BRB No. 05-0371 BLA

ROBERT L. WYATT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RANGER FUEL CORPORATION	)	DATE ISSUED: 01/30/2006
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

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

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; 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 (03-BLA-6253) of Administrative Law Judge Michael P. Lesniak awarding benefits 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).[1] This case involves a subsequent claim filed on August 21, 2001.[2] After crediting claimant with sixteen and one-half years of coal mine employment, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b). Although the administrative law judge found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), he found that the newly submitted evidence was sufficient to establish the existence of complicated pneumoconiosis, thereby entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis set out at 20 C.F.R. §718.304. The administrative law judge, therefore, found that claimant had established that one of the applicable conditions of entitlement had changed since the date upon which claimant's prior 1990 claim became final. Accordingly, the administrative law judge awarded benefits. On appeal, employer argues that the administrative law judge erred in excluding x-ray and CT scan interpretations from the record. Employer also argues that the administrative law judge erred in excluding Dr. Wheeler's deposition testimony from the record. Employer further argues that the administrative law judge erred in finding that the x-ray evidence was

---

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

[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on April 5, 1988. Director's Exhibit 1. The district director denied benefits on September 15, 1998. *Id.* The district director denied benefits because he found that the evidence was insufficient to establish that claimant was totally disabled due to pneumoconiosis. *Id.* There is no indication that claimant took any further action in regard to his 1988 claim.

Claimant filed a second claim on July 31, 1990. Director's Exhibit 1. In a Decision and Order dated May 18, 1993, Administrative Law Judge Edward Terhune Miller found that the newly submitted evidence was insufficient to establish that claimant was suffering from a totally disabling respiratory or pulmonary impairment or that such a disability was due to pneumoconiosis. *Id.* Judge Miller, therefore, found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* Accordingly, Judge Miller denied benefits. *Id.* There is no indication that claimant took any further action in regard to his 1990 claim.

Claimant filed a third claim on August 21, 2001. Director's Exhibit 3.

sufficient to establish the existence of complicated pneumoconiosis. Employer also contends that the administrative law judge erred in not addressing the significance of the lack of evidence of a totally disabling pulmonary impairment in finding that the evidence was sufficient to establish the existence of complicated pneumoconiosis. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge acted within his discretion in excluding x-ray and CT scan interpretations from the record. The Director also argues that the administrative law judge properly excluded Dr. Wheeler's deposition testimony from the record. The Director further contends that the administrative law judge's failure to specifically address claimant's lack of a pulmonary impairment in evaluating the evidence of complicated pneumoconiosis is harmless error. In a reply brief, employer reiterates its previous contentions.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Before considering whether the evidence was sufficient to establish the existence of complicated pneumoconiosis, the administrative law judge first addressed whether the evidence was sufficient to establish the existence of simple pneumoconiosis. The administrative law judge's inquiry was a correct one. 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.[3] The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

In this case, the administrative law judge stated that:

---

[3]Section 718.304 provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (a) an x-ray of the miner's lungs shows an opacity greater than one centimeter in diameter; (b) a biopsy or autopsy shows massive lesions in the lung; or (c) when diagnosed by other means the condition could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.

> Because a significant question arises in this claim regarding whether Claimant has *complicated* pneumoconiosis under the Regulations, I will begin by determining whether Claimant has coal-dust-induced pneumoconiosis at all. I observe that, in his May 21, 1993 Decision and Order, Judge Tehune [sic] stated that "[t]he additional evidence which was introduced by the Claimant in conjunction with his [subsequent] claim for benefits reconfirms the existence of pneumoconiosis." DX 1. Indeed, even upon Claimant's initial claim for benefits in 1988, he was found to have shown that he has the disease. *Id.* Upon re-examining the evidence from the prior claims, I am satisfied that Claimant showed by a preponderance of the evidence that he has clinical CWP.

Decision and Order at 10.

The administrative law judge next addressed whether the newly submitted x-ray evidence was sufficient to establish the existence of simple pneumoconiosis. However, before reviewing the administrative law judge's finding as to whether the newly submitted x-ray evidence is sufficient to establish the existence of simple pneumoconiosis, we must first address employer's contention that the administrative law judge erred in excluding x-ray evidence from the record.

Employer contends that the administrative law judge erred in excluding four negative x-ray interpretations rendered by Dr. Wheeler. Although the administrative law judge admitted Dr. Wheeler's negative interpretations of claimant's October 29, 2001, August 31, 2002 and February 13, 2003 x-rays, *see* Employer's Exhibit 7, he excluded Dr. Wheeler's negative interpretations of claimant's May 1, 1992, December 11, 2000, March 13, 2002, and November 5, 2002 x-rays because he found that they exceeded the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer argues that the administrative law judge erred in excluding this evidence because "all relevant evidence must be considered." Employer's Brief at 21. Employer also argues that the administrative law judge erred in not finding "good cause" for the admission of the excluded x-ray evidence. *Id.* at 23 n.5.

To the extent that employer asserts that the evidentiary limitations set forth at 20 C.F.R. §725.414[4] are invalid, its contention has no merit. The Board has rejected the

---

[4]Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more

argument that Section 725.414 conflicts with Section 413(b) of the Act. 30 U.S.C. §923(b); s*ee Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004). The Board has also rejected the argument that the evidentiary limitations set forth at Section 725.414 are inconsistent with the Administrative Procedure Act. 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); s*ee Dempsey*, *supra*.

Employer does not dispute that the excluded x-ray evidence exceeds the limitations of Section 725.414. Employer contends, however, that good cause exists for its admission into the record. An administrative law judge is afforded broad discretion in dealing with procedural matters. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). In this case, the administrative law judge noted that employer's only reason for submitting additional x-ray interpretations was because they supported Dr. Wheeler's diagnosis as stated in his deposition testimony. Administrative Law Judge's June 7, 2004 Order at 3. The administrative law judge, however, noted that Dr. Wheeler's deposition testimony was not admissible.[5] *Id.* Consequently, we hold that the administrative law judge, under the facts of this case, did not abuse his discretion in determining that good cause did not exist for the admission of Dr. Wheeler's interpretations of claimant's May 1, 1992, December 11, 2000, March 13, 2002, and November 5, 2002 x-rays. *Id.*

---

than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id*. "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "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). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

[5]As discussed *infra*, the administrative law judge properly excluded Dr. Wheeler's deposition testimony from the record.

Employer next argues that the administrative law judge erred in finding the newly submitted x-ray evidence sufficient to establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[6] In his consideration of whether the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge stated that:

> Three of the six new x-ray readings provide evidence that Claimant has the disease. In fact, three of the physicians reading Claimant's films found him to have evidence of q- or r-sized opacities of 2/3 or 3/2 profusion, as well as large opacities. One physician who read some of the same films found no large opacities and found the films to contain so little evidence of small opacities to be of 0/1 profusion. All of the physicians who read x-rays in the new evidence, Drs. Wheeler, Duponte [sic], Willis, and Alexander – are extremely well qualified to read x-rays, as all are Board-certified radiologists and NIOSH-certified B-readers. However, because Dr. Wheeler's findings are so inconsistent with those of three other equally qualified doctors, I find his opinion in this matter to be the least reliable. Therefore, I find that the new x-ray evidence supports a finding of clinical pneumoconiosis under §718.202(a)(1).

Decision and Order at 10-11.

---

[6]The record contains six newly submitted x-ray interpretations. Dr. Wheeler, a B reader and Board-certified radiologist, interpreted claimant's October 29, 2001 x-ray as negative for pneumoconiosis. Employer's Exhibit 7. There are no other interpretations of this film in the record.

While Dr. Deponte, a B reader and Board-certified radiologist, interpreted claimant's August 31, 2002 x-ray as positive for pneumoconiosis, Claimant's Exhibit 2, an equally qualified physician, Dr. Wheeler, interpreted this x-ray as negative for the disease. Employer's Exhibit 7.

Dr. Willis, a B reader and Board-certified radiologist, interpreted claimant's November 5, 2002 x-ray as positive for pneumoconiosis. Claimant's Exhibit 4. There are no other interpretations of this film in the record.

While Dr. Alexander, a B reader and Board-certified radiologist, interpreted claimant's February 13, 2003 x-ray as positive for pneumoconiosis, Claimant's Exhibit 3, an equally qualified physician, Dr. Wheeler, interpreted this x-ray as negative for the disease. Employer's Exhibit 7.

The administrative law judge's only basis for discrediting Dr. Wheeler's negative x-ray interpretations is because Dr. Wheeler's findings are inconsistent with the "three other equally qualified doctors." Decision and Order at 10-11. However, Drs. Wheeler, Deponte, Willis and Alexander did not render interpretations of the same x-rays. The administrative law judge erred in counting the number of readers rendering positive interpretations of claimant's most recent x-rays. The number of x-ray interpretations, along with the readers' qualifications, dates of film, quality of film and the actual reading must be considered. *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). An administrative law judge should focus upon the weighing of positive and negative x-ray interpretations, as opposed to counting the number of individual readers rendering such interpretations. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Rankin v. Keystone Coal Mining Corp.*, 8 BLR 1-54 (1985). Consequently, we vacate the administrative law judge's finding that the newly submitted x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). On remand, should the administrative law judge find the x-ray evidence sufficient to establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), he must weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), before determining whether the evidence is sufficient to establish the existence of simple pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

We now turn our attention to employer's contention that the administrative law judge erred in finding the newly submitted x-ray evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). In his consideration of whether the newly submitted x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis,[7] the administrative law judge stated that:

---

[7]Dr. Wheeler, a B reader and Board-certified radiologist, interpreted claimant's October 29, 2001 x-ray as negative for complicated pneumoconiosis. Employer's Exhibit 7. There are no other interpretations of this film in the record.

While Dr. Deponte, a B reader and Board-certified radiologist, interpreted claimant's August 31, 2002 x-ray as positive for complicated pneumoconiosis, Claimant's Exhibit 2, an equally qualified physician, Dr. Wheeler, interpreted this x-ray as negative for complicated pneumoconiosis. Employer's Exhibit 7.

Dr. Willis, a B reader and Board-certified radiologist, interpreted claimant's November 5, 2002 x-ray as positive for complicated pneumoconiosis. Claimant's Exhibit 4. There are no other interpretations of this film in the record.

> I previously examined the six new x-ray interpretations of four x-rays in the subsection discussing pneumoconiosis. Here, I reiterate that I give less weight to Dr. Wheeler's readings, which are consistent with each other but inconsistent with the three readings of other, equally qualified physicians. Drs. DePonte, Willis, and Alexander all found large opacities on Claimant's x-ray. Therefore, under the Regulations, I find that the preponderance of the x-ray evidence shows that Claimant has complicated pneumoconiosis. 20 C.F.R. §718.304(a).

Decision and Order at 14 (footnote omitted).

The administrative law judge committed the same error in regard to his consideration of whether the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis that he committed in regard to his consideration of whether the x-ray evidence was sufficient to establish the existence of simple pneumoconiosis. The administrative law judge's sole basis for discrediting Dr. Wheeler's negative x-ray interpretations is because his findings are inconsistent with the "three readings of other, equally qualified physicians." Decision and Order at 14. However, as previously discussed, Drs. Wheeler, Deponte, Willis and Alexander did not render interpretations of the same x-rays. The administrative law judge erred in counting the number of readers rendering positive interpretations of claimant's most recent x-rays. The number of x-ray interpretations, along with the readers' qualifications, dates of film, quality of film and the actual reading must be considered. *See Dixon*, *supra*; *Roberts*, *supra*; *see also Wheatley*, *supra*; *see generally Gober, supra*. An administrative law judge should focus upon the weighing of positive and negative x-ray interpretations as opposed to counting the number of individual readers rendering such interpretations. *See Adkins*, *supra*; *see also Rankin*, *supra*. Consequently, we also vacate the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), and remand the case for further consideration.

Employer next contends that the administrative law judge erred in applying the affirmative-case evidentiary limitations of 20 C.F.R. §725.414 to CT scan interpretations. Claimant's treatment records[8] include Dr. Shaw's interpretation of a

---

While Dr. Alexander, a B reader and Board-certified radiologist, interpreted claimant's February 13, 2003 x-ray as positive for complicated pneumoconiosis, Claimant's Exhibit 3, an equally qualified physician, Dr. Wheeler, interpreted this x-ray as negative for complicated pneumoconiosis. Employer's Exhibit 7.

[8]The regulations provide that "[n]otwithstanding the limitations" of Section

December 13, 2000 CT scan.[9] In support of its case, employer submitted four interpretations of claimant's December 13, 2000 CT scan. Employer submitted the interpretations of Drs. Wheeler, Scott, Scatarige and Zaldivar. In his June 7, 2004 Order, the administrative law judge stated:

> Employer offers four interpretations of a CT scan performed on Claimant on December 13, 2000. I construe the regulatory limitations on x-ray evidence as defined at §725.414 to also apply to CT scan interpretations. My basis for drawing this analogy is that CT scans provide evidence substantially similar to x-rays (albeit with a more advanced technology). In promulgating the new regulations, the Secretary of Labor could not have intended for parties to sidestep the evidentiary limitations by offering substantially similar evidence in excessive quantities. The purpose of the evidentiary limitations, as I discussed *supra*, apply [sic] as readily to CT scans as they [sic] do to x-ray films.
>
> Therefore, although the CT scan interpretations are relevant evidence, I will not admit more than two interpretations as affirmative evidence from a party. As the first two interpretations that Employer lists are those of Drs. Wheeler and Scott, I will admit those into evidence. The interpretations of Drs. Scatarige and Zaldivar are cumulative and repetitive evidence, serving only a very limited purpose in this proceeding, and

---

725.414(a)(2), (a)(3), "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). Dr. Shaw's CT scan interpretation was properly admitted into the record as a part of claimant's medical treatment records. *See* 20 C.F.R. §725.414(a)(4).

[9]On December 13, 2000, Dr. Shaw interpreted claimant's December 13, 2000 CT scan as revealing "multiple small nodular opacities projecting mainly within the upper and middle lobes." Director's Exhibit 12. Dr. Shaw noted that these nodules measured between 1 mm to 6 mm in size. *Id.* Although Dr. Shaw saw a "conglomerant [sic] area of small pulmonary nodules within the right upper lobe," he noted that this was "not thought to represent a single mass." *Id.* Dr. Shaw's impression was as follows:

> Multiple small pulmonary nodules with a predominance within the upper and middle lobes. The differential diagnosis includes silicosis vs. metastatic disease vs. TB. We favor silicosis, given the distribution of these numerous small nodules and the presence of bilateral pleural thickening.

Director's Exhibit 12.

> moreover are excluded by the limitations at §725.414. I am therefore excluding them.

Administrative Law Judge's June 7, 2004 Order at 4.

Citing *Dempsey*, *supra*, employer argues that the administrative law judge erred in excluding the CT scan interpretations rendered by Drs. Scatarige and Zaldivar. In *Dempsey*, the Board held that:

> CT-scans are admissible as "[o]ther medical evidence" under 20 C.F.R. §718.107(a), which provides for the submission of "[t]he results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis," its sequela, "or a respiratory or pulmonary impairment." 20 C.F.R. §718.107(a). Unlike Section 725.414, Section 718.107(a) contains no specific numerical limits. If a party submits other medical evidence pursuant to Section 718.107, Section 725.414 provides that the opposing party may "submit one physician's assessment of each piece of such evidence in rebuttal." 20 C.F.R. §725.414(a)(2)(ii),(a)(3)(ii). Thus, by its terms, revised Section 725.414 imposes no numerical limits on CT-scan readings submitted as a party's affirmative case.

Dempsey, 23 BLR at 1-59-60.

Thus, in *Dempsey*, the Board held that the affirmative case limitations of Section 725.414 do not extend to CT scans. *Dempsey*, 23 BLR at 1-60.

However, the Board recently revisited its prior interpretation of Section 718.107.[10]

---

[10]Section 718.107 provides that:

> (a) The results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis, the sequelae of pneumoconiosis or a respiratory or pulmonary impairment may be submitted in connection with a claim and shall be given appropriate consideration.
>
> (b) The party submitting the test or procedure pursuant to this section bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits.

20 C.F.R. §718.107.

In *Webber v. Peabody Coal Co.*, BLR , BRB No. 05-0335 BLA (Jan. 27, 2006) (*en banc*) (Boggs, J., concurring), the Board adopted the Director's position that Section 718.107 should be interpreted to allow for the submission, as part of a party's affirmative case, of only one reading of each separate test or procedure undergone by claimant.[11] *Webber*, slip op. at 8. Thus, as part of its affirmative case, employer is entitled to submit one interpretation of claimant's December 13, 2000 CT scan. Consequently, we vacate the administrative law judge's ruling as to the CT scan readings and instruct him to require employer to select and submit, pursuant to Section 718.107(a), only one reading of the December 13, 2000 CT scan, which the administrative law judge should then consider, together with any supporting evidence submitted pursuant to Section 718.107(b), and in conjunction with any rebuttal evidence submitted by claimant pursuant to 20 C.F.R. §725.414(a)(2)(ii), (3)(ii). 20 C.F.R. §718.107; 20 C.F. R. §725.414(a)(2)(ii), (3)(ii). After employer makes its selection, the administrative law judge is instructed to reconsider the CT scan evidence pursuant to 20 C.F.R. §718.304(c).

Employer next argues that the administrative law judge erred in excluding Dr. Wheeler's deposition testimony. In his June 7, 2004 Order, the administrative law judge stated:

> Employer has offered the deposition testimony of Dr. Wheeler, who did not author a medical report offered as affirmative evidence by either party. The Regulations make specific provision for the hearing testimony of physicians whose medical reports are admitted into evidence. 20 C.F.R. §725.414(c). Dr. Wheeler's testimony, offered as a deposition transcript, does not fit into that definition. Employer contends that Claimant had three people testify at the hearing, and that it therefore must also be permitted to submit the testimony of three individuals into evidence. Employer provides no regulatory basis for its claim. Moreover, admissible physician testimony

---

[11]The Board noted that its imposition of limitations on the affirmative evidence admissible under Section 718.107 was consistent with the Secretary of Labor's goal of limiting evidence in order to avoid repetition, reducing the costs of litigation, focusing on the quality, rather than the quantity, of the evidence, and leveling the playing field between employers and claimants. *Webber v. Peabody Coal Co.*, BLR , BRB No. 05-0335 BLA (Jan. 27, 2006) (*en banc*) (Boggs, J., concurring), slip op. at 8 n.15.

The Board, however, declined to hold that a party could only submit the first, or original, results of each test or procedure. Instead, the Board held that each party could choose which set of results, for each test or procedure, to submit in order to best support its position. *Webber*, slip op. at 8.

> is so clearly defined at §725.414 that little doubt can exist as to its meaning. I find that Dr. Wheeler's deposition testimony is not admissible into evidence.

Administrative Law Judge's June 7, 2004 Order at 3-4.

Employer contends that the administrative law judge erred in excluding the deposition testimony of Dr. Wheeler as exceeding the evidentiary limitations set forth at 20 C.F.R. §725.414. We disagree. Section 725.457(c) provides that "[n]o person shall be permitted to testify as a witness at the hearing, or pursuant to deposition or interrogatory under §725.458, *unless that person meets the requirements of §725.414(c)*." 20 C.F.R. §725.457(c) (emphasis added).

Section 725.414(c) provides, in relevant part, that:

> A physician who prepared a medical report admitted under this section may testify with respect to the claim at any formal hearing conducted in accordance with subpart F of this part, or by deposition. If a party has submitted fewer than two medical reports as part of that party's affirmative case under this section, a physician who did not prepare a medical report may testify in lieu of such a medical report. The testimony of such a physician shall be considered a medical report for purposes of the limitations provided by this subsection. A party may offer the testimony of no more than two physicians under the provisions of this section unless the adjudication officer finds good cause under paragraph (b)(1) of §725.456 of this part.

20 C.F.R. §725.414(c).

Dr. Wheeler did not prepare a medical report; he rendered interpretations of claimant's chest x-rays.[12] However, Dr. Wheeler's deposition testimony could still have

---

[12] A "medical report" is "a physician's written assessment of the miner's respiratory or pulmonary condition." 20 C.F.R. §725.414(a). By contrast, "[a] physician's written assessment of a single objective test, such as a chest X-ray . . . shall not be considered a medical report for purposes of this section." *Id.*

We reject employer's contention that Section 725.414 is invalid because it prohibits a party from submitting the testimony of a radiologist. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*) (rejecting the argument that Section 725.414 imposes arbitrary limits on evidence). Contrary to employer's assertion, by its terms, the

been admitted "in lieu of" a medical report if employer had "submitted fewer than two medical reports as part of [its] affirmative case . . . ." In that case, Dr. Wheeler's testimony would "be considered a medical report for purposes of the limitations provided by this section." 20 C.F.R. §725.414(c). Employer, however, had already submitted its limit of two medical reports as part of its affirmative case (Drs. Crisalli and Zaldivar). 20 C.F.R. §725.414(a)(3)(i); Director's Exhibits 13, 14; Employer's Exhibits 2, 3. Consequently, we hold that the administrative law judge properly excluded Dr. Wheeler's deposition testimony pursuant to Section 725.414(c).[13]

Employer finally contends that the administrative law judge erred in not addressing the significance of the lack of evidence of a totally disabling pulmonary impairment, in finding that the evidence was sufficient to establish the existence of complicated pneumoconiosis. A miner need not show that he suffers from a respiratory impairment in order to invoke the irrebuttable presumption set forth at 20 C.F.R. §718.304. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). However, a physician may consider the absence of a respiratory impairment as one factor in ascertaining whether an x-ray diagnosis of complicated pneumoconiosis is appropriate. *See Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 148, 11 BLR 2-1, 2-8 (1987), *reh'g denied* 484 U.S. 1047 (1988) (recognizing that other evidence can shed light on the meaning and significance of an x-ray).

In this case, the Director accurately notes that none of employer's physicians predicated their findings of the absence of complicated pneumoconiosis on the lack of a

---

regulation permits a party to submit the testimony of a physician who did not prepare a medical report. *See* 20 C.F.R. §725.414(c).

[13]On remand, the administrative law judge is instructed to consider whether any of Dr. Wheeler's deposition testimony is relevant pursuant to 20 C.F.R. §718.107(b). Dr. Wheeler provided testimony regarding the relevance and medical acceptability of CT scans. *See* Employer's Exhibit 7 at 11-13. To the extent a physician's statement or testimony addresses the general medical acceptability and relevance of a test or procedure submitted as "other medical evidence" pursuant to Section 718.107, and does not discuss the miner himself, that statement or testimony is properly admitted as part of that "other medical evidence" and is not subject to the evidentiary limitations set forth at Section 725.414 or the attendant good cause provisions of 20 C.F.R. §725.456(b)(1). *Webber*, slip op. at 10. Where a physician's statement or testimony offered to satisfy a party's burden of proof at Section 718.107(b) also contains additional discussion of the miner's condition, if the additional comments are not separately admissible pursuant to any of the provisions of Section 725.414 or Section 725.456(b)(1), the administrative law judge need not exclude the deposition or testimony in its entirety, but may sever and consider separately those portions relevant to Section 718.107(b). *Id.*

respiratory or pulmonary impairment. Dr. Zaldivar acknowledged that a miner could suffer from complicated pneumoconiosis in the absence of a pulmonary impairment.[14] Although Dr. Crisalli indicated that a person suffering from complicated pneumoconiosis would very likely have an "accompanying impairment," Employer's Exhibit 12 at 41-42, he also acknowledged that complicated pneumoconiosis could exist in the absence of significant respiratory symptoms. *Id.* at 40-41. Dr. Crisalli indicated that he relied upon the negative interpretations rendered by Dr. Wheeler in forming his opinion that claimant did not suffer from complicated pneumoconiosis. *Id.* at 42. Consequently, given the fact that none of the physicians explicitly premised his opinion regarding the existence of complicated pneumoconiosis on the lack of evidence of a totally disabling pulmonary impairment, the administrative law judge was not required to specifically address claimant's lack of impairment, when evaluating the evidence of complicated pneumoconiosis.

In light of our decision to vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.304, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §725.309.

Accordingly, the administrative law judge's Decision and Order 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

---

[14]During a March 22, 2004 deposition, Dr. Zaldivar stated that:

> When the mass is an A type, which is a one centimeter to five centimeter mass, there may not be any lung dysfunction whatsoever. As it gets bigger into the five centimeter or larger and the B and the C category radiographically, then you may have a combination of restriction and obstruction.

Employer's Exhibit 10 at 8-9.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge