

BRB No. 04-0308 BLA

PAULINE PRATER)
(on behalf of FERRELL PRATER, deceased))
)
 Claimant-Respondent)
)
 v.)
)
 KNOX CREEK COAL CORPORATION) DATE ISSUED: 12/28/2004
)
 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 – Awarding Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Helen H. Cox (Howard M. Radzely, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (00-0762) of Administrative Law Judge Mollie W. Neal on modification of a miner’s claim¹ 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 This case is before the Board for the second time. In a Decision and Order issued on June 11, 1996, Administrative Law Judge Pamela Lakes Wood credited the miner with “at least” twenty-four years of coal mine employment. Director's Exhibit 34 at 10. Judge Wood found that the miner failed to establish the existence of complicated pneumoconiosis pursuant to Section 718.304 (2000). *Id.* at 14. However, Judge Wood also found that the miner established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), 718.203(b) (2000) and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204 (2000) and, therefore, awarded benefits. *Id.* at 14-18.

In response to employer’s appeal, the Board affirmed Judge Wood’s findings that the miner failed to establish the existence of complicated pneumoconiosis and that the miner established the existence of simple pneumoconiosis arising out of coal mine employment and total respiratory disability. Director's Exhibit 42 at 7-8, 10-11. However, the Board vacated Judge Wood’s finding that total disability due to pneumoconiosis was established, and remanded the case for reconsideration of that issue. *Id.* at 10.

On remand from the Board, Judge Wood first remanded the case to the district director for further evidentiary development and then denied benefits because consideration of all of the evidence failed to establish that claimant was totally disabled due to pneumoconiosis. Director's Exhibits 44-68. However, because Judge Wood found that some of the new evidence developed by the district director may show that she erred in previously finding that the existence of complicated pneumoconiosis was not established, Judge Wood remanded the case to the district director for modification proceedings in light of this new evidence. Director's Exhibit 68. Thereafter, claimant filed a motion for reconsideration, which Judge Wood denied on August 18, 1999.

¹Claimant is Pauline Prater, widow of Ferrell Prater, the miner, whose claim for benefits, filed on August 1, 1994, was pending at the time of his death. Director's Exhibit 1.

²The 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.

Director's Exhibit 74. Claimant's modification request was subsequently considered by the district director. Director's Exhibit 89. After considering the new evidence in support of claimant's request for modification, the district director awarded benefits based on a finding of a change in conditions since Judge Wood's prior denial. *Id.* Thereafter, employer and claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibits 90, 91. A hearing was held by Administrative Law Judge Mollie W. Neal (hereinafter, the administrative law judge) on October 19, 2000.

In a Decision and Order dated September 27, 2001, the administrative law judge found that the miner established total disability due to pneumoconiosis.³ Decision and Order at 31. The administrative law judge found "that [the miner had] silicotuberculosis, which falls under the statutory definition of pneumoconiosis," and that the silicotuberculosis caused his pulmonary disability. *Id.* Alternatively, the administrative law judge found that the miner established complicated pneumoconiosis and, therefore, was also entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. *Id.* Accordingly, benefits were awarded, commencing on August 1, 1994.

In response to employer's appeal, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration. *Prater v. Knox Creek Coal Corp.*, BRB No. 02-0214 BLA (Nov. 26, 2002)(unpub.). Initially, the Board rejected employer's assertion that the administrative law judge erred in finding that a valid petition for modification had been filed by claimant. *Prater*, slip op. at 6. The Board vacated the administrative law judge's finding that the miner established that he was totally disabled due to his silicotuberculosis and remanded this case for the administrative law judge to determine whether the evidence establishes that the miner was totally disabled due to pneumoconiosis.⁴ *Id.* at 10. Additionally, the Board vacated the administrative law judge's finding of complicated pneumoconiosis and remanded this

³The administrative law judge stated that the evidence submitted since April 1999, the date of the prior denial, would be reviewed to determine whether a change in conditions has been demonstrated and that all of the evidence would be reviewed to determine whether a mistake in a determination of fact has been demonstrated. Decision and Order at 5.

⁴The Board stated that "because [employer] has conceded the existence of simple pneumoconiosis, the question before the administrative law judge is not whether [the miner] has pneumoconiosis, *e.g.*, silicotuberculosis, but whether [the miner's] pneumoconiosis as defined by the Act, 20 C.F.R. §718.201(a)-(c), is a substantially contributing cause of [the miner's] total disability, 20 C.F.R. §718.204(c)(1)." *Prater v. Knox Creek Coal Corp.*, BRB No. 02-0214 BLA (Nov. 26, 2002)(unpub.).

case for her to reconsider all of the relevant evidence on remand. *Id.* at 12. The Board also vacated the administrative law judge's finding of the "onset date" of entitlement and instructed the administrative law judge on remand "to reconsider when [the miner] became totally disabled *due to pneumoconiosis* or was first diagnosed with complicated pneumoconiosis." *Id.* at 14. Finally, the Board instructed the administrative law judge to reconsider on remand "whether reopening the claim in this case would render justice under the Act" because the Board vacated the administrative law judge's finding of causation and complicated pneumoconiosis, which formed the basis for her award on modification. *Id.* at 14.

On remand, the administrative law judge initially found that reopening this claim on modification renders justice under the Act. Decision and Order on Remand at 5. The administrative law judge found that claimant failed to demonstrate that a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000)⁵ was made in the prior administrative law judge's finding that the miner failed to establish the existence of complicated pneumoconiosis. *Id.* at 7. Considering the new evidence, the administrative law judge found that claimant established the existence of complicated pneumoconiosis and, therefore, was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. *Id.* at 7-8. Based on her finding of the existence of complicated pneumoconiosis, the administrative law judge also found that claimant demonstrated a change in condition pursuant to Section 725.310 (2000). *Id.* at 8. Accordingly, benefits were awarded, commencing on October 1, 1999, the month in which modification was requested. *Id.* at 9.

On appeal, employer contends that the administrative law judge erred in determining that claimant established modification pursuant to Section 725.310 (2000). Employer's Brief at 11-13. Additionally, employer asserts that the administrative law judge erred in finding the existence of complicated pneumoconiosis established pursuant to Section 718.304. *Id.* at 13-24. Lastly, employer requests that the Board require that this case be reassigned to a new administrative law judge on remand. *Id.* at 24. Claimant responds, urging affirmance of the administrative law judge's award of benefits, but challenging the administrative law judge's finding regarding the date of entitlement. Claimant's Brief at 7. Employer has not filed a reply brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response to employer's appeal. The Director urges the Board to reject employer's assertion that the

⁵Although the Department of Labor has made substantive revisions to 20 C.F.R. §725.310 in the new regulations, these revisions only apply to claims filed after January 19, 2001.

administrative law judge did not adequately address whether modification would render justice in this case.⁶ Director's Brief at 2-3.

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

MODIFICATION

Pursuant to 20 C.F.R. §725.310(a) (2000), the administrative law judge initially considered whether claimant could establish modification by demonstrating either a change in conditions or a mistake in a determination of fact. Decision and Order on Remand at 5, 7. The administrative law judge found "no error" in Judge Wood's determination, which was affirmed by the Board, that "the evidence presented before [Judge Wood] was insufficient to establish the existence of complicated pneumoconiosis." Decision and Order on Remand at 7. The administrative law judge then considered the newly submitted evidence and determined that it was sufficient to establish a change in conditions by establishing the existence of complicated pneumoconiosis. *Id.* at 7-8.

Employer asserts that the administrative law judge erred in finding that claimant demonstrated a change in conditions pursuant to Section 725.310 (2000) without engaging in a comparison of the old and new evidence. Employer's Brief at 11-12. In order to establish a change in conditions, an administrative law judge must determine if the new evidence, considered in conjunction with the old evidence, is sufficient to establish at least one of the elements of entitlement that defeated entitlement in the prior decision. *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1991); *see Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Because, as discussed below, the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis, we decline to affirm the administrative law judge's finding of a change in conditions based on complicated pneumoconiosis. Therefore, we vacate the administrative law judge's finding that claimant established a change in conditions based on the existence of complicated pneumoconiosis and instruct the administrative law judge on remand to reconsider whether claimant established a change in conditions before considering the

⁶We affirm the administrative law judge's finding that claimant failed to establish a mistake in fact pursuant to 20 C.F.R. §718.310 (2000) as it is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

merits of this case. *Napier*, 17 BLR at 1-113; *Nataloni*, 17 BLR at 1-84; *see Jessee*, 5 F.3d at 724-25, 18 BLR at 2-28.

Employer additionally contends that the administrative law judge erred in failing to fully explain her conclusion that reopening this claim on modification renders justice under the Act. Employer's Brief at 13. In its previous Decision and Order, the Board instructed the administrative law judge to consider whether reopening the claim in this case would render justice under the Act, in light of employer's contention that the administrative law judge failed to do so. *Prater*, slip op. at 14. On remand, the administrative law judge determined that, based on the facts of this case, reopening this claim on modification renders justice under the Act because a timely request for modification was made and "there was a sound basis for such a request." Decision and Order on Remand at 5. The Director urges the Board to reject employer's assertion. Director's Brief at 2-3. The Director asserts that in the absence of evidence demonstrating that the moving party deliberately engaged in egregious and recalcitrant conduct in the initial claim proceeding, modification would render justice under the Act where there existed a sound basis for modification. *Id.* The Director further asserts that employer has not specifically asserted how modification, in this case, would not render justice under the Act. *Id.* We reject employer's assertion and hold that justice would be served if modification is granted in this case because there is no evidence that claimant or the miner engaged in any egregious and recalcitrant conduct in the initial claim proceeding. *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *Branham v. Bethenergy Mines, Inc.*, 20 BLR 1-27 (1996).

EXISTENCE OF COMPLICATED PNEUMOCONIOSIS

Pursuant to Section 718.304, employer asserts that the administrative law judge erred in finding the existence of complicated pneumoconiosis. Employer's Brief at 16-24. Considering the newly submitted x-ray evidence pursuant to Section 718.304(a), the administrative law judge found Drs. Navani, Alexander, Aycoth, Sargent, Barrett, Cappiello, Wheeler, and Scott to be the "most highly qualified physicians of record" because these physicians are both B readers⁷ and Board-certified radiologists. Decision and Order on Remand at 7. The administrative law judge further found:

⁷A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Of these most highly qualified physicians of record, six found the newly submitted x-rays they read to be indicative of complicated pneumoconiosis, while two did not. Based upon the preponderance of B-readers and board-certified physicians who found the x-ray evidence to be positive for complicated pneumoconiosis, I find that the same has been established pursuant to 20 C.F.R. 718.304(a). In so concluding, I also give great weight to the readings rendered by Drs. Sargent and Barrett in particular, given their superior qualifications.

Id. The administrative law judge next considered the biopsy evidence pursuant to Section 718.304(b)⁸ and the CT scan evidence pursuant to Section 718.304(c). *Id.* at 7-8. After reviewing the biopsy and CT scan evidence, the administrative law judge found that claimant failed to establish the existence of complicated pneumoconiosis at Section 718.304(b) and (c). *Id.* We affirm the administrative law judge's findings at Section 718.304(b) and (c) because her findings that claimant failed to establish the existence of complicated pneumoconiosis pursuant to these subsections is supported by substantial evidence.⁹ *Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); *see Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-248-49 (2003).

The administrative law judge considered the x-ray, biopsy, and CT scan evidence together and found that “the totality of the evidence of complicated pneumoconiosis outweighs the contrary probative evidence of record.” Decision and Order on Remand at 8. The administrative law judge noted that “the CT scans and biopsy evidence are not as recent as the chest x-rays.” *Id.* Therefore, the administrative law judge concluded that claimant has established the existence of complicated pneumoconiosis “based upon the most recent chest x-rays of record, and in particular the positive readings rendered by Drs. Barrett, Sargent, Alexander, Cappiello, Aycoth, Pathak, and Robinette.” *Id.* The administrative law judge referred to the holding of the United States Court of Appeals for the Fourth Circuit in *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), that “the most objective measure of [complicated pneumoconiosis] is obtained through chest x-rays.” *Id.*

Pursuant to Section 718.304(a), employer contends that the administrative law judge erred in weighing the x-ray evidence by improperly relying upon numerical superiority, by failing to adequately explain her findings, and by “ignor[ing] the

⁸The administrative law judge properly noted that the record contains no autopsy evidence. Decision and Order on Remand at 7.

⁹Neither employer nor claimant has challenged the administrative law judge's finding that the biopsy and CT scan evidence is insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b), (c).

equivocal nature” of the x-ray readings of Drs. Sargent, Barrett, Cappiello, and Robinette. *Id.* at 21-24. As discussed below, employer’s contentions have merit. Therefore, we vacate the administrative law judge’s finding of the existence of complicated pneumoconiosis pursuant to Section 718.304(a) and remand this case for her to reconsider the x-ray evidence.

First, in considering the readings by Drs. Navani, Alexander, Aycoth, Sargent, Barrett, Cappiello, Wheeler, and Scott, the administrative law judge determined that six of “these most highly qualified physicians” found the existence of complicated pneumoconiosis while two of these physicians did not. Decision and Order on Remand at 7. Of the physicians whose readings the administrative law judge credited, Dr. Navani identified a Category C large opacity on the February 19, 1997 x-ray whereas Dr. Wheeler found no large opacities on this x-ray. Director's Exhibits 54, 64. On the December 15, 1998 x-ray, Dr. Alexander identified a Category A large opacity, Drs. Aycoth and Cappiello identified a Category B large opacity, Dr. Barrett identified a Category C large opacity, and Drs. Wheeler and Scott found no large opacities. Director's Exhibits 67, 81, 87; Claimant's Exhibits 1, 2. Dr. Sargent identified a Category C large opacity on the October 14, 1999 x-ray whereas Drs. Wheeler and Scott found no large opacities on this x-ray. Director's Exhibits 82, 87. As the evidence reveals, in determining that six of “these most highly qualified physicians” found the existence of complicated pneumoconiosis while two of these physicians did not, the administrative law judge focused on the number of *physicians* interpreting the x-rays and not on the number of x-ray *readings* these physicians rendered. Thus, the administrative law judge found complicated pneumoconiosis based on the preponderance of the x-ray *readers* and not the x-ray *readings*. As employer asserts, the administrative law judge erred in relying heavily on the fact that more of the “most highly qualified physicians” opined that the miner had complicated pneumoconiosis than opined that he did not, without taking into consideration that Dr. Wheeler interpreted three different x-rays as revealing no large opacities and Dr. Scott read two different x-rays as showing no large opacities whereas Drs. Navani, Alexander, Aycoth, Cappiello, Sargent, and Barrett interpreted only one x-ray each as showing large opacities. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440, 21 BLR 2-269, 2-273 (4th Cir. 1997). Therefore, in reweighing the x-ray evidence, we instruct the administrative law judge that she should consider *all* of the following factors when evaluating the x-ray evidence on remand: the number of x-ray interpretations, the readers’ qualifications, the dates of the film, the quality of the film, and the actual reading. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984); *see generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988).

Second, the administrative law judge failed to explain why she “gave great weight to the readings rendered by Drs. Sargent and Barrett” because of “their superior

qualifications.” Because the record reveals that Drs. Sargent, Barrett, Wheeler, and Scott are all B readers and Board-certified radiologists, Decision and Order on Remand at 7; Director's Exhibits 64 at 7-8, 12-15, 81, 82, 87, it is unclear, without further elaboration, why the administrative law judge accorded greater weight to the readings of Drs. Sargent and Barrett based on their superior qualifications. Moreover, in finding complicated pneumoconiosis, the administrative law judge also relied on the December 15, 1998 x-ray reading of Dr. Robinette, who is a B-reader, but does not explain why she found Dr. Robinette's x-ray reading to be more probative than the readings of Drs. Scott and Wheeler, who are B readers and Board-certified radiologists. Decision and Order on Remand at 8. Accordingly, we instruct the administrative law judge on remand to provide additional explanation for her findings regarding Drs. Sargent, Barrett, and Robinette, as required by the Administrative Procedure Act. *See* 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 30 U.S.C. §932(a); *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984). Moreover, as employer points out, in reweighing the x-ray evidence on remand, the administrative law judge should consider that the Board noted in its previous decision that “each of the x-rays submitted on modification which were read as positive for complicated pneumoconiosis were also read as not revealing complicated pneumoconiosis by an equally qualified radiologist.” *Prater*, slip op. at 11.

Third, employer asserts that the administrative law judge “ignored the equivocal nature of the findings of the physicians she has given ‘particular’ weight to.” Employer's Brief at 22-23. Specifically, employer contends that the administrative law judge failed to consider additional comments that Drs. Sargent, Barrett, Cappiello, and Robinette made on their x-ray reports because these comments acknowledge the possibility that the x-ray interpretation could be due to something other than complicated pneumoconiosis. *Id.* On his report interpreting the October 14, 1999 x-ray, Dr. Sargent found a Category C large opacity and noted below in the “Other Comments” section: “Rule out associated tb. Correlate Clinically. Need additional view.” Director's Exhibit 82. Dr. Barrett noted a Category C large opacity on his interpretation of the December 15, 1998 x-ray and noted in the “Other Comments” section: “old films would be helpful.” Director's Exhibit 81. Dr. Cappiello interpreted the December 15, 1998 x-ray as showing a Category B large opacity and noted in the “Other Comments” section: “Possibility of underlying neoplasm in the masses in the upper lobes cannot be excluded. Patient may consult personal physician & consideration for a CT of thorax may be contemplated.” Claimant's Exhibit 1. On his report interpreting the December 15, 1998 x-ray, Dr. Robinette found a Category C large opacity and noted below in the “Other Comments” section: “severe

[illegible] [due to] apparent coal workers' pneumoconiosis [with] PMF – cannot exclude TB.”¹⁰ Claimant's Exhibit 4.

While comments in an x-ray report that address the source of a pneumoconiosis diagnosed by x-ray are not relevant to the issue of the existence of pneumoconiosis, comments in an x-ray report that undermine the credibility of a positive ILO classification are relevant to the issue of the existence of pneumoconiosis. *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991)(*en banc*). Because the administrative law judge credited the x-ray interpretations of Drs. Sargent, Barrett, Cappiello, and Robinette without addressing the significance of the additional comments made by these physicians on their x-ray reports, we instruct her to consider the comments on remand. In doing so, the administrative law judge should determine whether the comments made by Drs. Sargent, Barrett, Cappiello, and Robinette call into question their respective findings of complicated pneumoconiosis pursuant to Section 718.304(a). See *U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 390, 21 BLR 2-639, 2-651 (4th Cir. 1999).

Additionally, employer contends that the administrative law judge erred in failing to weigh the contrary biopsy and CT scan evidence against the x-ray evidence and in failing to consider the medical opinion evidence, as the Board instructed in its previous Decision and Order. Employer's Brief at 15-20. When the Board remanded this case to the administrative law judge to reconsider the relevant evidence regarding the existence of complicated pneumoconiosis, it specifically instructed the administrative law judge to consider the opinions of Drs. Branscomb, Kleinerman, Wheeler, Castle, and Fino, who opined that the miner did not have complicated pneumoconiosis. *Prater*, slip op. at 11. Additionally, the Board instructed the administrative law judge to “specifically discuss the conflicting CT scan or biopsy evidence of record relevant to the existence of complicated pneumoconiosis.” *Id.*

As the Board instructed, the administrative law judge weighed the x-ray, biopsy, and CT scan evidence together, but accorded more weight to the x-ray readings of Drs. Barrett, Sargent, Alexander, Cappiello, Aycoth, Pathak, and Robinette because she found their x-ray readings to be more recent than the biopsy and CT scan evidence. Decision and Order on Remand at 8. Drs. Barrett, Alexander, Cappiello, Aycoth, Pathak, and Robinette all found large opacities on the December 15, 1998 x-ray and Dr. Sargent found large opacities on the October 14, 1999 x-ray. Director's Exhibits 67, 81, 82; Claimant's Exhibits 1-4. However, the record contains an April 8, 1999 CT scan, which

¹⁰Dr. Robinette subsequently stated, in an August 10, 2000 opinion, that the miner has complicated pneumoconiosis and a superimposed tuberculosis process. Claimant's Exhibit 7.

was read by Dr. Hassett, who did not note any findings of complicated pneumoconiosis. Claimant's Exhibit 9. Moreover, the record contains three interpretations of a March 8, 2000 x-ray by Drs. Fino, Castle, and Branscomb, none of which supports a finding of complicated pneumoconiosis. Director's Exhibit 92, Employer's Exhibits 2, 4. The administrative law judge failed to discuss how she found the x-ray readings of the December 15, 1998 and October 14, 1999 to be more probative based on their recency in light of the interpretations of the April 8, 1999 CT scan and the March 8, 2000 x-ray. Accordingly, we instruct the administrative law judge, on remand, to address the significance of the interpretations of the April 8, 1999 CT scan and the March 8, 2000 x-ray. *See Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591; *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Additionally, although the Board instructed the administrative law judge to consider on remand the opinions of Drs. Branscomb, Kleinerman, Wheeler, Castle, and Fino, all of whom opined that the miner did not have complicated pneumoconiosis, the administrative law judge failed to do so. As employer asserts, many of the physicians, whose opinions are in the record, explained “why the masses seen on the x-rays should not be classified as complicated pneumoconiosis.” Employer's Brief at 16-20. Various physicians opine that the abnormalities seen on the miner's x-rays can be attributable to tuberculosis, some other granulomatous disease, or a fungal disease. Director's Exhibits 60-65, 88, 92; Employer's Exhibits 1, 2, 6, 8-11. Therefore, we instruct the administrative law judge to consider the relevant medical opinion evidence on remand. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

In light of the foregoing, we vacate the administrative law judge's consideration of the x-ray evidence pursuant to Section 718.304(a) and her consideration of all the evidence together pursuant to Section 718.304. In doing so, we also instruct the administrative law judge, in reconsidering the evidence regarding the existence of complicated pneumoconiosis on remand, to provide a detailed analysis for her findings, as required by the Administrative Procedure Act.¹¹ *See* 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 30 U.S.C. §932(a); *McGinnis*, 10 BLR at 1-6; *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

¹¹As employer contends, the administrative law judge must also determine on remand whether the opacities seen are related to a chronic dust disease of the lung pursuant to 20 C.F.R. §718.203(b). *See Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993).

DATE OF ENTITLEMENT TO BENEFITS

Claimant asserts that the administrative law judge erred in awarding benefits commencing as of October 1999, the month in which modification was requested. Claimant's Brief at 7. Specifically, claimant asserts that the administrative law judge should have awarded benefits as of August 1994, the month in which the miner filed his claim. *Id.* Claimant contends that benefits cannot begin later than October 13, 1994, the date of the miner's first diagnosis of complicated pneumoconiosis. *Id.* Claimant further asserts because the record does not demonstrate exactly when the miner contracted complicated pneumoconiosis, benefits must commence as of the filing date of the miner's claim pursuant to 20 C.F.R. §725.503(b). *Id.*

The Board has consistently held that arguments in response briefs must be limited to those which respond to issues raised in petitioner's brief and those in support of the decision below, and that other arguments will not be considered by the Board. 20 C.F.R. §802.212(b); *Barnes v. Director, OWCP*, 18 BLR 1-55, 1-57-58 (1994); *Shelesky v. Director, OWCP*, 7 BLR 1-1034 (1984); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87, 1-91-92 (1983); see *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994); *Dalle-Tezze v. Director, OWCP*, 814 F.2d 129, 133, 10 BLR 2-62, 2-68 (3d Cir. 1987). Moreover, where the prevailing party below seeks to contest adverse findings of fact or conclusions of law, those contentions must be raised in the form of a cross-appeal. 20 C.F.R. §802.201(a)(2); *Barnes*, 18 BLR at 1-57-58; *King*, 6 BLR at 1-91-92. Because claimant raises issues in her response brief that are not in support of the decision below, she should have filed a cross-appeal. *Id.*

However, for clarification on remand, we note that claimant's assertion regarding the commencement date of benefits is incorrect. Because this case involves modification on the basis of a change in conditions, in accordance with Section 725.503(d)(2):

Benefits are payable beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, provided that no benefits shall be 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. Where the evidence does not establish the month of onset, benefits shall be payable to such miner from the month in which the [miner] requested modification.

In determining the date of entitlement, the administrative law judge noted that she found the existence of complicated pneumoconiosis based on the x-ray readings. Decision and Order on Remand at 9. Because the administrative law judge found the x-ray readings "do not definitively establish the date of onset of disability," she determined the date of entitlement to be October 1, 1999, the month in which modification was

requested, in accordance with Section 725.503(d)(2). *Id.* However, because we vacate the administrative law judge's finding of the existence of complicated pneumoconiosis at Section 718.304, we also vacate the administrative law judge's finding regarding the date of entitlement and instruct the administrative law judge to reconsider this issue, if reached on remand.

REASSIGNMENT TO A NEW ADMINISTRATIVE LAW JUDGE

Employer finally requests that the case be remanded to a different administrative law judge. Employer's Brief at 15. However, because employer has not demonstrated any bias or prejudice on the part of the administrative law judge, employer's request is denied. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-108 (1992).

Accordingly, the administrative law judge's Decision and Order on Remand 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

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge