BRB No. 04-0405 BLA

BANNER EDISON MARSHALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GLAMORGAN COAL CORPORATION	)	DATE ISSUED: _____
	)	
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 of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (02-BLA-5212) of Administrative Law Judge Edward Terhune Miller awarding benefits on a subsequent 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). The administrative law judge credited claimant with twenty-three years of coal mine employment based on employer's concession and adjudicated this subsequent claim pursuant to the regulations contained in 20 C.F.R. Part 718.[1] Although

[1]The pertinent procedural history of this case is as follows: Claimant filed his first

the administrative law judge found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), he found the newly submitted evidence sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Consequently, the administrative law judge found the evidence sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found the evidence sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence is sufficient to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Employer also challenges the administrative law judge's finding that the evidence is sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 on the merits. Claimant responds, urging

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claim with the Social Security Administration (SSA) on February 6, 1973. Director's Exhibit 1. After several denials by the SSA, this claim was finally denied by the Department of Labor (DOL) on December 11, 1979. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his second claim – a duplicate claim - with the DOL on December 31, 1981. Director's Exhibit 2. This claim was denied by the DOL on February 10, 1983. *Id*. The denial became final because claimant did not pursue this claim any further. Claimant filed his third claim – a duplicate claim - with the DOL on June 20, 1986. Director's Exhibit 3. On June 16, 1992, Administrative Law Judge Paul H. Teitler issued a Decision and Order denying benefits because claimant failed to establish the existence of pneumoconiosis and a material change in conditions. *Id*. The Board affirmed Judge Teitler's denial of benefits on the merits. *Marshall v. Glamorgan Coal Corp.*, BRB No. 92-2026 BLA (Aug. 26, 1993)(unpub.). Furthermore, the Board denied claimant's request for reconsideration. *Marshall v. Glamorgan Coal Corp.*, BRB No. 92-2026 BLA (Jan. 25, 1996)(unpub. Order). Claimant filed a request for modification on November 19, 1996. *Id*. On January 29, 1999, Administrative Law Judge Richard A. Morgan issued a Decision and Order denying benefits. Director's Exhibit 3. Although Judge Morgan found that claimant failed to establish the existence of complicated pneumoconiosis, he found that claimant established the existence of simple pneumoconiosis arising out of coal mine employment. *Id*. However, Judge Morgan found that claimant failed to establish total disability and total disability due to pneumoconiosis. *Id*. The Board affirmed Judge Morgan's denial of benefits. *Marshall v. Glamorgan Coal Co.*, BRB No. 99-0485 BLA (Feb. 25, 2000)(unpub.). Since claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim – a subsequent claim - with the DOL on March 1, 2001. Director's Exhibit 5.

affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Initially, employer contends that the administrative law judge erred in finding the evidence sufficient to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309.[3] Section 725.309 provides that a subsequent claim shall be denied unless claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. The administrative law judge correctly stated that "the previous denial was based on the finding that [c]laimant had not proved that he was totally disabled by a pulmonary or respiratory impairment." Decision and Order at 12; *see* Director's Exhibit 3. The administrative law judge therefore concluded that "in order to establish a "change in conditions," [c]laimant must establish that he is totally disabled by a pulmonary or respiratory impairment." Decision and Order at 12.

Employer argues that the administrative law judge erred in finding the newly

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[2]Since the administrative law judge's length of coal mine employment finding is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3]We reject employer's assertion that the administrative law judge found a mistake in a determination of fact at 20 C.F.R. §725.310, rather than a change in conditions at 20 C.F.R. §725.309, because claimant has the same mass in his lung that he had in the prior claim. Employer's assertion is based on the premise that, in the prior denial, Judge Morgan found that the mass in claimant's lung was caused by an inflammatory disease, and not a chronic disease of the lung, while the administrative law judge found that the abnormality was due to pneumoconiosis. The administrative law judge stated that "the existence of the five to six centimeter mass has not previously been established." Decision and Order at 15. The administrative law judge noted that Judge Morgan, in the prior denial, did not credit evidence which supported a finding that a five to six centimeter mass was located in the miner's right upper lung, and thus, he did not find that such a condition existed. *Id*. Moreover, in order to establish a "change in conditions," new evidence must be submitted in connection with the subsequent claim that establishes at least one condition of entitlement. 20 C.F.R. §725.309(d)(3). In this case, claimant must establish total disability.

submitted evidence sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Specifically, employer argues that the administrative law judge erred in relying on Dr. DePonte's interpretation of the May 21, 1997 x-ray because of the date of the underlying x-ray. The administrative law judge considered the newly submitted interpretations of x-rays dated May 21, 1997, September 17, 2001, October 3, 2002 and January 2, 2003 at 20 C.F.R. §718.304(a), and interpretations of a CT scan dated December 14, 2000 at 20 C.F.R. §718.304(c).[4] Of the four newly submitted x-ray interpretations, three interpretations of x-rays dated May 21, 1997, September 17, 2001 and January 2, 2003 by Drs. DePonte, Hippensteel and Robinette demonstrate the presence of complicated pneumoconiosis, Director's Exhibit 31; Claimant's Exhibits 1, 3, while one interpretation of an x-ray dated October 3, 2002 by Dr. Wheeler does not demonstrate the presence of complicated pneumoconiosis, Employer's Exhibit 15. The administrative law judge stated that "Dr. DePonte recorded a 2/1 p/r with B sized large opacity; Dr. Hippensteel, 1/2, q/p with questioned B sized large opacity which he separately argued was not complicated pneumoconiosis; Dr. Robinette, 2/3, q/r with B sized large opacity; and Dr. Wheeler, 0/0, though he noted the existence of an oval 6 x 3 subapical mass which he described as compatible with conglomerate tuberculosis, rather than what he characterized as a less likely tumor." Decision and Order at 16.

A change in an applicable condition of entitlement at 20 C.F.R. §725.309 must be based on evidence developed after the prior denial of benefits. In the instant case, the May 21, 1997 x-ray was taken and available before the prior denial of benefits. Although Dr. DePonte read this x-ray on May 8, 2001, Claimant's Exhibit 1, the x-ray was taken on May 21, 1997. As Section 725.309(d)(3) specifically provides that a change in a condition of entitlement must be established through new evidence, we hold that the administrative law judge erred in failing to exclude Dr. DePonte's interpretation of the May 21, 1997 x-ray from the new evidence he considered. 20 C.F.R. §725.309(d)(3).

Employer also argues that the administrative law judge erred in failing to consider Dr. Barrett's interpretation of the November 27, 2000 x-ray and the interpretations of the April 20, 2001 x-ray by Drs. Forehand and Dr. Wiot. Dr. Barrett interpreted the November 27, 2000 x-ray as negative for pneumoconiosis. Director's Exhibit 16. Dr. Forehand interpreted the April 10, 2001 x-ray as positive for pneumoconiosis with a category A sized opacity, Director's Exhibit 14, while Dr. Wiot interpreted the same x-ray as negative for pneumoconiosis, Director's Exhibit 31. The administrative law judge indicated that these x-ray interpretations were admitted into the record. In discussing the admittance into the record

[4]The administrative law judge stated that "[t]here is no new evidence of diagnosis by biopsy before this tribunal, though there was biopsy evidence before Judge Morgan upon which he based his finding of simple pneumoconiosis." Decision and Order at 16; *see* 20 C.F.R. §718.304(b).

of medical evidence contained in Director's Exhibits 1-42, the administrative law judge stated:

> Director's Exhibits 1-42 were identified and offered into evidence in accordance with §725.421, but by oversight were not formally admitted into evidence at the hearing. Since both parties indicated at the hearing that they did not object to the admission of these identified documents, except for [e]mployer's objection to the admissibility of two specific x-ray interpretations included in DX-16, the Director's Exhibits 1-42 are deemed to have been admitted into the evidentiary record, subject to [e]mployer's objection, as they properly should have been, without objection, *nunc pro tunc*, as D-1-42. (Tr. 6-7)"[5]

Decision and Order at 3. However, as employer argued, the administrative law judge did not consider the x-ray interpretations of Drs. Barrett, Forehand and Wiot.

The Administrative Procedure Act (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), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see also Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). Nonetheless, Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii).

In rebuttal of the case presented by the opposing party, each party may submit "no

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[5]The administrative law judge stated that "[e]mployer's objection to the admission into evidence of the two particular x-ray interpretations included in D-16 as it was originally submitted by [c]laimant pertained to the reading by Dr. DePonte of a November 27, 2000, x-ray film, and the reading by Dr. Patel of a February 12, 2001, x-ray film, as part of Dr. Rasmussen's examination used as a basis of one of [c]laimant's medical reports." Decision and Order at 3. The administrative law judge also stated that "[e]mployer contended that the two x-rays should be counted against the limitation of two x-rays under §725.414(a)(2)(i), because they were evidence developed after the previous denial of benefits on February 25, 2000 (D-16; Tr. 6-8, 10, 12)." *Id*.

more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406."[6] 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id*.

"Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

Although the administrative law judge indicated that "evidence developed after the close of the prior claim is subject to the constraints of §725.414(a)(2)(i)," Decision and Order at 3, he violated the evidentiary limitations at 20 C.F.R. §725.414 by admitting into the record all three of the x-rays provided by Drs. Barrett, Forehand and Wiot. As previously noted, the administrative law judge also admitted into the record the x-ray interpretations of Drs. DePonte, Hippensteel, Robinette and Wheeler. Thus, we hold that the administrative law judge erred in failing to consider the x-ray evidence in accordance with the requirements of the APA and the evidentiary limitations at 20 C.F.R. §725.414 and 724.456(b)(1).

Further, employer argues that the administrative law judge erred in discounting Dr. Wheeler's x-ray interpretation because Dr. Wheeler did not explain why the mass in the miner's lung was not recorded as a category A or B sized opacity. Dr. Wheeler interpreted the October 30, 2002 x-ray as negative for pneumoconiosis. Employer's Exhibit 15. Although Dr. Wheeler noted a 6 x 3 centimeter mass in the right upper lung, he did not classify it as a category A, B, or C sized opacity. *Id*. Although the administrative law judge indicated that the sole negative interpretation by Dr. Wheeler is outweighed by the three interpretations by Drs. DePonte, Hippensteel and Robinette, which demonstrate the existence of complicated pneumoconiosis, the administrative law judge did not explain why he found that the preponderance of the x-ray evidence establishes the existence of complicated pneumoconiosis. Rather, the administrative law judge focused on why Dr. Wheeler should have classified the mass in the miner's lung as a category A or B sized opacity. The administrative law judge specifically stated:

[6]Pursuant to 20 C.F.R. §725.406, the Director provides a complete pulmonary evaluation of the miner, the results of which are "not . . . counted as evidence submitted by the miner under §725.414." 20 C.F.R. §725.406(b).

> Dr. Wheeler [classified the October 3, 2002 x-ray as] 0/0, though he noted the existence of an oval 6 x 3 subapical mass which he described as compatible with conglomerate tuberculosis, rather than what he characterized as a less likely tumor. Why this would not have qualified and been recorded as a large category A or B opacity under the ILO U/C classifications is not explained, and this tribunal finds it is, at least, not inconsistent with the other three x-ray interpretations with regard to the existence of a large opacity of more than one centimeter visible by x-ray under prong (a) of §718.304.

Decision and Order at 16. Section 718.304(a) provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is diagnosed by a chest x-ray as suffering from a chronic dust disease of the lung which yields one or more large opacities and would be classified in category A, B, or C. 20 C.F.R. §718.304(a). Dr. Wheeler indicated that the mass in the miner's right upper lung was related to tuberculosis, not a chronic dust disease of the lung. Employer's Exhibit 15. Thus, since Dr. Wheeler did not diagnose a condition which satisfies the requirements of 20 C.F.R. §718.304(a), we hold that the administrative law judge erred in discounting Dr. Wheeler's x-ray interpretation because Dr. Wheeler did not explain why the mass in the miner's lung was not recorded as a category A or B sized opacity.

In addition, employer argues that the administrative law judge erred in considering the CT scan evidence at 20 C.F.R. §718.304(c). The administrative law judge considered interpretations of a December 14, 2000 CT scan by Drs. DePonte and Wheeler. Dr. DePonte opined that the abnormalities in the lung mass were consistent with pneumoconiosis, Claimant's Exhibit 1, while Dr. Wheeler opined that they were compatible with tuberculosis, Employer's Exhibit 18. The administrative law judge also considered the opinions of Drs. Dahhan, Hippensteel, Rasmussen and Robinette. Drs. Rasmussen and Robinette opined that claimant suffers from complicated pneumoconiosis, Director's Exhibit 16; Claimant's Exhibit 2; 2001 Transcript at 21-54, while Drs. Dahhan and Hippensteel opined that claimant does not suffer from complicated pneumoconiosis, Director's Exhibit 31; Employer's Exhibits 15, 19.[7]

Employer specifically argues that the administrative law judge erred in failing to consider Dr. Hippensteel's interpretation of the September 17, 2001 CT scan. As previously

[7]The administrative law judge discredited Dr. Rasmussen's opinion because it is based on an x-ray that was not admitted into the record. Decision and Order at 8. Although the administrative law judge did not consider Dr. Dahhan's opinion at 20 C.F.R. §725.309, he discredited it in his consideration of the evidence at 20 C.F.R. §718.304 on the merits because he found that it is equivocal. *Id*. at 19.

noted, the administrative law judge considered interpretations of a December 14, 2000 CT scan by Drs. DePonte and Wheeler. However, the administrative law judge did not indicate that the record contained a CT scan dated September 17, 2001. In a deposition dated April 24, 2003, Dr. Hippensteel discussed the September 17, 2001 CT scan.[8] Employer's Exhibit 19 (Dr. Hippensteel's Deposition at 10). Dr. Hippensteel opined that the large opacity in the right upper lobe of claimant's lung was not related to pneumoconiosis. *Id.* (Dr. Hippensteel's Deposition at 15). In his decision, the administrative law judge specifically stated that "[a]lthough Dr. Hippensteel speculated that the lesion was caused by granulomatous disease, and opined that the tests that were (sic) apparently were not totally reliable, he opined that TB was very unlikely, and Dr. Robinette essentially ruled it out based on those tests." Decision and Order at 16. Although the administrative law judge considered Dr. Hippensteel's deposition testimony, based on the context of his decision, it appears that the administrative law judge's consideration of Dr. Hippensteel's testimony relates to the December 14, 2000 CT scan. Since the administrative law judge did not specifically identify the September 17, 2001 CT scan in considering Dr. Hippensteel's deposition testimony, we hold that the administrative law judge did not comply with the requirements of the APA in considering the conflicting medical evidence at 20 C.F.R. §718.304(c).

Employer further argues that the administrative law judge erred in finding that Dr. Hippensteel "speculated" that granulomatous disease caused claimant's right upper lung zone mass. In a report dated October 5, 2001, Dr. Hippensteel stated:

> The normal pulmonary function studies and blood gases in this man show that the findings in his lungs are more localized and less inflammatory than could be expected if this actually represented complicated pneumoconiosis. Even though a specific diagnosis has not been made in this infectious granulomatous disease that has become quiescent by his own body defenses rather than complicated pneumoconiosis, since such granulomatous diseases can create significant lesions on chest x-ray without significant impairment in function, although it would be very unusual for complicated pneumoconiosis to do this. The reason that complicated pneumoconiosis or progressive massive fibrosis is regarded as a disabling disease, is because the pulmonary function is expected to be routinely affected by such a disease, and the lack of any effect on function in this man's case, is thereby strongly against that diagnosis in this man.

Director's Exhibit 31. A medical report is reasoned if the underlying documentation is

[8]Dr. Hippensteel also testified that CT scans dated April 11, 2000, December 4, 2000 and May 9, 2001 showed results that were similar to the results found in the CT scan he obtained. Employer's Exhibit 19 (Dr. Hippensteel's Deposition at 14).

adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Dr. Hippensteel explained that the objective tests support a finding that the mass in the right upper lung was caused by granulomatous disease, rather than complicated pneumoconiosis. Director's Exhibit 31. Although the administrative law judge determined that Dr. Hippensteel's opinion is based on speculation, he has not explained why he found that Dr. Hippensteel speculated as to the cause of the mass in the right upper lung in reaching this conclusion. Thus, we hold that the administrative law judge erred in failing to provide an explanation for his consideration of Dr. Hippensteel's opinion in accordance with the requirements of the APA. *Wojtowicz*, 12 BLR at 1-165.[9]

Employer additionally argues that the administrative law judge erred in failing to consider Dr. Hippensteel's testimony that claimant had a mycobacterium avium infection. Employer specifically asserts that a mycobacterium avium infection supports a diagnosis of tuberculosis. The administrative law judge noted that Dr. Hippensteel opined that claimant was infected with mycobacterium avium[10] in his summary of the medical evidence. Decision and Order at 10. The administrative law judge stated that "Dr. Hippensteel opined that [c]laimant had a localized process that was associated with finding atypical mycobacterium on culture, which is a known cause for such a calcified lesion, as is common to granulomatous disease." *Id*. The administrative law judge also stated that "Dr. Hippensteel opined that the negative tuberculosis skin test did not exclude a diagnosis of granulomatous disease, because that disease does not create a positive skin test for tuberculosis." *Id*. However, the administrative law judge did not specifically note Dr. Hippensteel's opinion about this condition in his discussion of Dr. Hippensteel's opinion at 20 C.F.R. §718.304. Decision and Order at 15-18. Thus, since the administrative law judge did not consider Dr. Hippensteel's testimony that claimant had a mycobacterium avium infection in his

[9]Employer argues that the administrative law judge is biased against it, and that this bias is evident from the administrative law judge's finding that Dr. Hippensteel's opinion was based on speculation. Although the administrative law judge erred in failing to explain why he found that Dr. Hippensteel speculated as to the cause of the mass in the right upper lung, *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989), his consideration of Dr. Hippensteel's opinion does not reflect bias against employer, *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992). Since employer has not demonstrated any bias or prejudice on the part of the administrative law judge, we deny employer's assertion. *Cochran*, 16 BLR at 1-108.

[10]In the April 24, 2003 deposition, Dr. Hippensteel explained that mycobacterium avium is a bacteria that is called atypical mycobacteria. Employer's Exhibit 19 (Dr. Hippensteel's Deposition at 18).

consideration of the evidence at 20 C.F.R. §718.304, we hold that the administrative law judge failed to consider the evidence in accordance with the requirements of the APA.

Employer also argues that the administrative law judge erred in discounting Dr. Wheeler's CT scan interpretation as equivocal since, employer asserts, the administrative law judge did not discount Dr. DePonte's CT scan interpretation as equivocal. The administrative law judge stated:

> The December 14, 2000, CT scan interpreted by Dr. DePonte and Dr. Wheeler established the existence of a posterior subapical right upper lung mass which Dr. Wheeler measured as 6 cm. thick, and Dr. DePonte measured as 5x2 cm. Dr. DePonte described the mass as consistent with a conglomerate pneumoconiotic mass, but could not entirely rule out a lung carcinoma. Dr. Wheeler denied the existence of pneumoconiosis, but characterized the mass as well defined and compatible with "TB unknown activity probably healed." That assessment suggests equivocation and is given little weight because there is no credible evidence that [c]laimant has or has had TB, and there is evidence that he has tested negative for TB. Dr. Wheeler's reading, however, tends to reinforce the evidence of the existence of a large opacity and massive lesion.

Decision and Order at 16. As previously noted, the APA requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz*, 12 BLR at 1-165. Although the administrative law judge indicated that Dr. Wheeler's CT scan interpretation suggests equivocation, he did not explain why he found that it is equivocal. *Id*. Moreover, in light of our holding that the administrative law judge erred in discounting Dr. Hippensteel's opinion that tuberculosis caused the mass in the miner's lung, because the administrative law judge did not provide an explanation for his consideration of Dr. Hippensteel's opinion in accordance with the requirements of the APA, we hold that the administrative law judge erred in failing to provide an explanation for his finding that Dr. Wheeler's interpretation of tuberculosis is not credible. *Id*.

Based on the aforementioned errors by the administrative law judge, we vacate the administrative law judge's finding that the newly submitted evidence is sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, and remand the case for further consideration of the evidence in accordance with the requirements of the APA. Furthermore, in light of our decision to vacate the administrative law judge's finding that claimant established invocation of the irrebuttable presumption at 20 C.F.R. §718.304 based on the newly submitted evidence, we also vacate the administrative law judge's finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

Next, employer contends that the administrative law judge erred in finding the evidence sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 on the merits. In view of our decision to vacate the administrative law judge's finding that the evidence is sufficient to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, we also vacate the administrative law judge's finding that the evidence is sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 on the merits based on all the evidence of record. Nonetheless, in the interest of judicial economy, we will address employer's assertions of error with regard to the administrative law judge's findings at 20 C.F.R. §718.304 on the merits.

Employer argues that the administrative law judge erred in finding that "the mere presence of [a] radiographic opacity greater than one centimeter establishes 'legal complicated pneumoconiosis.' " Employer's Brief at 15. Employer specifically argues that the administrative law judge erred in discounting Dr. Hippensteel's opinion because Dr. Hippensteel focuses on the existence of clinical complicated pneumoconiosis, rather than legal complicated pneumoconiosis. In considering Dr. Hippensteel's opinion, the administrative law judge stated:

> Dr. Hippensteel's various reasons for his opinion that [c]laimant does not have complicated pneumoconiosis are essentially beside the point, as they focus upon the existence of clinical, as opposed to legal, complicated pneumoconiosis, and do not reduce the probative force of the evidence which proves the existence of the large opacity under prong (a). Dr. Hippensteel opined that [c]laimant's normal pulmonary function test findings, including diffusing capacity, and resting and exercise arterial blood gas studies, are not indicative of progressive massive fibrosis referable to severe advance effects of coal dust inhalation. He opined that [c]laimant does not have any pulmonary dysfunction, and that the evidence is strongly contrary to a diagnosis of complicated CWP because complicated pneumoconiosis regularly causes impairment in pulmonary function. In his deposition, Dr. Hippensteel could not rule out a finding of simple CWP, but opined that the large opacity was not complicated CWP because its calcification and pattern visible in the CT scans, as well as its failure to grow, strongly favored granulomatous disease over CWP…Dr. Hippensteel's description of complicated pneumoconiosis or progressive massive fibrosis as a disabling disease routinely affecting pulmonary function is a description of a clinical disease with characteristics which are not essential to proof of the elements specified in §718.304. Dr. Hippensteel's opinion regarding [c]laimant's minimal pulmonary impairment was essentially consistent with Dr. Rasmussen's.

Decision and Order at 18. In the April 24, 2003 deposition, however, Dr. Hippensteel testified that he was not saying that complicated pneumoconiosis cannot exist absent the loss of lung function. Employer's Exhibit 19 (Hippensteel's Deposition at 45-46). Rather, Dr. Hippensteel testified that he was merely saying that complicated pneumoconiosis is not likely to exist where there is no loss of lung function. Employer's Exhibit 19 (Hippensteel's Deposition at 46).

Further, in addition to noting that claimant's lung function was not impaired, Dr. Hippensteel considered the fact that the mass in the miner's lung was an acute development of a process that did not progress, Employer's Exhibit 19 (Hippensteel's Deposition at 22-23), and that an atypical mycobacterium was found on a culture, Employer's Exhibit 19 (Hippensteel's Deposition at 29). Based on all of these factors, Dr. Hippensteel opined that the mass in the right upper lung was caused by granulomatous disease, not coal dust exposure. Dr. Hippensteel opined that atypical mycobacterium is a known cause of a lesion that has been calcified, as is common to granulomatous disease. Employer's Exhibit 19 (Hippensteel's Deposition at 28-30). Thus, since Dr. Hippensteel determined that claimant does not suffer from a chronic dust disease of the lung based on his consideration of the aforementioned factors, rather than for the reasons presented by employer, we reject employer's specific allegations of error on the part of the administrative law judge.

Finally, employer argues that the administrative law judge erred in giving enhanced weight to Dr. Robinette's opinion as a treating physician. Employer's Brief at 17. The criteria set forth in 20 C.F.R. §718.104(d)(1)-(4) for considering a treating physician's opinion are applicable to medical evidence developed after January 19, 2001, the effective date of the amended regulations. Section 718.104(d) requires the officer adjudicating the claim to "give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). While the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5). In this case, Dr. Robinette's opinion was developed after January 19, 2001. Although the administrative law judge indicated that he considered Dr. Robinette's status as claimant's treating physician, he did not specifically consider his opinion in light of the criteria provided in 20 C.F.R. §718.104(d).

Employer specifically asserts that the administrative law judge mischaracterized the treatment claimant received from Dr. Robinette by indicating that Dr. Robinette consistently

treated claimant since 1987. At the May 14, 2003 hearing, Dr. Robinette testified that he initially evaluated claimant in 1987 to assess claimant's occupational pneumoconiosis. 2003 Transcript at 23. Dr. Robinette further testified that "[t]he subsequent treatment was in 1998 through 2003, and that was requested by his private physician, Dr. Topoddi in Wise, to evaluate the evolution of X-ray changes which were concerning to the private physician and the fact that they had been documented at Holston Valley Hospital." *Id*. Consequently, Dr. Robinette did not evaluate or treat the miner from 1987 to 1998, a period of approximately eleven years. However, the administrative law judge stated that "[i]n reports and in his testimony at the hearing, Dr. Robinette noted that he had followed [c]laimant's health since 1987 and has seen him on a regular basis since the 1990s which adds an element of persuasion to his assessment." Decision and Order at 18. Thus, to the extent that the administrative law judge has mischaracterized the frequency of treatment claimant received from Dr. Robinette, we hold that the administrative law judge erred in according greater weight to Dr. Robinette's opinion based on his status as claimant's treating physician. If reached on remand, the administrative law judge is instructed to consider Dr. Robinette's opinion in light of the criteria provided in 20 C.F.R. §718.104(d).

In sum, on remand, the administrative law judge must initially determine what evidence should be admitted into the record in accordance with the evidentiary limitations at 20 C.F.R. §725.414. Next, the administrative law judge must consider whether the newly submitted evidence is sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, and thus, whether the evidence is sufficient to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Further, the administrative law judge must consider whether the evidence is sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 on the merits, if reached.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded 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