BRB Nos. 05-0608 BLA
and 05-0608 BLA-A

BERTHA S. PARTIN (Widow of ALVA H. PARTIN) Claimant-Petitioner Cross-Respondent v. CANADA MOUNTAIN COAL AUGERING and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Respondents Cross-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/24/2006 DECISION and ORDER

Appeal of the Decision and Order on Remand of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant[1] appeals and employer cross-appeals the March 21, 2005 Decision and Order on Remand (97-BLA-0961 and 00-BLA-0956) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) awarding benefits in the miner's claim but denying benefits in the survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] The pertinent procedural history of this case is as follows: The miner filed a claim for benefits on June 5, 1996. Director's Exhibit 35. In his January 30, 1998 Decision and Order, the administrative law judge credited the miner with twenty-three years of coal mine employment based on the parties' stipulation and adjudicated the miner's claim pursuant to the regulations contained in 20 C.F.R. Part 718. Based on the parties' stipulation, the administrative law judge also found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b) (2000). The administrative law judge further found that the x-ray evidence established the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) (2000) and thereby established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000). Accordingly, the administrative law judge awarded benefits in the miner's claim. In response to employer's appeal, the Board affirmed the administrative law judge's length of coal mine employment finding. The Board also affirmed the administrative law judge's findings that the evidence established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1) and 718.203(b) (2000). Further, the Board affirmed the administrative law judge's finding that the evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a) (2000). However, the Board vacated the administrative law judge's finding that the evidence established invocation of the irrebuttable presumption at 20 C.F.R. §718.304 (2000) and remanded the case to the administrative law judge to consider and weigh all of the relevant evidence of record at 20 C.F.R. §718.304(a), (b), and (c) (2000) to decide if entitlement was established. The Board additionally instructed the administrative law judge, on remand, to consider the evidence of record pursuant to 20 C.F.R. §718.204 (2000) to decide if the evidence established a totally disabling respiratory impairment due to pneumoconiosis, if he concluded that entitlement was not

[1]Claimant is the widow of the deceased miner, Alva H. Partin.

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

established at 20 C.F.R. §718.304 (2000). *Partin v. Canada Mountain Coal Augering*, BRB No. 98-0687 BLA (Feb. 11, 1999)(unpub.).

The miner died on May 7, 1999. Director's Exhibits 6, 35. On June 2, 1999, claimant filed a survivor's claim. Director's Exhibit 1. While the survivor's claim was being developed by the district director, the administrative law judge continued to adjudicate the miner's claim.

In considering the miner's claim on remand, the administrative law judge noted, in his June 21, 1999 Decision and Order on Remand, that the Board affirmed his finding that the x-ray evidence established the presence of complicated pneumoconiosis at Section 718.304(a) (2000).[3] The administrative law judge also found that the medical evidence established the presence of complicated pneumoconiosis at Section 718.304(c) (2000). Consequently, the administrative law judge found that the evidence established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304 (2000). Accordingly, the administrative law judge again awarded benefits in the miner's claim. Further, in his August 20, 1999 Decision and Order on Reconsideration, the administrative law judge denied employer's request for reconsideration. In disposing of employer's second appeal,[4] the Board concluded that the administrative law judge properly found that the x-ray evidence supported a finding of complicated pneumoconiosis at Section 718.304(a) (2000) since its previous affirmance of the administrative law judge's finding thereunder constituted the law of the case on this issue. The Board also noted that complicated pneumoconiosis could not be established at Section 718.304(b) (2000) as the administrative law judge correctly found that the record contained no biopsy or autopsy evidence. However, the Board vacated the administrative law judge's finding that the medical evidence established the presence of complicated pneumoconiosis at Section 718.304(c) (2000), and remanded the case to the administrative law judge for further consideration of all of the relevant evidence thereunder. The Board, therefore, vacated the administrative law judge's finding that the evidence established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304 (2000), and remanded the case for further consideration of the relevant evidence thereunder. Further, the Board instructed the

[3]Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) noted that the record does not contain any biopsy or autopsy evidence. 1999 Decision and Order on Remand at 3.

[4]Counsel for the deceased miner filed a motion with the Board on October 25, 1999 to consolidate the survivor's claim with the miner's claim. In its October 27, 2000 Decision and Order, the Board denied this request because the survivor's claim was not before it on appeal. *Partin v. Canada Mountain Coal Augering*, BRB No. 99-1285 BLA (Oct. 27, 2000)(unpub.).

administrative law judge, on remand, to consider the evidence of record at Section 718.204 (2000) to decide if it established a totally disabling respiratory impairment due to pneumoconiosis, in the event the administrative law judge concluded that entitlement was not established at Section 718.304 (2000). *Partin v. Canada Mountain Coal Augering*, BRB No. 99-1285 BLA (Oct. 27, 2000)(unpub.).

In his September 27, 2001 Decision and Order on Remand, the administrative law judge considered both the miner's claim and the survivor's claim.[5] The administrative law judge noted that the Board affirmed his previous finding that the x-ray evidence established the presence of complicated pneumoconiosis at Section 718.304(a). The administrative law judge also found that the medical evidence established the presence of complicated pneumoconiosis at Section 718.304(c). Consequently, the administrative law judge found that the evidence established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304. Accordingly, the administrative law judge again awarded benefits in the miner's claim. Turning to the survivor's claim, the administrative law judge found that claimant is automatically entitled to survivor's benefits because the presumptions at Section 718.304 and Section 718.203(b) are applicable.

With regard to employer's third appeal, the Board rejected employer's contention that the administrative law judge erred in concluding that the x-ray evidence supported a finding of complicated pneumoconiosis at Section 718.304(a) as its previous holding on this issue constituted the law of the case. The Board also affirmed the administrative law judge's finding that the medical evidence established the presence of complicated pneumoconiosis at Section 718.304(c). Further, the Board affirmed the administrative law judge's finding that the evidence established invocation of the irrebuttable presumption at Section 718.304. Hence, the Board affirmed the administrative law judge's award of benefits in both the miner's claim and the survivor's claim. *Partin v.*

[5]Although the district director denied the survivor's claim on September 20, 1999 because the evidence did not show that pneumoconiosis caused the miner's death, Director's Exhibit 8, he subsequently reversed that decision on January 31, 2000 and found that claimant was entitled to survivor's benefits, Director's Exhibit 19. Both employer and carrier filed requests for a hearing in the survivor's claim. Director's Exhibits 21, 22, 30, 32. In a July 28, 2000 letter, the district director notified claimant that her survivor's claim was being referred to the Office of Administrative Law Judges for a hearing. Director's Exhibit 36. On November 27, 2000, Administrative Law Judge Donald W. Mosser ordered the survivor's claim reassigned to the administrative law judge for resolution of both cases. Judge Mosser also ordered the parties to advise the administrative law judge within ten days that they waive their right to a hearing and request a Decision and Order based on Director's Exhibits 1 through 36 and additional documentary evidence submitted by the parties.

Canada Mountain Coal Augering, BRB No. 02-0160 BLA (Aug. 21, 2002)(unpub.). In response to employer's request for reconsideration, the Board vacated the administrative law judge's award of benefits in the miner's claim. Although the Board affirmed the administrative law judge's finding that the evidence established the presence of complicated pneumoconiosis at Section 718.304(c), it vacated the administrative law judge's finding that the evidence established the presence of complicated pneumoconiosis at Section 718.304(a), and remanded the case for further consideration of the evidence.

The Board specifically instructed the administrative law judge, on remand, to reconsider whether it was proper, in determining whether complicated pneumoconiosis was established in the miner's claim, to refuse to address new evidence developed by employer in the survivor's claim. In addition, the Board instructed the administrative law judge to address the responses of both claimant and employer to Administrative Law Judge Donald W. Mosser's November 3, 2000 Order, consolidating both the miner's claim and the survivor's claim. Furthermore, the Board vacated the administrative law judge's award of benefits in the survivor's claim, and remanded the case to the administrative law judge to consider whether the evidence established the presence of complicated pneumoconiosis and thereby established invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 718.304. The Board instructed the administrative law judge to consider, on remand, whether the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205,[6] if he determined that claimant was not entitled to the irrebuttable presumption at Section 718.304. *Partin v. Canada Mountain Coal Augering*, BRB No. 02-0160 BLA (Sept. 15, 2003)(Decision and Order on Recon.)(unpub.)(McGranery, J., dissenting).

In a March 21, 2005 Decision and Order on Remand, the administrative law judge considered both the miner's claim and the survivor's claim. The administrative law judge found that the evidence establishes the presence of complicated pneumoconiosis at Section 718.304(a) and (c). Consequently, the administrative law judge found that the evidence establishes invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304. Accordingly, the administrative law judge awarded benefits in the miner's claim. Regarding the survivor's claim, however, the administrative law judge found that the evidence does not establish the presence of complicated pneumoconiosis at Section 718.304(a), (b) and (c) and therefore does not establish invocation of the irrebuttable presumption of death due to pneumoconiosis at

[6]The Board noted that employer conceded the existence of simple pneumoconiosis and did not object to the administrative law judge's finding that it arose out of coal mine employment. *Partin v. Canada Mountain Coal Augering*, BRB No. 02-0160 BLA, slip op. at 7 n.2 (Sept. 15, 2003)(Decision and Order on Recon.)(unpub.)(McGranery, J., dissenting).

Section 718.304. Moreover, the administrative law judge found that the evidence does not establish that the miner's death was due to pneumoconiosis at Section 718.205(c). Accordingly, the administrative law judge denied benefits in the survivor's claim.

On appeal, claimant challenges the administrative law judge's finding that the evidence does not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304 in the survivor's claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits in the survivor's claim. On cross-appeal, employer contends that the administrative law judge erred in finding that the evidence establishes the presence of complicated pneumoconiosis at Section 718.304 in the miner's claim. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[7]

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

Initially, we will address employer's contention, on cross-appeal, that the administrative law judge erred in finding that the evidence establishes the presence of complicated pneumoconiosis at Section 718.304 in the miner's claim. Specifically, employer asserts that the administrative law judge erred in refusing to consider the evidence admitted into the record of the survivor's claim, along with the evidence admitted into the record of the miner's claim. In addition to agreeing to the consolidation of the survivor's claim with the miner's claim, employer also agreed to waive its right to a hearing. Employer's assertion of error on cross-appeal is based upon the premise that its waiver of the right to a hearing was conditioned on the administrative law judge's consolidation of the record in the survivor's claim with the record in the miner's claim. As discussed *supra*, the administrative law judge issued several decisions awarding benefits in the miner's claim before the survivor's claim was referred to the Office of Administrative Law Judges for a hearing and assigned to Judge Mosser. The Board, however, vacated each of the administrative law judge's decisions in the miner's claim. *Partin v. Canada Mountain Coal Augering*, BRB No. 98-0687 BLA (Feb. 11, 1999)(unpub.); *Partin v. Canada Mountain Coal Augering*, BRB No. 99-1285 BLA (Oct. 27, 2000)(unpub.).

On November 3, 2000, Judge Mosser ordered the parties in the survivor's claim to show cause by November 20, 2000 why the survivor's claim should not be reassigned to

[7]Since the administrative law judge's finding of no death due to pneumoconiosis at 20 C.F.R. §718.205(c) is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

the administrative law judge presiding over the related case involving the miner's claim so that that judge could resolve both claims at the same time. On November 24, 2000, employer filed a letter in response to Judge Mosser's November 3, 2000 Order, requesting leave to respond out of time and stating that it does not object to the consolidation of the claims *provided that the record in the miner's claim and the record in the survivor's claim were merged for consideration in connection with both claims*. Noting employer's conditional acceptance of the merger of the claims and claimant's failure to respond to his November 3, 2000 Order, Judge Mosser, on November 27, 2000, ordered the survivor's claim reassigned to the administrative law judge for resolution of both cases. Judge Mosser also ordered the parties to advise the administrative law judge within ten days that they waive their right to a hearing and request a Decision and Order based on Director's Exhibits 1 through 36 and additional documentary evidence submitted by the parties.

On December 4, 2000, employer filed its response to Judge Mosser's November 27, 2000 Order, stating that it had no objection to a decision made on the record that includes Director's Exhibits 1 through 36 and Employer's Exhibits 1 through 12. Employer also requested an extension of time to have Dr. Fino deposed. On December 11, 2000, claimant filed her response to Judge Mosser's November 27, 2000 Order, stating that she would object to the administrative law judge's consideration of any exhibits in the miner's claim that were inconsistent with the Board's October 27, 2000 Decision and Order. Claimant also stated that she had no objection to waiving her right to a hearing as the only issue will involve the interpretation of medical evidence. On December 12, 2000, the administrative law judge ordered the merger of the miner's claim and the survivor's claim for resolution of both claims at the same time. Taking into consideration claimant's response to Judge Mosser's November 27, 2000 Order and employer's brief regarding the merger of the miner's and survivor's claims, the administrative law judge determined, in his September 27, 2001 Decision and Order on Remand, that the evidence in the survivor's claim would not be consolidated with the evidence in the miner's claim. The administrative law judge specifically stated:

> Claimant argued, in her response to Judge Mosser's November 27, 2000 order to advise the undersigned whether she waived her right to a hearing, that insofar as the miner's claim was concerned, she objected to consideration of any of the exhibits submitted after the Board's most recent decision ordering remand. In the employer's brief, it clearly considered all the evidence in the record in arguing both claims. The undersigned agrees with the claimant that only the evidence developed in conjunction with the miner's claim as of the time of my January 30, 1998 Decision and Order should be considered in determining the issues on remand. That was the very evidence the undersigned considered when deciding the case on remand for the first time in the June 21, 1999 Decision and Order on

Remand.

2001 Decision and Order on Remand at 3.

Following appeal, the Board, in its August 21, 2002 Decision and Order, did not address the administrative law judge's decision to consolidate the miner's claim with the survivor's claim. *Partin v. Canada Mountain Coal Augering*, BRB No. 02-0160 BLA (Aug. 21, 2002)(unpub.). However, in its September 15, 2003 Decision and Order on Reconsideration, the Board vacated the administrative law judge's finding that the evidence established the presence of complicated pneumoconiosis at Section 718.304(a) and the award of benefits in the miner's claim, on the basis that the administrative law judge never referred to employer's response to Judge Mosser's November 3, 2000 Order, which stated that it agreed to the consolidation of the cases *provided that the record in the miner's claim and the record in the survivor's claim were merged for consideration in connection with both claims*. The Board therefore remanded the case for further consideration. The Board instructed the administrative law judge, on remand, to reconsider whether it was proper to refuse to address new evidence developed by employer in the survivor's claim, in determining whether complicated pneumoconiosis was established in the miner's claim. The Board also instructed the administrative law judge, on remand, to address the responses of both claimant and employer to Judge Mosser's order consolidating the claims to determine whether they were aware of the evidence to be considered on remand in the miner's claim when they agreed to the consolidation of the claims in this case. *Partin v. Canada Mountain Coal Augering*, BRB No. 02-0160 BLA (Sept. 15, 2003)(Decision and Order on Recon.)(unpub.)(McGranery, J., dissenting).

In his March 21, 2005 Decision and Order on Remand, the administrative law judge considered the responses of claimant and employer to Judge Mosser's November 3, 2000 Order, consolidating the miner's and survivor's claims. Based on his consideration of the procedural history surrounding the consolidation of the miner's claim and the survivor's claim, the administrative law judge stated that he could not determine whether the parties were aware of the evidence that was to be considered on remand when they agreed to the consolidation of the claims in this case. The administrative law judge specifically stated, "I conclude that since [c]laimant did not file a timely response and [e]mployer did not manifest its 'awareness' of what it thought the record in the living miner['s] claim would consist of, the undersigned cannot determine whether the parties were 'aware' that the resolution of the living miner['s] claim on second remand would include evidence developed in connection with the survivor['s] claim." 2005 Decision and Order on Remand at 7. The administrative law judge also found that it was proper for him to refuse to address the evidence in the survivor's claim in conjunction with the evidence in the miner's claim, based on his discretion not to consolidate the records of

the two claims pursuant to 20 C.F.R. §725.460.[8]

In support of his refusal to consider the evidence in the survivor's claim in conjunction with the evidence in the miner's claim, the administrative law judge gave the following three reasons: 1) it is not fair to allow employer, in the miner's claim, to wipe the slate clean and start fresh with all new evidence because, unlike the survivor's claim that was before him on the first occasion, the miner's claim was before him on the second remand; 2) it is an unjustified attempt by employer to relitigate settled issues, as opposed to utilizing the proper method of filing a request for modification in accordance with 20 C.F.R. §725.310 to develop medical evidence in the miner's claim; and 3) it cannot be inferred from Judge Mosser's consolidation of the cases for a hearing[9] that he also granted employer's request to merge the records of the two claims in his November 27, 2000 Order, when he reassigned the survivor's claim after acknowledging employer's contingent agreement.

The administrative law judge, as trier-of-fact, has broad discretion in dealing with procedural matters. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Although the administrative law judge could not determine whether the parties were aware of the evidence to be considered on remand in the miner's claim when they agreed to consolidate the cases, he reasonably found, based on the circumstances surrounding the consolidation of these claims, that it was proper for him to refuse to address the evidence in the survivor's claim in conjunction with the evidence in the miner's claim. As noted by the administrative law judge, before the survivor's claim was merged with the miner's claim for the purpose of resolving both claims at the same time, the Board had reviewed

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[8]Section 725.460 provides that when two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Chief Administrative Law Judge may, upon motion of any party or on his or her own motion, order that a consolidated hearing be conducted. 20 C.F.R. §725.460. Further, Section 725.460 provides that where consolidated hearings are held, a single record of the proceedings shall be made and the evidence introduced in one claim may be considered as introduced in the others, and a separate or joint decision shall be made, as appropriate. *Id*.

[9]In Orders dated November 3, 2000 and November 27, 2000, Judge Mosser indicated that the purpose of consolidating the survivor's claim with the miner's claim was to enable the administrative law judge to resolve both cases at the same time. As discussed *infra*, the administrative law judge previously decided the miner's claim on the record. Hence, contrary to the administrative law judge's finding, it does not appear that Judge Mosser consolidated the cases for the purpose of having only one hearing for both cases.

both of the administrative law judge's previous decisions in the miner's claim on the record.[10] Hence, employer did not waive its right to a hearing in the miner's claim by agreeing to consolidate the survivor's claim with the miner's claim. In addition, employer did not allege that the credibility of witnesses was a crucial factor in resolving a factual dispute in the survivor's claim. *Worrell v. Consolidation Coal Co.*, 8 BLR 1-158, 1-160 (1985).

Further, the evidence offered by employer in the survivor's claim was not limited as a result of either employer's waiver of its right to a hearing or the merger of both cases for resolution at the same time. Moreover, the record in the miner's claim was closed prior to the consolidation of the survivor's claim with the miner's claim. Thus the facts do not support employer's argument that the administrative law judge abused his discretion in denying its request to reopen the record in the miner's claim. The law is similarly unsupportive of employer's argument. Relevant case law holds that due process and fundamental fairness mandate a reopening of the record where a significant alteration in the type of evidence necessary to meet a party's burden of proof results from a change in law. *Peabody Coal Co. v. Ferguson,*140 F.3d 634, 21 BLR 2-344 (6th Cir. 1998); *Peabody Coal Co. v. White*, 135 F.3d 416, 21 BLR 2-247 (6th Cir. 1998); *Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997); *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *see also Marx v. Director, OWCP*, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989). In this case, however, neither employer's evidentiary burden nor the type of evidence relevant to the issue of complicated pneumoconiosis at Section 718.304 was affected by a change in the law. We conclude, therefore, that the decision regarding whether to reopen the record on remand in this instance was a procedural matter within the discretion of the administrative law judge. *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989); *see also Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984). Hence, on the facts of this case, we hold that the administrative law judge acted within his discretion in refusing to consolidate the record in the survivor's claim with the record in the miner's claim. *Clark*, 12 BLR at 1-153.

Employer also asserts that the administrative law judge erred in overlooking relevant evidence at Section 718.304(a) in the miner's claim. Specifically, employer argues that the administrative law judge erred in failing to consider the readings of a physician dually qualified as a B reader and a Board-certified radiologist. Employer further argues that the administrative law judge erred in failing to consider medical evidence that demonstrated that the miner was not disabled for work by any respiratory or

[10]In a November 3, 1997 letter, both claimant and employer agreed to a decision on the record in the miner's claim. Director's Exhibit 35. On November 7, 1997, the administrative law judge issued an Order, canceling the hearing scheduled for November 6, 1997 and ordering a decision based on the record in the miner's claim. *Id*.

pulmonary impairment. Lastly, employer argues that the Board failed to consider intervening and controlling authority by the United States Court of Appeals for the Fourth Circuit in *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000).[11]

In considering the evidence on the merits, the administrative law judge reiterated his prior finding, rendered in his September 21, 2001 Decision and Order on Remand, that the evidence establishes the presence of complicated pneumoconiosis at Section 718.304(a). 2005 Decision and Order on Remand at 9. However, in his September 21, 2001 Decision and Order on Remand, the administrative law judge merely noted that the Board affirmed his original finding, rendered in his January 30, 1998 Decision and Order, that the x-ray evidence established the presence of complicated pneumoconiosis at Section 718.304(a). 2001 Decision and Order on Remand at 4. As discussed *supra*, in its February 11, 1999 Decision and Order, the Board affirmed the administrative law judge's 1998 finding that the evidence established the presence of complicated pneumoconiosis at Section 718.304(a) in the miner's claim. *Partin v. Canada Mountain Coal Augering*, BRB No. 98-0687 BLA (Feb. 11, 1999)(unpub.). In that Decision and Order, the Board addressed employer's assertion that the administrative law judge failed to provide a reason in compliance with the Administrative Procedure Act for his decision not to accord greater weight to the x-ray interpretations of Dr. Sargent, a B reader and Board-certified radiologist, at Section 718.304(a). After noting that the administrative law judge identified Dr. Sargent as both a B reader and a Board-certified radiologist, the Board

[11]Employer specifically argues that, in *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit admonished the Board to remand decisions to the administrative law judge to supply an explanation that complies with the Administrative Procedure Act where an administrative law judge has not explained why he has discounted evidence. Employer's Brief at 14. Employer also argues that, in *Sparks*, the Fourth Circuit court made it clear that while a judge does not have to accept the opinion of the best qualified doctor, he must provide a valid reason in his decision for finding that the doctor's qualifications do not carry the day. Contrary to employer's assertion, as the Board previously held, the administrative law judge did not discount Dr. Sargent's x-ray reading. *Partin v. Canada Mountain Coal Augering*, BRB No. 98-0687 BLA, slip op. at 3 (Feb. 11, 1999)(unpub.). Rather, the administrative law judge acted within his discretion in according Dr. Sargent's x-ray readings equal weight with the x-ray readings of the physicians who were B readers. An administrative law judge is not required to defer to the physician with superior qualifications in weighing the x-ray evidence. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Moreover, the Fourth Circuit court's decision in *Sparks* is not binding precedent in this case because this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit.

stated that "[t]he administrative law judge did not discredit any properly classified x-ray reading; rather, he found that the preponderance of the x-ray evidence [was] sufficient to establish complicated pneumoconiosis at Section 718.304(a)." *Partin*, BRB No. 98-0687 BLA, slip op. at 3. Hence, the Board concluded that the administrative law judge acted within his discretion in according equal weight to the x-ray interpretations of Drs. Baker, Powell, and Sargent because they were B readers, and in declining to accord determinative weight to any one reader based on other qualifications.

The doctrine of the law of the case is a discretionary rule of practice based on the policy that once an issue is litigated and decided, the matter should not be relitigated. *United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186 (1950), *reh'g denied*, 339 U.S. 972 (1950). However, under the law of the case doctrine, it is proper for a court to depart from a prior holding if there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was erroneous, or the decision is clearly erroneous and not in the interest of justice. *Cale v. Johnson*, 861 F.2d 943 (6th Cir. 1988), *citing Arizona v. California*, 460 U.S. 605 (1983); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989) (Brown, J. dissenting); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). As there is no persuasive evidence that the law of the case doctrine is inapplicable, or that an exception to its application has been demonstrated, the Board's previous disposition of the case at Section 718.304 will stand. We therefore decline to revisit the issue of complicated pneumoconiosis at 20 C.F.R. §718.304 in the miner's claim. *Cale*, 861 F.2d at 947; *Brinkley*, 14 BLR at 1-150-151; *Williams*, 22 BRBS at 237; *Bridges*, 6 BLR at 1-989-990.

Next, we address claimant's contention, on original appeal, that the administrative law judge erred in finding that the x-ray evidence does not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a) in the survivor's claim. The administrative law judge considered thirty-three interpretations of thirteen x-rays taken on November 11, 1993, August 8, 1995, September 25, 1995, October 12, 1995, March 20, 1996, March 26, 1996, July 24, 1996, August 1, 1996, August 10, 1996, August 4, 1997, August 8, 1997, January 11, 1998, and February 7, 1999.[12] In considering each x-ray based on the quantity of the readings and the qualifications of the physicians, the administrative law judge determined that eleven x-rays do not support a finding of complicated pneumoconiosis, while two x-rays support a finding of complicated

[12]The administrative law judge excluded interpretations by Drs. Branscomb and Fino of two undated x-rays, because he found that "their interpretations do not substantially comply with the quality requirements of §718.102 and Appendix B to Part 718." 2005 Decision and Order on Remand at 11.

pneumoconiosis.[13] 2005 Decision and Order on Remand at 13.

Citing *Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002), claimant asserts that the doctrine of collateral estoppel prevents employer from relitigating the presence of complicated pneumoconiosis in the survivor's claim since the administrative law judge previously found that the evidence established the presence of complicated pneumoconiosis in the miner's claim. In the miner's claim, the administrative law judge found that the evidence establishes the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a) and (c) and thereby invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304. However, in the survivor's claim, the administrative law judge found that the evidence does not establish the presence of complicated pneumoconiosis at Section 718.304(a) and (c). Consequently, the administrative law judge found that the evidence does not establish invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 718.304.

The doctrine of collateral estoppel refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that actually has been litigated and decided in the initial action. *Freeman United Coal Mining Co. v. Director, OWCP* [*Forsythe*], 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994). To successfully invoke the doctrine of collateral estoppel, the party asserting it must establish the following criteria:

(1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;
(2) determination of the issue must have been necessary to the outcome of the prior determination;
(3) the prior proceeding must have resulted in a final judgment on the merits; and
(4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

N.A.A.C.P., Detroit Branch v. Detroit Police Officers Association, 821 F.2d 328 (6th Cir. 1989); *Virginia Hospital Association v. Baliles*, 830 F.2d 1308 (4th Cir. 1987), *appeal after remand* 868 F.2d 653, *reh'g denied*, *certiorari granted in part* 110 S.Ct. 49 (1989) *aff'd Wilder v. Virginia Hospital Association*, 110 S.Ct. 49 (1990); *Forsythe*, 20 F.3d at 293-4, 18 BLR at 2-195; *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

[13]The administrative law judge stated that "[t]he two films that support a finding of complicated pneumoconiosis were obtained on August 8, 1997 and February 7, 1999." 2005 Decision and Order on Remand at 13.

Applying these principles to the facts of this case, we hold that claimant's reliance on *Villain* in support of the application of the doctrine of collateral estoppel is misplaced. In *Villain*, the United States Court of Appeals for the Seventh Circuit considered whether a coal company was collaterally estopped in a widow's claim from denying that the miner had coal workers' pneumoconiosis, based upon the finding in the prior disability proceeding that he did. The Seventh Circuit court stated that "[w]hen deciding that [the miner] was disabled by pneumoconiosis, the agency necessarily concluded that he *had* that disease – and as this is one element of the widow's claim too, it makes sense to treat it as established." *Villain*, 312 F.3d at 333-34, 22 BLR at 2-586 (emphasis in original). Hence, the Seventh Circuit court held that a grant of survivor's benefits may rest on findings made during the miner's life.

The facts in the instant case, however, are distinguishable from the facts in *Villain*. In *Villain*, the Seventh Circuit court held that a coal company in the survivor's claim was collaterally estopped from establishing that the miner did not suffer from pneumoconiosis because that element of entitlement was established in a prior disability proceeding. In the instant case, however, the administrative law judge did not find that the evidence established the presence of complicated pneumoconiosis in a prior proceeding that had resulted in a final judgment on the merits. Although the administrative law judge found that the evidence established the presence of complicated pneumoconiosis at Section 718.304 in his January 30, 1998 and June 21, 1999 decisions, the Board vacated both of those decisions and remanded the case for further consideration. Consequently, none of the prior proceedings on this issue by the administrative law judge had resulted in a final judgment on the merits. Therefore, we reject claimant's assertion that *Villain* supports the application of the doctrine of collateral estoppel in the instant case.

Claimant also asserts that the administrative law judge erred in failing to properly assess Dr. Fino's interpretation of the February 7, 1999 x-ray. Specifically, claimant argues that it is reasonable to assume that Dr. Fino's notation that the miner had either complicated pneumoconiosis or a tumor includes a finding of a "large opacity." Claimant's Brief at 7. Contrary to claimant's assertion, the administrative law judge did not mischaracterize Dr. Fino's reading of the February 7, 1999 x-ray. The administrative law judge stated that "Dr. Fino also found the [February 7, 1999 x-ray] film to reveal the presence of pneumoconiosis, but he did not detect the presence of any large opacities." 2005 Decision and Order on Remand at 13. In interpreting the February 7, 1999 x-ray, Dr. Fino classified the profusions of the small opacities as 3/3 and noted "0" for the size of the large opacities. Employer's Exhibit 1. Although Dr. Fino indicated that there were other abnormalities, he noted in the "other comments" section of the x-ray report that it is questionable whether these findings represent *possible* complicated coal workers' pneumoconiosis or a tumor. *Id*. Thus, since Dr. Fino did not unequivocally indicate the presence of a large opacity in the February 7, 1999 x-ray, we reject claimant's assertion that the administrative law judge erred in failing to properly assess Dr. Fino's

interpretation of this x-ray.

Finally, claimant asserts that the administrative law judge erred in failing to accord dispositive weight to Dr. Powell's positive reading of the February 7, 1999 x-ray on the basis that it is the most recent x-ray of record. As discussed *supra*, the administrative law judge determined that the February 7, 1999 x-ray supports a finding of complicated pneumoconiosis. 2005 Decision and Order on Remand at 13. Nonetheless, while the administrative law judge noted that the February 7, 1999 x-ray is the most recent x-ray of record, he declined to accord it the greatest probative weight on the ground that the x-ray evidence does not indicate a progression of the miner's pneumoconiosis after August 1997. *Id*. at 13, 14. The administrative law judge specifically stated that "the three B-readers who interpreted [the miner's] chest x-rays between August 1997 and February 1999 each rendered almost an identical interpretation as their prior interpretation."[14] *Id*. at 14.

As noted by the administrative law judge, Dr. Powell consistently classified the opacities in each of the four x-rays dated August 4, 1997, August 8, 1997, January 11, 1998, and February 7, 1999 as size B. However, Dr. Powell also interpreted the November 11, 1993 and March 26, 1996 x-rays. Dr. Powell noted zero large opacities in the November 11, 1993 x-ray. Director's Exhibit 27. Further, Dr. Powell classified the opacities in the March 26, 1996 x-ray as size A. *Id*. Thus, Dr. Powell's classifications of the sizes of the opacities in x-rays from November 1993 to February 1999 ranged from none to B. Although the administrative law judge correctly stated that "no dually-certified physicians interpreted a chest x-ray obtained during the last four years of [the miner's] lifetime," 2005 Decision and Order on Remand at 14, the administrative law judge did not explain why he limited his consideration of those doctors' x-ray readings to x-rays taken after August 1997, in determining whether there was any progression in the size of the large opacities, *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In addition, in weighing the x-ray evidence at Section 718.304(a), the administrative law judge focused on whether the weight of the x-ray film evidence supported a finding of complicated pneumoconiosis, rather than on whether analysis of the films showed progression and therefore supported finding the presence of

[14]In considering x-rays taken from August 1997 to February 1999, the administrative law judge stated that "three B-readers [Drs. Powell, Fino, and Branscomb] consistently disagreed as to whether or not large opacities were present." 2005 Decision and Order on Remand at 14. The administrative law judge specifically stated, "[b]eginning with the August 4, 1997 film, Dr. Powell consistently found the presence of a large opacity, Dr. Fino consistently questioned whether his findings represented a large opacity or a tumor, and Dr. Branscomb consistently found the absence of a large opacity." *Id*.

complicated pneumoconiosis.

The administrative law judge stated: "I have determined that eleven of the films did not support a finding of complicated pneumoconiosis while two films did support such a finding." 2005 Decision and Order on Remand at 13. That statement is somewhat misleading: the first eight films, dated from November 11, 1993 to August 10, 1996 were negative for complicated pneumoconiosis; on the ninth film, dated August 4, 1997, the evidence was in equipoise; on the tenth film, dated August 8, 1997, the evidence was positive; on the eleventh film, dated January 11, 1998, the evidence was in equipoise; and the last film, dated February 7, 1999, was positive for the existence of complicated pneumoconiosis.

Furthermore, it was unreasonable for the administrative law judge to hold that claimant failed to establish the existence of complicated pneumoconiosis because the x-ray evidence did not prove progression between 1997 and 1999, instead of considering the evidence as a whole. Of the four x-rays taken between 1997 and 1999, two of the x-rays were positive for complicated pneumoconiosis, including the most recent, the evidence was in equipoise on the other two x-rays, and all eight of the earlier x-rays were negative. The United States Court of Appeals for the Sixth Circuit discussed the correct application of the "later evidence rule" in *Woodward v. Director, OWCP*, 991 F.2d 314, 319, 17 BLR 2-77, 2-84-85 (6th Cir. 1993), citing the Supreme Court's statement in *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 151 (1987), that "early negative x-ray readings are not inconsistent with significantly later positive readings…[t]his proposition is not applicable where the factual pattern is reversed." Thus, since the administrative law judge appears to have ignored his findings regarding the weighing of each x-ray film, in determining whether the miner's pneumoconiosis had progressed, we vacate the administrative law judge's finding that the evidence does not establish the presence of complicated pneumoconiosis in the survivor's claim, and remand the case for further consideration of the evidence thereunder. *Woodward*, *supra*. On remand, the administrative law judge must reconsider the progressivity of the miner's pneumoconiosis, based on his weighing of the conflicting x-ray films.

Accordingly, the administrative law judge's Decision and Order on Remand denying 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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REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from the majority's decision to vacate the administrative law judge's denial of benefits in the survivor's claim, and remand the case for further consideration of the evidence. Inasmuch as I believe there is substantial evidence in the record to support the administrative law judge's weighing of the conflicting x-ray evidence, I would affirm the administrative law judge's finding that the evidence is insufficient to establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) in the survivor's claim. Claimant asserts that the administrative law judge erred in failing to accord dispositive weight to Dr. Powell's positive reading of the February 7, 1999 x-ray on the basis that it is the most recent x-ray of record. In considering the x-ray evidence at Section 718.304(a), the administrative law judge stated:

> While I have determined that the most recent chest x-ray revealed the presence of a large-size opacity, I decline to accord it greater probative weight. It is proper to accord the most recent chest x-ray greater probative weight based on the definition of pneumoconiosis as a latent and progressive disease. However, the three B-readers who interpreted [the miner's] chest x-rays between August 1997 and February 1999 each rendered almost an identical interpretation as their prior interpretation. For instance, Dr. Powell found a "B" size large-opacity on all four films he interpreted between August 1997 and February 1999. The record does not indicate a progression in the classification of [the miner's] level of

> pneumoconiosis after August 1997. Thus, it would be inappropriate to accord more probative weight to the most recent chest x-ray simply based on its status as the most recent.

2005 Decision and Order on Remand at 14.

Drs. Powell, Fino, and Branscomb interpreted the x-rays taken from August 1997 to February 1999. Although Drs. Powell, Fino, and Branscomb interpreted the x-ray films taken during this period differently, one physician from another, each individual physician interpreted the x-ray films taken between August 1997 and February 1999 with the same x-ray classification. Thus, since the administrative law judge, within his discretion as trier-of-fact, found that none of the x-ray interpretations after August 1997 indicated a progression in the classification of the large opacities, I would reject claimant's assertion that the administrative law judge erred in failing to accord dispositive weight to Dr. Powell's positive reading of the February 7, 1999 x-ray on the basis that it is the most recent x-ray of record. Furthermore, since it is supported by substantial evidence, I would affirm the administrative law judge's finding that the evidence is insufficient to establish the presence of complicated pneumoconiosis at Section 718.304(a) and (c). Therefore, I would affirm the administrative law judge's finding that the evidence is insufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 718.304 and the denial of benefits in the survivor's claim.

I agree with the majority opinion in all other respects.

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ROY P. SMITH
Administrative Appeals Judge