BRB No. 09-0330 BLA

JAMES CLAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PERFORMANCE COAL COMPANY	)	
	)	DATE ISSUED: 12/29/2009
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 Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (08-BLA-5328) of Administrative Law Judge Richard A. Morgan rendered on a claim 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). Claimant's prior application for benefits, filed on October 11, 2002, was finally denied on August 21, 2003 because claimant failed to establish the existence of a totally disabling respiratory impairment. Director's Exhibit

2. On March 28, 2007, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 4.

In a Decision and Order Awarding Benefits issued on January 9, 2009, the administrative law judge credited claimant with thirty-two years of coal mine employment[1] and found that the medical evidence developed since the prior denial of benefits established invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.304, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 29. The administrative law judge therefore found that claimant demonstrated a change in the applicable condition of entitlement as required by 20 C.F.R. §725.309(d).[2] Considering the merits of the claim, the administrative law judge found that claimant established the existence of simple clinical pneumoconiosis and legal pneumoconiosis,[3] in the form of chronic obstructive pulmonary disease (COPD) and emphysema due in part to coal dust exposure, pursuant to 20 C.F.R. §718.202(a)(1), (2), and (4), and the existence of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(a), (c), and further established that both his simple and complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that, in addition to establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, claimant established the existence of a totally disabling respiratory impairment due to pneumoconiosis

[1] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim shall 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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

[3] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

pursuant to 20 C.F.R. §718.204(b), (c). Decision and Order at 37. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in excluding four x-ray readings and the deposition testimony of Dr. Wiot, pursuant to 20 C.F.R. §725.414. Employer also challenges the administrative law judge's findings with regard to the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), (c), the existence of simple clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), and the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4). Finally, employer challenges the administrative law judge's finding of total disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to affirm the administrative law judge's decision to exclude Dr. Wiot's deposition testimony because it was proffered in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414(c). The Director has declined to address the merits of claimant's entitlement to benefits.[4]

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order and the issues presented on appeal, we are unable to affirm the award of benefits in this case, as it is unclear whether the administrative law judge has considered all relevant evidence. We specifically vacate the administrative law judge's findings that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), (c), and further vacate his findings that claimant established the existence of simple clinical

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[4] The administrative law judge's finding of thirty-two years of coal mine employment, and his finding that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), and thus a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We further affirm, as unchallenged, the administrative law judge's findings that the biopsy evidence established the existence of simple pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(2). *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.

pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1), and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Therefore, we also vacate the administrative law judge's finding of total disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c).

Initially, we address employer's evidentiary arguments under 20 C.F.R. §725.414(c). At the hearing, employer proffered the deposition testimony of Dr. Wiot, a B reader and Board-certified radiologist, who serially read four chest x-rays taken on June 14, 2007, September 24, 2007, February 6, 2008, and May 20, 2008. Employer also proffered the medical reports and deposition testimony of Drs. Crisalli and Castle. The administrative law judge admitted the medical reports and deposition testimony of Drs. Crisalli and Castle, but ruled that Dr. Wiot's deposition testimony was inadmissible under Section 725.414(c), as it was in excess of the evidentiary limitations.[5] Specifically, the administrative law judge found that employer had already proffered its limit of two medical reports as affirmative evidence by submitting the reports of Drs. Crisalli and Castle, and further found that employer failed to establish "good cause" for the additional submission of Dr. Wiot's deposition testimony.

Employer does not dispute that Dr. Wiot's deposition testimony exceeds the limitations of Section 725.414.[6] Employer contends, however, that the administrative

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[5] The revised regulation at 20 C.F.R. §725.414 provides that each party may submit two x-ray readings, one autopsy report, one biopsy report, two pulmonary function studies, two blood gas studies, and two medical reports as its affirmative case. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Each party may then submit one piece of evidence in rebuttal of each piece of evidence submitted as the opposing party's case. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, the party that originally proffered the evidence may submit one piece of rehabilitative evidence. *Id.* Notwithstanding these limits, "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Each x-ray, autopsy or biopsy report, pulmonary function study, blood gas study, or medical report referenced in a medical report must either be admissible under the 20 C.F.R. §725.414(a) limits, or be admissible as a hospitalization or treatment record under 20 C.F.R. §725.414(a)(4). 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). "Good cause" is required to exceed the numerical limits. 20 C.F.R. §725.456(b)(1). "A physician's written assessment of a single objective test, such as a chest X-ray or a pulmonary function test, shall not be considered a medical report for purposes of this section." 20 C.F.R. §725.414(a)(1).

[6] The revised regulation governing witness testimony provides that "[n]o person shall be permitted to testify as a witness at the hearing, or pursuant to deposition . . . unless that person meets the requirements of [Section] 725.414(c)." 20 C.F.R.

law judge erred in failing to adequately explain why he found that good cause did not exist for its admission into the record. Employer's contention has merit.

At the hearing, employer argued that "good cause" existed for the admission of Dr. Wiot's deposition testimony in excess of the evidentiary limitations. Hearing Tr. at 35-37. Specifically, employer asserted that Dr. Wiot had the unique opportunity to view the x-ray evidence "all at one time in a series," and that his deposition testimony explained how his serial readings of the x-rays, which showed a declining profusion of small background opacities over time, demonstrated that the changes seen on those x-rays were not consistent with the development of complicated coal workers' pneumoconiosis. Hearing Tr. at 35-37. The administrative law judge stated that employer's argument was "extremely alluring and attractive," and was "the best good cause argument" that he had heard. The administrative law judge nonetheless applied a "strict interpretation of the regulations" and denied employer's request to submit Dr. Wiot's deposition testimony for good cause. Hearing Tr. at 38-39. Specifically, the administrative law judge found that the regulations set limitations on the admission of evidence, and that if employer deemed Dr. Wiot's perspective to be unique and important, employer could have substituted Dr. Wiot's testimony for the medical report of either Dr. Crisalli or Dr. Castle. Hearing Tr. at 38-39.

An administrative law judge is afforded broad discretion in dealing with procedural matters. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*). Moreover, as the Director asserts, the United States Court of Appeals for the Fourth Circuit has held that the fact that evidence is relevant does not establish good cause for its admission. *See Elm Grove Coal Co. v. Blake*, 480 F.3d 278, 297 n.18, 23 BLR 2-430, 2-460-61 n.18 (4th Cir. 2007); Director's response at 1 n.1. However, as employer contends, the good cause provision, by its terms, provides that medical

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§725.457(c). Section 725.414(c) further provides that "[a] physician who prepared a medical report admitted under this section may testify with respect to the claim . . . by deposition." 20 C.F.R. §725.414(c). In this case, Dr. Wiot read chest x-rays but did not prepare a "medical report" as defined at Section 725.414(a)(1). *See* 20 C.F.R. §725.414(a)(1). Nonetheless, Dr. Wiot's deposition testimony could still be admitted "in lieu of" a medical report if employer "submitted fewer than two medical reports as part of [its] affirmative case . . . ." *Id.* Under such circumstances, Dr. Wiot's testimony would "be considered a medical report for purposes of the limitations provided by this section." 20 C.F.R. §725.414(c). However, because employer had already submitted its limit of two affirmative medical reports by Drs. Crisalli and Castle pursuant to Section 725.414(a)(3)(i), Dr. Wiot's testimony could not be admitted as a medical report under Section 725.414(c). *See* 20 C.F.R. §725.414(a)(3)(i); Employer's Exhibits 1, 12.

evidence *in excess of the limitations* may be admitted for good cause. *See* 20 C.F.R. §725.456(b)(1). Thus, the fact that employer could have substituted Dr. Wiot's deposition testimony for one of its affirmative medical reports is not determinative of the question of whether employer has established good cause for the submission of excess evidence. As we are unable to discern any other reason for the administrative law judge's rejection of employer's good cause argument, we vacate the administrative law judge's determination. On remand, the administrative law judge must reconsider the good cause issue, and must better explain his findings. *See Clark*, 12 BLR at 1-153.

Employer next asserts that in finding that the x-ray evidence established the existence of both complicated and simple pneumoconiosis, pursuant to 20 C.F.R. §§718.304(a) and 718.202(a)(1), the administrative law judge failed to consider the rebuttal interpretations by Dr. Wiot of the February 6, 2008 and May 20, 2008 x-rays, submitted by employer in response to claimant's affirmative x-ray evidence in the current claim. Employer's Brief at 10, 16. Employer asserts that, as the administrative law judge "failed to admit Dr. Wiot's deposition transcript into the record for good cause shown, he should have at least considered or addressed the rebuttal interpretations offered by [employer] in response to claimant's affirmative chest x-ray evidence." Employer's Brief at 10.

As employer contends, the record reflects that following the hearing, by letter dated August 4, 2008, employer proffered Dr. Wiot's written interpretations of the February 6, 2008 and May 20, 2008 x-rays, which Dr. Wiot had discussed in the excluded deposition. While both employer and claimant addressed Dr. Wiot's interpretations in their post-hearing briefs, the record does not reflect a ruling by the administrative law judge as to the admissibility of these interpretations, nor did the administrative law judge consider these readings in his evaluation of the x-ray evidence. Rather, pursuant to 20 C.F.R. §718.304(a), the administrative law judge found that Dr. Rasmussen's positive, Category A, reading of the February 6, 2008 x-ray, and Dr. DePonte's positive, Category A, reading of the May 20, 2008 x-ray, were uncontradicted as to the existence of complicated pneumoconiosis. Similarly, pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge found Dr. Rasmussen's positive "1/0" reading of the February 6, 2008 x-ray to be uncontradicted as to the existence of simple pneumoconiosis.[7] An administrative law judge must address and discuss all of the

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[7] The administrative law judge also found Dr. Deponte's "0/1" reading of the May 20, 2008 x-ray to be uncontradicted, and determined that the x-ray was negative. Decision and Order at 31. Because an x-ray reading of "0/1" is considered negative for pneumoconiosis, the administrative law judge's error, if any, in failing to consider Dr. Wiot's negative reading of the same x-ray, is harmless. *See* 718.102(b); *Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986). Nonetheless, he must reconsider the relevant readings of the May 20, 2008 x-ray on remand.

relevant evidence. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984). The administrative law judge's conclusions that the x-ray evidence establishes the existence of both simple and complicated pneumoconiosis rested on his determination that the above-mentioned x-rays were positive because the positive readings were uncontradicted. As it is unclear from the record whether the administrative law judge ruled on the admissibility of the contradictory readings by Dr. Wiot, we must vacate the administrative law judge's findings pursuant to 20 C.F.R. §§718.304(a) and 718.202(a)(1), and the award of benefits. *McCune*, 6 BLR at 1-988. On remand, the administrative law judge must render a finding as to the admissibility of Dr. Wiot's x-ray interpretations and, if necessary, re-weigh the x-ray evidence relevant to the existence of both complicated and simple pneumoconiosis.

We further find merit in employer's contention that the administrative law judge erred in denying its request to submit Dr. Wiot's readings of the x-rays dated February 25, 2000 and November 18, 2002, that were submitted by the Director in connection with the complete pulmonary evaluations conducted in claimant's two prior claims. *See* 20 C.F.R. §725.406. Employer's Brief at 17; Hearing Tr. at 28-30, 39-40. At the hearing, employer stated that it had not offered rebuttal readings of these films during the initial litigation of the prior claims, and asked that Dr. Wiot's rebuttal readings be considered, should the administrative law judge reach the merits of entitlement. Hearing Tr. at 28-29, 39-40. The administrative law judge provisionally excluded Dr. Wiot's readings, stating that the parties were free to argue the issue in their post-hearing briefs. Hearing Tr. at 29.

In its post-hearing brief, and on appeal to the Board, employer contends that the regulation at 20 C.F.R. §725.309(d)(1) provides that any evidence submitted in connection with any prior claim shall be made part of the record in the subsequent claim, provided it was not excluded during the adjudication of that claim. Employer's Brief at 17. Employer asserts that because the prior claim x-rays are part of the record in the current claim, and because the regulation at 20 C.F.R. §725.414(a)(3)(ii) allows for rebuttal of the x-rays submitted by the Director pursuant to 20 C.F.R. §725.406, employer should be able to submit rebuttal interpretations of the February 25, 2000 and November 18, 2002 x-rays at this point in the litigation. Employer's Brief at 17. Employer asserts that consideration of rebuttal evidence is especially important in a case such as the instant one, where claimant has established a change in an applicable condition of entitlement, requiring the administrative law judge to review all current and prior claim evidence. Employer's Brief at 17.

In his Decision and Order, the administrative law judge addressed employer's request for the submission of additional rebuttal evidence, stating:

> The employer additionally sought admission of Dr. Wiot's rereading of the February 25, 2000 and November 18, 2002 chest X-rays. However, the

> proffered evidence was excluded at the hearing because the employer did not present a good argument as to why the evidence should be admitted. Furthermore, the employer did not present a good cause argument.

Decision and Order at 2. As it is unclear from the administrative law judge's decision whether he has considered the argument articulated by employer in its post-hearing brief, we vacate the administrative law judge's exclusion of Dr. Wiot's rereadings of the February 25, 2000 and November 18, 2002 x-rays. On remand, the administrative law judge must reconsider employer's request, and must better explain his finding as to the admissibility of employer's additional rebuttal x-ray readings. *See Clark*, 12 BLR at 1-153.

In order to avoid any repetition of error on remand, we next address employer's contention that, in considering whether claimant established the existence of complicated pneumoconiosis, the administrative law judge erred in according diminished weight to Dr. Wiot's negative readings of the June 14, 2007 and September 24, 2007 x-rays, on the ground that they conflicted with the biopsy evidence.

Under Section 411(c)(3) of the Act, 30 U.S.C. §923(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition that would yield results equivalent to (A) or (B). 20 C.F.R. §718.304(a)-(c); *see Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*).

Beginning with the biopsy evidence, the administrative law judge noted that on March 6, 2007, claimant underwent a CT-guided needle biopsy of the lung. Claimant's Exhibit 3. In a report dated March 7, 2007, Dr. Koh, a pathologist, listed the final diagnosis as "Anthracotic-silicotic nodule with central area of necrosis. No dysplastic or malignant cells identified." *Id.* In a report dated June 18, 2008, Dr. Oesterling, who is Board-certified in Anatomic and Clinical Pathology, reviewed the biopsy slide and concluded that "[t]here is sufficient evidence to suggest the presence of coal dust, however this is at best a very mild form of coal workers' pneumoconiosis." Employer's Exhibit 13. The administrative law judge found that the biopsy evidence did not support a finding of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(b), because neither pathology report noted a finding of massive lesions in the lungs. Decision and Order at 25. The administrative law judge further found that the biopsy evidence established the existence of simple pneumoconiosis, but did not rule out the existence of cancer, due to the limited size of the tissue sample. Decision and Order at 24-25, 31-32.

Turning to the chest x-ray evidence, the administrative law judge noted that two of the four x-rays had conflicting readings.[8] Dr. Deponte, a Board-certified radiologist and B reader, and Dr. Rasmussen, a B reader, read a June 14, 2007 x-ray as positive for the existence of both simple pneumoconiosis, and Category A complicated pneumoconiosis. By contrast, Dr. Meyer, a Board-certified radiologist and B reader, concluded that the x-ray was negative for the existence of pneumoconiosis, but revealed bullous emphysema, worsening fibrosis consistent with "UIP/IPF," and a focal soft tissue density in the left upper zone. Employer's Exhibit 9. Dr. Wiot, a Board-certified radiologist and B reader, also read the June 14, 2007 x-ray as negative for the existence of coal workers' pneumoconiosis, and noted that the left hilum lung mass "must be considered a malignancy until proven otherwise." Employer's Exhibit 5.

The administrative law judge accorded equal weight to the readings by Drs. DePonte and Meyer, based on their equal qualifications. Decision and Order at 24. The administrative law judge accorded diminished weight to Dr. Wiot's negative interpretation, however, finding that "the needle biopsy, which shows the presence of pneumoconiosis and no malignant cells, somewhat diminishes the reading[']s probative value."[9] Decision and Order at 24. Thus, the administrative law judge found that Dr. Wiot's negative reading, and Dr. Rasmussen's positive reading, were of equal probative value, notwithstanding Dr. Wiot's superior radiological qualifications. The administrative law judge therefore concluded that as the positive and negative readings of the June 14, 2007 x-ray were in equipoise, the x-ray was not probative for either the presence or absence of complicated pneumoconiosis. Decision and Order at 24.

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[8] As discussed above, the administrative law judge has not yet ruled on the admissibility of Dr. Wiot's rebuttal readings of the February 6, 2008 and May 20, 2008 x-rays.

[9] The administrative law judge stated:

> Both Drs. Castle and Crisalli have testified that the March, 2007 needle biopsy produced a small and likely unrepresentative sample. Therefore, the mass remains suspect for cancer. Although the aforementioned credible testimony does reduce the probative value of the needle biopsy evidence with respect to the existence of cancer, it does not render the needle biopsy evidence completely void of probative value with respect to the etiology of the mass. Therefore, I find that the needle biopsy evidence lends some support against the reading of Dr. Wiot.

Decision and Order at 24 n.31.

With respect to the September 24, 2007 x-ray, the administrative law judge found, correctly, that Dr. Deponte, a Board-certified radiologist and B reader, interpreted the x-ray as positive for the existence of both simple pneumoconiosis, and Category A complicated pneumoconiosis, while Dr. Wiot, also a Board-certified radiologist and B reader, read the x-ray as negative for the existence of coal workers' pneumoconiosis, and again noted that the left hilum lung mass "must be considered a malignancy until proven otherwise." Employer's Exhibit 18. Despite their equal radiological qualifications, the administrative law judge accorded greater weight to Dr. DePonte's positive reading, as better supported by the biopsy evidence, to conclude that the x-ray is positive for the existence of complicated pneumoconiosis. In so doing, the administrative law judge stated:

> Dr. DePonte read the chest x-ray to show a mass consistent with complicated pneumoconiosis whereas Dr. Wiot did not classify the mass as pneumoconiosis, but instead stated that the mass must be considered a malignancy until proven otherwise. The needle biopsy evidence shows the presence of pneumoconiosis, and fails to show the presence of any malignant cells. Therefore, while the biopsy evidence is clearly not determinative, the biopsy evidence lends some additional support to Dr. DePonte's readings. Conversely, the biopsy evidence slightly reduces the credibility of Dr. Wiot's reading.

Decision and Order at 24. Thus, the administrative law judge concluded that the more probative x-ray evidence supported a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(a).

We agree with employer that, in light of the administrative law judge's acknowledgement that the biopsy neither rules out the possibility that the mass is a cancerous lesion, nor supports a finding of complicated pneumoconiosis, the administrative law judge inadequately explained his rationale for finding that the needle biopsy results undercut Dr. Wiot's x-ray readings. On remand, the administrative law judge must better explain his credibility determination. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

We further agree with employer that in evaluating the medical evidence at 20 C.F.R. §718.304(c), the administrative law judge did not adequately explain his reliance on the biopsy evidence to accord diminished weight to the opinions of Drs. Castle and Crisalli, that claimant does not suffer from complicated pneumoconiosis. Specifically, the administrative law judge noted that both physicians concluded that the biopsy evidence was too limited to support a diagnosis of pneumoconiosis, which was contrary to the administrative law judge's own finding that the biopsy evidence established the

existence of the disease. Decision and Order at 26. The administrative law judge stated that, while "the finding of coal workers' pneumoconiosis within the mass does not equate to complicated pneumoconiosis . . . to provide an adequately reasoned opinion in accord with underlying documentation and objective medical evidence, an explanation as to why the mass is not complicated pneumoconiosis in light of the biopsy evidence is necessary." Decision and Order at 26. The administrative law judge concluded that because Drs. Castle and Crisalli "fail[ed] to account for the presence of coal workers' pneumoconiosis within the biopsy tissue," their opinions were not well-reasoned. Decision and Order at 26. However, the administrative law judge has not adequately explained how the presence of simple coal worker's pneumoconiosis within the biopsy sample casts doubt on the opinions of Drs. Castle and Crisalli as to the existence of complicated pneumoconiosis, in light of the administrative law judge's acknowledgement that the biopsy evidence does not establish the existence of complicated pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. As the administrative law judge noted, "Drs. Crisalli and Castle do not have the burden of proving that the mass is not complicated pneumoconiosis; it is the claimant's burden to prove." *See Lester v. Director, OWCP*, 993 F.2d 1143, 1146, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); Decision and Order at 26 n.39. We, therefore, vacate the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c).

Finally, we address employer's contention that in finding the medical evidence sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge erred in according greater weight to the opinion of Dr. Rasmussen, than to the opinions of Drs. Crisalli and Castle. Employer's contention has some merit.

In evaluating the medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202)(a)(4), the administrative law judge accurately found that Dr. Rasmussen diagnosed claimant with emphysema and obstructive lung disease due in part to coal dust exposure, or legal pneumoconiosis, while, by contrast, Drs. Crisalli and Castle opined that claimant does not suffer from any coal dust-related disease of the lung.[10] Decision and Order at 33. The administrative law judge initially

[10] Dr. Rasmussen, a Board-certified internist, initially examined claimant on February 25, 2000, in connection with a prior claim. Director's Exhibit 1. In connection with the current claim, Dr. Rasmussen performed the Department of Labor sponsored pulmonary evaluation on June 14, 2007, and examined claimant a second time on February 6, 2008. Dr. Rasmussen opined that both smoking and coal dust exposure contributed to claimant's chronic obstructive lung disease and to his emphysema. Claimant's Exhibit 2; Director's Exhibit 15. Dr. Crisalli, who is a Board-certified pulmonologist, diagnosed bullous emphysema and interstitial lung disease. He opined

accorded diminished weight to Dr. Crisalli's opinion, in part because he "placed heavy reliance" on x-ray evidence that was not contained in the record, to conclude that claimant's emphysema was consistent with the variety formed by smoking, and not coal dust exposure. Decision and Order at 33. Weighing the opinion of Dr. Castle against the contrary opinion of Dr. Rasmussen, the administrative law judge found that Dr. Rasmussen's opinion, that claimant's COPD and emphysema are due in part to coal dust exposure, was well-reasoned, well-documented, and better explained than the contrary opinion of Dr. Castle. The administrative law judge concluded, therefore, that Dr. Rasmussen's opinion established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Initially, we reject employer's argument that the administrative law judge erred in discounting the opinion of Dr. Crisalli, which employer contends is well-reasoned and well-documented. As noted above, the administrative law judge discounted Dr. Crisalli's opinion, in part, because in formulating his opinion as to the cause of claimant's emphysema, he reviewed and relied on x-ray readings by Dr. Willis, which are not contained in the record. Decision and Order at 33. The administrative law judge's determination is within his discretion, and is supported by substantial evidence in the record. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-242 n.15 (2007)(*en banc*); Employer's Exhibit 19 at 35. Moreover, it is unchallenged by employer. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Thus, because the administrative law judge presented a valid reason for discounting Dr. Crisalli's opinion, his finding is affirmed. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

We further reject employer's argument that the administrative law judge erred in finding Dr. Rasmussen's opinion to be sufficiently reasoned and documented to support a finding of legal pneumoconiosis. Employer's Brief at 23. Specifically, employer asserts that although Dr. Rasmussen examined claimant on February 25, 2000, June 14, 2007 and February 6, 2008, his reports do not incorporate an analysis of all three of those evaluations and the changes documented over time. Employer's Brief at 23. Employer is asking the Board to reweigh the evidence, which the Board is not authorized to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). In evaluating Dr. Rasmussen's opinion, the administrative law judge noted, correctly, that Dr. Rasmussen considered claimant's employment and smoking histories, the biopsy results, the physical

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that claimant's emphysema was due to smoking and stated that while the exact etiology of the interstitial lung disease was unknown, it was not due to coal dust exposure. Employer's Exhibits 12, 19. Dr. Castle, who is also a Board-certified pulmonologist, diagnosed bullous emphysema due to cigarette smoking. Employer's Exhibits 12, 20.

findings from his two more recent examinations, and the pulmonary function study, blood gas study and x-ray results associated with those examinations. Decision and Order at 5. Moreover, the administrative law judge explicitly stated, as was within his discretion, that he found the more recent evidence of record to be the most probative, given the progressive nature of pneumoconiosis. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004)(*en banc*); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004)(*en banc*); Decision and Order at 34 n.57. In addition, contrary to employer's argument, the administrative law judge permissibly concluded that Dr. Rasmussen sufficiently explained how the underlying documentation supported his conclusion that both coal dust and smoking contributed to claimant's COPD and emphysema.[11] Decision and Order at 34; Employer's Brief at 23. Thus, the administrative law judge acted within his discretion in finding that Dr. Rasmussen's opinion was reasoned and documented, and supported a finding of legal pneumoconiosis. *See Island Creek Coal Co. v. Compton*,

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[11] In his most recent report dated February 6, 2008, Dr. Rasmussen opined that claimant's pulmonary function studies indicated "a marked loss of lung function as reflected by his reduced diffusing capacity and his marked impairment in oxygen transfer during light exercise," and that claimant does not retain the pulmonary capacity to perform his usual coal mine work. Dr. Rasmussen explained the cause of claimant's impairment, stating:

> [Claimant's] coal mine dust is a major contributing factor. The two known factors which cause or contribute to [claimant's] disabling lung disease are, of course, his 23 years of cigarette smoking at ½ to ¾ pack per day, and his 32 years of coal mine employment. Both cause emphysema, including all forms of emphysema. Their effects in those susceptible individuals are caused by identical cellular and enzymatic changes, which basically dissolve lung tissue leading to emphysema.
>
> Coal mine dust, in contrast to cigarette smoke causes interstitial fibrosis, which accompanies emphysema. This combination can result in impairment in oxygen transfer secondary to both the emphysema and the fibrosis, but because of persistent airway attachments prevents or diminishes airway collapse and can result in findings of significant impairment in oxygen transfer absent or in excess of any ventilatory impairment. This pattern is commonly encountered among impaired coal miners and occurs not uncommonly among patients with complicated pneumoconiosis.
>
> [Claimant's] coal mine dust is a major contributing factor.

Claimant's Exhibit 2.

211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Clark*, 12 BLR at 1-155; Decision and Order at 34.

We agree with employer, however, that the administrative law judge erred in discrediting the opinion of Dr. Castle, that claimant does not suffer from any coal dust-related lung disease. The administrative law judge found, correctly, that both Drs. Rasmussen and Castle opined that smoking is a cause of claimant's emphysema, but that the difference in opinion is that Dr. Rasmussen believes that coal dust exposure also contributed to claimant's emphysema. The administrative law judge accorded diminished weight to the opinion of Dr. Castle, stating:

> While Dr. Rasmussen goes on to state his basis for determining that coal mine dust exposure contributed to the claimant's emphysema, Dr. Castle's opinion fails to identify the basis for his conclusion that coal mine employment played no role in the claimant's bullous emphysema. In light of Dr. Rasmussen's opinion, Dr. Castle's failure to explain how he ruled out coal mine dust exposure and the claimant's thirty-two years of coal mine employment as contributing to the claimant's emphysema is particularly problematic. Therefore, I accord Dr. Castle's opinion on the issue of legal pneumoconiosis slightly diminished weight.

Decision and Order at 34.

As employer contends, a review of the record reveals that the administrative law judge has mischaracterized the evidence. In his report dated June 19, 2008, Dr. Castle explained that the specific pattern of claimant's impairment was consistent with a smoking-related disease:

> The physiologic studies have demonstrated evidence of a mild to moderate degree of airway obstruction which showed a very significant degree of reversibility when bronchodilators were administered. There was no evidence of any restriction. He did have a reduction in diffusing capacity and the DL/VA indicating that these changes are consistent with tobacco smoke induced bullous emphysema. When coal workers' pneumoconiosis causes an impairment, it generally does so because of a mixed, irreversible obstructive and restrictive ventilatory defect. Those were not the findings in this case. It is my opinion with a reasonable degree of medical certainty that the physiologic changes of mild to moderate airway obstruction with a significant degree of reversibility without restriction with a reduction in the diffusing capacity are due to tobacco smoke induced bullous emphysema with a significant asthmatic component.

Employer's Exhibit 12 at 10. During his deposition, Dr. Castle reiterated and further explained his conclusion, stating that "[claimant] has had evidence of mild to moderate airway obstruction with a very significant degree of reversibility, which had been variable over time, which has been associated with a significant reduction in the diffusing capacity." Employer's Exhibit 20 at 25-27. Dr. Castle stated that this pattern was seen with tobacco smoking-induced bullous emphysema with a significant asthmatic component, but was not normally seen with coal dust-related disease without a high degree of profusion on chest x-ray, which claimant did not have. Employer's Exhibit 20 at 28-29. Thus, the administrative law judge's determination that Dr. Castle did not provide an explanation for his conclusion, that claimant's emphysema is not due to coal dust exposure, is not supported by substantial evidence. *See Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Hicks*, 138 F.3d at 528, 21 BLR at 2-326.

Accordingly, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and remand the case to the administrative law judge for further consideration. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999) The administrative law judge must sufficiently discuss the evidence and his reasons for crediting or discrediting a medical opinion. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and 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

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge