

BRB No. 12-0184 BLA

JAMES McCOY, JR.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
HOLLY BETH COAL COMPANY)	DATE ISSUED: 01/31/2013
)	
and)	
)	
ROCKWOOD INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-05729) of Administrative Law Judge Linda S. Chapman, rendered on a request for modification of the denial of a subsequent claim, pursuant to the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The relevant procedural history¹ of this case is as follows: Claimant filed a claim for benefits on February 2, 1987, which was denied by Administrative Law Judge Giles J. McCarthy. Director's Exhibit 1. Judge McCarthy found that claimant established the existence of simple pneumoconiosis arising out of coal mine employment, but failed to establish total disability. *Id.* The Board affirmed the denial of benefits. *McCoy v. Holly Beth Coal Co.*, BRB No. 91-0488 BLA (Feb.19, 1993) (unpub.). Claimant submitted four requests for modification, all of which were denied, with the fourth denial becoming final on March 28, 2001. Director's Exhibit 1.

Claimant took no further action until filing the present subsequent claim on April 22, 2002.² Administrative Law Judge Richard T. Stansell-Gamm awarded benefits, based on his findings that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and a change in an applicable condition of entitlement pursuant to 20 C.F.R §725.309. Director's Exhibit 64. The Board vacated the administrative law judge's determination that claimant proved that he had complicated pneumoconiosis and remanded the case for reconsideration. *McCoy v. Holly Beth Coal Co.*, BRB No. 05-0818 BLA (May 25, 2006) (unpub.). Judge Stansell-Gamm subsequently issued a Decision and Order on Remand Denying Benefits in which he found that claimant did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, as the newly submitted evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, or total disability pursuant to 20 C.F.R. §718.204(b). The Board affirmed the denial of benefits. *McCoy v. Holly Beth Coal Co.*, BRB No. 08-0143 BLA (Oct. 30, 2008) (unpub.). On October 29, 2009, claimant filed a request for modification, which was denied by the district director. Director's Exhibits 81, 87. Claimant contested the district director's denial and requested a hearing. The case was assigned to Judge Chapman (the administrative law judge), whose Decision and Order Awarding Benefits is the subject of this appeal.

In the administrative law judge's Decision and Order, she accepted employer's stipulation to twenty-eight and three-quarters years of underground coal mine employment and found that claimant established the existence of complicated pneumoconiosis under 20 C.F.R. §718.304 and, therefore, a change in an applicable

¹ We incorporate the procedural histories set forth in *McCoy v. Holly Beth Coal Co.*, BRB No. 08-0143 BLA, slip op. at 2 n.2 (Oct. 30, 2008) (unpub.) and *McCoy v. Holly Beth Coal Co.*, BRB No. 98-1524 BLA, slip op. at 2 n.1 (May 17, 2000) (unpub.).

² Because claimant's subsequent claim was filed before January 1, 2005, the recent amendments to the Black Lung Benefits Act do not apply. 30 U.S.C. §921(c)(4).

condition of entitlement under 20 C.F.R. §725.309(d). The administrative law judge further determined that a *de novo* review of the entire record, which contains substantially older evidence from claimant's prior claim, did not change this finding. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Claimant has not responded. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a substantive response unless specifically requested to do so by the Board.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.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *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). Claimant's prior claim, filed on February 2, 1987, was denied for failure to establish total disability. Director's Exhibit 1. Consequently, in order to obtain review of the merits of his current subsequent claim, claimant had to submit new evidence establishing that element of entitlement. 20 C.F.R. §725.309(d)(2), (3).

Additionally, because claimant seeks modification of the denial of his subsequent claim pursuant to 20 C.F.R. §725.310, the administrative law judge was required to determine whether the new evidence submitted on modification, considered along with the evidence submitted in the subsequent claim, established a change in the applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); *Hess v. Director, OWCP*, 21 BLR

³ We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding of twenty-eight and three-quarters years of underground coal mine employment. *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

⁴ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

1-141, 143 (1998). The administrative law judge was also required to consider whether there was a mistake in a determination of fact with regard to the denial of claimant's subsequent claim by Judge Stansell-Gamm. See *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

In the present case, the administrative law judge began her consideration of claimant's request for modification by considering whether claimant established the existence of complicated pneumoconiosis under 20 C.F.R. §718.304 and, therefore, invoked the irrebuttable presumption of total disability due to pneumoconiosis. Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis, if claimant 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 which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. 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 any conflicts, and make a finding of fact. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (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). Additionally, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C), would appear as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999).

Under 20 C.F.R. §718.304(a), the administrative law judge considered seventeen readings of six x-rays dated June 28, 2002, September 12, 2002, October 22, 2003, May 12, 2004, June 2, 2004, and May 6, 2010. Drs. Miller and Alexander, dually qualified as Board-certified radiologists and B readers, indicated that the film dated June 28, 2002 contained Category A large opacities, while Dr. Forehand, a B reader, identified Category B large opacities. Director's Exhibit 15; Claimant's Exhibits 4, 5. Dr. Scott, a dually

qualified radiologist, interpreted this x-ray as negative for pneumoconiosis and noted the presence of lung nodules measuring up to two centimeters in diameter, compatible with granulomatous disease or metastases. Employer's Exhibit 8. Dr. Hippensteel, a B reader, read the film as positive for simple pneumoconiosis and indicated that it revealed nodules measuring up to 2.5 centimeters in diameter that were compatible with nodular sarcoidosis. Director's Exhibit 39. Regarding the x-ray obtained on September 12, 2002, Dr. Alexander interpreted the film as containing large opacities consistent with complicated pneumoconiosis, while Dr. Wheeler, also a dually qualified radiologist, read the film as negative for pneumoconiosis and indicated that it revealed masses measuring up to two centimeters in diameter that were compatible with inflammatory disease or possible lymphatic spread. Director's Exhibits 37, 51. The film dated October 22, 2003 was read as containing Category B large opacities by Dr. Pathak, a dually qualified radiologist. Director's Exhibit 51. Dr. Robinette, a B reader, interpreted the x-ray as showing Category A large opacities. *Id.* Dr. Scatarige, a dually qualified radiologist, read this film as negative for pneumoconiosis and noted that it contained nodules measuring up to two centimeters in diameter compatible with metastatic disease, fungal disease, or lymphoma. Director's Exhibit 52. Dr. Renn, a B reader, determined that the x-ray was positive for simple pneumoconiosis and reflected the presence of densities consistent with metastatic disease. *Id.* The x-ray dated May 12, 2004, was read by Dr. Alexander, as containing Category B large opacities, while Dr. Scatarige noted that the film was negative for pneumoconiosis and revealed a 1.5 centimeter mass and scattered nodules that were indicative of chronic pneumonia, infiltrative disease, neoplasm, Wegner's disease, or amyloidosis. Director's Exhibits 52, 59. Regarding the film obtained on June 2, 2004, Dr. Mullens, who has no special radiological qualifications, stated that the x-ray revealed multiple ill-defined masses and reticulonodular interstitial disease. Director's Exhibit 57. Dr. Hippensteel determined that this film contained nodules, measuring one and two centimeters in diameter, and interstitial changes and adenopathy consistent with sarcoidosis. Director's Exhibit 61. The May 6, 2010 x-ray was read by Dr. Scott as showing a five centimeter mass or local infiltrate and hyperinflation consistent with emphysema. Employer's Exhibit 4. Dr. Alexander determined that this film revealed Category A large opacities. Claimant's Exhibit 1.

The administrative law judge considered the x-rays individually and determined that each was inconclusive for the presence or absence of complicated pneumoconiosis, as each produced conflicting readings by equally qualified physicians. Decision and Order at 26-27. The administrative law judge stated, "[c]onsidering only the interpretations of the analog x-rays, I find that [claimant] has not met his burden to establish the existence of complicated pneumoconiosis by a preponderance of the x-ray interpretations under prong A." *Id.* at 27.

Pursuant to 20 C.F.R. §718.304(b), the administrative law judge addressed two reports reviewing the needle biopsy of a mass in claimant's lower right lung that was

performed on June 2, 2004. Dr. Buddington stated that the tissue sample obtained showed “scanty amounts of skeletal muscle and anthracotic pigment.” Director’s Exhibit 57. Dr. Bush indicated that the tissue contained moderate to dense dust pigment, but no fibrous tissue. Employer’s Exhibit 6. The administrative law judge found that, while the biopsy yielded some evidence of pneumoconiosis, it was insufficient, in isolation, to demonstrate the presence of complicated pneumoconiosis under 20 C.F.R. §718.304(b). Decision and Order at 28.

The administrative law judge then considered the CT scan, digital x-ray and PET scan evidence together at 20 C.F.R. §718.304(c). Dr. Mullens reviewed CT scans dated August 20, 2002, June 2, 2004, October 11, 2004, April 14, 2005, and May 21, 2010, and interpreted them as showing a diffuse reticular nodular interstitial pattern with multiple, larger bilateral speculated nodules consistent with coal workers’ pneumoconiosis/silicosis and progressive massive fibrosis. Director’s Exhibit 38; Claimant’s Exhibit 3. Dr. Hippensteel read the CT scans obtained on September 12, 2002, June 2, 2004, October 11, 2004, April 14, 2005, and May 21, 2010. Dr. Hippensteel noted the presence of reticular and nodular infiltrates and a nodule measuring two centimeters and stated that the nodules were more compatible with sarcoidosis than complicated pneumoconiosis. Director’s Exhibit 37; Employer’s Exhibit 5. Dr. Castle reviewed CT scans dated May 6, 2004 and June 2, 2004, and identified a mass in claimant’s right mid-lung zone, which he stated could represent a malignancy or granulomatous disease. Director’s Exhibit 86. Dr. McReynolds read a CT scan dated June 7, 2004 and observed a persistent tiny apical pneumothorax. Employer’s Exhibit 3.

The record contains one whole body PET scan performed on May 10, 2004. Dr. Mullens stated that the scan showed intense hypermetabolic lesions representing conglomerate masses or a neoplasm. Director’s Exhibit 57. Dr. Mullens recommended that a needle biopsy be performed to rule out a malignancy. *Id.* Although Dr. Hippensteel was unable to interpret the PET scan because his copy was unreadable, he indicated that he agreed with Dr. Mullens’s reading, but noted that sarcoidosis can cause similar findings and suggested that Dr. Mullens erred in failing to consider sarcoidosis in his differential diagnosis. Employer’s Exhibits 5, 7.

The digital x-ray evidence consists of three readings of two x-rays dated June 4, 2004 and October 19, 2010. Dr. Ramakrishnan, whose qualifications are not of record, interpreted the June 4, 2004 x-ray and indicated that claimant still had a right-sided pneumothorax. Employer’s Exhibit 1. Dr. Scott read the October 19, 2010 x-ray as showing a possible five centimeter mass and a diffuse pattern of opacities compatible with tuberculosis, histoplasmosis, sarcoidosis, or simple coal workers’ pneumoconiosis. Employer’s Exhibit 5. Dr. Miller interpreted the same x-ray and noted the presence of Category B large opacities. Claimant’s Exhibit 2.

Based on her review of the CT scan, PET scan, and digital x-ray evidence at 20 C.F.R. §718.304(c), the administrative law judge stated, “a preponderance of this evidence confirms the existence of bilateral large masses, but does not confirm or refute a diagnosis of complicated pneumoconiosis.” Decision and Order at 28-30. The administrative law judge further stated:

But while the evidence, when considered in isolation under the independent subsections at 20 C.F.R. §718.304, is not sufficient to establish the presence, *or absence*, of complicated pneumoconiosis, I find that, considering the evidence as a whole, as instructed by the Fourth Circuit in [*Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285-87, 24 BLR 2-269, 2-282-84 (4th Cir. 2010)], the overwhelming preponderance of the more credible x-ray, CT scan, and biopsy evidence establishes that claimant has a condition in his lungs that has resulted in the development of masses that appear on x-ray as larger than one centimeter in diameter, which are due to pneumoconiosis.

Id. at 31. Specifically, the administrative law judge credited the preponderance of well-reasoned physicians’ opinions that identified pneumoconiosis as the source of claimant’s masses, over the contrary opinions of employer’s experts, who did not dispute the existence of the masses, but “speculate[d] that these large masses are due to a number of diseases or conditions other than pneumoconiosis.”⁵ *Id.* The administrative law judge

⁵ The administrative law judge referenced the medical opinions of Drs. Robinette, Hippensteel and McSharry when weighing the evidence relevant to 20 C.F.R. §718.304 as a whole. Decision and Order at 32-37. Dr. Robinette, claimant’s treating physician, ruled out metastatic disease or cancer, based on the 2004 needle biopsy, and noted that, although claimant had a positive PPD skin test, three subsequent sputum tests were negative for tuberculosis. Director’s Exhibit 38; Claimant’s Exhibit 3. Dr. McSharry examined claimant at employer’s request on May 12, 2004 and reviewed claimant’s medical records. Employer’s Exhibit 1. Based upon claimant’s normal objective studies, and the appearance of the nodules on claimant’s x-rays and CT scans, Dr. McSharry ruled out the presence of pneumoconiosis and stated that claimant likely suffered from sarcoidosis. *Id.* Dr. McSharry testified at deposition that claimant’s angiotensin converting enzyme (ACE) level was inconclusive for sarcoidosis, that some studies had linked elevated ACE levels to pneumoconiosis (though Dr. McSharry did not believe this to be the case), and that he would require a biopsy before making such a diagnosis. Employer’s Exhibit 8 at 15. Dr. Hippensteel examined claimant on September 12, 2002 and October 19, 2010, and reviewed claimant’s medical records. Director’s Exhibit 39; Employer’s Exhibit 5. Dr. Hippensteel concluded that claimant does not have pneumoconiosis and that his lung abnormalities are attributable to probable sarcoidosis. *Id.*

concluded, therefore, that claimant successfully invoked the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304. *Id.* at 37.

Employer argues that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. In support of this contention, employer maintains that the administrative law judge's determination that the evidence is insufficient to establish the presence of complicated pneumoconiosis under the individual subsections of 20 C.F.R. §718.304, cannot be reconciled with her determination that the evidence, when considered as a whole, "transforms into evidence of complicated pneumoconiosis excluding any other potential cause." Employer's Brief in Support of its Petition for Review at 6. Employer also challenges the administrative law judge's crediting of the opinion in which Dr. Robinette diagnosed complicated pneumoconiosis and her discrediting of the contrary opinions of Drs. Hippensteel and McSharry. Employer's arguments are without merit, as the administrative law judge's considered all of the relevant evidence of record and her ultimate conclusion that claimant has complicated pneumoconiosis, is rational and supported by substantial evidence.

The administrative law judge reasonably concluded that the medical experts agreed that the analog and digital x-ray evidence, as well as the CT scan evidence, demonstrated the presence of masses in claimant's lungs that appear greater than one centimeter in diameter on chest x-ray, but disagreed as to their etiology. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; Decision and Order at 31. In assessing the conflicting evidence on this issue, the administrative law judge correctly noted that, with respect to the radiological evidence, Drs. Miller, Alexander, and Pathak, who are dually-qualified Board-certified radiologists and B readers, and Drs. Forehand and Robinette, who are B readers, identified the masses as category A or B opacities. Decision and Order at 31. The administrative law judge also indicated correctly that Drs. Forehand, Miller, Pathak, and Robinette identified pneumoconiosis as the disease process that accounted for these masses/opacities, while Dr. Alexander stated that "other diseases that cause nodules need to be excluded." *Id.* at 31 n. 12, *quoting* Claimant's Exhibit 5. Regarding the readings offered by Drs. Scatarige, Scott, Wheeler, and Renn, the administrative law judge accurately determined that these physicians identified large masses, densities, or nodules, but noted that they represented conditions other than pneumoconiosis, including "questionable granuloma," metastatic disease, fungal disease, lymphoma, possible chronic pneumonia, infiltrate disease, neoplasm, Wegner's disease, amyloidosis, cancer, inflammatory disease, or lymphatic spread. Decision and Order at 31-32; Director's Exhibits 37, 39, 52, 61; Employer's Exhibits 4, 8.

The administrative law judge rationally determined that the interpretations of the x-ray and CT scan evidence by Drs. Scatarige, Scott, Wheeler and Renn were "equivocal and speculative," as there is no evidence in the record that claimant has ever been

diagnosed with, or treated for, any of these conditions. Decision and Order at 32-37; *see Cox*, 602 F.3d at 287, 24 BLR at 2-287; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). We, therefore, affirm the administrative law judge's discrediting of the opinions in which Drs. Scatarige, Scott, Wheeler, and Renn ruled out the presence of complicated pneumoconiosis. *See Cox*, 602 F.3d at 287, 24 BLR at 2-287; Decision and Order at 37.

Further, the administrative law judge permissibly relied on the diagnoses rendered by Drs. Forehand, Miller, Pathak, and the medical opinion of Dr. Robinette, to find that claimant satisfied his burden of proof, as they "unequivocally identified pneumoconiosis as the disease process responsible for the large masses/opacities." Decision and Order at 37; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. We specifically reject employer's allegation that the administrative law judge erred in relying upon Dr. Robinette's opinion, in particular, because it was based on radiological and biopsy evidence that the administrative law judge found insufficient to establish the existence of complicated pneumoconiosis. The administrative law judge rationally found that Dr. Robinette's treatment notes provided an extensive documentary foundation for his conclusion that claimant suffers from complicated pneumoconiosis, as he had followed claimant's condition since 1990 and based his diagnosis on relevant data including: medical, occupational and smoking histories; normal pulmonary function and blood gas studies; a 1998 diagnostic bronchoscopy negative for malignancy; a 2004 PET scan, multiple CT scans, and x-rays; a 2004 fine needle biopsy with no evidence of malignancy;⁶ and negative sputum cultures for tuberculosis. *See Hicks*, 138 F.3d at 533,

⁶ Although we agree with employer that Dr. Robinette's characterization of the biopsy results was inconsistent, the administrative law judge's omission of this factor from consideration does not constitute error requiring remand. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Dr. Robinette requested the needle biopsy, which was performed on June 2, 2004, because a PET scan presented abnormalities associated with either coal workers' pneumoconiosis or a neoplasm. Director's Exhibit 57; Claimant's Exhibit 3. In his June 7, 2004 treatment note, Dr. Robinette reiterated his diagnosis of complicated pneumoconiosis and accurately stated that the report of the needle biopsy indicated the presence of anthracotic pigment, but no malignancy. Claimant's Exhibit 3. In subsequent treatment notes, Dr. Robinette occasionally referred to the biopsy as showing the presence of silicosis. *Id.* Contrary to employer's suggestion, however, the administrative law judge was not required to find that the bare reference in the biopsy report to anthracotic pigment contradicted a diagnosis of pneumoconiosis in the form of silicosis. 20 C.F.R. §718.201(a)(1); *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997). Moreover, the administrative law judge rationally found that Dr. Robinette's diagnosis of complicated pneumoconiosis is supported by claimant's occupational history, symptoms, and objective testing, including

21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 32; Director's Exhibit 38; Claimant's Exhibit 3.

In addition, we affirm the administrative law judge's rational finding that Dr. McSharry's opinion, attributing claimant's large opacities to an unidentified form of granulomatous disease, was speculative, as claimant's medical records do not indicate that he has ever been treated for, or diagnosed with, any form of granulomatous disease. *See Cox*, 602 F.3d at 287, 24 BLR at 2-287; Decision and Order at 35. The administrative law judge also rationally determined that Dr. McSharry's apparent requirement that claimant have evidence of a totally disabling pulmonary impairment before he would render a diagnosis of complicated pneumoconiosis, and his belief that claimant's x-rays do not show the typical abnormalities expected in coal workers' pneumoconiosis, were inconsistent with 20 C.F.R. §718.304. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-93; Decision and Order at 35; Director's Exhibit 52. Accordingly, we affirm the administrative law judge's decision to discredit Dr. McSharry's opinion.

We also affirm the administrative law judge's discrediting of Dr. Hippensteel's opinion, that an elevated angiotensin converting enzyme (ACE) level, a positive skin test for tuberculosis, and the lack of respiratory impairment, proves that claimant's lung abnormalities were caused by a granulomatous disease, including possible sarcoidosis, rather than a disease secondary to coal mine dust exposure. Decision and Order at 35; Employer's Exhibit 7. The administrative law judge permissibly found that Dr. Hippensteel's "reliance on the elevated ACE level to diagnose sarcoidosis was called into question by Dr. McSharry, who testified that [claimant's] ACE level was inconclusive for sarcoidosis," and that Dr. Hippensteel did not adequately address the results of the fine needle biopsy, which did not yield evidence of sarcoidosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 35-36; Director's Exhibit 57; Employer's Exhibit 8 at 15. Furthermore, the administrative law judge reasonably found that the probative value of Dr. Hippensteel's opinion was diminished by reliance on claimant's positive tuberculosis skin test to attribute his radiographic abnormalities to granulomatous disease, while failing to mention claimant's subsequent negative acid fast smears and cultures for the disease. *See Cox*, 602 F.3d at 287, 24 BLR at 2-287; Decision and Order at 36. Lastly, the administrative law judge acted within her discretion in finding that Dr. Hippensteel's opinion was "adversely

multiple x-rays and CT scans. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Similarly, the administrative law judge was not required to discredit Dr. Mullens's reading of the October 11, 2004 CT scan, based on his statement that the results were consistent with "biopsy[-]proven anthracotic nodules." Claimant's Exhibit 3; *see Lane*, 105 F.3d at 174, 21 BLR at 2-48.

affected” by his reliance on the lack of objective evidence of total respiratory disability and the appearance of claimant’s large opacities after he left mining, as these factors are not consistent with the definition of pneumoconiosis or the requirements of 20 C.F.R. §718.304. 20 C.F.R. §718.201(a); 65 Fed. Reg. 79,970 (Dec. 20, 2000); *see Scarbro*, 220 F.3d at 255, 22 BLR at 2-93; *Workman v. Eastern Assoc. Coal Corp.*, 23 BLR 1-22 (2004) (order on recon.) (en banc); Decision and Order at 37.

Based on the foregoing, we reject employer’s assertion that the administrative law judge’s findings under the individual subsections of 20 C.F.R. §718.304 precludes a finding of complicated pneumoconiosis in this case. Contrary to employer’s argument, the administrative law judge merely noted at the outset of her analysis that the x-ray readings for complicated pneumoconiosis by qualified radiologists were conflicting and that the digital x-ray evidence, CT scan evidence, and medical opinion evidence, standing alone, did not establish complicated pneumoconiosis. The administrative law judge, however, properly assessed the credibility of the new evidence in light of the Fourth Circuit’s decision in *Cox* and explained why the positive radiological evidence was entitled to controlling weight, why the physicians diagnosing complicated pneumoconiosis were more credible, and why the evidence as a whole established the existence of the disease. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101 (explaining that “all of the evidence must be considered and evaluated to determine whether the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray”). Consequently, we affirm the administrative law judge’s findings that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, demonstrated a change in an applicable condition of entitlement at §725.309(d), and established a basis for modification at 20 C.F.R. §725.310. 20 C.F.R. §§718.304, 725.309(d)(2), (3), 725.310; *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28; *White*, 23 BLR at 1-3.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge