BRB No. 07-0903 BLA

R.C.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 09/25/2008
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, for claimant.

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

Richard A. Seid (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor of Labor; 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 (05-BLA-0075) of Chief Administrative Law Judge John M. Vittone awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

amended, 30 U.S.C. §901 *et seq*. (the Act).[1] Claimant filed a claim for benefits on September 19, 2000. However, the administrative law judge found that an earlier claim, filed by claimant on May 22, 1997, was still pending. Specifically, the administrative law judge found that the district director, in denying claimant's 1997 claim, did not properly act upon claimant's hearing request. The administrative law judge, therefore, found that claimant's 1997 claim was still pending, and he merged the 2000 claim with the 1997 claim. *See* 20 C.F.R. §725.309(d) (2000).[2] In his consideration of the merits of claimant's 1997 claim,[3] the administrative law judge found that the evidence established the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge also found that claimant was entitled to the presumption that his complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b) and that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant's 1997 claim was still pending. In the event that claimant's 1997 claim was properly found to be pending, employer contends that it cannot be held liable for the payment of benefits. Employer also argues that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, contending that, "on the facts of this case [and] given basic concerns of fairness," the administrative law judge properly found that claimant's 1997 claim was still pending because his request for a hearing was not

[1] The Department of Labor (DOL) 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 (2008). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The recent revisions to 20 C.F.R. §725.309 do not apply to claims, such as this one, that were pending on January 19, 2001, the effective date of the revised regulations. 20 C.F.R. §725.2(c). Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

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

honored by the district director. Director's Brief at 6. The Director also urges the Board to reject employer's contention that it must be released from liability because its due process rights were violated.

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

The Viability of Claimant's 1997 Claim

Employer initially contends that the administrative law judge erred in finding that claimant's 1997 claim was still pending.

Procedural History

Claimant initially filed a claim for benefits on May 22, 1997. Director's Exhibit 29. The district director denied benefits on September 26, 1997. *Id.* In the denial letter, the district director advised claimant:

> Your claim can be scheduled for a formal hearing conducted by the Office of Administrative Law Judges of the United States Department of Labor. An informal conference may be scheduled prior to the hearing if it appears a conference would be helpful in resolving your claim. If you want a hearing, you must make your request within sixty (60) days of the date of this letter unless you notify us that you intend to submit additional evidence.

Director's Exhibit 29.

Claimant, without the assistance of counsel, filed a letter on November 7, 1997, stating that:

> I . . . do not agree with the decision that was made for me for Black Lung Benefits. I strongly agree that I am eligible. In the letter I got I was denied. *Please take my case further more*. Thank you for your cooperation.

Director's Exhibit 29 (emphasis added).

An informal conference was held on July 1, 1998.[4] In a Final Memorandum of Informal Conference dated July 17, 1998, the district director denied benefits. Director's Exhibit 29. A cover letter accompanying the Memorandum stated that:

> The Regulations provide that the parties shall in writing, indicate their acceptance or rejections of all or part of the recommendation of the Acting District Director within thirty (30) days. If a recommendation is rejected, the rejecting party shall state the reason(s) for such rejection. Either party may reject a recommendation, in whole or in part, and may request a formal hearing before the Office of Administrative Law Judges of the Department of Labor.
>
> The Regulations further provide that if no reply is received by this office within thirty (30) days from the date the Memorandum is sent to the parties, the recommendation made therein shall be considered accepted by the parties.

Director's Exhibit 29.

There is no indication that claimant took any further action until he filed a second claim on September 19, 2000.[5] Director's Exhibit 1.

The Administrative Law Judge's Finding

In his consideration of whether claimant's 2000 claim was timely filed, the administrative law judge relied upon the reasoning in *Plesh v. Director, OWCP*, 71 F.3d 103, 20 BLR 2-30 (3d Cir. 1995),[6] and found that claimant's November 7, 1997, letter

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[4] At the informal conference, claimant was not represented by counsel. Claimant appeared with his daughter-in-law. Director's Exhibit 29.

[5] Claimant filed another claim for benefits one month later on October 23, 2000. Director's Exhibit 1. The record does not reflect why claimant filed two applications within one month. Because his September claim was pending, the October claim merged with it. *See* 20 C.F.R. §725.309(d) (2000).

[6] In *Plesh v. Director, OWCP*, 71 F.3d 103, 20 BLR 2-30, (3d Cir. 1995), the United States Court of Appeals for the Third Circuit recognized the validity of premature hearing requests, *i.e.*, hearing requests filed before the district director completes the processing of the claim and enters a final order. The Third Circuit rejected the argument that a miner, after filing a request for a hearing, is required to take some further action after the district director issues his final order. *Plesh*, 71 F.3d at 111-112, 20 BLR at 2-

"effectively triggered" the district director's obligation to forward the claim to the Office of Administrative Law Judges for a formal hearing. Decision and Order at 5. In making this determination, the administrative law judge held that the district director's subsequent processing of the claim (informal conference and subsequent decision) did not nullify claimant's premature hearing request. *Id.* The administrative law judge, therefore, found that claimant's 1997 claim remained open. *Id.*

Discussion

Section 19(c) of the Longshore and Harbor Workers' Compensation Act states in pertinent part that the district director "shall make or cause to be made such investigation as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon." 33 U.S.C. §919(c), as incorporated into the Act by 30 U.S.C. §932(a).

The regulations provide that:

> In any claim for which a formal hearing is requested or ordered, and with respect to which the [district director] has completed development and adjudication without having resolved all contested issues in the claim, the [district director] shall refer the claim to the Office of Administrative Law Judges for a hearing.

20 C.F.R. §725.421(a) (2000).

Section 725.450 further provides that:

> Any party to a claim . . . shall have a right to a hearing concerning any contested issue of fact or law unresolved by the [district director]. There shall be no right to a hearing until the processing and adjudication of the claim by the [district director] has been completed.

20 C.F.R. §725.450 (2000).

Employer contends that the administrative law judge erred in relying upon *Plesh*, arguing that claimant's claim does not arise within the jurisdiction of the Third Circuit Court and that no other circuit court has adopted the reasoning in *Plesh*. We disagree. The fact that a case arises within a different circuit is not a sufficient reason for

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45-47. The Third Circuit further rejected the contention that such a miner is required to file a second request for a hearing after the district director issues his final order. The court determined that the initial request for a hearing is sufficient. *Id.*

disregarding a published decision of another circuit court. *See Shuff v. Cedar Coal Co.*, 967 F.2d 977, 980, 16 BLR 2-90 (4th Cir. 1992). Moreover, employer points to no other circuit court case law that contradicts or does not follow the reasoning set forth in *Plesh*.[7] Further, employer's attempts to distinguish the instant case from the fact situation in *Plesh* are unpersuasive.

We, therefore, hold that, under the facts of this case, the administrative law judge properly found that claimant filed an effective request for a hearing in connection with his 1997 claim and that claimant's request had not been granted. Consequently, we affirm the administrative law judge's determination that claimant's 1997 claim was still pending.[8] Because claimant's 1997 claim was still pending, the administrative law judge properly merged claimant's 2000 claim with his 1997 claim.[9] *See* 20 C.F.R. §725.309(d) (2000).

Liability for Benefits

Relying upon *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000), *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), and *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999), employer argues that if claimant's 1997 claim is viable, employer must be dismissed from liability. Employer contends that delays in the adjudication of claimant's 1997 claim deprived employer of its right to due process.

Employer specifically states that:

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[7] The Director, Office of Workers' Compensation (the Director), accurately notes that the DOL has revised 20 C.F.R. §725.418(c) to codify the result reached in *Plesh*. However, the Director acknowledges that, since claimant's 1997 claim was filed prior to January 20, 2001, it is not subject to revised Section 725.418(c). 20 C.F.R. §725.2(c).

[8] The Director urges the Board to extend the holding in *Plesh* to all claims filed prior to January 20, 2001 that arise outside of the jurisdiction of the United States Court of Appeals for the Third Circuit. Because we need not address the Director's request at this time, we limit our holding to the administrative law judge's reliance upon *Plesh* under the facts of this case.

[9] In the list of contested issues, employer raised the issues of whether claimant's 2000 claim was timely filed and whether claimant had established a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). Because the administrative law judge properly found that claimant's 1997 claim was still pending, he correctly determined that these issues were not relevant.

> [T]he first notice that [employer] received that [claimant's] 1997 claim was still valid came with the [administrative law judge's] decision, long after the administrative processing of the case, and after the hearing. This conclusion deprived [employer] of a defense (that if [claimant] had complicated pneumoconiosis, he had it at the time of his original claim, therefore any award of benefits in the second claim would be based on a mistake of fact), and it imposed the burden of seven additional years of benefits on [employer].

Employer's Brief at 19.

Employer's reliance upon *Holdman*, *Lockhart*, and *Borda*, wherein it was held that the Department of Labor's delay deprived the employer of the opportunity to defend itself, is misplaced. In this case, employer's argument presupposes that claimant's second claim is a distinct and separate claim. Because the administrative law judge correctly found that claimant's 1997 claim was still pending, he properly merged claimant's second filed claim with his first claim. Employer was free to, and did, in fact, argue that the administrative law judge erred in finding that claimant's 1997 claim was still pending. However, employer fails to identify how it was deprived of a fair opportunity to mount a meaningful defense, once the determination was made. Similarly, the fact that employer may ultimately be held responsible for an additional seven years of benefits does not mean that its due process rights were violated. Consequently, under the facts of this case, we hold that employer was not deprived of a fair opportunity to mount a meaningful defense.

Complicated Pneumoconiosis

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Employer argues that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis, and was, therefore, entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis set out at 20 C.F.R. §718.304. Under Section 411(c)(3) of the Act, 30 U.S.C. §923(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (A) an x-ray of the miner's lungs

shows an opacity greater than one centimeter that would be classified as Category A, B, or C; (B) a biopsy or autopsy shows massive lesions in the lung; or (C) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North Am. Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980). Moreover, claimant is entitled to the irrebuttable presumption only if the evidence establishes that he has a "chronic dust disease of the lung," commonly known as complicated pneumoconiosis. *See Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993).

Employer specifically argues that the administrative law judge (1) erred in his consideration of the x-ray evidence pursuant to 20 C.F.R. §718.304(a); (2) erred in his consideration of the CT scan evidence pursuant to 20 C.F.R. §718.304(c); and (3) erred in failing to address all of the relevant evidence pursuant to 20 C.F.R. §718.304(c), specifically, medical opinion evidence stating that claimant does not have complicated pneumoconiosis, but has tuberculosis.[10]

X-ray Evidence

Employer contends that the administrative law judge committed numerous errors in finding that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). After noting that the record contains interpretations of x-rays dating from June 12, 1962, through February 28, 2006,[11] the

[10] The administrative law judge noted that claimant's "pulmonary history [was] somewhat murky because of his history of tuberculosis, as indicated by at least one positive tuberculin skin test (PPD) and treatment for the disease in 2000." Decision and Order at 22.

[11] The administrative law judge noted that x-ray interpretations rendered by a B reader or a Board-certified radiologist could be accorded greater weight than the x-ray interpretations rendered by physicians without these radiological qualifications. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 9. The administrative law judge further noted that x-ray interpretations rendered by physicians dually-qualified as B readers and Board-certified radiologists could be accorded greater weight than the interpretations rendered by B readers. *See Sheckler v. Clinchfield Coal*

administrative law judge stated that:

> The x-ray studies dating from June 12, 1962, through April 20, 1984, are of little probative value because they are interpreted by physicians whose qualifications are unknown and do not address the presence or absence of coal workers' pneumoconiosis, in compliance with 20 C.F.R. §718.202(a)(1). They do, however, indicate that the condition of the Claimant's lungs worsened over time. Additionally, the final x-ray, taken on February 28, 2006, is of little probative value because the reader's qualifications are unknown and it was not classified in accordance with 20 C.F.R. §718.202(a)(1). Consequently, my evaluation of the x-ray evidence will focus on the remaining thirty-nine interpretations of fifteen x-ray studies.

Decision and Order at 15.

After considering the interpretations of the remaining x-rays, the administrative law judge concluded that:

> On balance, the studies reveal opacities and masses that support diagnoses of complicated pneumoconiosis. Drs. James and Coultas, who are both B-Readers, and the dually-qualified Drs. Preger and Miller definitely diagnosed the presence of complicated pneumoconiosis. Dr. Wheeler's interpretations of various studies are not inconsistent with these findings because he found it was "possible" that the Claimant suffers from complicated pneumoconiosis with category A opacities. Each of these physicians also made additional diagnoses of other abnormalities on the Claimant's x-rays. These interpretations diagnosing the Claimant with complicated pneumoconiosis outweigh the contrary x-ray interpretations by Drs. Repsher, Cole and Renn.

Decision and Order at 18.

October 6, 1993 X-ray

Employer contends that the administrative law judge erred in his consideration of the interpretations of the October 6, 1993 x-ray. The administrative law judge noted that three B readers interpreted the October 6, 1993 x-ray. While Drs. James and Coultas interpreted the October 6, 1993 x-ray as positive for both simple and complicated pneumoconiosis, Employer's Exhibit 20, Dr. Repsher interpreted this x-ray as negative

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Co., 7 BLR 1-128 (1984); Decision and Order at 9.

for both simple and complicated pneumoconiosis.[12] Employer's Exhibit 25. The administrative law judge found that the "positive interpretations by the two B-Readers who found similarly sized opacities [were] more persuasive than Dr. Repsher's negative interpretation." Decision and Order at 15. The administrative law judge, therefore, found that the October 6, 1993 x-ray supported a finding of both simple and complicated pneumoconiosis. *Id.*

Employer contends that the administrative law judge did not explain why the x-ray interpretations rendered by Drs. James and Coultas were "more persuasive" than Dr. Repsher's negative interpretation. To the extent that the administrative law judge was relying upon the numerical superiority of the positive interpretations, employer contends that this was an "impermissible reason to resolve the impasse." Employer's Brief at 21. We disagree. In weighing x-ray evidence, an administrative law judge should consider the number of x-ray interpretations, along with the readers' qualifications, dates of film, quality of film, and the actual reading. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984); *see generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988). In this case, the administrative law judge permissibly found that a majority of the B readers who interpreted the October 6, 1993 x-ray found that it was positive for complicated pneumoconiosis. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995). Because it is supported by substantial evidence, this finding is affirmed.

April 27, 1995 X-ray

Employer next challenges the administrative law judge's consideration of the interpretations of the April 27, 1995 x-ray. Four physicians interpreted the April 27, 1995 x-ray. An unidentified physician from Indian Health Hospital in Kayenta, Arizona, interpreted the April 27, 1995 x-ray as revealing bilateral upper lobe infiltrates, which the physician found most likely represented active tuberculosis. Employer's Exhibit 8 at 192. Dr. James, a B reader, interpreted this x-ray as positive for both simple and complicated pneumoconiosis. By contrast, Dr. Repsher, a B reader, interpreted this x-ray as negative for both simple and complicated pneumoconiosis. Employer's Exhibit 25. Dr. Repsher commented that the x-ray revealed "conglomerate TB, probably inactive." *Id.* Finally, Dr. Wheeler, a B reader and Board-certified radiologist, interpreted a series of x-rays beginning with the April 27, 1995 x-ray.[13] Dr. Wheeler interpreted each of the

[12] In the comments section of his report, Dr. Repsher noted "conglomerate TB, probably inactive." Employer's Exhibit 25.

[13] Dr. Wheeler also interpreted x-rays taken on January 19, 1998, November 6, 1998, April 19, 2000, May 21, 2001, August 2, 2001, August 13, 2001, March 23, 2002,

x-rays as negative for simple pneumoconiosis. Moreover, on each of his x-ray reports, in the section addressing "large opacities," Dr. Wheeler checked both the O and A boxes, and added a question mark by the box. Employer's Exhibit 29. Dr. Wheeler also included comments on his x-ray reports. In connection with his interpretation of the April 27, 1995 x-ray, Dr. Wheeler noted that there were, *inter alia*, "small nodular infiltrate compatible with conglomerate TB or histoplasmosis, possibly with CWP." *Id.* However, Dr. Wheeler further commented that, "Large opacities of CWP are *unlikely without higher profusion nodular infiltrates* but check clinically for high unprotected dust exposure." Director's Exhibit 29 (emphasis added).

In his consideration of the interpretations of the April 27, 1995 x-ray, the administrative law judge stated that:

> The reading from Kayenta PHS holds little persuasive value because there is no information about the physician who interpreted the film. One B-Reader, Dr. James, observed both small and category A large opacities consistent with pneumoconiosis. Dr. Repsher, also a B-Reader, determined that there were no abnormalities consistent with pneumoconiosis. The final interpretation, by the dually-qualified Dr. Wheeler, suggests that there are possible category A large opacities, but he qualifies the interpretation by saying that it depends on the Claimant's exposure to coal dust. On balance, this study does not support the absence of simple or complicated pneumoconiosis. Specifically, Dr. Repsher's negative interpretation is outweighed by the positive findings by Dr. James. Dr. Wheeler's observations are not inconsistent with the conclusions of Dr. James.

Decision and Order at 15-16.

Employer contends that the administrative law judge erred in failing to explain why Dr. Repsher's negative x-ray interpretation was outweighed by Dr. James's positive x-ray interpretation. We agree. The administrative law judge failed to explain his basis for crediting Dr. James's interpretation of the April 27, 1995 x-ray over that of Dr. Repsher. Consequently, the administrative law judge's analysis of the interpretations of claimant's April 27, 1995 x-ray does not comport with the requirements of the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented in the record." 5 U.S.C. §557(c)(3)(A), as incorporated

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April 15, 2002, and August 2, 2002. Employer's Exhibit 29.

into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

We also agree with employer that the administrative law judge erred in his consideration of Dr. Wheeler's interpretation of the April 27, 1995 x-ray. Although the administrative law judge noted that Dr. Wheeler suggested that the April 27, 1995 x-ray revealed "possible category A large opacities," a finding supported by Dr. Wheeler's insertion of a question mark in the section of the report related to large opacities, the administrative law judge did not address the significance of Dr. Wheeler's additional comment that large opacities of CWP were "*unlikely without higher profusion nodular infiltrates* . . . ." Director's Exhibit 29 (emphasis added). Because the administrative law judge did not address the significance of Dr. Wheeler's comments regarding the unlikely possibility of complicated pneumoconiosis, we instruct the administrative law judge to do so on remand. *See Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999); *Melnick*, 16 BLR at 1-37. On remand, the administrative law judge should address Dr. Wheeler's entire x-ray report, including his additional notations.

The administrative law judge's statement that Dr. Wheeler's x-ray interpretation was not inconsistent with Dr. James's findings also ignores that fact that claimant bears the burden of proof, and thus the risk of non-persuasion if a medical report is found insufficient to establish an element of entitlement. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). The administrative law judge should focus upon whether Dr. Wheeler's x-ray interpretation supports a finding of complicated pneumoconiosis. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999) (holding that a physician's opinion that a condition is possible is insufficient to fulfill a claimant's burden to establish "more-probably-than-not" that the condition exists).

Dr. Wheeler's Additional X-ray Interpretations

We also agree with employer's contention that the administrative law judge erred in his consideration of Dr. Wheeler's additional x-ray interpretations. As previously noted, Dr. Wheeler also rendered interpretations of the January 19, 1998, November 6, 1998, April 19, 2000, May 21, 2001, August 2, 2001, August 13, 2001, March 23, 2002, April 15, 2002, and August 2, 2002 x-rays.[14] Employer's Exhibit 29. Based upon Dr.

[14] Although there are other interpretations of some of these x-rays in the record, the administrative law judge found that Dr. Wheeler's interpretations were entitled to the greatest weight based upon his superior radiological qualifications. Decision and Order at 16-17.

Wheeler's x-ray interpretations, the administrative law judge found that these x-rays were "not inconsistent with a finding of complicated pneumoconiosis" because the doctor was unsure whether claimant had category A opacities consistent with pneumoconiosis. Decision and Order at 16-17. However, in connection with each of these x-rays, the administrative law judge again erred in failing to address the significance of Dr. Wheeler's comments that other diseases, such as tuberculosis and granulomatous disease, were "more likely" to exist than the large opacities of coal workers' pneumoconiosis.[15] *Cranor*, 22 BLR at 1-5; *Melnick*, 16 BLR at 1-37; Director's Exhibit 29.[16]

February 6, 2005 and February 9, 2005 X-rays

The administrative law judge noted that Dr. Repsher interpreted the February 6, 2005 and February 9, 2005 x-rays as negative for both simple and complicated pneumoconiosis. The administrative law judge, however, further found that:

> [A]lthough these [x-rays] are the most recent of record, they are not the most probative. Dr. Repsher has consistently interpreted [x-rays] over time as revealing no parenchymal or pleural abnormalities consistent with pneumoconiosis. His interpretations have been outweighed by the observations of other B-Readers and dually-qualified physicians. As a result, Dr. Repsher's interpretations of the 2005 [x-rays] do not persuade this tribunal that the disease, in its simple and complicated forms, is not present. This is particularly so in light of the temporal proximity of the series of [x-rays] pre-dating the February, 2005 [x-rays].

Decision and Order at 17-18.

In light of our holding that the administrative law judge erred in his consideration of the interpretations of the earlier x-rays, the administrative law judge's basis for according less weight to Dr. Repsher's negative interpretations of the February 6, 2005 and February 9, 2005 x-rays (*i.e.*, that the doctor's earlier x-ray interpretations were

[15] On some of his x-ray reports, Dr. Wheeler noted that an exact diagnosis would typically require a biopsy or microbiology. Employer's Exhibit 29.

[16] The record also contains interpretations of x-rays taken on June 17, 1997 and November 30, 2000. Because no party challenges the administrative law judge's finding that the June 17, 1997 x-ray "does not support the conclusion that . . . [c]laimant suffered from either simple or complicated pneumoconiosis," or the administrative law judge's finding that the November 30, 2000 x-ray is positive for complicated pneumoconiosis, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 16, 17.

called into question by the interpretations rendered by better qualified physicians) cannot stand. Consequently, we vacate the administrative law judge's weighing of the February 6, 2005 and February 9, 2005 x-rays and instruct the administrative law judge to reconsider this evidence on remand.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).[17]

CT Scan Evidence

Employer next argues that the administrative law judge erred in his consideration of the CT scan evidence under 20 C.F.R. §718.304(c).[18] In his consideration of the CT scan evidence, the administrative law judge stated:

> Six physicians interpreted twelve CT-scans taken between May, 2001, and February, 2006. Eight out of the twelve interpretations were by physicians whose qualifications are unknown. As with the chest x-ray evidence, interpretations by physicians whose qualifications are unknown are of little probative value . . . .
>
> Dr. Repsher, a B-Reader, provided brief narratives about three CT-scans as a part of his medical opinions, concluding that the masses in the Claimant's lungs represent tuberculosis and not pneumoconiosis. His opinion and those of the physicians whose qualifications are unknown are outweighed by that of Dr. Wheeler, a dually-qualified physician. Dr. Wheeler reviewed the May, 2001, CT-scan and found two 3-centimeter and one 2-centimeter masses in the Claimant's lungs. This is consistent with his x-ray findings of possible category A pneumoconiosis. Although Dr. Wheeler is uncertain as to the etiology of the masses, he acknowledges the "possible" presence of coal workers' pneumoconiosis among the other potential diagnoses. Dr. Wheeler's interpretation of the May 21, 2001, CT-scan is more probative than the rest of the CT-scan reports because he is a dually-qualified

[17] Because there is no biopsy evidence in the record, the administrative law judge properly found that 20 C.F.R. §718.304(b) was not applicable in this case. Decision and Order at 18.

[18] CT scan evidence falls into the "other means" category of establishing complicated pneumoconiosis at 20 C.F.R. §718.304(c). *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*).

> physician. As a result, the weight of the CT-scan evidence supports the conclusion that the Claimant suffers from complicated pneumoconiosis.

Decision and Order at 20-21.

Employer contends that the administrative law judge's analysis of the CT scan evidence is flawed for the same reasons as his consideration of the x-ray evidence. We agree. In evaluating Dr. Wheeler's interpretation of the May, 21, 2001 CT scan, the administrative law judge erred in not addressing the entirety of the CT scan report, including Dr. Wheeler's comments.[19] Consequently, we vacate the administrative law judge's finding that the CT scan evidence established the existence of complicated pneumoconiosis.

Medical Opinion Evidence

Employer also argues that the administrative law judge erred in not addressing the relevant medical opinion evidence pursuant to 20 C.F.R. §718.304(c). Employer is correct.[20] In this case, the administrative law judge addressed the medical opinion

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[19] Dr. Wheeler interpreted claimant's May 21, 2001 CT scan as revealing:

> Oval 3 cm. mass lateral subapical LUL, 2 cm. mass superior segment LLL and 3 cm. mass lower posterior RUL involving upper right hilum compatible with conglomerate granulomatous disease, TB or histoplasmosis, *more likely than large opacities of CWP because small background nodular infiltrates in upper lobes are very low profusion.*

Employer's Exhibit 29 (emphasis added).

[20] The record contains numerous medical reports addressing the existence of complicated pneumoconiosis and/or tuberculosis. Dr. James was the only physician of record to render a diagnosis of complicated pneumoconiosis. Director's Exhibit 6. Conversely, Dr. Repsher opined that the opacities on claimant's x-rays represented conglomerate tuberculosis. Hearing Transcript at 46. Dr. Tuteur opined that claimant suffered from "inactive pulmonary tuberculosis." Employer's Exhibit 13. Dr. Tuteur further opined that claimant "may have very mild simple coal workers' pneumoconiosis" superimposed on his tuberculosis. *Id.* Dr. Renn opined that claimant suffered from tuberculosis. Employer's Exhibit 37 at 49. Dr. Renn also opined that claimant did not suffer from complicated pneumoconiosis. *Id.* at 51. Dr. Castle opined that claimant "possibly has radiographic changes consistent with both coal workers' pneumoconiosis and . . . tuberculosis." Employer's Exhibit 17 at 10. Dr. Repsher opined that claimant's radiographic findings were due to "far advanced pulmonary tuberculosis." Employer's

evidence only pursuant to 20 C.F.R. §718.203, rather than initially addressing this evidence pursuant to 20 C.F.R. §718.304(c). As a result, the administrative law judge noted that claimant was entitled to a rebuttable presumption that his complicated pneumoconiosis arose out of his coal mine employment. The administrative law judge noted that employer, "in rebuttal," had offered tuberculosis as the cause of the abnormalities in claimant's lungs." Decision and Order at 21-22. After weighing the evidence, the administrative law judge found that the opinions of employer's physicians were "insufficient to rebut the presumption at 20 C.F.R. §718.203(b)." *Id.* at 28.

By not addressing the medical opinion evidence pursuant to 20 C.F.R. §718.304, the administrative law judge shifted the burden of proof to employer to establish that the abnormalities in claimant's lungs are not complicated pneumoconiosis. Employer, however, does not have the burden to "rule out" the existence of complicated pneumoconiosis. *Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12. The burden of proof remains at all times with the claimant. *See Gulf & W. Indus. v. Ling*, 176 F.3d 226, 233, 21 BLR 2-571, 2-583 (4th Cir. 1999) ("The burden of persuading the factfinder of the validity of the claim remains at all times with the miner."); *Lester*, 993 F.2d at 1146, 17 BLR at 2-118 ("The claimant retains the burden of proving the existence of the disease.").

The administrative law judge's failure to address the relevant medical opinion evidence pursuant to 20 C.F.R. §718.304(c) is error that requires remand. *See Lester*, 993 F.2d at 1146, 17 BLR at 2-117; *Melnick*, 16 BLR at 1-33; *Truitt*, 2 BLR at 1-203. Accordingly, we vacate the administrative law judge's finding that complicated pneumoconiosis was established pursuant to Section 718.304 and remand the case for consideration of all the relevant evidence on the issue.

On remand, the administrative law judge should consider whether the weight of the x-ray evidence at 20 C.F.R. §718.304(a), and the weight of the CT scan and medical opinion evidence at 20 C.F.R. §718.304(c), support a finding of the existence of complicated pneumoconiosis, and should then weigh together all of the relevant evidence to determine whether the existence of complicated pneumoconiosis is established. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-311 (2003); *Melnick*, 16 BLR at 1-33-34.

Exhibit 36. During the March 14, 2006 hearing, Dr. Repsher also testified that the large masses represented tuberculosis or granulomatous disease rather than pneumoconiosis. Transcript at 49, 53. Dr. Braun diagnosed (1) apparent speculated masses and (2) probable interstitial disease, secondary to uranium and coal mining. Claimant's Exhibit 8.

On remand, if the administrative law judge finds that the evidence establishes the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, claimant is not automatically entitled to benefits. The administrative law judge must also reconsider whether the evidence establishes that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203. *See Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007).

If the administrative law judge finds that complicated pneumoconiosis is not established, he must consider whether claimant has established that he is totally disabled due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202, 718.203, and 718.204. *See Trent*, 11 BLR at 1-27; *Gee*, 9 BLR at 1-5; *Perry*, 9 BLR at 1-2.

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 consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge