BRB Nos. 05-0501 BLA
and 05-0501 BLA-A

JOHN J. PLAXA	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
JEDDO HIGHLAND COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 03/28/2006
	)	
LACKAWANNA CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Maureen E. Herron (Cipriani & Werner), Scranton, Pennsylvania, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (04-BLA-6589) of Administrative Law Judge Ralph A. Romano (the administrative law judge) denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] This case involves a subsequent claim filed on June 26, 2003.[2] After crediting claimant

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

[2]The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on March 31, 1988. Director's Exhibit 1. The district director denied benefits on June 9, 1988. *Id.* The district director found that the evidence was insufficient to establish (1) the existence of pneumoconiosis; (2) that the disease was caused at least in part by coal mine work; and (3) that claimant was totally disabled by the disease. *Id.* The district director subsequently denied benefits on September 1, 1989, April 12, 1990 and June 14, 1991. *Id.* Claimant submitted additional evidence on April 16, 1992. *Id.* However, by letter dated April 17, 1992, the district director informed claimant that all of his evidence had been considered by the district director in issuing the June 14, 1991 denial. *Id.* The district director informed claimant that he could pursue modification of his claim by submitting a request in writing within one year of the June 14, 1991 denial date. *Id.* There is no indication that claimant took any further action in regard to his 1988 claim.

Claimant filed a second claim on February 22, 1994. Director's Exhibit 1. In a Proposed Decision and Order dated July 27, 1995, the district director found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* The district director, therefore, denied benefits. *Id.* There is no indication that claimant took any further action in regard to his 1994 claim.

Claimant filed a third claim on May 7, 1998. Director's Exhibit 1. In a Decision and Order dated September 28, 1999, Administrative Law Judge Lawrence P. Donnelly found that the case before him involved claimant's request for modification of the district director's July 27, 1995 denial of claimant's 1994 claim. *Id.* Judge Donnelly found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Id.* Judge Donnelly, therefore, found that the evidence was insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *Id.* Accordingly, Judge Donnelly denied

with forty-three years of coal mine employment, the administrative law judge found that the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b). However, the administrative law judge found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in failing to determine whether the various newly submitted pulmonary function studies are valid. Claimant also argues that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, requesting that the Board vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and remand the case for further consideration. Employer responds in support of the administrative law judge's denial of benefits. Employer has also filed a cross-appeal, contending, *inter alia*, that the administrative law judge erred in finding that the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Neither claimant nor the Director has filed a response to employer's cross-appeal.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant's 2003 claim is considered a "subsequent" claim under the amended regulations because it was filed more than one year after the date that claimant's prior 1998 claim was finally denied. 20 C.F.R. §725.309(d). The regulations provide that a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement[3] has changed since the date upon which the order

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benefits. *Id.* There is no indication that claimant took any further action in regard to his 1998 claim.

Claimant filed a fourth claim on June 26, 2003. Director's Exhibit 3.

[3]The regulations provide that a miner, in order to satisfy the requirements for entitlement to benefits, must establish the existence of pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he is totally disabled; and that pneumoconiosis contributed to his total disability. 20 C.F.R. §725.202(d).

denying the prior claim became final. *Id.* The district director denied benefits on claimant's initial 1988 claim because he found that the evidence was insufficient to establish (1) that claimant suffered from pneumoconiosis (black lung disease); (2) that the disease was caused at least in part by coal mine work; and (3) that claimant was totally disabled by the disease. Director's Exhibit 1. Duplicate claims filed in 1994 and 1998 were subsequently denied.[4] In none of claimant's previous claims was the existence of pneumoconiosis or total disability adjudicated in claimant's favor.

We initially address claimant's contention that the administrative law judge erred in not determining whether the various newly submitted pulmonary function studies are valid. The record contains the results of five newly submitted pulmonary function studies conducted on June 13, 2001, November 11, 2003, January 9, 2004, September 28, 2004 and October 13, 2004. Because a majority of the newly submitted pulmonary function studies produced non-qualifying results,[5] the administrative law judge found that the

[4]The district director, in denying claimant's 1994 claim, found that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 1.

In regard to claimant's 1998 claim, we note that Judge Donnelly erred in considering whether claimant had established "modification" since the denial of his 1994 claim. Because claimant's 1998 claim was filed more than a year after the denial of claimant's 1994 claim, it cannot be considered a request for modification pursuant to 20 C.F.R. §725.310 (2000). Judge Donnelly should have addressed whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Although Judge Donnelly found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000), he did not address whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000).

[5]A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values, *i.e.* Appendix B of Part 718. A "non-qualifying" study yields values that exceed the requisite table values. In regard to Appendix B, the administrative law judge noted that:

> The maximum age listed is 71 years. Although claimant is 13 years beyond that age, I must use the values that correspond to age 71, as that is the greatest age the table accounts for.

Decision and Order at 8-9 (footnote omitted).

newly submitted pulmonary function study evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 10.

Claimant does not contest the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Rather, claimant contends that the administrative law judge erred in not addressing the validity of the newly submitted pulmonary function studies because the validity (or invalidity) of a pulmonary function study can affect the weighing of the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). Claimant's contention has merit. An administrative law judge may properly discredit a physician's finding regarding the extent of a miner's pulmonary impairment if it is based upon an invalid pulmonary function study. *See Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984). Because the record contains conflicting evidence regarding the validity of several of the newly submitted pulmonary function studies,[6] the administrative law judge, on remand, is instructed to address whether or not

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No party challenges the administrative law judge's decision to use an age of 71 in determining whether claimant's pulmonary function study test results are qualifying.

The administrative law judge found that claimant's June 13, 2001 pulmonary function studies produced non-qualifying values both before and after the administration of a bronchodilator. Director's Exhibit 15. The administrative law judge found that claimant's November 11, 2003 pre-bronchodilator pulmonary function study produced qualifying values. Claimant's Exhibit 10. The administrative law judge next noted that although claimant's January 9, 2004 pulmonary function study produced non-qualifying values before the administration of a bronchodilator, the post-bronchodilator portion of the study produced qualifying values. Director's Exhibit 5. Finally, the administrative law judge noted that claimant's September 28, 2004 and October 13, 2004 pulmonary function studies are non-qualifying. Claimant's Exhibit 8.

[6]In regard to claimant's November 11, 2003 pulmonary function study, Dr. Levinson opined that the study is not acceptable because there was less than maximal effort. Employer's Exhibit 2 at 14. Dr. Levinson explained that there was hesitancy in the onset of exhalation and excessive variability of the FEV1 results. *Id.*

Dr. Levinson also opined that claimant's January 9, 2004 study is invalid because of unacceptable patient effort. Employer's Exhibit 2 at 14-15. Dr. Levinson again based his finding on the variability of the FEV1 results. *Id.* at 15.

Dr. Levinson opined that claimant's September 28, 2004 pulmonary function study is invalid because it was improperly performed. Employer's Exhibit 2 at 15-16. Dr. Levinson explained that:

the disputed pulmonary function studies produced valid results. *See generally Siegel v. Director, OWCP*, 8 BLR 1-156 (1985).

Claimant also argues that the administrative law judge, in considering claimant's June 13, 2001 pulmonary function study, erred in considering Dr. Kaplan's validation. The record includes Dr. Shah's medical records, including treatment notes from December 2, 1983 through October 6, 2003. *See* Director's Exhibit 15. These records include the results of a non-qualifying pulmonary function study conducted by Dr. Shah on June 13, 2001. *Id.* At the hearing, claimant objected to the admission of Dr. Kaplan's validation of claimant's June 13, 2001 pulmonary function study. *See* Director's Exhibit 16. Because employer submitted the June 13, 2001 pulmonary function study as part of its affirmative case,[7] claimant argued that employer should not be permitted to review the validity of its own study. Transcript at 5-7. Because the regulations do not permit a party to submit a validation of a study that it has submitted in support of its affirmative case, *see* 20 C.F.R. §725.414, the administrative law judge properly excluded Dr. Kaplan's validation of claimant's June 13, 2001 pulmonary function study.[8] Transcript at 7.

However, in his consideration of claimant's June 13, 2001 pulmonary function

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> [T]here is a break on each and every flow volume curve between inhalation and exhalation suggesting to me that [claimant] is on disconnect from the spirometer so that exhalation was not proceeded [sic] by a maximal inhalation and I feel that the results if properly done would have been somewhat higher.

Employer's Exhibit 2 at 16.

Dr. Kraynak disagreed with Dr. Levinson's assessment, finding no breaks in the flow volume curves. Claimant's Exhibit 8. Dr. Kraynak opined that claimant's September 28, 2004 pulmonary function study is valid. *Id.*

[7]Although employer initially asserted that the June 13, 2001 pulmonary function study was properly admissible as part of the miner's treatment records, *see* 20 C.F.R. §725.414(a)(4), employer subsequently acknowledged that the June 13, 2001 pulmonary function study was one of the two pulmonary function studies submitted in support of its affirmative case. *See* Transcript at 4-7; 20 C.F.R. §725.414(a)(3)(i).

[8]Claimant, however, submitted two invalidations of claimant's June 13, 2003 pulmonary function study. The administrative law judge admitted the invalidations submitted by Drs. Venditto and Simelaro into the record as part of Claimant's Exhibit 7.

study, the administrative law judge stated that:

> This study produced non-qualifying values both pre- and post-bronchodilator. However, this test was invalidated by Dr. Venditto because only one set of results were given and they do not seem reproducible. (CX-7). The study was also invalidated by Dr. Simelaro because only one set of pre-bronchodilator results were noted. (CX-7). The study was validated by Dr. Kaplan. (DX-16). Dr. Kaplan explained that a type-written date of January 8, 1992 appeared on the report but was crossed out and a date of June 13, 2001 was hand written next to it and initialed. According to Dr. Kaplan, so long as June 13, 2001 is the correct date, then the test is valid as it complies with the requirements of Part 718. (DX-16).

Decision and Order at 10.

Because the administrative law judge excluded Dr. Kaplan's validation report, it is not a part of the record and should not have been be considered. We also note that the record contains two invalidations of claimant's June 13, 2003 pulmonary function study. *See* Claimant's Exhibit 7. The regulations permit claimant to submit, as part of his rebuttal evidence, only one physician's interpretation of claimant's June 13, 2001 pulmonary function study. *See* 20 C.F.R. §725.414(a)(2)(ii).[9] Thus, on remand, the administrative law judge is instructed to address whether the admission of both of these invalidations is consistent with the evidentiary limitations set forth at 20 C.F.R. §725.414.[10] After doing so, the administrative law judge is instructed to address the

[9]Section 725.414(a)(2)(ii) provides, in relevant part, that:

> The claimant shall be entitled to submit, in rebuttal of the case presented by the party opposing entitlement, no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by the designated responsible operator or the fund, as appropriate, under paragraph (a)(3)(i) or (a)(3)(iii) of this section and the Director pursuant to §725.406.

20 C.F.R. §725.414(a)(2)(ii).

[10]In any case in which the claimant has submitted rebuttal evidence pursuant to 20 C.F.R. §725.414(a)(2)(ii), the employer is entitled to submit an additional statement from the physician who originally interpreted the objective testing. 20 C.F.R. §725.414(a)(3)(ii). Thus, the administrative law judge, on remand, may elect to provide employer with an opportunity to submit a statement from Dr. Shah, the physician who administered the June 13, 2001 pulmonary function study.

validity of the June 13, 2001 pulmonary function study.

Claimant next contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The record contains four newly submitted medical opinions. Although Drs. Corazza, Kraynak and Kruk opined that claimant was totally disabled,[11] Director's Exhibit 5; Claimant's Exhibits 3, 8, Dr. Levinson opined that claimant was not totally disabled from a pulmonary standpoint.[12] Employer's Exhibits 1, 2. The administrative law judge credited Dr. Levinson's opinion that claimant was not totally disabled, over the contrary opinions of Drs. Corazza, Kraynak and Kruk, because he found that Dr. Levinson's opinion was better documented and reasoned. Decision and Order at 12-13.

The administrative law judge also accorded less weight to the opinions of Drs. Corazza, Kraynak and Kruk because they relied upon non-qualifying objective tests. Decision and Order at 12-13. The administrative law judge erred in discrediting the opinions of these doctors on this basis. Test results that exceed the applicable table values may be relevant to the overall evaluation of a miner's condition if a physician states that they show values indicative of reduced pulmonary function. *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985). The determination of the significance of the test is a medical assessment for the doctor, rather than the administrative law judge. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Consequently, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). On remand, the administrative law judge must reconsider whether the opinions of Drs. Corazza, Kraynak and Kruk are sufficiently reasoned. After doing so, the administrative law judge must reconsider whether the newly submitted medical opinion evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

We now turn our attention to employer's contention, raised in its cross-appeal, that the administrative law judge erred in finding the newly submitted x-ray evidence

[11]Dr. Corazza opined that claimant's impaired pulmonary function would preclude his coal mine employment. Director's Exhibit 5. Dr. Kraynak opined that claimant was totally and permanently disabled due to coal workers' pneumoconiosis. Claimant's Exhibit 3. Dr. Kruk opined that claimant was totally disabled due to pneumoconiosis. Claimant's Exhibit 8.

[12]Dr. Levinson opined that from a pulmonary standpoint, claimant maintained "the residual capcities [sic] to perform work similar to his previous work in the coal mining industry." Employer's Exhibit 1; *see also* Employer's Exhibit 2.

sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer initially argues that the administrative law judge erred in not considering Dr. Ciotola's negative interpretation of claimant's November 13, 2003 x-ray. We agree. Dr. Ciotola's x-ray interpretation was admitted into the record as a part of the Department-sponsored pulmonary evaluation. *See* 20 C.F.R. §725.406; Director's Exhibit 5. Consequently, the administrative law judge erred in not considering Dr. Ciotola's negative interpretation of claimant's November 13, 2001 x-ray.[13]

Claimant and employer each submitted rebuttal evidence in response to Dr. Ciotola's x-ray interpretation. As part of his rebuttal evidence, claimant submitted Dr. Ahmed's positive interpretation of claimant's November 13, 2003 x-ray.[14] 20 C.F.R. §725.414(a)(2)(ii); Claimant's Exhibit 3. Employer, as part of its rebuttal evidence, submitted Dr. Wheeler's negative interpretation of this x-ray. 20 C.F.R. §725.414(a)(3)(ii); Director's Exhibit 6. The administrative law judge found that while Dr. Ahmed was dually qualified as a B reader and Board-certified radiologist, Dr. Wheeler was only qualified as a B reader. The administrative law judge, therefore, accorded greater weight to Dr. Ahmed's negative interpretation, based upon his superior radiological qualifications. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order 5-6.

Employer argues that the administrative law judge erred in not recognizing that Drs. Wheeler and Scott, in addition to being qualified as Board-certified radiologists, were also qualified as B readers. Employer submitted two x-ray interpretations rendered by Dr. Wheeler and one x-ray interpretation rendered by Dr. Scott.[15] Director's Exhibit 6; Employer's Exhibits 1, 4. In each instance, employer submitted a copy of the doctor's curriculum vitae and a "B reader" certificate from the National Institute for Occupational

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[13]Dr. Ciotola is dually qualified as a B reader and Board-certified radiologist. Director's Exhibit 5.

[14]Claimant argues that the administrative law judge erred in not considering Dr. Cappiello's positive interpretation of claimant's November 13, 2003 x-ray. Claimant's Brief at 4. The administrative law judge properly excluded this interpretation because it exceeded the evidentiary limitations set forth at 20 C.F.R. §725.414. Decision and Order at 5 n.5.

[15]As part of his affirmative case, claimant submitted Dr. Miller's positive interpretation of an October 23, 2003 x-ray and Dr. Smith's positive interpretation of a September 28, 2004 x-ray. Claimant's Exhibit 3, 13. In rebuttal, employer submitted Dr. Scott's negative interpretation of the October 23, 2003 x-ray and Dr. Wheeler's negative interpretation of the September 28, 2004 x-ray. Employer's Exhibits 1, 4.

Safety and Health. *Id*. While the doctors' respective curriculum vitae document their status as Board-certified radiologists, the administrative law judge accurately noted that the "B reader" certificates for Drs. Wheeler and Scott (that were submitted with their x-ray interpretations) had expired by the time that each doctor rendered his x-ray interpretation(s).[16] Decision and Order at 5. However, we note that the administrative law judge failed to address the significance of the fact that the x-ray interpretation forms utilized by both Drs. Wheeler and Scott are identified as "B-readings."[17] *See* Director's Exhibit 6; Employer's Exhibit 4. We, therefore, remand the case to the administrative law judge with instructions to reconsider whether the evidence is sufficient to establish that Drs. Wheeler and Scott were qualified as B readers when they rendered their respective x-ray interpretation(s).[18]

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[16]Dr. Wheeler rendered his negative interpretation of claimant's November 13, 2003 x-ray on January 15, 2004 and his negative interpretation of claimant's September 28, 2004 x-ray on October 1, 2004. The "B reader" certificate, submitted by employer, indicates that Dr. Wheeler's B reader certification remained in effect until April 30, 2001.

Dr. Scott rendered his negative interpretation of claimant's October 23, 2003 x-ray on March 2, 2004. The "B reader" certificate, submitted by employer, indicates that Dr. Scott's B reader certification remained in effect until July 31, 2000.

[17]The heading on the form utilized by Dr. Wheeler to report his interpretation of claimant's November 13, 2003 x-ray states: "ILO-1980 Pneumoconiosis Classification / B-Reading." Director's Exhibit 6. The heading on the form utilized by Dr. Wheeler to report his interpretation of claimant's September 28, 2004 x-ray states: "B-READING." Employer's Exhibit 4.

The heading on the form utilized by Dr. Scott to report his interpretation of claimant's October 23, 2003 x-ray states: "ILO-1980 Pneumoconiosis Classification / B-Reading." Employer's Exhibit 1.

[18]We reject employer's contention that the administrative law judge erred in failing to take judicial notice of the qualifications of Drs. Wheeler and Scott. While an administrative law judge *may* take judicial notice of the qualifications of physicians, provided he does so in accordance with the general principles concerning judicial notice, *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), an administrative law judge is under no obligation to develop a party's case to determine the credentials or qualifications of a party's physicians. *Maddaleni*, *supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *McFarland v. Peabody Coal Co.*, 8 BLR 1-163 (1985).

Employer also contends that the administrative law judge improperly discounted Dr. Wheeler's negative interpretation of claimant's September 28, 2004 x-ray because Dr. Wheeler rated the film quality as a "3." Decision and Order at 5; Employer's Exhibit 4. The applicable regulation only requires that an x-ray be of suitable quality for proper classification of pneumoconiosis. 20 C.F.R. §718.102(a); *Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1233 (1984). In this case, Dr. Wheeler did not classify the September 28, 2004 film as unreadable or indicate that the film was not suitable for the proper classification of pneumoconiosis. Consequently, the administrative law judge erred in according less weight to Dr. Wheeler's interpretation of claimant's September 28, 2004 x-ray because it was of less than optimal quality.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the newly submitted x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Moreover, because the administrative law judge's weighing of the medical opinion evidence was based in part upon his evaluation of the x-ray evidence, we also vacate the administrative law judge's finding that the newly submitted medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[19]

On remand, should the administrative law judge find the newly submitted evidence sufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), or total disability pursuant to 20 C.F.R. §718.204(b), claimant will have established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Under these circumstances, the administrative law judge is required to consider claimant's 2003 claim on the merits, based on a weighing of all of the evidence of record. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

[19]Because no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge