BRB No. 09-0540 BLA

ROBERT D. SHORES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 07/28/2010
	)	
DONALDSON MINING COMPANY	)	
	)	
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 – Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita A. Roppolo (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 – Awarding Benefits (2008-BLA-5076) of Administrative Law Judge Thomas M. Burke with respect to a miner's claim filed on October 27, 2006, 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). The administrative law judge found, based on the parties' stipulation, that claimant established forty-three years of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718. In addition, the administrative law judge determined that although claimant did not establish the existence of legal pneumoconiosis, he established the existence of clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and a totally disabling respiratory impairment due to coal workers' pneumoconiosis (CWP) at 20 C.F.R. §718.204(b)(2)(iv), (c). Accordingly, the administrative law judge awarded benefits.

Employer argues that the administrative law judge erred in determining that Dr. Lenkey diagnosed clinical pneumoconiosis. In addition, employer asserts that it should be dismissed as the responsible operator, as Dr. Lenkey's report did not constitute a complete pulmonary evaluation under 30 U.S.C. §923(b), as implemented by 20 C.F.R. §725.406, and therefore, it was denied a "meaningful hearing." Further, employer states that the administrative law judge did not properly weigh all of the evidence of record in assigning greatest weight to Dr. Schaaf's opinion regarding the existence of clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203. Claimant responds, urging affirmance of the award of benefits. In his limited response brief, the Director, Office of Workers' Compensation Programs (the Director), states that he satisfied his obligation to provide claimant with a complete pulmonary evaluation.[1]

By Order dated March 30, 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 amended the Act with respect to the entitlement criteria for certain claims.[2] *Shores v. Donaldson Mining Co.*, BRB No. 09-0540 BLA (Mar. 30, 2010)(unpub. Order). The Director, claimant, and employer have responded.

[1] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and his findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(3), the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), or total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii), but established total disability at 20 C.F.R. §718.204(b)(iv). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4)), reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling

The Director states that Section 1556 will not affect this case if the Board affirms the administrative law judge's award of benefits. However, the Director further asserts that, if the Board does not affirm the administrative law judge's findings, remand for consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4), and for the possible submission of additional evidence, would be required, as the present claim was filed after January 1, 2005 and the administrative law judge credited claimant with more than fifteen years of coal mine employment. Claimant responds, arguing that the recent amendments to the Act are applicable to his claim because he has fifteen or more years of coal mine employment and has been diagnosed with pneumoconiosis and a totally disabling pulmonary impairment. Employer indicates that the recent amendments may affect this claim based on the claimant's coal mine employment history. Therefore, employer asserts that due process requires the claim to be remanded for the opportunity to develop evidence addressing the new standards created. Additionally, employer maintains that retroactive application of the amendments is unconstitutional because it denies the operator due process and constitutes an unconstitutional taking of private property.

To determine whether this case must be remanded for consideration of the invocation of the rebuttable presumption of total disability due to pneumoconiosis, we will first address employer's allegations of error regarding the administrative law judge's findings at 20 C.F.R. §§718.202(a), 718.203(b), and 718.204(c).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[3] 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements

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respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis.

[3] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. 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*).

precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

I. The Existence of Clinical Pneumoconiosis

A. 20 C.F.R. §718.202(a)(1)

The administrative law judge initially noted that the three x-rays of record, dated February 22, 2007, October 18, 2007, and January 9, 2008, were relatively contemporaneous. Decision and Order at 7. The administrative law judge stated that the x-rays were read as positive for pneumoconiosis by Dr. Ahmed, a Board-certified radiologist and B reader, and by Drs. Muchnok and Schaaf, B readers, and as negative by Dr. Wiot, a Board-certified radiologist and B reader.[4] *Id*.; *see* Director's Exhibit 12; Claimant's Exhibits 1, 3; Employer's Exhibit 3. The administrative law judge credited the positive readings as "constituting the preponderance of the evidence." Decision and Order at 7. The administrative law judge noted that the rationale offered by Dr. Wiot in support of his negative reading was not "sufficient to deny the presence of opacities evidencing pneumoconiosis under the ILO criteria."[5] *Id*. at 8. The administrative law judge also observed that Dr. Schaaf testified that irregular opacities can be consistent with CWP, that CWP can be diagnosed without upper lobe disease, and that CWP may exist in the presence or absence of honeycombing. *Id*.; *see* Claimant's Exhibit 6.

B. 20 C.F.R. §718.202(a)(4)

Regarding the medical opinion and CT scan evidence, the administrative law judge stated that all of the physicians agreed that claimant's x-rays and CT scans were abnormal and showed a severe disease process, but they disagreed about the identity and

[4] Claimant's February 22, 2007 x-ray was interpreted as positive for pneumoconiosis by Drs. Muchnok and Ahmed, while Dr. Wiot interpreted it as negative for the disease. Director's Exhibit 12; Claimant's Exhibit 3; Employer's Exhibit 2. Dr. Gaziano interpreted the x-ray for quality only. Director's Exhibit 12. Claimant's October 18, 2007 x-ray was interpreted as positive for pneumoconiosis by Dr. Schaaf and as negative for the disease by Dr. Wiot. Claimant's Exhibit 1; Employer's Exhibit 12. In addition, claimant's January 9, 2008 x-ray was interpreted as positive for pneumoconiosis by Dr. Ahmed and as negative by Dr. Wiot. Claimant's Exhibit 4; Employer's Exhibit 13.

[5] Dr. Wiot opined that claimant's x-rays did not indicate pneumoconiosis because the changes were primarily in the lung bases, the opacities were irregular, and honeycombing was present. Employer's Exhibit 17.

cause of the disease.[6] Decision and Order at 8; *see* Director's Exhibit 9; Claimant's Exhibits 1-2, 6; Employer's Exhibits 4, 11, 17-18. The administrative law judge indicated that Drs. Wiot and Altmeyer concluded that claimant has idiopathic pulmonary fibrosis (IPF), or possible unilateral diffuse pleural fibrosis (UPF), while Drs. Lenkey and Schaaf opined that claimant has CWP. *Id*. However, the administrative law judge discredited Dr. Wiot's opinion, relying on Dr. Schaaf's opinion, that although pneumoconiosis often begins in the upper lung zones, the presence of that pattern is not necessary to diagnose the disease. *Id*. at 9. In addition, the administrative law judge determined that Dr. Wiot's conclusion, that claimant does not have opacities in his upper lung zones, is undermined by the x-ray interpretations of Drs. Ahmed, Muchnok, and Schaaf, who observed opacities in all six lung zones. *Id*.

Relying on Dr. Schaaf's opinion, the administrative law judge also determined that irregular opacities can be associated with CWP, and that CWP may exist with or without honeycombing. Decision and Order at 9. In addition, the administrative law judge found that the Department of Labor (DOL) form, regarding the presence or absence of pneumoconiosis, presupposes that opacities consistent with CWP may be irregular and exist in the upper lung zones. *Id*. at 8 n.3. Based on the "absolutism" of Dr. Wiot's opinion and the x-ray interpretations of the other physicians, the administrative law judge concluded that Dr. Wiot's opinion, that claimant's impairment is IPF, was undermined. *Id*. at 9.

Similarly, the administrative law judge gave less weight to Dr. Altmeyer's opinion because, like Dr. Wiot, he opined that claimant did not have coal workers' pneumoconiosis, based on the shape and location of the opacities. Decision and Order at 10; *see* Employer's Exhibits 4, 18. The administrative law judge also noted Dr. Altmeyer's acknowledgement that it is possible to have IPF and pneumoconiosis and that IPF could cloud x-ray images and conceal underlying lung disease. Decision and Order

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[6] Pursuant to 20 C.F.R. §718.201(a)(1):

> "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

at 10 n.5. Further, the administrative law judge stated that Dr. Schaaf questioned Dr. Altmeyer's reliance on the presence of a restrictive impairment to exclude pneumoconiosis, since pneumoconiosis can cause a restrictive impairment without an obstructive impairment. *Id*. at 10. In addition, the administrative law judge indicated that Dr. Schaaf opined that the crackles noted by Dr. Altmeyer are a nonspecific finding and questioned Dr. Altmeyer's reliance on the clubbing in claimant's fingers, since medical literature indicates that clubbing can occur with any end-stage lung disease. *Id*.

In contrast, the administrative law judge determined that Dr. Schaaf's opinion was based on the objective medical evidence and the medical literature and was more persuasive than the opinions of Drs. Wiot and Altmeyer. Decision and Order at 10. The administrative law judge found that Dr. Schaaf explained why the evidence relied on by Drs. Wiot and Altmeyer was insufficient to result in an exclusionary diagnosis of IPF. *Id*. Further, the administrative law judge determined that Dr. Schaaf's opinion is supported by the findings of Dr. Lenkey. *Id*. In addition, the administrative law judge noted that, although claimant's CT scans were predominantly negative, all of the physicians agreed that there is radiographic evidence of opacities and/or lesions in claimant's lungs. *Id*. at 11. Relying on Dr. Schaaf's opinion, as supported by Dr. Lenkey's opinion, the administrative law judge concluded that claimant established the presence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4). *Id*.

C. Arguments on Appeal

1. 20 C.F.R. §718.202(a)(1)

Employer initially argues that the seven ILO interpretations of the three x-rays were not the only x-rays of record and that the administrative law judge should have "acknowledge[d]" the readings of the x-rays taken during claimant's hospitalizations. Employer's Brief at 13. Employer further maintains that, because none of these readings included a diagnosis of CWP, they are consistent with Dr. Wiot's opinion that the x-rays he reviewed were negative. Employer's Brief at 13.

We hold that employer's contentions have merit, in part. Employer accurately states that the administrative law judge did not weigh the x-ray interpretations contained in the miner's treatment records pursuant to 20 C.F.R. §718.202(a)(1).[7] *See* Claimant's

[7] An x-ray, dated November 21, 2003, was read as showing persistent areas of patchy opacity, suggesting acute infiltrate superimposed on chronic pulmonary fibrosis with extensive pulmonary fibrotic changes present in the periphery of the lungs. Claimant's Exhibit 5. An x-ray, dated November 27, 2003, was read as showing subcutaneous emphysema and interstitial fibrosis. *Id*. In addition, an x-ray was taken on December 2, 2003, showing diffuse infiltrates in the upper and lower lung zones. *Id*. An

Exhibit 5; Employer's Exhibits 6, 10, 16. Since these x-rays were obtained in the course of treatment, the fact that they were not classified under the ILO system does not preclude consideration of them at 20 C.F.R. §718.202(a)(1). 20 C.F.R. §718.101(b); *see also* 64 Fed. Reg. 54966, 54975 (Oct. 8, 1999); 65 Fed. Reg. 79,929 (Dec. 20, 2000) (The DOL clarified that only evidence developed in conjunction with a claim must comply with quality standards). However, contrary to employer's assertion, interpretations of treatment x-rays that do not contain diagnoses of pneumoconiosis are not necessarily negative for the disease. Rather, in the absence of applicable quality standards, the significance of x-ray readings that contain no mention of pneumoconiosis is a question committed to the discretion of the administrative law judge in his role as fact-finder. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996), *modified on recon.*, 21 BLR 1-52 (1997); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984).

In this case, although the administrative law judge noted that additional x-rays were performed in connection with claimant's treatment, he did not identify the weight, if any, he accorded them at 20 C.F.R. §718.202(a)(1). Therefore, we vacate the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1).

2. 20 C.F.R. §§718.202(a)(4), 718.203(b), and 718.204(c)

Because the administrative law judge relied on his weighing of the x-ray evidence at 20 C.F.R. §718.202(a)(1), when determining that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203(b), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), we must also vacate his finding under these sections and the award of benefits. We will address employer's specific allegations of error, however, in order to avoid the repetition of error on remand.

Employer argues that, contrary to the administrative law judge's finding under 20 C.F.R. §718.202(a)(4), Dr. Lenkey did not diagnose CWP. Employer contends that this mischaracterization of Dr. Lenkey's opinion violates the Administrative Procedure Act

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x-ray, dated December 9, 2003, was read as showing chronic changes in both lungs. *Id*. Extensive pleural and parenchymal changes were noted on the x-ray, dated December 10, 2003. *Id*. An x-ray, dated December 12, 2003, was interpreted as showing "diffuse severe fibrous interstitial disease." *Id*. Further, an x-ray, dated September 11, 2007, was interpreted as showing "chronic appearing markings" in the lungs, possibly interstitial in etiology. Employer's Exhibit 6.

(APA), 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). Employer's contentions have merit. Contrary to the arguments made by claimant and the Director, in his medical report, Dr. Lenkey merely inserted Dr. Muchnok's x-ray reading and did not indicate whether it was his opinion, that claimant has clinical pneumoconiosis. Director's Exhibit 9. A restatement of an x-ray interpretation does not constitute a reasoned medical opinion diagnosing clinical pneumoconiosis. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We further note that, on the ILO form he completed, Dr. Muchnok checked boxes indicating that there were opacities in a profusion of 3/2 in all six lung zones, but did not check the boxes indicating that there were parenchymal or pleural abnormalities consistent with pneumoconiosis. Director's Exhibit 12. In the written report attached to the ILO form, Dr. Muchnok noted that there were small opacities in all six lung zones in a profusion of 3/2, but he did not use the terms "pneumoconiosis" or "coal workers' pneumoconiosis." *Id*. Therefore, we agree with employer that the administrative law judge erred in determining that Dr. Lenkey diagnosed clinical pneumoconiosis and that his diagnosis supported Dr. Schaaf's opinion. *Tackett v. Director, OWCP*, 7 BLR 1-703, 706 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648, 1-651 (1985). On remand, the administrative law judge must first determine, at 20 C.F.R. §718.202(a)(1), whether Dr. Muchnok's x-ray reading was, in fact, positive for clinical pneumoconiosis.[8]

Employer also alleges that, in considering the CT scan evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge erred by finding that Dr. Lenkey's opinion supported Dr. Schaaf's positive x-ray and CT scan interpretations, because Dr. Lenkey did not diagnose clinical pneumoconiosis in his report. Employer states that Dr. Schaaf's opinion is unsupported, therefore, and his reasoning cannot be used to discredit the contrary opinions of Drs. Wiot and Altmeyer. Further, employer asserts that the administrative law judge, in violation of the APA, did not render a finding regarding the weight that he accorded to Dr. Lenkey's medical opinion.

We find merit in employer's assertions. As we previously held, Dr. Lenkey's opinion did not contain a reasoned diagnosis of clinical pneumoconiosis. In addition, employer correctly states that the administrative law judge did not indicate, as required by the APA, the weight, if any, he accorded to Dr. Lenkey's opinion regarding the existence of pneumoconiosis. *See Wojtowicz v. Director, OWCP*, 12 BLR at 1-162, 1-

[8] The Director, Office of Workers' Compensation (the Director), argues that Dr. Muchnok's diagnosis of clinical pneumoconiosis is evident from "the fact that, by form instruction, the size, shape, and profusion of opacities were to be noted only if the patient had parenchymal abnormalities consistent with pneumoconiosis." Director's Brief at 1. This is an issue for the administrative law judge to resolve in his role as fact-finder. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

165. In light of the foregoing, we vacate the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(4).

Relevant to 20 C.F.R. §718.203(b), employer contends that, with respect to the issue of the source of the opacities observed on claimant's x-rays, the administrative law judge erred in giving more weight to the opinion of Dr. Schaaf, a Board-certified pulmonologist, than to the opinion of Dr. Wiot, a Board-certified radiologist. Employer also asserts that the administrative law judge did not have the authority to find that Dr. Wiot's opinion was insufficient, under the ILO criteria, to rule out the presence of opacities consistent with pneumoconiosis. Further, employer states that the administrative law judge did not consider all of the evidence, when evaluating the credibility of Dr. Schaaf's opinion regarding the existence of CWP.

We initially hold that, although the administrative law judge made findings regarding the cause of the abnormalities observed on claimant's x-rays at 20 C.F.R. §718.202(a)(1), this evidence should have been considered at 20 C.F.R. §718.203.[9] *See Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc*). In addition, contrary to employer's contention, the administrative law judge noted correctly that the form on which the physicians record their ILO readings includes irregular opacities and opacities in the lower lung zones. Decision and Order at 8 n.3. However, the administrative law judge did not indicate that he was aware that the form contains no requirement that the physicians identify the source of the opacities. Accordingly, in contrast to the administrative law judge's apparent understanding, a positive ILO reading for pneumoconiosis does not establish that the pneumoconiosis arose out of dust exposure in coal mine employment. Employer accurately argues, therefore, that the administrative law judge did not provide a valid rationale for his decision to give more weight to Dr. Schaaf's opinion, that the condition observed on x-ray was caused by coal dust exposure, than to Dr. Wiot's contrary opinion. *See Sexton v. Director, OWCP*, 752 F.2d 213, 7 BLR 2-102 (6th Cir. 1985); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985). We note that employer did not raise any additional allegations of error regarding the administrative law judge's findings at 20 C.F.R. §718.204(c), other than to state that the administrative law judge relied on an improper weighing of the evidence at 20 C.F.R. §718.202(a)(1).

[9] On the ILO forms regarding the February 22, 2007, October 18, 2007, and January 9, 2008 x-rays, Dr. Wiot checked the boxes indicating that the films did not contain any pleural or parenchymal abnormalities consistent with pneumoconiosis. Employer's Exhibits 2, 12, 13. However, at his deposition, Dr. Wiot suggested that, although he observed opacities consistent with pneumoconiosis, he ruled out a diagnosis of coal workers' pneumoconiosis, based on their location and shape. Employer's Exhibit 17 at 13.

II. Complete Pulmonary Evaluation

Employer has raised the issue of whether Dr. Lenkey's medical report satisfies the Director's obligation to provide claimant with a complete pulmonary evaluation.[10] Employer maintains that, because Dr. Lenkey did not fully address the issue of whether claimant has pneumoconiosis, his opinion does not constitute a complete pulmonary evaluation. Employer asserts that, in light of the Director's failure to provide claimant with a complete pulmonary evaluation while allowing the claim to proceed, employer was denied "a meaningful hearing at a meaningful time." Employer's Brief at 7. Employer further contends, therefore, that the Black Lung Disability Trust Fund should be designated as the party responsible for paying any benefits found to be due to claimant.

The Director has responded and maintains that Dr. Lenkey "effectively diagnos[ed] pneumoconiosis," as he attached Dr. Muchnok's 3/2 ILO reading to his report and "adopted" Dr. Muchnok's profusion diagnosis of 3/2. Director's Response Letter at 1. In light of our decision to vacate the administrative law judge's findings regarding Dr. Muchnok's x-ray reading and the administrative law judge's finding, pursuant to 20 C.F.R. §718.202(a)(4), that Dr. Lenkey diagnosed clinical pneumoconiosis, on remand, the administrative law judge should address the complete pulmonary evaluation issue.

III. Conclusion

In summary, we vacate the administrative law judge's findings under 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and 718.204(c) and the award of benefits. In addition, based on our decision to vacate the award of benefits, we agree with the Director that the reconsideration of the claim must include a determination as to whether claimant has established invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4). If the administrative law judge determines that

[10] The Act requires that "[e]ach miner who files a claim. be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The Director fails to meet this duty where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n. 3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

the presumption is applicable to this claim, he must allow all parties the opportunity to submit evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1). Finally, because the administrative law judge has not yet considered this claim under the amended version of Section 411(c)(4) of the Act, we decline to address, as premature, employer's argument that the retroactive application of that amendment to this claim is unconstitutional.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge