BRB Nos. 10-0203 BLA
and 10-0203 BLA-S

CARL V. RAMEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	DATE ISSUED: 12/15/2010
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 and the Supplemental Decision and Order Awarding Attorneys' Fees of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Michelle S. Gerdano (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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits and Supplemental Decision and Order Awarding Attorneys' Fees (07-BLA-5320) of Administrative Law Judge Linda S. Chapman rendered on a claim filed pursuant to the provisions of 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 involves a subsequent claim filed on February 13, 2006, and is before the Board for the second time.[1]

In the initial decision, after crediting claimant with thirty-three years of coal mine employment,[2] the administrative law judge found that the new evidence established complicated pneumoconiosis, entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge, therefore, determined that claimant established that the applicable condition of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309. On the merits, the administrative law judge found that claimant established the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(3), 718.304, 718.203(b), and thus, was entitled to the irrebuttable presumption of total disability due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits, and subsequently, awarded attorney fees.

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding that the new evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The Board held, *inter alia*, that the administrative law judge improperly shifted the burden of proof to employer to affirmatively establish that the masses seen on claimant's x-rays are not there or that they are not related to pneumoconiosis. *C.V.R.* [*Ramey*] *v. Westmoreland Coal Co.*, BRB No. 08-0438 BLA, slip op. at 5 (May 29, 2009)(unpub.). Because the administrative law judge's finding that claimant established a change in the applicable condition of entitlement was premised on her finding that the new evidence established complicated pneumoconiosis, the Board vacated the administrative law judge's finding at 20 C.F.R. §725.309(d), and her findings

[1] The Board previously set forth the history of claimant's two prior claims. *C.V.R.* [*Ramey*] *v. Westmoreland Coal Co.*, BRB No. 08-0438 BLA, slip op. at 1-2 (May 29, 2009)(unpub.). Claimant's most recent claim was finally denied on September 17, 2004, because claimant did not establish total disability. Director's Exhibit 2.

[2] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

on the merits of entitlement. *Id.* at 5-8. In remanding the case for further consideration, the Board instructed the administrative law judge to make credibility determinations with respect to both claimant's and employer's evidence, to make specific findings as to whether claimant satisfied his burden of proving the existence of complicated pneumoconiosis based on the x-ray evidence under 20 C.F.R. §718.304(a) and the CT scan and medical opinion evidence under 20 C.F.R. §718.304(c), and, to then weigh together the evidence at 20 C.F.R. §718.304(a) and (c), before determining whether invocation of the irrebuttable presumption is established.[3]

On remand, the administrative law judge again found that the new evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that the evidence established the existence of complicated pneumoconiosis, and that claimant, therefore, is entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.[4] Accordingly, the administrative law judge awarded benefits. Subsequently, the administrative law judge awarded attorney fees.

On appeal, employer asserts that the administrative law judge failed to comply with the Board's instructions and again shifted the burden of proof to employer to disprove the existence of complicated pneumoconiosis. Employer also challenges the administrative law judge's award of attorney fees, arguing that the $300 hourly rate is excessive. Claimant responds, urging affirmance of the award of benefits and attorney fees. The Director, Office of Workers' Compensation Programs, declined to file a response brief in this appeal. Employer has filed a reply brief, reiterating its contentions on appeal.[5]

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[3] The record does not contain any new biopsy evidence relevant under 20 C.F.R. §718.304(b).

[4] The administrative law judge found that the totality of the evidence did not establish that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2).

[5] By Order dated May 28, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which reinstated the Section 411(c)(4) presumption of total disability due to pneumoconiosis, 30 U.S.C. 921(c)(4), for claims filed after January 1, 2005 that were pending on March 23, 2010. To establish invocation of that presumption, claimant must establish, *inter alia*, that he is totally disabled due to a respiratory impairment. 30 U.S.C. §921(c)(4). The Director, Office of Workers' Compensation Programs (the Director),

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, claimant's prior claim was denied because he failed to establish total disability. Director's Exhibit 2. Consequently, claimant was required to submit new evidence establishing this element of entitlement in order to obtain review of the merits of his subsequent claim. 20 C.F.R. §725.309(d)(2),(3).

One method of establishing total disability is by means of the irrebuttable presumption set forth at 20 C.F.R. §718.304. 20 C.F.R. §718.204(b)(1). Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), implemented by Section 718.304 of the regulations, provides 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 or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition that would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The United States Court of Appeals for the Fourth Circuit has held

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addressed this issue in a footnote to his non-response letter, and employer responded to the Board's Order in its reply brief. The Director and employer agree that, although the amendments apply to claimant's claim based on its filing date, they do not affect the adjudication of this case, because the administrative law judge found that the evidence "establishes overwhelmingly" that claimant is not totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), a finding that has not been contested. Decision and Order on Remand at 9. As claimant did not establish total disability, and he does not challenge that finding on appeal, we agree that Section 1556 does not affect this case.

that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition that is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-1143, 1145-46 (4th Cir. 1993); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

Employer raises several challenges to the administrative law judge's finding that the new evidence establishes complicated pneumoconiosis under 20 C.F.R. §718.304. Specifically, employer asserts that the administrative law judge failed to address the credibility of claimant's evidence, improperly shifted the burden of proof to employer, mischaracterized the conclusions of employer's medical experts, failed to consider relevant medical opinion evidence, and erred in weighing the CT scan evidence in conjunction with the x-ray evidence. Some of employer's assertions have merit.

Relevant to 20 C.F.R. §718.304(a), on remand, the administrative law judge considered ten interpretations of four new x-rays.[6] Finding that Drs. Alexander, DePonte, and Rasmussen diagnosed Category A large opacities, and that the x-ray interpretations of Drs. Wheeler, Scatarige, and Castle "d[id] not contradict the presence of the masses

[6] Drs. Rasmussen and Alexander indicated that the May 9, 2006 x-ray shows Category A large opacities. Director's Exhibits 17, 19. Dr. Wheeler reported that this x-ray shows "0" large opacities, or that the x-ray is negative for complicated pneumoconiosis. With respect to the July 6, 2006 x-ray, Dr. DePonte found Category A opacities, and Dr. Wheeler stated that there are "0" large opacities. Director's Exhibit 22, Employer's Exhibit 8. Dr. DePonte read the October 3, 2006 x-ray showing Category A opacities, while Dr. Wheeler reported "0" large opacities. Director's Exhibit 20, Employer's Exhibit 2. With respect to the October 10, 2006 x-ray, Dr. DePonte diagnosed Category A opacities while Drs. Scatarige and Castle reported "0" large opacities. Employer's Exhibits 1, 4; Claimant's Exhibit 4. Drs. Alexander, Wheeler, DePonte, and Scatarige also noted a two to three centimeter mass on x-ray.

that are the subject of Dr. Alexander's, Dr. DePonte's, and Dr. Rasmussen's readings,"[7] the administrative law judge found that claimant "has established that he has a process in his lungs that appears as an opacity of one centimeter or greater on x-ray."[8] Decision and Order on Remand at 6. Turning to the etiology of the mass, the administrative law judge found that, although Drs. Wheeler, Castle, and Scatarige designated "0" large opacities of pneumoconiosis, their negative x-ray readings were unpersuasive. Without similarly addressing the credibility of the positive x-ray readings of Drs. DePonte, Alexander, and Rasmussen, the administrative law judge found that, "Mr. Ramey has established that the unanimously acknowledged mass in his right lung is the result of a chronic dust disease of the lung, specifically, pneumoconiosis." *Id*.

Employer asserts that the administrative law judge erred in failing to assess the credibility of the x-ray evidence favorable to claimant and in discounting the x-ray evidence favorable to employer. We agree, in part. Specifically, we agree with employer that the administrative law judge erred in rejecting Dr. Castle's opinion for a reason that the Board previously held was "factually incorrect." *Ramey*, BRB No. 08-0438 BLA, slip op. at 8. Initially, the administrative law judge found that Dr. Castle's negative reading was unpersuasive because he offered no support for his distinction between an area of axillary coalescence and a Category A large opacity. Pursuant to employer's appeal, the Board held that the record did not support the administrative law judge's finding, because Dr. Castle explained his basis for distinguishing between the two diagnoses:

> Dr. Castle testified that on x-ray he found evidence of r and q type opacities in all lung zones with a profusion of 2/1, but that he did not find any evidence of large opacities. He further diagnosed atherosclerosis and evidence of axillary coalescence, and stated that "axillary coalescence is a

[7] The administrative law judge found that the 2.5 and 3 centimeter mass that Drs. Wheeler and Scatarige respectively found, and the area of axillary coalescence that Dr. Castle found on x-ray, corresponded in location to the large opacity that was identified by Drs. DePonte, Alexander, and Rasmussen.

[8] Employer argues that the administrative law judge applied the wrong standard because she required evidence of only a "one centimeter or greater" opacity, Decision and Order on Remand at 6, when the Act requires evidence of opacities "greater than one centimeter in diameter." 30 U.S.C. §921(c)(3)(A). Although employer is correct in its assertion, the administrative law judge's error was harmless, because the physicians of record who specified the size of the opacity seen on claimant's x-ray agree that it measured at least 2.5 to 3 centimeters. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 n.6, --- BLR --- (4th Cir. 2010).

> coming together of nodules, but you can still see discrete nodules . . . and they may be touching . . . [and] it may be that they are actually in different planes, [whereas] an actual large opacity is defined as a solid area at least one centimeter or greater . . .so that you cannot distinguish individual nodularity in the large opacity." Employer's Exhibit 7.

Id. at 7-8. On remand, the administrative law judge rendered the same determination as previously, finding that Dr. Castle "offered absolutely no support for this distinction. . . ." Decision and Order on Remand at 4. Because the administrative law judge's finding is not supported by substantial evidence, we must vacate her credibility finding with regard to Dr. Castle's x-ray reading, and her finding that the x-ray evidence establishes that claimant "has a process in his lungs that appears as an opacity of one centimeter or greater on x-ray."[9] Decision and Order on Remand at 6; *see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998).

We, however, reject employer's assertion that the administrative law judge erred in discounting the x-ray reports of Drs. Wheeler and Scatarige. Substantial evidence supports the administrative law judge's permissible finding that Dr. Wheeler did not adequately explain how he was able to ascribe the large mass in claimant's lung to granulomatous disease, as opposed to pneumoconiosis, in light of his testimony that both diseases can form from smaller nodules, and that some of the small nodules on claimant's x-rays could be pneumoconiosis. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Ramey*, slip op. at 8 (noting that "the administrative law judge could properly discount Dr. Wheeler's diagnosis of granulomatous disease on the ground that the physician failed to satisfactorily explain how he was able to ascribe claimant's condition completely and categorically to granulomatous disease"). Similarly, the administrative law judge acted within her discretion when she found that Dr. Scatarige's "designation of granuloma, hamartoma, or cancer," as differential diagnoses for the three-centimeter mass in claimant's right upper lung, was "equivocal" and "detract[ed] from his credibility," given that there was no evidence in the record showing that claimant had any of those

[9] Although Dr. Castle is qualified as a B reader only, while several of the other physicians who interpreted claimant's x-rays are qualified as both Board-certified radiologists and B readers, the administrative law judge did not resolve the conflicting x-ray readings based on the readers' relative qualifications. Decision and Order on Remand at 8 (finding all of the physicians of record to be "eminently qualified," and that there was, therefore, "no reason to accord more weight to one over the others, based solely on their credentials").

alternative diseases.[10] *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287 --- BLR at --- (4th Cir. 2010). Consequently, we reject employer's assertion that the administrative law judge impermissibly shifted the burden of proof to employer by discounting the x-ray readings of Drs. Wheeler and Scatarige. *See Cox*, 602 F.3d at 276, --- BLR ---; *Hicks*, 138 F.3d at 528, 21 BLR at 2-326.

Because the administrative law judge erred in her consideration of Dr. Castle's x-ray reading at 20 C.F.R. §718.304(a), we vacate her finding that the new x-ray evidence satisfies the requirements of prong A, and remand this case for further consideration. On remand, the administrative law judge must reconsider Dr. Castle's x-ray interpretation and determine whether the x-ray evidence supports a finding of complicated pneumoconiosis. In so doing, the administrative law judge must address Dr. Castle's statements as to the absence of a large x-ray opacity, and, if she again credits the positive x-ray readings of Drs. DePonte, Alexander, and Rasmussen on this issue, she must explain her basis for doing so. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Ramey*, slip op. at 7-8.

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge found that the medical opinion evidence, standing alone, did not establish that claimant has complicated pneumoconiosis, nor did it cause the x-ray evidence of large opacities to lose force.[11] Employer contends that the administrative law judge erred in discounting Dr. Spagnolo's medical opinion, and erred in failing to address Dr. Castle's opinion. Some of employer's contentions have merit.

[10] The administrative law judge found that the record "contains no evidence of exposure to causative agents other than coal dust, such as asbestos or tuberculosis. Nor are there any treatment records indicating that [claimant] has ever been diagnosed with or treated for tuberculosis, granulomatous, or any other pulmonary impairment that would produce opacities on an x-ray." Decision and Order at 15. Employer does not challenge that finding on appeal. It is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[11] The administrative law judge also found that two readings of a February 1, 2006 CT scan by Drs. Pugh and Wheeler did not "meet the equivalency requirements of prong (C), because neither physician indicated that these masses would appear on x-ray as opacities of at least one centimeter in diameter." Decision and Order on Remand at 7.

With respect to the medical opinion evidence, the administrative law judge considered Dr. Spagnolo's opinion[12] and the treatment records of Drs. Smiddy and Winegar. The administrative law judge discounted Dr. Spagnolo's opinion, finding that, although Dr. Spagnolo stated that he relied upon Dr. Wheeler's negative x-ray readings because Dr. Wheeler is a pre-eminent radiologist, Dr. Spagnolo "did not explain what it was about Dr. Wheeler's qualifications that entitled his opinions to greater weight in Dr. Spagnolo's mind; indeed, he did not even acknowledge or compare the qualifications of Drs. DePonte, Dr. Alexander, or Dr. Rasmussen." Decision and Order on Remand at 7. The administrative law judge found that the treatment records of Drs. Smiddy and Winegar were entitled to more weight than Dr. Spagnolo's opinion.[13] The administrative law judge concluded, "nevertheless, I find that the medical opinion reports, standing alone, are not sufficient to establish that Mr. Ramey has complicated pneumoconiosis. However, I also find that they do not cause the findings of category A opacities by Dr. DePonte, Dr. Alexander, and Dr. Rasmussen to lose force." Decision and Order on Remand at 8.

Employer asserts that the administrative law judge erred in discrediting Dr. Spagnolo's opinion for the reasons provided. We disagree. The administrative law judge discounted Dr. Wheeler's x-ray readings, a finding that we have affirmed. As Dr. Spagnolo relied on the discredited x-ray readings of Dr. Wheeler to conclude that claimant does not have complicated pneumoconiosis, substantial evidence supports the administrative law judge's determination to accord less weight to Dr. Spagnolo's opinion. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). Further, because the administrative law judge provided a valid reason for discrediting Dr. Spagnolo's opinion, we need not address employer's remaining

[12] Based on the x-ray interpretations of Dr. Wheeler, along with clinical testing and claimant's lack of impaired lung function, Dr. Spagnolo opined that claimant does not have complicated pneumoconiosis. Employer's Exhibit 5.

[13] The administrative law judge found that Dr. Smiddy had "become familiar with, and tracked Mr. Ramey's condition over a number of years." Decision and Order on Remand at 7. In so finding, the administrative law judge explained that Dr. Smiddy's treatment records "document consistent findings of progressive massive fibrosis on x-ray and CT scans since 1998, and a progressive history of pneumoconiosis since 1984." *Id*. With respect to Dr. Winegar, the administrative law judge noted that he treated claimant for pneumoconiosis "for the last several years," and that his reports include x-ray and CT scan readings by Drs. DePonte, Pugh, and Fletcher. *Id*. at 8. Employer does not challenge the administrative law judge's analysis of the weight and credibility of the treatment records from claimant's treating physicians. *See Skrack*, 6 BLR at 1-711.

assertions concerning the weight accorded to Dr. Spagnolo's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

We, however, agree with employer that the administrative law judge erred in failing to consider Dr. Castle's medical opinion pursuant to 20 C.F.R. §718.304(c). *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. Because the administrative law judge did not consider Dr. Castle's medical opinion in conjunction with the new medical opinion evidence, we vacate the administrative law judge's finding that the medical opinion evidence does not undermine a finding of complicated pneumoconiosis, and remand this case for further consideration of the medical opinion evidence. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. On remand, the administrative law judge must consider Dr. Castle's opinion, including his opinion as to the absence of a pulmonary impairment, and once again determine whether the medical opinion evidence supports a finding of complicated pneumoconiosis. 30 U.S.C. §923(b). In so doing, the administrative law judge must explain the basis for her credibility determination. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336.

Employer additionally asserts that, when weighing all of the evidence together, the administrative law judge did not adequately explain the weight accorded to the CT scan evidence.[14] We agree. Pursuant to 20 C.F.R. §718.304(c), the administrative law judge found that the CT scan evidence does not "independently support a finding of statutory complicated pneumoconiosis," because neither of the interpreting physicians indicated whether the large masses that they observed would appear on x-ray as masses of at least one centimeter in diameter. Decision and Order on Remand at 7. Later, when weighing the CT scan evidence along with the x-ray evidence, the administrative law judge stated, "I have evaluated the x-ray evidence, in conjunction with the CT scan evidence, and find that [claimant] has satisfied his burden of proving that he suffers from the statutorily defined condition referred to as complicated pneumoconiosis." *Id*. at 8. It is unclear from the administrative law judge's decision how she concluded that, despite the lack of an equivalency determination, the CT scan evidence, "in conjunction with" the x-ray evidence, establishes complicated pneumoconiosis. On remand, the administrative law judge must again consider what impact, if any, the CT scan evidence has on her x-ray findings under 20 C.F.R.§718.304(a), when weighing the evidence together, and she must

[14] Drs. Pugh and Wheeler interpreted claimant's February 1, 2006 CT scan. Dr. Pugh reported that the CT scan showed "coalescent opacities . . . . The largest coalescent opacity is a stellate mass-like lesion in the right upper lobe." Claimant's Exhibit 2. Dr. Pugh opined that "the appearance and distribution favor pneumoconiosis with probable progressive massive fibrosis." *Id*. By contrast, Dr. Wheeler opined that the observed masses are not complicated pneumoconiosis. Employer's Exhibit 9.

explain the basis of her findings. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gollie*, 22 BLR at 1-311; *Melnick*, 16 BLR at 1-33-34.

Because the administrative law judge relied upon her determination that claimant invoked the irrebuttable presumption to find that the new evidence established a change in the applicable condition of entitlement under Section 725.309(d), we must vacate that finding. The issue of whether claimant has established the requisite change in the applicable condition of entitlement must be reconsidered before reaching the merits of entitlement. 20 C.F.R. §725.309(d); *White*, 23 BLR at 1-3.

To summarize, we instruct the administrative law judge, on remand, to reconsider whether claimant has satisfied his burden to establish that he has complicated pneumoconiosis. The administrative law judge must first determine whether the evidence in each category at Section 718.304(a) or (c) tends to establish the existence of complicated pneumoconiosis, and then she must weigh together the evidence at subsections 718.304(a) and (c) before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-118; *Melnick*, 16 BLR at 1-33-34. The administrative law judge must also comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), by resolving all conflicts in the evidence and setting forth the rationale underlying her findings. If, on remand, the administrative law judge finds that claimant has established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 based on the new evidence, and has therefore satisfied his burden to establish a change in the applicable condition of entitlement at 20 C.F.R. §725.309, the administrative law judge must determine whether claimant has established that he is entitled to the irrebuttable presumption of total disability due to pneumoconiosis, on the merits of entitlement. *See White*, 23 BLR at 1-3; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18. If, upon reconsidering the merits of entitlement, the administrative law judge finds that claimant has established the existence of complicated pneumoconiosis, then she must determine whether the complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *See* 20 C.F.R. §718.203; *Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007).

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.[15]

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[15] We decline to address employer's challenges to the administrative law judge's Supplemental Decision and Order Awarding Attorneys' Fees, as the award is premature.