BRB No. 04-0940 BLA

SAMMY JOE MAYNARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN COAL COMPANY	)	
	)	DATE ISSUED: 09/28/2005
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 Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (00-BLA-0727) of Administrative Law Judge Richard E. Huddleston on a miner'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).[1] This case is before the Board for

[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

the third time. Initially, the administrative law judge credited the miner with thirteen and one-third years of coal mine employment. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant[2] established the existence of complicated pneumoconiosis and, therefore, was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000). Accordingly, benefits were awarded, commencing on October 26, 1985.

In response to employer's appeal, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration. *Maynard v. Eastern Coal Corp.*, BRB No. 93-2104 BLA (Feb. 22, 1995)(unpub.). Specifically, the Board vacated the administrative law judge's finding of complicated pneumoconiosis pursuant to Section 718.304 (2000) because it was based on the true doubt rule which was invalidated by the United States Supreme Court in *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). *Id.* Additionally, the Board stated that the administrative law judge erred in limiting his Section 718.304 (2000) analysis to a select number of x-ray interpretations. *Id.* Accordingly, the Board instructed the administrative law judge to consider all the relevant evidence in determining whether the irrebuttable presumption of total disability due to pneumoconiosis is available at Section 718.304 (2000) on remand. *Id.* Claimant subsequently filed a motion for reconsideration, which the Board denied.

On remand, the administrative law judge noted his previous finding of thirteen and one-third years of coal mine employment and found the evidence sufficient to establish the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) (2000), 718.203(b) (2000). The administrative law judge further found the evidence insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000) but sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000). Accordingly, benefits were awarded, commencing on October 26, 1985.

In response to employer's second appeal, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration. *Maynard v.*

(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant is Sammy Joe Maynard, the miner, who filed his claim for benefits on April 6, 1987. Director's Exhibit 1. The parties agreed to a decision on the record.

Eastern Coal Corp., BRB No. 97-1262 BLA (May 20, 1998)(unpub.). Specifically, the Board vacated the administrative law judge's finding of the existence of complicated pneumoconiosis and instructed him, on remand, to consider additional comments found on the x-ray forms of Drs. Kennard, Fisher, Bassali, and Ameji, which may call into question these physicians' diagnoses of complicated pneumoconiosis. *Id.* Moreover, the Board instructed the administrative law judge, on remand, to consider the numerous medical opinions in the record in which the physicians note the possibility of tuberculosis or sarcoidosis, but do not find the existence of complicated pneumoconiosis.[3] *Id.* The Board further instructed the administrative law judge, on remand, to consider all the relevant evidence of record at Section 718.304 (2000) and to keep in mind that Section 718.304 (2000) does not provide alternative means of establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis, but rather requires the administrative law judge first to evaluate the evidence in each category and then weigh the contrary evidence from Section 718.304(a)-(c) together to determine whether invocation is established.[4] *Id.*

When this case came before the administrative law judge on second remand, he issued several orders allowing further development of the evidence. After further development of the evidence was completed, the administrative law judge issued his 2004 Decision and Order. Because new evidence was submitted regarding total respiratory disability, the administrative law judge reconsidered this issue in his most recent decision and found the evidence insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2).[5] 2004 Decision and Order on Remand at 38-40. The

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[3]The Board affirmed, as unchallenged, the administrative law judge's findings regarding the length of coal mine employment and the date of entitlement. *Maynard v. Eastern Coal Corp.*, BRB No. 97-1262 BLA (May 20, 1998)(unpub.)(*Maynard II*). The Board further affirmed, as unchallenged, the administrative law judge's finding that claimant established the existence of simple pneumoconiosis arising out of coal mine employment and his finding that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(3), (c)(4) (2000). *Id.*

[4]The Board noted that the administrative law judge erred in determining that the pulmonary function and blood gas studies support his finding of complicated pneumoconiosis because these studies, without further explanation, are not relevant to establishing the existence of complicated pneumoconiosis. *Maynard II*, slip op. at 3.

[5]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b) in the new regulations, while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c) in the new regulations.

administrative law judge, however, found the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304. *Id.* at 47. Accordingly, benefits were awarded, commencing on October 26, 1985. *Id.*

In the present appeal, employer asserts that the administrative law judge erred in finding the existence of complicated pneumoconiosis established pursuant to Section 718.304. Employer's Brief at 27-39. Claimant responds, urging affirmance of the administrative law judge's award of benefits. Employer has filed a reply brief, reiterating the arguments set forth in its Petition for Review and brief. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[6]

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. 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).

Pursuant to Section 718.304, employer first asserts that the administrative law judge erred in failing to follow the Board's instructions on remand that Section 718.304 does not provide alternative means of establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis, but rather requires the administrative law judge to first evaluate the evidence in each category and then weigh all of the relevant evidence from Section 718.304(a)-(c) together to determine whether invocation is established. Employer's Brief at 27-28. Prior to his consideration of the medical evidence at Section 718.304 on last remand, the administrative law judge stated that, subsequent to the Board's second remand of this case, the United States Court of Appeals for the Sixth Circuit[7] determined in *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999) and *Sexton v. Switch Energy Coal Corp.*, 20 Fed.Appx. 325, No. 00-4451 (6th Cir. Sept.18, 2001)(unpub.), that Section 718.304 "***is*** properly read as establishing alternative means of establishing invocation of the irrebuttable presumption

[6]We affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) as it is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[7]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

of total disability due to pneumoconiosis." 2004 Decision and Order on Remand at 41. However, the administrative law judge further stated that while the *Gray* court determined that the disjunctive "or" between subsections (a), (b), and (c) of Section 718.304 does not require a claimant to present all three types of evidence in order to qualify for benefits under the Act, the court also stated that none of these three types of proof is conclusive if outweighed by contrary evidence. *Id.* at 42. As the administrative law judge noted, the court added that "[t]he disjunctive therefore serves to give miners flexibility in proving their claims, but does not establish three separate and independent irrebuttable presumptions." *Gray*, 176 F.3d at 389, 21 BLR at 2-627-28. The administrative law judge reiterated the *Gray* court's discussion regarding the proper reading of Section 718.304, in conjunction with 30 U.S.C. §§921, 923(b) of the Act, and concluded that "the court found that the phrase 'all relevant evidence' within Section 923(b) directs the factfinder to weigh evidence from different categories (e.g., X-ray v. autopsy) **against one another**, not together as the Board suggests, to determine whether a miner suffers from complicated pneumoconiosis." 2004 Decision and Order on Remand at 42.

The administrative law judge maintained that "the Sixth Circuit's reading and interpretation of the Act and regulations, which requires the evidence under Section 718.304(a), (b), and (c) to be weighed against one another, trumps the Board's interpretation of those same statutory and regulatory sections." *Id.* at 43. Thus, the administrative law judge concluded that "the approach outlined by the Sixth Circuit in *Gray* and *Sexton* will be employed to determine whether Claimant has established the existence of complicated pneumoconiosis such that he is totally disabled." *Id.* In his discussion of this issue, the administrative law judge implied that the Sixth Circuit court's directive in *Gray* and *Sexton* and the instructions given by the Board in its 1998 decision differ. However, both the court's directive – to weigh the evidence from different categories against each other - and the Board's instructions – to consider all relevant evidence together – require the same inquiry.

Prior to considering all of the relevant evidence, however, the administrative law judge did not first evaluate the evidence in each category, rendering it unclear as to which evidence he ultimately relied upon, and the basis for his reliance. Accordingly, we remand this case and initially instruct the administrative law judge to evaluate the evidence in each category of Section 718.304(a) and (c),[8] before weighing all relevant evidence together to determine whether or not invocation is established. *See Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991)(*en banc*).

[8]The record does not contain any biopsy evidence that would establish the existence of complicated pneumoconiosis pursuant to Section 718.304(b).

Regarding the administrative law judge's consideration of the relevant evidence, employer contends that the administrative law judge failed to provide consistent and rational explanations for accepting one physician's opinion over another physician's opinion, and failed to specifically identify the evidence that he relied on in finding the existence of complicated pneumoconiosis. Employer's Brief at 30. Employer further asserts that the administrative law judge selectively analyzed the evidence and substituted his judgment for that of the medical experts. *Id.* at 31-33. As discussed below, employer's contentions have merit. Therefore, for the reasons discussed, *infra*, we vacate the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to Section 718.304 and remand this case for him to reconsider the relevant evidence.

In finding that claimant established the existence of complicated pneumoconiosis, the administrative law judge stated:

> When all of the X-ray evidence is weighed, I find that Claimant has established that he has complicated pneumoconiosis. The X-rays consistently show opacities of Category size A or larger, which is consistent with complicated pneumoconiosis, as diagnosed by several well-qualified physicians. The opacities consistent with complicated pneumoconiosis continue to appear on the most recent X-rays, and given the progressive nature of the disease, the more recent positive X-ray readings are entitled to more weight.

2004 Decision and Order on Remand at 47. Therefore, the administrative law judge concluded "that the preponderance of X-ray evidence establishes that Claimant has complicated pneumoconiosis." *Id.*

In his consideration of the large volume of evidence in this case, it is unclear, as employer asserts, which evidence the administrative law judge ultimately relied upon. Specifically, when the administrative law judge concluded "that the preponderance of X-ray evidence establishes that Claimant has complicated pneumoconiosis," he did not articulate, nor is it apparent from his previous discussion of the x-ray evidence, which specific x-ray interpretations he relied upon to find the existence of complicated pneumoconiosis established. Accordingly, we instruct the administrative law judge, when reconsidering all relevant evidence at Section 718.304(a) on remand, to provide a detailed analysis for his crediting or discrediting of each x-ray interpretation and to articulate which x-ray interpretations he ultimately relies upon to support his finding of the existence or absence of complicated pneumoconiosis. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

As employer contends, the administrative law judge erred in his consideration of the x-ray evidence by selectively analyzing it. In his Decision and Order on Remand, the administrative law judge accorded greater weight to the x-ray interpretation of Dr. Kennard, a B reader[9] and Board-certified radiologist, who found Category A large opacities on the October 26, 1985 x-ray, based on his qualifications. 2004 Decision and Order on Remand at 31. However, later in his decision, the administrative law judge accorded "less weight" to Dr. Poulos's finding that claimant did not have pneumoconiosis and that he had probable old granulomatous disease, on the December 1, 1986 x-ray, and to this physician's finding of simple pneumoconiosis, on the May 7, 1987 x-ray, because Dr. Poulos did not examine claimant or his medical records and because he "made these diagnoses based upon two older X-rays."[10] *Id.* at 36. As employer notes, Dr. Poulos is also a B reader and Board-certified radiologist and Dr. Kennard also did not examine claimant or review his medical records. Thus, it is unclear, without further elaboration, why the administrative law judge treated the x-ray readings of these two physicians differently. Moreover, the administrative law judge erred in according less weight to Dr. Poulos's reading on the basis that this physician failed to examine claimant. *See generally Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-55 (1988)(a physician need not perform a physical examination in order to provide a credible opinion concerning the existence of pneumoconiosis by x-ray). Accordingly, we instruct the administrative law judge to consider the foregoing when reconsidering the weight to be accorded to the x-ray evidence on remand.

Further, throughout his decision, the administrative law judge accords less weight to a number of physician's x-ray interpretations on the basis that the physician never examined claimant or the physician did not review claimant's medical records. 2004 Decision and Order on Remand at 35-37. To the extent that the administrative law judge

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[9]A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[10]It is unclear, without further elaboration, whether the administrative law judge's basis for according less weight to Dr. Poulos's diagnosis because it is "based upon two older X-rays" is rational. In this regard, we note that Dr. Kennard found Category A large opacities on the October 26, 1985 x-ray whereas Dr. Poulos found the absence of pneumoconiosis and probable old granulomatous disease on the later December 1, 1986 x-ray and found simple pneumoconiosis on the later May 7, 1987 x-ray.

employed this rationale to discredit x-ray readings, we instruct the administrative law judge that it was error for him to do so. *See generally Bobick*, 13 BLR at 1-55.

Employer asserts that the administrative law judge erred in according less weight to the opinions of Drs. Repsher, Rosenberg, and Broudy. The record contains a number of medical reports in which physicians opined that the large opacities seen on claimant's x-rays are not evidence of complicated pneumoconiosis, but rather indicate a history of tuberculosis, sarcoidosis, histoplasmosis, or granulomatous disease. Regarding the medical opinion evidence, the administrative law judge concluded that "the additional medical reports in the record were most often issued in conjunction with reading Claimant's X-rays and in some case[s], after a review of claimant's medical records, and also establish that Claimant established that he has complicated pneumoconiosis." 2004 Decision and Order on Remand at 47. Earlier in his decision, the administrative law judge stated:

> A review of the record shows that seventeen different physicians diagnosed either tuberculosis and/or sarcoidosis but did not diagnose complicated pneumoconiosis. Of those seventeen physicians, six offered multiple opinions citing tuberculosis or sarcoidosis as the source of the opacities. However, none of these physicians ever cited additional evidence or explanation to support their suggestion that claimant had either tuberculosis or sarcoidosis.

Id. at 33.

Regarding the opinions of Drs. Repsher and Rosenberg, the administrative law judge accorded less weight to these opinions, that the large opacities seen on claimant's x-rays are due to some other disease process, because these two physicians did not examine claimant and "discounted" claimant's lack of clinical history of tuberculosis and claimant's negative skin tests for the disease.[11] *Id.* at 34, 36. We cannot affirm the administrative law judge's bases for discrediting the opinions of Drs. Repsher and Rosenberg.

[11]In according less weight to Dr. Rosenberg's opinion, the administrative law judge also noted that because "Dr. Rosenberg is only a B reader, I find that his opinion is entitled to less weight than some of his more qualified colleagues." 2004 Decision and Order on Remand at 36. In fact, in addition to being a B reader, Dr. Rosenberg is Board-certified in internal medicine, pulmonary disease, and occupational medicine. Employer's Exhibit 9.

First, while the record does not contain a history of a diagnosis and treatment for tuberculosis, several physicians, whose opinions are in the record, do note the possibility that claimant has tuberculosis. For example, Drs. Fisher, Bassali, Ameji, Deardoff, Halbert, Spitz, Scott, and Wheeler, noted the possibility of tuberculosis on their interpretations of x-rays taken in 1985, 1986, 1987 and 1991. Further, Dr. Harrison, who examined claimant on January 19, 1987, noted that the changes exhibited on claimant's x-rays are more consistent with tuberculosis or sarcoidosis. Additionally, after examining claimant on August 6, 1987, Dr. Abernathy diagnosed possible pulmonary tuberculosis. Dr. Lane, who reviewed claimant's medical records and issued his report on June 21, 1988, noted the possibility of claimant having some form of granulomatous disease, such as tuberculosis or sarcoidosis. Therefore, we instruct the administrative law judge to consider this evidence when reassessing the credibility of the opinions of Drs. Repsher and Rosenberg on remand.

Second, while the record does contain negative tuberculosis skin tests performed on claimant, Drs. Repsher and Rosenberg testified, at their depositions, as to why they believe claimant may have evidence of tuberculosis on x-ray, notwithstanding the negative test results for this disease. The administrative law judge noted Dr. Repsher's testimony that "it was possible that Claimant had atypical tuberculosis but that the test for that type of tuberculosis was not widely available." *Id.* at 34. The administrative law judge further noted that Dr. Rosenberg "testified that negative skin tests were not dispositive of whether a person had tuberculosis, because newly diagnosed patients could have negative skin tests."[12] *Id.* at 36. Although the administrative law judge noted the reasons that Drs. Repsher and Rosenberg offered as to why claimant might have negative tuberculosis skin tests but still have evidence of the disease on x-ray, the administrative law judge did not provide any rationale to support his finding that the reasoning provided by these physicians was inadequate.

[12]Dr. Repsher testified that there are a number of forms of atypical tuberculosis that will "produce typical looking tuberculosis lesions on the chest x-ray, but the patient will have a negative TB skin test." Employer's Exhibit 14 at 9. Dr. Repsher also testified that he would not assume that claimant does not have tuberculosis based on the negative tuberculosis skin tests of 1995 and 1999 because the lesions on claimant's x-ray "are quite typical for tuberculosis." *Id.* at 12. Dr. Rosenberg testified that a negative tuberculosis skin test does not always mean that a patient has never had tuberculosis. Employer's Exhibit 16 at 8-9. Specifically, Dr. Rosenberg testified that "between 10 to 25 percent of patients with newly diagnosed pulmonary tuberculosis have a negative TB skin test. Negative TB skin tests can occur as one gets older. Some forms of tuberculosis just characteristically have negative TB manifestations under PPD. It is not uncommon, 25 percent. In fact, with sicker patients it can even be greater, 50 percent or greater can have negative skin tests." *Id.* at 9.

Moreover, the administrative law judge accorded less weight to the opinions of Drs. Repsher and Rosenberg because neither of these two physicians examined claimant. *Id.* at 34, 36. While Drs. Repsher and Rosenberg did not examine claimant, both of these physicians considered the voluminous amount of medical evidence in the record, including a November 17, 1999 CT scan. The administrative law judge did not state why these physicians' opinions were entitled to lesser weight merely because they did not examine claimant, when their conclusions were based on a review of the extensive record evidence. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002). Accordingly, we instruct the administrative law judge to consider the foregoing when reexamining the weight to be accorded to the opinions of Drs. Repsher and Rosenberg on remand.

The administrative law judge accorded less weight to Dr. Broudy's opinion that the large opacities seen on claimant's x-rays are due to some other disease process, because he "consistently ignored evidence that Claimant had no history of tuberculosis." 2004 Decision and Order on Remand at 33. As discussed above, while the record does not contain a history of a diagnosis and treatment for tuberculosis, several physicians, whose opinions are in the record, do note the possibility that claimant has tuberculosis. Therefore, we instruct the administrative law judge to consider this evidence when reassessing the credibility of Dr. Broudy's opinion on remand.

The administrative law judge also noted that Dr. Broudy "read claimant's 1999 tuberculosis skin test as negative, and after he testified that tuberculosis would remain in the body if no treatment were administered, he attempted to justify his previous findings during his second deposition by insisting that a negative tuberculosis test did not necessarily mean that Claimant did not have or had never had tuberculosis." *Id.* at 34. The administrative law judge then concluded that "Dr. Broudy's inconsistent testimony does not contribute to placing great weight on his opinions." *Id.* Because Dr. Broudy did not testify, at his earlier deposition, that a negative tuberculosis skin test is always accurate, it is unclear, without further elaboration, why the administrative law judge found Dr. Broudy's testimony in his depositions regarding this issue to be inconsistent. Accordingly, we instruct the administrative law judge to more fully explain his reasoning regarding this issue when reexamining the weight to be accorded to Dr. Broudy's opinion on remand.

Furthermore, the administrative law judge gave less weight to Dr. Broudy's opinion because he read the October 20, 1999 x-ray as positive for complicated pneumoconiosis, but later read two other x-rays as negative for the existence of pneumoconiosis. *Id.* However, Dr. Broudy testified at his December 3, 2001 deposition that he found the October 20, 1999 film to be "of marginal diagnostic quality" and that he graded it as a number three because of haziness and underpenetration. Employer's Exhibit 18 at 6. Dr. Broudy further testified that the words, "see report" on the ILO form

refer to his narrative report regarding the October 20, 1999 x-ray on which he stated that "[t]he findings were compatible with pneumoconiosis but could be related to other disease processes." *Id.* at 6-7. Therefore, in reconsidering Dr. Broudy's opinion on remand, we also instruct the administrative law judge to consider Dr. Broudy's testimony regarding his findings on the October 20, 1999 x-ray.

Employer asserts that the administrative law judge erred in according greater weight to the opinions of Drs. Nadorra and Younes, who found the existence of complicated pneumoconiosis, because they are claimant's treating physicians. Employer additionally contends that the administrative law judge erred in failing to accord less probative weight to the opinions of Drs. Nadorra and Younes because these physicians relied on inaccurate length of coal mine employment and smoking histories. In crediting Dr. Nadorra's opinion, the administrative law judge stated that "[g]iven that Dr. Nadorra had the opportunity to observe Claimant over a significant period of time as well as the fact that he was knowledgeable as to claimant's employment and medical histories, I find that Dr. Nadorra's opinion is entitled to some weight, despite Dr. Nadorra's lack of qualifications." 2004 Decision and Order on Remand at 45. Additionally, the administrative law judge found that "Dr. Younes is also in the unique position when compared to other physicians reading Claimant's X-rays, as Dr. Younes examined Claimant twice, served as one of his treating physicians, consulted with Claimant's other treating physician Dr. Nadorra, and reviewed his medical records. . . ." *Id.* at 46.

Contrary to employer's assertion, the administrative law judge rationally found that the discrepancy between the reliance of Dr. Nadorra and Dr. Younes on an eighteen-year coal mine employment history, and the administrative law judge's finding of thirteen and one-third years, is not significant. *O'Neal v. Director, OWCP*, 6 BLR 1-1132, 1-1134 (1984)(administrative law judge's decision to credit medical report, despite the discrepancy between physician's assumption of ten years of coal mine employment and the administrative law judge's finding of six years, is rational in light of small difference between actual length of coal mine employment and corroborating medical evidence); *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Regarding claimant's smoking history, Drs. Harrison, Cooper, Broudy, Abernathy, Mettu, Lane, Wright, and Vuskovich, all examining physicians, recorded an average smoking history for claimant of about twenty pack years.[13] At his deposition, Dr. Younes testified that claimant denied any smoking history. Claimant's Exhibit 7 at 6. Dr.

[13]A pack year is defined as "one package of cigarettes consumed per day per year." *In re Simon Litigation*, 211 F.R.D. 86, 2002 WL 31375510 (E.D.N.Y.).

Nadorra referred to claimant's smoking habits several times in his treatment notes.[14] Claimant's Exhibit 6. The administrative law judge found "that Dr. Nadorra treated Claimant for a significant length of time such that he [sic] any discrepancy as to his smoking history is outweighed by Dr. Nadorra's status as his treating physician." 2004 Decision and Order on Remand at 46. Regarding Dr. Younes, the administrative law judge found:

> the inaccuracy as to the smoking history does impact the proper weight to be assigned to his opinion. However, Dr. Younes' opinions are otherwise well-reasoned and in line with other medical evidence. Dr. Younes also examined claimant and his medical records, and despite the fact that Claimant may have reported an inaccurate smoking history to him, certainly he had access to and could have taken into account the smoking histories contained with the other medical records he reviewed. Therefore, I find the impact on Dr. Younes' opinion is slight.

Id. at 46-47.

Employer's assertions regarding the administrative law judge's treatment of the opinions of Drs. Nadorra and Younes have merit. First, because Section 718.304 defines complicated pneumoconiosis as "a chronic **dust** disease of the lung," it is important that a physician have accurate knowledge of any other causes, apart from coal dust exposure, that could result in a chronic disease of the lung, prior to rendering a conclusion on whether or not a claimant suffers from complicated pneumoconiosis. *See Gray*, 176 F.3d at 388, 21 BLR at 2-627; *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993). Consequently, it is not clear, without further explanation, how the administrative law judge could rationally find that the impact of Dr. Younes's reliance on an inaccurate smoking history is "slight." *See Sellards v. Director, OWCP*, 17 BLR 1-77 (1993); *Bobick*, 13 BLR at 1-54; *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Additionally, although Dr. Nadorra noted that claimant smoked a pack of cigarettes per day, he did not record any notations regarding the duration of claimant's smoking history. The administrative law judge found that any discrepancy as to claimant's smoking history in Dr. Nadorra's opinion, was outweighed by this physician's status as claimant's treating physician. In doing so, the administrative law judge erred in failing to offer any reasoning to support his conclusion that Dr.

[14]Dr. Nadorra noted that claimant smoked one pack of cigarettes per day, that claimant quit smoking in 1992, that he started smoking again in 1997, that he cut down on his smoking in 1998, and that he quit smoking in 2000. Claimant's Exhibit 6.

Nadorra's status as claimant's treating physician remedies his lack of knowledge as to claimant's smoking history. *Id.*

Moreover, in crediting the opinions of Drs. Nadorra and Younes, the administrative law judge presumed that these treating physicians' opinions were more credible than other physicians' opinions in the record simply because the former treated claimant. As noted above, the administrative law judge found inconsequential Dr. Nadorra's and Dr. Younes's lack of knowledge of claimant's smoking history merely because these physicians treated claimant. Thus, the administrative law judge erred in crediting the opinions of Drs. Nadorra and Younes because they treated claimant, without providing any meaningful analysis of the adequacy of the reasoning and documentation behind their opinions. *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002). An administrative law judge may not automatically accord greater weight to the medical opinion of a treating physician. *See Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003)(there is no rule requiring deference to treating physicians' opinions in black lung claims). Rather, the administrative law judge must examine all of the physicians' opinions on their merits and make a reasoned judgment about their credibility, with proper deference given to the treating physicians' opinions only when warranted. *See* 20 C.F.R. §718.104(d).[15] Accordingly, we instruct the administrative law judge to reconsider the credibility of the opinions of Drs. Nadorra and Younes on remand, providing a detailed rationale for his findings. *See Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Employer contends that the administrative law judge failed to provide an adequate rationale for discrediting the interpretations of a November 17, 1999 CT scan. Drs. Broudy, Repsher, and Rosenberg read the November 17, 1999 CT scan as showing no evidence of simple or complicated pneumoconiosis. As employer contends, in reviewing the evidence in this case, the administrative law judge did not weigh the contrary CT scan evidence against the x-ray evidence. Accordingly, we instruct the administrative law judge, on remand, to address the impact the negative interpretations of the November 17, 1999 CT scan may have on the credibility of the x-ray evidence. *See Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

[15]While the administrative law judge referred to the factors outlined in 20 C.F.R. §718.104(d), he did not perform any meaningful analysis of these factors in relation to the opinions of Drs. Nadorra and Younes. 20 C.F.R. §718.104(d) applies to the reports and testimony of Drs. Nadorra and Younes, which were developed after January 19, 2001.

Finally, because we vacate the administrative law judge's weighing of the evidence at 20 C.F.R. §718.304, we also vacate the administrative law judge's finding regarding the date of entitlement pursuant to 20 C.F.R. §725.503 and instruct the administrative law judge to reconsider this issue, if reached, on remand.

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 for further consideration 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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JUDITH S. BOGGS
Administrative Appeals Judge