

BRB Nos. 08-0766 BLA  
and 08-0766 BLA-A

S.P.	)	
(Widow of J.P.)	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 07/29/2009
	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard A. Morgan,  
Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Kathy L. Snyder and Wendy G. Adkins (Jackson Kelly PLLC),  
Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order on Remand (05-BLA-5061) of Administrative Law Judge Richard A. Morgan (the administrative law judge) awarding benefits on a survivor's 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). This case is before the Board for the second time. In the original Decision and Order, the administrative law judge credited claimant with 19 years of coal mine

employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Although the administrative law judge found that the evidence did not establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (3), he found that the evidence established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(b). The administrative law judge also found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). In addition, the administrative law judge found that the evidence did not establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a)-(c), thereby finding that the evidence did not establish invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge denied benefits.

In response to claimant's appeal, the Board affirmed the administrative law judge's findings that the evidence did not establish the existence of simple pneumoconiosis at 20 C.F.R. §718.202(a)(1) and that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), (c). *S.P. v. Westmoreland Coal Co.*, BRB No. 06-0961 BLA, slip op. at 2 (Sept. 25, 2007) (unpub.). The Board vacated the administrative law judge's finding that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b), and remanded the case for further consideration of the evidence thereunder. *S.P.*, slip op. at 5. The Board further instructed the administrative law judge, on remand, to reconsider the evidence supporting equivalency and to consider all of the relevant evidence under 20 C.F.R. §718.304(a), (b), and (c). *S.P.*, slip op. at 6. In addition, the Board vacated the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). *S.P.*, slip op. at 8-9.

On remand, the administrative law judge found that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b) and, thus, that the evidence did not establish invocation of the irrebuttable presumption at 20 C.F.R. §718.304. Further, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(1), (3). However, the administrative law judge found that the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2). Claimant<sup>1</sup> responds, urging affirmance of the administrative law judge's

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<sup>1</sup> Claimant is the widow of the miner, who died on October 20, 2002. She filed

award of benefits. On cross-appeal, claimant argues that the administrative law judge erred in finding that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b).<sup>2</sup> The Director, Office of Workers' Compensation Programs, has declined to file a brief in this appeal.<sup>3</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.<sup>4</sup> 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).

To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>5</sup> *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director*,

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her survivor's claim on September 17, 2003. Director's Exhibit 4.

<sup>2</sup> Claimant also filed a reply to employer's brief in response to claimant's cross-appeal, reiterating her prior contentions.

<sup>3</sup> Because the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(1) is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>4</sup> The record indicates that the miner was employed in the coal mining industry in West Virginia. Director's Exhibit 5. Accordingly, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>5</sup> Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor

*OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence establishes, *inter alia*, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

Initially, we will address employer's contentions that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis at Section 718.205(c)(2). The administrative law judge considered the reports of Drs. Cohen, Green, Kahn, Bush, Caffrey, and Castle.<sup>6</sup> Dr. Cohen opined that the miner had coal workers' pneumoconiosis and severe chronic obstructive lung disease related to coal dust exposure and cigarette smoke, and that coal dust exposure and cigarette smoke significantly contributed to his death. Claimant's Exhibit 2. Dr. Green opined that pneumoconiosis/silicosis and coal dust-induced emphysema significantly contributed to the miner's respiratory failure. Claimant's Exhibit 3. Dr. Kahn opined that coal workers' pneumoconiosis and silicosis contributed to the miner's death. Director's Exhibit 21; Claimant's Exhibit 1. By contrast, Dr. Bush opined that neither coal workers' pneumoconiosis nor coal dust exposure hastened, or played a role in, the miner's death. Employer's Exhibits 1, 4, 5. Dr. Caffrey opined that the miner's simple

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leading to the miner's death or where the death was caused by complications of pneumoconiosis, or

(3) Where the presumption set forth at §718.304 is applicable.

(4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.

(5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

<sup>6</sup> The record also consists of a hospital discharge summary and a death certificate, which addressed the cause of the miner's death. In the hospital discharge summary, Dr. Lye opined that the miner's death was due to respiratory failure. Director's Exhibit 23. In the death certificate, Dr. Lye listed the immediate cause of the miner's death as chronic obstructive pulmonary disease. Director's Exhibit 14. Dr. Lye further listed cor pulmonale as another significant condition that contributed to the miner's death. *Id.*

coal workers' pneumoconiosis did not cause, contribute to, or hasten his death. Employer's Exhibits, 2, 2A. Lastly, Dr. Castle opined that the miner's death was not caused by, contributed to, or hastened by coal workers' pneumoconiosis. Employer's Exhibit 3.

The administrative law judge found that Dr. Kahn's death causation opinion was undermined by his inconsistent pathological findings.<sup>7</sup> 2008 Decision and Order on Remand at 17. The administrative law judge also gave less weight to the opinions of Drs. Bush, Caffrey, and Green than to the opinions of Drs. Castle and Cohen because the former physicians are Board-certified pathologists, while the latter physicians are Board-certified pulmonary specialists. *Id.* at 17. The administrative law judge then found that Dr. Cohen's opinion outweighed Dr. Castle's contrary opinion because Dr. Cohen's opinion was better reasoned and documented. *Id.* at 17-18. Hence, based on Dr. Cohen's opinion, the administrative law judge found that claimant established that the miner's death was due to pneumoconiosis at Section 718.205(c)(2).

Employer argues that the administrative law judge irrationally gave less weight to the opinions of the pathologists and that of Dr. Castle, than to Dr. Cohen's opinion, because they did not opine that the miner had legal pneumoconiosis. Employer's Brief at 9. Specifically, employer asserts that the administrative law judge, on remand, violated the Administrative Procedure Act (APA)<sup>8</sup> by changing his prior finding that the evidence did not establish the existence of legal pneumoconiosis, without explanation. Contrary to employer's assertion, the administrative law judge properly considered the role that legal pneumoconiosis played in the miner's death. In his original Decision and Order, as discussed, *supra*, the administrative law judge found that the evidence established the existence of simple pneumoconiosis at 20 C.F.R. §718.202(a)(2), (4). 2006 Decision and Order at 20. The administrative law judge further noted that the type of pneumoconiosis that claimant established was clinical pneumoconiosis, and not legal pneumoconiosis. *Id.* at 20-21. In considering Dr. Cohen's opinion with regard to the issue of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge stated:

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<sup>7</sup> No party challenges the administrative law judge's findings with regard to Dr. Kahn's death causation opinion.

<sup>8</sup> The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

The only evidence in the record that specifically links the miner's COPD to his coal mine employment is the opinion of Dr. Cohen...However, Dr. Cohen never specifically explained how this particular miner's COPD arose out of coal dust exposure; rather, he merely relied on scientific studies that counsel toward that conclusion. This reasoning, however, is overly generalized and does not specifically focus on the miner. *See Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985) (holding that an opinion based on such reasoning is insufficient to support its conclusion). Therefore, Dr. Cohen's opinion is insufficient to establish the necessary showing. Because this was the sole evidence proffered that linked COPD to coal mine employment, the [c]laimant has not established that the miner's COPD constituted legal pneumoconiosis. Therefore, the type of pneumoconiosis the [c]laimant has established is properly characterized as clinical.

*Id.* at 21 (footnote omitted).

In addition, the administrative law judge gave less weight to Dr. Cohen's death causation opinion at Section 718.205(c) for the same reasons that he gave less weight to Dr. Cohen's opinion that the miner had legal pneumoconiosis at Section 718.202(a)(4). The administrative law judge specifically stated:

Dr. Cohen's report is also accorded minimal weight on this issue as its documentation is overly generalized (CX 2). Dr. Cohen noted that the miner's fatal condition was obstructive pulmonary disease. As was true in his discussion of the existence of legal pneumoconiosis, Dr. Cohen relies largely on epidemiologic studies that counsel toward the role of coal dust exposure in the development of COPD. He did not, however, reference specific evidence from the miner's condition in attributing this situation to this case. Thus, as was true toward the issue of legal pneumoconiosis, Dr. Cohen's support for this conclusion is overly generalized and not focused on the miner. Consistent with *Knizner*, it is accorded minimal weight as a result.

*Id.* at 25.

In its previous decision, however, the Board held that the administrative law judge mischaracterized Dr. Cohen's death causation opinion as being based on documentation that was overly generalized and for failing to reference specific evidence of the miner's condition. *S.P.*, slip op. at 7. The Board stated that "Dr. Cohen's opinion reflects that he relied on the objective evidence of obstructive lung disease and the pathologic evidence of coal workers' pneumoconiosis to support his conclusion that pneumoconiosis

contributed to the miner's death." *Id.* The Board, therefore, vacated the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), and remanded the case for further consideration of the evidence thereunder.

In his Decision and Order on Remand, the administrative law judge considered the medical opinion evidence at 20 C.F.R. §718.205(c) and found that the opinions of Drs. Bush, Caffrey, and Green, who are Board-certified pathologists, were less probative than the opinions of Drs. Cohen and Castle, who are Board-certified pulmonary specialists. The administrative law judge stated, "as fact-finder, I find that expertise in *pulmonary* diseases is more relevant than expertise in *pathology* in assessing the possible role of (legal) pneumoconiosis in the miner's death due to 'respiratory failure.'" 2008 Decision and Order on Remand at 17. Further, in considering Dr. Castle's death causation opinion, the administrative law judge found that "even though Dr. Castle stated that the presence of (minimal) coal workers' pneumoconiosis pathologically did not play a role in the miner's death, he did not adequately explain why the miner did not also have 'legal' pneumoconiosis, nor did he expressly rule out its possible role in the miner's death." *Id.* at 18.

As discussed, *supra*, the administrative law judge previously found that the type of simple pneumoconiosis that was established at 20 C.F.R. §718.202(a)(2), (4) was clinical pneumoconiosis, and not legal pneumoconiosis. Although the Board did not expressly vacate the administrative law judge's finding that Dr. Cohen's opinion failed to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the Board's holding that the administrative law judge mischaracterized Dr. Cohen's opinion at 20 C.F.R. §718.205(c) effectively opened the issue of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Consequently, the administrative law judge was not required to reconcile his current finding, based on Dr. Cohen's opinion, that legal pneumoconiosis played a role in the miner's death with his prior finding that claimant failed to establish that the miner had legal pneumoconiosis. *Dale v. Wilder Coal Co.*, 8 BLR 1-119 (1985). Thus, because the administrative law judge properly rendered new findings at Section 718.205(c)(2) in accordance with the Board's instructions, *see* 20 C.F.R. §802.405(a); *cf. Hall v. Director, OWCP*, 12 BLR 1-80 (1988), we reject claimant's assertion that the administrative law judge violated the APA by failing to provide an explanation for the change in his prior finding that the evidence did not establish the existence of legal pneumoconiosis.

Employer also argues that substantial evidence does not support the administrative law judge's reliance on Dr. Cohen's opinion to establish death causation at 20 C.F.R. §718.205(c)(2). Specifically, employer asserts that the administrative law judge erred in failing to address the significant flaws in Dr. Cohen's death causation opinion. Employer maintains that "Dr. Cohen's opinion rested on an overstated understanding of the severity

of the disease which is not supported by the record.” Employer’s Brief at 13. In considering Dr. Cohen’s death causation opinion, the administrative law judge found that the doctor’s overall analysis of the miner’s pulmonary condition was reasoned and documented. In so finding, the administrative law judge explained:

As stated by the Board, and reiterated herein, upon reevaluation of Dr. Cohen’s opinion, I find that Dr. Cohen did not simply rely on epidemiologic studies. Dr. Cohen also made references to specific evidence of the miner’s condition in support of his opinion that pneumoconiosis contributed to the miner’s death. Dr. Cohen cited specific test results to exclude the miner’s asthma and rheumatoid lung disease as possible alternative causes of death, and further cited pathologic evidence of both coal workers’ pneumoconiosis and significant silicosis to buttress his conclusion that the miner’s exposure to coal mine dust substantially contributed to the miner’s respiratory failure and death. Dr. Cohen’s opinion is more consistent with the miner’s 19-year history of coal mine employment; the qualifying pulmonary function studies before and after bronchodilators; the pathology evidence of more than negligible pneumoconiosis; and, the epidemiologic studies which show that exposure to coal mine dust and cigarette smoking can cause obstructive pulmonary disease, and that exposure to both toxins can have an additive effect.

2008 Decision and Order on Remand at 18.

An administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indication upon which the medical opinion or conclusion is based. *See generally Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). In this case, the administrative law judge acted within his discretion in finding that Dr. Cohen’s death causation opinion was reasoned and documented. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Consequently, we reject employer’s assertion that substantial evidence does not support the administrative law judge’s reliance on Dr. Cohen’s opinion to establish death causation at Section 718.205(c)(2).

Employer further argues that the administrative law judge erred in discrediting the death causation opinions of the pathologists, Drs. Bush, Caffrey, and Green, on the ground that the pathological evidence was inconclusive.<sup>9</sup> Employer maintains that the

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<sup>9</sup> Employer asserts that the administrative law judge erred in his characterization of Dr. Castle’s opinion at 20 C.F.R. §718.205(c)(2). Dr. Castle opined that “[o]ne of the pathologists, namely the prosector, indicated that coal workers’ pneumoconiosis was not



administrative law judge should have resolved the conflicts in pathological evidence regarding the exact extent of the miner's simple pneumoconiosis. In this case, the administrative law judge gave less weight to the opinions of Board-certified pathologists than to the opinions of Board-certified pulmonary specialists because he found that the pathology opinions were inconclusive with respect to the exact extent of the miner's clinical pneumoconiosis. 2008 Decision and Order on Remand at 17. Although it is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw his own conclusions and inferences from it, *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), the interpretation of medical data is for the medical experts, *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). In this case, the administrative law judge did not find that the pathology evidence was inconclusive with regard to whether the miner had clinical pneumoconiosis. In his original Decision and Order, as discussed, *supra*, the administrative law judge found that the autopsy evidence established simple pneumoconiosis at 20 C.F.R. §718.202(a)(2). 2006 Decision and Order at 19-20. The Board did not vacate the administrative law judge's finding at Section 718.202(a)(2) or instruct him to reconsider the autopsy evidence thereunder. In his Decision and Order on Remand, the administrative law judge found that "[c]laimant has established the presence of *simple* pneumoconiosis under [Section] 718.202(a)." 2008 Decision and Order on Remand at 16. In considering whether the pathology evidence established the presence of complicated pneumoconiosis at Section 718.304(b), however, the administrative law

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present pathologically," and "[v]irtually all of the other pathologists indicated that it was present in a minimal degree." Employer's Exhibit 3. In considering Dr. Castle's death causation opinion, the administrative law judge stated that "[a]lthough Dr. Castle provided a very lengthy discussion of the medical evidence and cited medical literature, he mischaracterized the pathology evidence, stating that all of the [non-prosector] pathologists found only a 'minimal degree' of coal workers' pneumoconiosis." 2008 Decision and Order on Remand at 17. The administrative law judge stated that "[t]o the contrary, some of the pathologists found 'mild' pneumoconiosis, while another (*i.e.*, Dr. Green) found lesions up to 2.0 [centimeters] in maximum dimension." *Id.* In his report, Dr. Castle reviewed the pathology reports of Drs. Kahn, Bush, and Caffrey. As noted by the administrative law judge, Drs. Kahn, Bush, and Caffrey opined that the miner had mild, simple coal workers' pneumoconiosis. Employer's Exhibit 3. Thus, we reject employer's assertion that the administrative law judge mischaracterized Dr. Castle's report.

judge noted that “there are wide disparities in the various pathology findings.” *Id.* at 14. Thus, to the extent that the administrative law judge discounted the death causation opinions of the pathologists on the ground that the pathology opinions were inconclusive regarding the exact degree of clinical pneumoconiosis and failed to explain why this evidence was inconclusive in this regard, he impermissibly discounted the death causation opinions of the pathologists because they did not comply with his own medical conclusion. *Hall v. Consolidation Coal Co.*, 6 BLR 1-1306, 1-1309 (1984).

Employer additionally argues that because the administrative law judge required Dr. Castle to “rule out” coal mine dust exposure as a contributing factor to the miner’s death, the administrative law judge shifted the burden of proof to employer.

In considering Dr. Castle’s death causation opinion, the administrative law judge stated:

[E]ven though Dr. Castle stated that the presence of (“minimal”) coal workers’ pneumoconiosis pathologically did not play a role in the miner’s death, he did not adequately explain why the miner did not also have “legal” pneumoconiosis, nor did he expressly rule out its possible role in the miner’s death.

2008 Decision and Order on Remand at 18.

Contrary to the administrative law judge’s finding, the “rule out” standard does not apply to Section 718.205(c). *Hutson v. Freeman United Coal Mining*, 12 BLR 1-72 (1988) (*en banc*). Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if his evidence does not establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Thus, to the extent that the administrative law judge required employer’s medical experts to rule out legal pneumoconiosis as a contributing factor to the miner’s death, we hold that the administrative law judge erroneously shifted the burden of proof to employer.

In view of the forgoing, we vacate the administrative law judge’s finding that the evidence established that the miner’s death was due to pneumoconiosis at 20 C.F.R. §718.205(c), and remand the case for further consideration of the evidence thereunder.

Next, we address claimant’s contentions, on cross-appeal, that the administrative law judge erred in finding that the autopsy evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b). Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(1), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of death due to pneumoconiosis if the miner

suffered 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. In determining whether claimant has established invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*). Additionally, the Fourth Circuit has held that “[b]ecause prong (A) sets out an entirely objective scientific standard” for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999).

At Section 718.304(b), the administrative law judge considered the reports of Drs. Imbing, Kahn, Bush, Caffrey, Green, and Cohen. Dr. Imbing opined that there was no gross or microscopic evidence that the miner had coal workers’ pneumoconiosis. Director’s Exhibit 19. Dr. Kahn, in a report dated March 12, 2006, observed the presence of coal workers’ pneumoconiosis, including a small coal nodule that represented a more advanced stage of the disease, and silicosis. Claimant’s Exhibit 1. In a prior report dated January 26, 2004, Dr. Kahn observed that several conglomerate silicotic nodules measured up to 1.2 centimeters in diameter. Director’s Exhibit 21. Dr. Bush opined that the miner had simple coal workers’ pneumoconiosis.<sup>10</sup> Employer’s Exhibits 1, 4, 5. Dr. Caffrey opined that the autopsy slides showed evidence of simple coal workers’ pneumoconiosis and lesions of Caplan’s syndrome that are not related to coal mine employment.<sup>11</sup> Employer’s Exhibits 2, 2A, 3. Dr. Green observed that “[a]lthough some

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<sup>10</sup> Dr. Bush observed that the lung evidence showed mostly subpleural anthrosilicotic nodules extending along pleura measuring up to 0.8 cm in thickness and smaller lesions in the parenchyma. Employer’s Exhibit 1.

<sup>11</sup> In reports dated March 9, 2006 and March 22, 2006, Dr. Caffrey observed that two slides labeled G showed subpleural lesions that measured up to 1.0 centimeters.

of the larger lesions were 0.8 cm in thickness (see figure 1), they all were greater than 1.0 in maximum dimension which ranged from 1.2 – 2.0 cm (see figure 1).” Claimant’s Exhibit 3. Dr. Green therefore opined that the dimensions of the lesions were sufficient to establish the presence of progressive massive fibrosis. *Id.* Dr. Cohen opined that “[a]ccording to Dr. Kahn, the silicotic nodules measure up to 1.2 cm, which would be the equivalent of [C]ategory A opacities that Dr. Alexander identified radiographically.” Claimant’s Exhibit 2.

The administrative law judge gave little weight to Dr. Imbing’s opinion because his credentials were not in the record and his failure to find any pathology evidence of pneumoconiosis was inconsistent with the findings of all the Board-certified pathologists. 2008 Decision and Order on Remand at 15. In addition, the administrative law judge gave little weight to Dr. Kahn’s opinion because the reports of Dr. Kahn were inconsistent. *Id.* Further, although the administrative law judge found that the pathology opinions of Drs. Bush, Caffrey, and Green were all well-reasoned and well-documented, he concluded that “none of them expressly diagnosed *complicated* pneumoconiosis.” *Id.* Lastly, the administrative law judge determined that Dr. Cohen’s opinion was not persuasive because he found that Dr. Cohen’s analysis of the equivalency issue was cursory, the x-ray evidence as a whole did not establish pneumoconiosis, and Dr. Cohen lacked expertise in pathology. *Id.* Hence, the administrative law judge found that claimant failed to establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b).

Claimant argues that the administrative law judge erred in discounting Dr. Kahn’s opinion because the reports of Dr. Kahn were inconsistent. Specifically, claimant asserts that “Dr. Kahn meant that one of the coal macules had increased in size prior to the miner’s death, not between Dr. Khan’s first and second review of the slides, as the [administrative law judge] has suggested as another distraction.” Claimant’s Brief at 6. Claimant also asserts that the administrative law judge erred in failing to address whether the silicotic lesions noted by Dr. Kahn meet the criteria set forth at 20 C.F.R. §718.304.

In a report dated August 16, 2003, Dr. Kahn observed that “[t]here are only small quantities of coal dust present” and that “[a] few widely scattered, small coal macules, the hallmark lesion of coal workers’ pneumoconiosis, are present.” Director’s Exhibit 18. Dr. Kahn also observed that “[t]here are no coal nodules.” *Id.* Dr. Kahn therefore diagnosed simple coal workers’ pneumoconiosis. *Id.* In a subsequent report dated January 26, 2004, Dr. Kahn observed that “[t]here are also collections of coal dust present within macrophages in the walls of terminal respiratory units, i.e., respiratory bronchioles and alveolar ducts, where they are sometimes associated with fibrous

proliferation to produce ‘coal macules’, the hallmark lesion of Coal Workers’ Pneumoconiosis.” Director’s Exhibit 21. Dr. Kahn further observed, however, that “[o]ne such lesion has increased in size sufficiently to be considered a small ‘coal nodule’, reflecting a more advanced stage of the disease.” *Id.* Similarly, in a report dated March 12, 2006, Dr. Kahn observed the presence of coal workers’ pneumoconiosis, including a small coal nodule that represented a more advanced stage of the disease. Claimant’s Exhibit 1.

In finding that the reports of Dr. Kahn were inconsistent, the administrative law judge stated that “Dr. Kahn failed to explain how the lesion increased during the period between his initial pathology review and the second pathology review; or, to otherwise explain this changed finding.” 2008 Decision and Order on Remand at 15. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, because the administrative law judge acted within his discretion in finding that Dr. Kahn’s reports were inconsistent with regard to the presence of coal nodules, *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Surma v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-799 (1984), we reject claimant’s assertion that the administrative law judge erred in discounting the reports of Dr. Kahn because they were inconsistent.

Nonetheless, claimant’s assertion that the administrative law judge erred in failing to address the credibility of Dr. Kahn’s opinion regarding the silicotic lesions at 20 C.F.R. §718.304 has merit. In addition to opining, in his August 16, 2003 report, that the microscopic slides showed that the miner had simple coal workers’ pneumoconiosis, Dr. Kahn also diagnosed pulmonary silicosis. Director’s Exhibit 18. In his January 26, 2004 report, Dr. Kahn observed that “[t]here are several conglomerate silicotic nodules measuring up to 1.2 centimeters in diameter.” Director’s Exhibit 21. As noted above, the administrative law judge properly found that the reports of Dr. Kahn were inconsistent with respect to Dr. Kahn’s observations regarding the presence of pathological evidence of a coal nodule at Section 718.304(b). However, the administrative law judge did not address the credibility of Dr. Kahn’s observations regarding the presence of pathological evidence of silicotic lesions at 20 C.F.R. §718.304(b). To the contrary, the administrative law judge merely noted that Dr. Cohen stated that silicotic nodules observed by Dr. Kahn would be the equivalent of Category A opacities that Dr. Alexander identified radiographically, and then found that, “[i]n light of [his] analysis of the pathology evidence,...Dr. Cohen’s reliance upon Dr. Kahn’s pathology findings in making his ‘equivalency’ determination is misplaced.” 2008 Decision and Order on Remand at 15. As discussed, *supra*, the APA, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. In this case, the administrative law judge

did not explain why Dr. Kahn's pathology findings with respect to silicotic nodules were not credible. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Because there is medical evidence in the record that indicates that the silicotic nodules observed by Dr. Kahn would show as opacities greater than one centimeter in diameter on an x-ray, Claimant's Exhibit 2; *Perry*, 220 F.3d at 364, 23 BLR at 2-384; *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561, the administrative law judge erred in failing to consider the credibility of Dr. Kahn's opinion regarding the silicotic nodules at Section 718.304(b), *Wojtowicz*, 12 BLR at 1-165.

Claimant also argues that the administrative law judge erred in discounting Dr. Cohen's opinion. Specifically, claimant asserts that the administrative law judge mischaracterized Dr. Cohen's equivalency opinion as cursory, because the administrative law judge "gave no indication that anything was missing or unclear." Claimant's Brief at 8. Claimant also asserts that the administrative law judge erred in giving diminished weight to Dr. Cohen's equivalency opinion because the x-ray evidence was negative for pneumoconiosis.

In considering the equivalency opinion of Dr. Cohen at Section 718.304(b), the administrative law judge found that Dr. Cohen's reliance on Dr. Kahn's pathology findings were misplaced, by stating:

Dr. Cohen's "analysis" regarding this issue is quite cursory. Dr. Cohen stated, in pertinent part: "Yes, the autopsy pathology confirmed that [the miner] had simple coal workers' pneumoconiosis and at least some of the larger opacities were conglomerate silicotic nodules. According to Dr. Kahn, the silicotic nodules measured up to 1.2 cm, which would be the equivalent of [C]ategory A opacities that Dr. Alexander identified radiographically." (CX 2).

2008 Decision and Order on Remand at 15.

However, as discussed, *supra*, the administrative law judge erred in failing to explain why Dr. Kahn's pathology findings with respect to silicotic nodules were not credible at Section 718.304(b). *Wojtowicz*, 12 BLR at 1-165. In addition, contrary to the administrative law judge finding that Dr. Cohen's opinion was cursory, Dr. Cohen further explained his opinion regarding the size of the silicotic nodules that Dr. Kahn observed. Claimant's Exhibit 2. In addition to discussing the silicotic nodules that were noted by Dr. Kahn, Dr. Cohen specifically stated:

Dr. Bush and Dr. Caffrey suggest that there is also evidence of Caplan's syndrome except there is no palisading granulomatous peripheral change in the lesions, which Dr. Kahn notes is the most characteristic feature of

Caplan's nodules. In any event, Caplan's syndrome refers to a type of pneumoconiosis that occurs among coal miners with rheumatoid arthritis, so its etiology is occupational by definition. It is associated with exposure to both coal and silica dust, and [the miner] ha[d] an occupational history and pathological evidence of exposure to both.

*Id.* Thus, because the administrative law judge failed to consider all of the reasons that Dr. Cohen provided for finding that Dr. Kahn observed silicotic nodules that would be the equivalent of a Category A opacity radiographically, the administrative law judge mischaracterized Dr. Cohen's analysis of the equivalency issue. *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

Claimant additionally asserts that the administrative law judge erred in discounting Dr. Cohen's equivalency opinion because the x-ray evidence was negative for pneumoconiosis. In considering Dr. Cohen's opinion at Section 718.304(b), the administrative law judge stated, "notwithstanding Dr. Alexander's x-ray findings which included Category A opacities as a possible worst-case scenario diagnosis, the x-ray evidence, taken as a whole, did not establish pneumoconiosis." 2008 Decision and Order on Remand at 15. Contrary to the administrative law judge's finding, x-ray evidence is not relevant to the weighing of autopsy evidence at 20 C.F.R. §718.304(b). *Compare* 20 C.F.R. §718.304(a) *with* 20 C.F.R. §718.304(b). Consequently, the administrative law judge erred in giving diminished weight to Dr. Cohen's equivalency opinion because the x-ray evidence was negative for pneumoconiosis.

Claimant further asserts that the administrative law judge erred in discounting Dr. Cohen's opinion at 20 C.F.R. §718.304(b) because Dr. Cohen lacked expertise in pathology. Claimant maintains that Dr. Cohen has the appropriate expertise to render an equivalency opinion because Dr. Cohen's opinion was based on Dr. Kahn's expertise in pathology for determining the size of the silicotic lesions and his B reader qualifications for determining whether those lesions were equivalent to Category A opacities radiographically. In considering Dr. Cohen's opinion, the administrative law judge stated that "although Dr. Cohen is a B-reader and Board-certified pulmonary specialist, he lacks expertise in pathology (CX 5)." 2008 Decision and Order on Remand at 15. However, the administrative law judge did not explain why he found that Dr. Cohen was incompetent to render an opinion at Section 718.304(b), based on a review of pathology evidence. *Wojtowicz*, 12 BLR 1-165. Thus, the administrative law judge erred in giving less weight to Dr. Cohen's opinion because he is not an expert in pathology.

Finally, claimant argues that the administrative law judge erred in failing to consider whether Dr. Green's diagnosis of progressive massive fibrosis satisfied the regulatory criteria at 20 C.F.R. §718.304(b). The administrative law judge gave equal weight to the pathology opinions of Drs. Bush, Caffrey, and Green because they were

well-reasoned and well-documented. 2008 Decision and Order on Remand at 15. Nevertheless, the administrative law judge found that claimant failed to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 718.304(b) because “none of them expressly diagnosed *complicated* pneumoconiosis.” *Id.* Further, the administrative law judge found that “[e]ven Dr. Green, who found three lesions of progressive massive fibrosis[] ranging from 1.2 cm to 2.0 [cm] in maximum dimension, diagnosed *simple* pneumoconiosis...[and] did not make an equivalency determination.” *Id.*

While a physician is not required to expressly diagnose complicated pneumoconiosis, 20 C.F.R. §718.304(b), a physician must render an opinion regarding the sizes of nodules or lesions that meets the statutory criteria of Section 921(c)(3), *i.e.*, the medical evidence must indicate that the nodules or lesions observed by a physician would show as opacities greater than one centimeter in diameter on an x-ray, *Perry*, 220 F.3d at 364, 23 BLR at 2-384; *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561. In this case, Dr. Green did not state whether the lesions would show as opacities greater than one centimeter in diameter on an x-ray. Claimant’s Exhibit 3. Because the administrative law judge properly found that Dr. Green did not render an equivalency determination, *Perry*, 220 F.3d at 364, 23 BLR at 2-384; *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561, we reject claimant’s assertion that Dr. Green’s diagnosis of progressive massive fibrosis satisfied the regulatory criteria at 20 C.F.R. §718.304(b).

In view of the foregoing, we vacate the administrative law judge’s finding that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b), and remand the case for further consideration of all the evidence thereunder. *Perry*, 220 F.3d at 364, 23 BLR at 2-384; *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561; *see also Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007)(holding that the miner must also establish that his complicated pneumoconiosis arose out of coal mine employment). If the administrative law judge finds that the relevant evidence at 20 C.F.R. §718.304(b) tends to establish the presence of complicated pneumoconiosis, then he must weigh the evidence together under 20 C.F.R. §718.304(a)-(c) before determining whether the evidence is sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 718.304. *Lester*, 993 F.2d at 1143, 17 BLR at 2-114; *Melnick*, 16 BLR at 1-31.



Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge