.F.R. §718.304(a), (b), (c); *Melnick*, 16 BLR at 1-33. Here, the administrative law judge erred in considering the medical opinion evidence in his evaluation of the x-ray evidence at Section 718.304(a). *Melnick*, 16 BLR at 1-33. Consequently, the administrative law judge erred in giving less weight to Dr. Wheeler's readings of the October 29, 2001, August 31, 2002, and February 13, 2003 x-rays at Section 718.304(a) because he found that they were inconsistent with the medical opinion evidence.

Further, as employer asserts, the administrative law judge erred in failing to explain why he gave greater weight to the readings of the October 29, 2001, August 31, 2002, and February 13, 2003 x-rays by Drs. Patel, DePonte, and Alexander over the contrary x-ray readings of the same x-rays by Dr. Wheeler to find that a preponderance of the x-ray evidence established the presence of complicated pneumoconiosis. *Wojtowicz*, 12 BLR at 1-165.

Employer also argues that the administrative law judge erred in finding that the x-ray evidence was superior to the CT scan evidence in determining that the presence of complicated pneumoconiosis was established. Employer asserts that the administrative law judge substituted his opinion for that of a highly-qualified radiologist in comparing the x-ray evidence with the CT scan evidence. At Section 718.304(a), the administrative law judge summarized the new x-ray evidence and then stated:

> As I discussed in my prior Decision and Order on Remand, I found the x-ray evidence to be the superior evidence under the [r]egulations in determining whether [c]laimant has complicated pneumoconiosis because there are no ILO guidelines for CT scans and consequently no objective guidance for evaluating and assigning weight to CT scan interpretations. For these reasons, I continue to find the x-ray evidence superior under the [r]egulations.

Decision and Order on Remand at 4.

However, as discussed, *supra*, the administrative law judge erred in weighing the x-ray evidence and the CT scan evidence together at Section 718.304(a). *Melnick*, 16 BLR at 1-33. Rather, the administrative law judge should have first considered the x-ray evidence at Section 718.304(a), as well as the CT scan and medical opinion evidence at Section 718.304(c), and then weighed all of the relevant evidence at Section 718.304(a) and (c) together. *Id*.

Moreover, we note that, even if he had weighed together all of the evidence at Sections 718.304(a) and (c), after he first weighed the evidence in each category, the administrative law judge did not provide a valid basis for finding that the x-ray evidence was superior to the CT scan evidence. *Wojtowicz*, 12 BLR at 1-165. Unlike the regulations relating to x-ray evidence, *see* 20 C.F.R. §§718.201 and 718.202(a), the regulation relating to CT scan evidence does not provide that this type of medical test must be classified according to the ILO classification system, *see* 20 C.F.R. §718.107. Further, as employer asserts, the administrative law judge did not consider Dr. Wheeler's deposition testimony regarding the differences between an x-ray interpretation and a CT scan interpretation. Dr. Wheeler stated:

> The CT scan, the routine CT scan, is - - provides more information in general than a routine chest x-ray, and it's the preferred technique for going after the pleura for presence or absence of pleural plaques. The high resolution CT scan has for years been the gold standard for distinguishing early interstitial lung disease from normal branching, tapering vessels.

Employer's Exhibit 7 (Dr. Wheeler's Deposition at 12). Dr. Wheeler additionally stated, "So basically, with the CT scan, we get rid of a lot of the uncertainties that are inherent in a single PA view or even a PA and lateral view." Employer's Exhibit 7 (Dr. Wheeler's Deposition at 13). Thus, the administrative law judge did not adequately explain why he found that the x-ray evidence was superior to the CT scan evidence. *Wojtowicz*, 12 BLR at 1-165.

In view of the foregoing, we vacate the administrative law judge's finding that the new evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a) and remand the case for further consideration of all the x-ray evidence of record in accordance with the APA.

Employer next contends that the administrative law judge erred in failing to weigh together all the relevant evidence, in determining that the evidence established the presence of complicated pneumoconiosis at Section 718.304. Specifically, employer argues that the administrative law judge erred in failing to consider the CT scan and medical opinion evidence on the issue of complicated pneumoconiosis.

After finding that the new x-ray evidence established the presence of complicated pneumoconiosis at Section 718.304(a), the administrative law judge stated:

> I find the newly-submitted evidence most indicative of [c]laimant's current condition, and find that the preponderance of the newly-submitted evidence establishes the presence of complicated pneumoconiosis. Thus, [c]laimant is entitled to the irrebuttable presumption that he is totally disabled by pneumoconiosis and has established all elements of entitlement.

Decision and Order on Remand at 6.

As discussed, *supra*, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis at Sections 718.304(a), (b), and (c) prior to invocation. *See* 20 C.F.R. §718.304(a), (b), (c); *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33. In this case, however, the administrative law judge did not weigh the x-ray, CT scan, and medical opinion evidence at Sections 718.304(a) and (c) together. Rather, the administrative law judge focused on whether the x-ray evidence established the presence of complicated pneumoconiosis at Section 718.304(a). Thus, the administrative law judge erred in finding that the new evidence established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304. *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33. Moreover, the administrative law judge did not specifically identify or discuss the new evidence that he found established the

presence of complicated pneumoconiosis, as required by the APA. *Brewster v. Director, OWCP*, 7 BLR 1-120, 1-123 (1984); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

On remand, the administrative law judge must first evaluate the evidence in each of the relevant categories, and then weigh all of the relevant evidence together prior to finding invocation of the irrebuttable presumption.

Employer finally contends that the case should be assigned to a different administrative law judge on remand. Employer maintains that "this case has reached the point of administrative gridlock that warrants a 'fresh look' from a different [administrative law judge]" and that "[s]ending this claim back to the same [administrative law judge] for a fourth time is not in the interest of justice." Employer's Brief at 32. Employer's request is rejected. The record does not reflect that the administrative law judge is unfair or partial to claimant, or that he has demonstrated a bias against employer. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992). Thus, we reject employer's contention that the case should be reassigned to another administrative law judge.

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

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge