BRB No. 10-0614 BLA

LAWRENCE GRIFFITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	DATE ISSUED: 07/29/2011
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2007-BLA-5646) of Administrative Law Judge Linda S. Chapman, rendered on a subsequent claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case is before the Board for a second time. The relevant procedural history of this claim is as follows. Claimant filed this

subsequent claim on May 15, 2006.[1] In a Decision and Order dated September 29, 2008, the administrative law judge credited claimant with twenty-seven and one-half years of coal mine employment and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence was sufficient to establish that claimant has complicated pneumoconiosis and, thus, found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Based on her review of the entire record, the administrative law judge further found that claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

Upon consideration of employer's appeal, the Board rejected employer's argument that the administrative law judge did not undertake the proper analysis to determine whether there had been an actual change in claimant's condition since the prior denial, and that she erred in not applying the principles of *res judicata* to her review of the subsequent claim. *L.G.* [*Griffith*] *v. Dominion Coal Corp*., BRB No. 09-0132 BLA, slip op. at 3-4 (Oct. 30, 2009) (unpub.). However, the Board agreed with employer that the administrative law judge erred in failing to focus her analysis at 20 C.F.R. §725.309 on the newly submitted evidence. *Id*. at 4. Additionally, the Board held that the administrative law judge improperly shifted the burden of proof to employer to prove that claimant does not have complicated pneumoconiosis and erred in her consideration of the conflicting x-ray evidence for complicated pneumoconiosis. *Id*. at 8-9. The Board further held that the administrative law judge applied an inconsistent standard in assessing the credibility of the medical experts and erred in rejecting the opinions of Drs. Tuteur and Castle, that claimant does not have complicated pneumoconiosis. *Id*. at 9. Finally, the Board held that the administrative law judge erred in failing to explain the basis for her conclusion that the CT scan evidence supports a finding of complicated pneumoconiosis. *Id*. at 10. Thus, the Board vacated the award of benefits and remanded the case for the administrative law judge to reconsider whether claimant satisfied his burden to establish complicated pneumoconiosis and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.304 and 725.309.

While the case was pending on remand, amendments to the Act were adopted, which affect claims, such as this one, that were filed after January 1, 2005 and pending on March 23, 2010. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if fifteen or more years of qualifying coal mine

[1] The procedural history of the prior claims is set forth in the Board's prior decision and is incorporated herein. *L.G.* [*Griffith*] *v. Dominion Coal Corp*., BRB No. 09-0132 BLA, slip op. at 1-2 n.1 (Oct. 30, 2009) (unpub.).

employment and a totally disabling respiratory or pulmonary impairment is established. On March 29, 2010, the administrative law judge issued a Notice of Change in Law, directing the parties to file position statements as to whether the new amendments affected the claim and allowing for the submission of evidence addressing the applicability of the rebuttable presumption of total disability due to pneumoconiosis. *See* March 29, 2010 Notice of Change of Law. Employer submitted supplemental reports from Dr. Tuteur, dated April 12, 2010, and Dr. Castle, dated April 23, 2010, which the administrative law judge admitted into the record. *See* May 11, 2010 Order Regarding Evidence and Supplemental Briefs.

In her Decision and Order on Remand, issued on July 9, 2010, the administrative law judge indicated that she excluded from consideration the portions of the supplemental reports of Drs. Tuteur and Castle in which the physicians addressed the issue of the existence of complicated pneumoconiosis. Turning to the merits of the claim, the administrative law judge found that the evidence was insufficient to establish total disability and, therefore, concluded that claimant was not entitled to invocation of the Section 411(c)(4) presumption. The administrative law judge further found, however, that the newly submitted x-ray evidence established the existence of complicated pneumoconiosis and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. She also found, based on her review of the entire record, that claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in excluding from consideration the portions of the supplemental reports in which Drs. Tuteur and Castle discussed the evidence relevant to complicated pneumoconiosis. Employer also contends that the administrative law judge erred by not applying the principles of *res judicata* in this subsequent claim, and that she failed to follow the Board's remand instructions in weighing the newly submitted x-ray and medical opinion evidence pursuant to 20 C.F.R. §718.304(a), (c). Employer's overall assertion in this case is that the administrative law judge "has not explained in a rational manner how claimant's previous evidence did not support complicated pneumoconiosis, but the 'latest evidence' establishes complicated pneumoconiosis by a preponderance of the evidence." Employer's Brief in Support of Petition for Review at 20. Employer asks that the Board either reverse the award of benefits or reassign the case to a new administrative law judge for a fresh look at the record. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's decision to exclude those portions of the supplemental reports of Drs. Tuteur and Castle that fell outside the scope of her Order reopening the record.

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.[2] 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).

I. Evidentiary Issue

The evidentiary record in this case closed on July 21, 2008, at which point the parties were precluded from submitting any additional evidence on the issue of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See* Order Closing the Record and Establishing Briefing Schedule. In the administrative law judge's Notice of Change in Law, she reopened the record to allow the parties to supplement their affirmative medical opinion evidence on "medical issues in this claim in light of the potential applicability of [amended Section 411(c)(4)]."[3] *See* March 29, 2010 Notice of Change in Law. Employer submitted supplemental reports from Drs. Tuteur and Castle, which the administrative law judge admitted into the record. *See* May 11, 2010 Order Regarding Evidence and Supplemental Briefs. In the administrative law judge's Decision and Order on Remand, however, she stated that she would not consider the portions of the reports in which Drs. Tuteur and Castle discussed whether claimant has complicated pneumoconiosis, as they exceeded the scope of her order allowing the parties to develop

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibits 1, 4.

[3] The administrative law judge referred to 20 C.F.R. §718.305 in informing the parties of the recent amendments to the Act and in giving the parties the opportunity to develop additional evidence. Prior to its recent amendment, Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), was implemented by 20 C.F.R. §718.305, which includes a provision barring application of the rebuttable presumption in claims filed after January 1, 1982. 20 C.F.R. §718.305(e). Although Congress removed the portion of Section 411(c)(4) limiting the availability of the rebuttable presumption to claims filed before January 1, 1982, the Secretary of Labor has not amended 20 C.F.R. §718.305 to reflect this change. Therefore, by its own terms, 20 C.F.R. §718.305 is not applicable to claims, such as the present one, that were filed after January 1, 1982. *See* 20 C.F.R. §718.305(e). The administrative law judge's citation of 20 C.F.R. §718.305 does not constitute error requiring remand, however, as the portions of 20 C.F.R. §718.305 regarding invocation and rebuttal are virtually identical to the terms of amended Section 411(c)(4). *See Larioni v. Director, OWCP*, 12 BLR 1-1276 (1989).

evidence regarding the applicability of amended Section 411(c)(4). Decision and Order on Remand at 12 nn. 8-9.

Employer argues that the administrative law judge's evidentiary ruling cannot be affirmed. Employer maintains that "a threshold requirement" for invocation of the rebuttable presumption is negative evidence for complicated pneumoconiosis and, therefore, the administrative law judge was required to consider the supplemental opinions of Drs. Tuteur and Castle in their entirety.[4] Employer's Brief in Support of Petition for Review at 22. The Director maintains that the Board should reject employer's allegations, as the administrative law judge considered the evidence relevant to complicated pneumoconiosis in her prior Decision and Order and employer developed "ample evidence regarding complicated pneumoconiosis . . . ." Director's Letter Brief at 3.

An administrative law judge is empowered to conduct formal hearings and is given broad discretion in resolving procedural matters, including evidentiary issues. *See Dempsey v. Sewell Coal Corp*., 23 BLR 1-47 (2004) (*en banc*); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989) (*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). Based on our review, we conclude that employer has not met its burden to prove that the administrative law judge's evidentiary ruling represented an abuse of discretion. *See Clark*, 12 BLR at 1-153. Prior to the issuance of the administrative law judge's Notice of Change in Law, the parties had developed a full complement of evidence relevant to complicated pneumoconiosis, as invocation of the irrebuttable presumption, set forth in Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and as implemented by 20 C.F.R. §718.304, was a contested issue in the subsequent claim. The administrative law judge rationally determined, therefore, that the existence of complicated pneumoconiosis was not a "medical issue[] in this claim in light of the potential applicability" of amended Section 411(c)(4). Decision and Order on Remand at 12 n.8, *citing* March 29, 2010 Notice of Change in Law; *Dempsey*, 23 BLR at 1-58-59. Accordingly, we affirm, as a permissible exercise of her discretion, the administrative law judge's exclusion of the

[4] Employer references the portion of amended Section 411(c)(4) that provides: "[I]f a miner was employed for fifteen years or more in one or more underground coal mines, and *if there is a chest roentgenogram submitted in connection with such miner's . . . claim and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection*, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis[.]" *See* 30 U.S.C. §921(c)(4) (emphasis added). Relevant to this claim, paragraph 3 of Section 411(c) provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the existence of complicated pneumoconiosis is established. *See* 30 U.S.C. §921(c)(3).

portions of the supplemental opinions of Drs. Tuteur and Castle in which they discussed whether claimant has complicated pneumoconiosis. *Dempsey*, 23 BLR at 1-58-59; *Clark*, 12 BLR at 1-153.

II. The Subsequent Claim and Merits of Entitlement

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."[5] 20 C.F.R. §725.309(d); *see 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). In this case, because claimant's prior claim was denied on the ground that he failed to establish total disability, claimant was required to submit new evidence establishing this element of entitlement in order to have his claim reviewed on the merits. Director's Exhibits 1, 2.

The administrative law judge found that claimant established a change in an applicable condition of entitlement by establishing that he suffers from complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.[6] Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, provides

[5] In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

[6] Employer restates the argument, raised in the prior appeal, that the administrative law judge did not undertake the proper analysis to determine whether there has been an actual change in claimant's condition since the prior denial. Employer's Brief in Support of Petition for Review at 29-32. Employer asserts that "the evidence from claimant's prior claim establishes with finality that claimant had granulomatous disease, not complicated pneumoconiosis." *Id*. at 29. Employer argues that the administrative law judge failed to apply the principles of *res judicata* in her consideration of whether claimant satisfied his burden of proof. *Id*. For the reasons set forth in the prior decision, we again reject employer's argument that *res judicata* precludes an award of benefits in this claim. *Griffith*, BRB No. 09-0132 BLA, slip op. at 3-4; *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc*).

that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy, 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, however, automatically invoke 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. *See Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *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*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979). On remand, the administrative law judge found that the newly submitted x-ray evidence was sufficient to establish complicated pneumoconiosis at 20 C.F.R. §718.304(a) and that the contrary medical opinion evidence of record at 20 C.F.R. §718.304(c) did not outweigh the x-ray evidence of complicated pneumoconiosis.[7]

A. The X-ray Evidence

Employer asserts on appeal that the administrative law judge failed to follow the Board's instruction that she explain the weight accorded the conflicting x-rays for complicated pneumoconiosis at 20 C.F.R. §718.304(a). We disagree.

The newly submitted x-ray evidence consists of seven interpretations of three x-rays dated August 17, 2006, December 12, 2006 and May 24, 2007. Dr. Alexander, a Board-certified radiologist and B reader, read the August 17, 2006 x-ray as positive for simple pneumoconiosis, and noted a twelve millimeter mass in the left hilum. Director's Exhibit 16. Dr. Wheeler, a Board-certified radiologist and B reader, read the same film as negative for simple and complicated pneumoconiosis. *Id*. In the "Comments" section of the ILO form, Dr. Wheeler identified a one and one-half centimeter mass in the left lung, compatible with granulomas or possible cancer. *Id*. In contrast, Dr. Rasmussen, a B reader, read the August 17, 2006 film as positive for simple and complicated pneumoconiosis, Category A. Director's Exhibit 13. The December 12, 2006 x-ray was read by Dr. Castle, a B reader, as positive for simple pneumoconiosis but negative for

[7] The record in this case does not contain any biopsy evidence relevant to 20 C.F.R. §718.304(b).

complicated pneumoconiosis. *Id*. Dr. Castle noted a questionable lesion in the left mid-zone. *Id*. The May 24, 2007 film was read by Dr. Alexander as positive for simple pneumoconiosis and complicated pneumoconiosis, Category A. Claimant's Exhibit 1. Dr. Wheeler read this x-ray as negative for simple and complicated pneumoconiosis, but described an ill-defined 1.5 centimeter calcified granuloma in the right upper lung and a 1.5 centimeter mass "probably" involving the left hilum, compatible with granulomas or possible cancer. Employer's Exhibit 4.

On remand, the administrative law judge noted that the newly submitted x-ray evidence showed masses in the lungs and that the conflict in the evidence was over the etiology of those masses. Decision and Order on Remand at 7 n.2. The administrative law judge reconsidered the probative value of Dr. Wheeler's negative x-ray readings for complicated pneumoconiosis, in light of the recent decision of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010), and found that they were speculative and equivocal and entitled to little weight. Decision and Order on Remand at 8. The administrative law judge noted that, of the four remaining readings, two were positive for both simple and complicated pneumoconiosis, while two were positive for simple pneumoconiosis alone. *Id*. The administrative law judge resolved the conflict by relying on Dr. Alexander's interpretation of the most recent x-ray, dated May 24, 2007, in which he reported the presence of a category A opacity of pneumoconiosis, to find that claimant "met his burden to establish that he has a condition that shows up on the x-rays as a greater than one centimeter opacity in his lungs, due to pneumoconiosis." *Id*.

Employer argues that the administrative law judge erred in discounting Dr. Wheeler's negative x-ray readings as "speculative" and "equivocal," and that she has improperly acted as a medical expert in this case. Employer's Brief in Support of Petition for Review at 37-38. We disagree. Subsequent to the Board's remand decision, the Fourth Circuit held in *Cox*, under factual circumstances similar to this case, that an administrative law judge may reject, as speculative and equivocal, the opinions of employer's experts, who exclude coal dust exposure as the cause for large opacities or masses identified by x-ray, and attribute the radiological findings to conditions, such as tuberculosis, histoplasmosis, granulomatous disease, or sarcoidosis, if they fail to point to evidence in the record indicating that the miner suffers or suffered from any of the alternative diseases. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284.[8]

[8] The court noted that in *Westmoreland Coal Co. v. Barker*, 136 Fed. Appx. 583 (4th Cir. 2005) (*per curiam*), *aff'g Barker v. Westmoreland Coal Co.*, BRB No. 03-0553 BLA (May 28, 2004) (unpub.), it had affirmed the Board's approval of a similar approach and concluded that the administrative law judge had acted "well within her discretion to

In this case, the administrative law judge permissibly concluded that Dr. Wheeler's x-ray readings were entitled to less weight and explained:

> Dr. Wheeler is not [claimant's] treating physician, and Dr. Wheeler has not pointed to any medical evidence in the record to suggest that [claimant] had cancer or a granulomatous disease. Nor did Dr. Wheeler offer any explanation for his exclusion of pneumoconiosis as the cause for these acknowledged masses. Again, assessing the probative value of Dr. Wheeler's x-ray readings, rather than accepting them at face value, I find that his conclusions, that the masses he acknowledged on [claimant's] x-rays were due to cancer or granulomatous disease, *are equivocal as well as speculative, and not based on any evidence that* [*claimant*] *suffered from any of the suggested diseases*.

Decision and Order on Remand at 8 (emphasis added). We affirm the administrative law judge's credibility finding with regard to Dr. Wheeler, as it is proper and in accordance with law. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).[9]

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reject opinions that she found to be 'unsupported by a sufficient rationale.'" *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 288, 24 BLR 2-269, 2-287 (4th Cir. 2010), *quoting Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998). In *Barker*, the Board affirmed the present administrative law judge's decision to reject, as equivocal, the opinions of Dr. Wheeler, and other physicians, who attributed the miner's x-ray findings to tuberculosis or granulomatous disease, when there was no evidence in the record that the miner had ever suffered from, or been exposed to, tuberculosis, or any other inflammatory disease process. *Barker*, BRB No. 03-0533 BLA, slip op. at 5.

[9] We also reject employer's assertion that, in the prior claim record, "there is ample evidence supporting a granulomatous process," as diagnosed by Dr. Wheeler. Employer's Brief in Support of Petition for Review at 37. Employer erroneously suggests that the mere fact that the x-ray evidence was insufficient in the prior claim to establish the existence of complicated pneumoconiosis somehow confirms that claimant had, or has, granulomatous disease. Moreover, contrary to employer's argument, the administrative law judge specifically addressed the x-ray evidence in the prior claim and rejected the interpretations by those radiologists, including Dr. Wheeler, who diagnosed "possible" granulomatous disease, on the ground that these interpretations were speculative. Decision and Order on Remand at 13-14.

Employer also argues that the administrative law judge erred in crediting Dr. Alexander's determination that the May 24, 2007 x-ray was positive for complicated pneumoconiosis, noting that he read an earlier x-ray, taken on August 17, 2006, as negative for complicated pneumoconiosis, and "gave no explanation whatsoever as to how complicated pneumoconiosis could develop between August 2006 and May 2007." Employer's Brief in Support of Petition for Review at 39. Employer further asserts that the administrative law judge failed to explain why she discounted Dr. Castle's uncontradicted determination that the December 12, 2006 x-ray was negative for complicated pneumoconiosis.

Contrary to employer's contentions, the administrative law judge followed the Board's instructions to explain how she resolved the conflict in the x-ray evidence. The administrative law judge properly considered the chronology of the evidence, and reasonably concluded, in light of the progressive nature of pneumoconiosis, that Dr. Alexander's most recent reading for complicated pneumoconiosis of the May 24, 2007 x-ray was more probative of claimant's condition than earlier negative x-rays. *See Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

B. The Medical Opinion Evidence

Pursuant to 20 C.F.R. §718.304(c), employer contends that the administrative law judge erred in rejecting the medical opinions of Drs. Castle and Tuteur, that claimant does not have complicated pneumoconiosis. Employer maintains that the administrative law judge did not follow the Board's instruction that she apply a consistent standard in determining the weight to accord the conflicting evidence. *See Griffith*, BRB No. 09-0132 BLA, slip op. at 9 n.8. Employer's arguments are without merit.

On remand, the administrative law judge discussed the Board's instructions and specifically explained that she gave less weight to Dr. Castle's opinion because he did not discuss relevant medical evidence that was contained in the record that he reviewed and that contradicted his conclusion that claimant does not have complicated pneumoconiosis. The administrative law judge explained:

> I note that Dr. Castle's report clearly reflects that he reviewed the x-ray interpretations by Dr. Alexander, and Dr. Rasmussen, which included findings of Category A opacities. Nevertheless, in both of his reports, he stated that [claimant] did not have "evidence" of complicated pneumoconiosis (December 21, 2006 report), or "findings" indicative of

> complicated pneumoconiosis (December 4, 2007 report). He simply did not address the *x-ray* findings of category A opacities, but merely stated that "I did not find evidence of complicated coal workers' pneumoconiosis." Thus, the Board is correct when it states that Dr. Castle read the December 12, 2006 x-ray as positive for simple, but negative for complicated pneumoconiosis. But this is not "contrary" to my characterization of Dr. Castle's opinion. Clearly, Dr. Castle did not find "evidence" of complicated pneumoconiosis on his examination of Mr. Griffith's x-ray. But he DID NOT DISCUSS the evidence that clearly was before him, the readings by Dr. Alexander and Dr. Rasmussen, and which did constitute "evidence" or "findings" of complicated pneumoconiosis.

Decision and Order on Remand at 9 (emphasis in original). We conclude that the administrative law judge rationally rejected Dr. Castle's opinion because she found that his "reports appear to be carefully worded to bypass any discussion of the radiographic evidence of complicated pneumoconiosis" that was before him for review. *Id.*; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *see also Yogi Mining Co. v. Fife*, 159 Fed. Appx. 441, slip op. at 7-8 (4th Cir., Dec. 7, 2005)(unpub.) (an administrative law judge acted within his discretion in discounting the opinions of employer's doctors because they were equivocal or failed to explain contrary data adequately).

The administrative law judge also permissibly accorded less weight to Dr. Tuteur's opinion, noting that, while Dr. Tuteur stated that "there is absolutely no evidence of progressive massive fibrosis" in the record he reviewed, he was not provided a copy of Dr. Alexander's positive x-ray reading for complicated pneumoconiosis of the most recent x-ray. Decision and Order on Remand at 10; *see Hicks*, 138 F.3d at 524, 21 BLR at 2-323; *Akers*, 131 F.3d at 438, 21 BLR at 2-269; *Clark*, 12 BLR at 1-155. We consider employer's assertion of error with regard to the administrative law judge's consideration of Dr. Tuteur's opinion to be a request that the Board reweigh the evidence, which we are not empowered to do. *See Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, we affirm the administrative law judge's finding, at 20 C.F.R. §718.304(c), that the opinions of Drs. Castle and Tuteur did not detract from the probative value of the positive x-ray evidence for complicated pneumoconiosis.[10]

[10] Although the administrative law judge found that Dr. Rasmussen's opinion, diagnosing complicated pneumoconiosis, was reasoned and documented, she did not

The administrative law judge's finding of complicated pneumoconiosis is supported by a consideration of all of the available medical evidence, an approach that is legally proper under *Scarbro*. *See 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"); *Cox*, 602 F.3d at 285, 24 BLR at 2-284. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis, based on the newly submitted x-ray evidence, and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[11] *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34; *White*, 23 BLR at 1-3.

Lastly, we reject employer's contention that the administrative law judge failed to properly consider the prior claim evidence. The administrative law judge specifically noted, "[t]he medical evidence in connection with the previous claim shows the development of a mass or density in [claimant's] lungs, consistent with the newer medical evidence submitted in this claim." Decision and Order on Remand at 14-15. Because the administrative law judge reasonably found that the new evidence established the existence of complicated pneumoconiosis, based on its progression from the simple pneumoconiosis previously established, we conclude that the administrative law judge fulfilled her obligation to weigh all of the relevant evidence, including the evidence that predated the prior denial. *See Cox*, 602 F.3d at 288, 24 BLR at 2-287-88; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. Further, because it is unchallenged on appeal, we affirm the administrative law judge's finding that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *Skrack v. Island*

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indicate whether it was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).

[11] Employer argues that the administrative law judge erred in finding Dr. Rasmussen's medical opinion, diagnosing complicated pneumoconiosis, to be reasoned and documented, and supportive of a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(c). However, because the administrative law judge properly rejected the contrary medical opinions of Drs. Castle and Tuteur at 20 C.F.R. §718.304(c), and we have affirmed her finding that claimant established the existence of complicated pneumoconiosis based on the x-ray evidence at 20 C.F.R. §718.304, it is not necessary that we address whether the administrative law judge erred in her findings with regard to Dr. Rasmussen's opinion. *See Larioni*, 6 BLR at 1-1278.

Creek Coal Co., 6 BLR 1-710 (1983); Decision and Order on Remand at 15. We, therefore, affirm the award of benefits in this claim.

III. DATE OF ONSET

Employer contends that the administrative law judge erred in failing to follow the Board's instructions for determination of the date for commencement of benefits. Employer's Brief in Support of Petition for Review at 21, 42-43. We agree. In our Decision and Order, we stated:

> Lastly, if the administrative law judge concludes on remand that claimant is entitled to benefits, she must make a finding as to the date from which employer is liable for the payment of benefits. If the award of benefits in this case is based upon claimant's invocation of the irrebuttable presumption set forth in Section 718.304, the date for commencement of benefits is determined by the date of onset, i.e., the month in which the existence of complicated pneumoconiosis was established, based upon the evidence in the subsequent claim. 20 C.F.R. §725.503(b); *see Williams v. Director, OWCP*, 13 BLR 1-28 (1989). If the date of onset is not ascertainable, then benefits commence in the month in which the subsequent claim was filed. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989).

Griffith, BRB No. 09-0132 BLA, slip op. at 11. On remand, the administrative law judge summarily concluded that employer was required to pay benefits commencing in May 2006, the month in which claimant filed his subsequent claim. Because the administrative law judge did not make a finding as to the month in which the existence of complicated pneumoconiosis was established, we vacate her finding that benefits should commence May 2006 and remand this case to the administrative law judge for consideration of this issue. On remand, the administrative law judge must address employer's assertion that May 2007 is the earliest date for commencement of benefits, based on her reliance on the May 2007 x-ray to find that claimant proved that he has complicated pneumoconiosis.[12]

[12] Employer requests that the Board remand this case for consideration by a different administrative law judge. Employer's Brief In Support of Petition for Review at 5. However, because the record does not reflect that the administrative law judge was partial to claimant, or biased against employer, employer's request for reassignment is denied. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge