BRB Nos. 07-0968 BLA
and 07-0972 BLA

B.K. (Widow of and o/b/o W.K.) Claimant-Petitioner v. KOCH CARBON, INCORPORATED Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/30/2008 DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

B.K., Raven, Virginia, *pro se*.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

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

PER CURIAM:

Claimant, the surviving spouse of the deceased miner, appeals, without the assistance of counsel, the Decision and Order (2007-BLA-05124 and 2005-BLA-00022) of Administrative Law Judge Daniel F. Solomon denying benefits on a miner's claim and a survivor's claim 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] This case

[1]Brenda Yates, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested on behalf of claimant that the Board review the

involves a request for modification of a denial of benefits in the miner's claim and a survivor's claim.[2] In his Decision and Order, the administrative law judge credited the miner with twenty-three years of coal mine employment, based upon a stipulation by the parties, and found that employer was the responsible operator. The administrative law judge initially considered the request for modification of the denial of benefits in the miner's claim and determined that there was no change in conditions or mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[3] Accordingly, the administrative law judge denied the request for modification in the miner's claim. In the survivor's claim, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits in the survivor's claim.

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administrative law judge's decision, but Ms. Yates is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] The miner filed his claim for benefits on February 5, 1993. Miner's Claim (MC) Director's Exhibit 1. In a Decision and Order issued on September 14, 1994, Administrative Law Judge Stuart A. Levin found the evidence sufficient to establish total disability, but determined that the miner failed to prove that he had pneumoconiosis or that his total disability was due to pneumoconiosis. Director's Exhibit 56. The Board affirmed Judge Levin's determination that the evidence was insufficient to establish the existence of pneumoconiosis and the denial of benefits. [*W.K.*] *v. Koch Carbon, Inc.*, BRB No. 95-0468 BLA (June 28, 1995) (unpub.). Thereafter, the miner filed several requests for modification, all of which were denied. The current request for modification was filed on May 18, 2004, and was pending at the time of the miner's death on March 15, 2005. MC Director's Exhibit 164. The miner's surviving spouse, B.K., filed a survivor's claim on October 27, 2005. Survivor's Claim (SC) Director's Exhibit 2. Subsequently, both claims were consolidated and referred to the administrative law judge for hearing. MC Director's Exhibit 166; SC Director's Exhibit 32.

[3] 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 (2008). The revised version of 20 C.F.R. §725.310 does not apply to the request for modification in the miner's claim, however, as this claim was pending on the effective date of the amended regulations. 20 C.F.R. §725.2. Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

On appeal, claimant generally challenges the administrative law judge's denial of the request for modification in the miner's claim and the denial of benefits in the survivor's claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits in both claims as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not respond in this case.[4]

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.[5] 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 Miner's Claim

Upon review of the administrative law judge's denial of the request for modification in the miner's claim, we hold that we must vacate this portion of the administrative law judge's Decision and Order, as we cannot ascertain whether the findings set forth by the administrative law judge are rational, supported by substantial evidence, and in accordance with law. *See McFall*, 12 BLR at 1-177. The Administrative Procedure Act (APA) 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. . . ." 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 U.S.C. §932(a). In the present case, the administrative law judge's Decision and Order does not accord with the requirements of the APA, as the administrative law judge did not accurately characterize relevant evidence, did not identify with specificity the evidence in the record relevant to the miner's request for modification, and did not adequately set forth the rationale underlying his findings. *See Wojtowicz v. Duquesne*

[4] The administrative law judge's length of coal mine employment and responsible operator determinations are affirmed, as they are not adverse to claimant or challenged by employer on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 6.

[5] The record indicates that the miner's coal mine employment was in Virginia. MC Director's Exhibit 2; SC Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Light Co., 12 BLR 1-1621, 1-165 (1988); *Fetterman v. Director, OWCP*, 7 BLR 1-688, 1-690 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

With respect to the issue of change in conditions pursuant to 20 C.F.R. §725.310 (2000), when considering the newly submitted x-ray evidence, the administrative law judge misidentified Dr. H. Patel, who has no radiological qualifications, as the physician who provided the reading of the film dated August 10, 2004. Decision and Order at 7. A review of the record in the miner's claim establishes that Dr. Dilip R. Patel, who is a Board-certified radiologist, performed the positive reading of this film. MC Director's Exhibit 188 (Claimant's Exhibit 8). It is also unclear whether the administrative law judge considered the newly submitted readings of the CT scan obtained on January 25, 2005 by Drs. Hoffnung, Scott and Scatarige. Director's Exhibit 188; Employer's Exhibits 22, 23. Dr. Hoffnung's interpretation was submitted on behalf of the miner in support of his May 18, 2004 request for modification, while employer had this scan reread by Drs. Scott and Scatarige in response. Director's Exhibit 188. The administrative law judge did not list any of these readings in his recitation of the evidence submitted by the parties in conjunction with the miner's request for modification, but included Dr. Scatarige's interpretation in his summary of the evidence relevant to the survivor's claim. Decision and Order at 11; Employer's Exhibit 4.

Similarly, the administrative law judge's summary of the evidence relevant to the request for modification does not identify the records of the miner's hospitalizations in 2003, 2004, and 2005. *See* Decision and Order at 9. Although the administrative law judge indicated that the diagnoses contained in these records were unreasoned or were outweighed by the opinions of employer's experts, *see* Decision and Order at 18-19, without a more detailed identification of the different types of evidence (*e.g.*, x-ray readings, CT scan interpretations, or medical opinions) and the physicians who prepared them, we cannot discern whether the administrative law judge's findings are rational and supported by substantial evidence.

Our ability to assess whether the administrative law judge's weighing of the newly submitted evidence at 20 C.F.R. §718.202(a)(1)-(4) was proper is also hampered by the fact that the administrative law judge did not set forth distinct findings under each subsection. The administrative law judge noted correctly that, under the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000), he was required to weigh together all of the evidence relevant to 20 C.F.R. §718.202(a) to determine whether the evidence establishes that the miner had pneumoconiosis. However, because the record in this case contains so many different types of evidence (x-ray readings, biopsy reports, medical opinions, hospital records, and CT scans), the absence of explicit findings as to whether each type of evidence supports a finding of pneumoconiosis under the subsection to which it is relevant, prevents us from determining whether the

administrative law judge's weighing of the entirety of the newly submitted evidence is rational and supported by substantial evidence. The lack of specific findings relevant to 20 C.F.R. §718.304(a)-(c), which is referenced in 20 C.F.R. §718.202(a)(3), is particularly problematic. We cannot assess whether the administrative law judge properly determined that this evidence is insufficient to establish the existence of complicated pneumoconiosis, as the administrative law judge addressed the issue of complicated pneumoconiosis in several different parts of his discussion of the newly submitted evidence. Decision and Order at 17-19.

Because the administrative law judge did not accurately characterize the newly submitted evidence and did not set forth his findings in adequate detail, the administrative law judge did not comply with the requirements of the APA. Accordingly, we must vacate the administrative law judge's determination that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *See Wojtowicz*, 12 BLR at 1-165; *Fetterman*, 7 BLR at 1-690; *McCune*, 6 BLR at 1-998.

We also cannot affirm the administrative law judge's determination that the prior denial in the miner's claim did not contain a mistake in a determination of fact under 20 C.F.R. §725.310 (2000). The Fourth Circuit has held that when a request for modification is filed, a claimant need not allege a specific error in order for an administrative law judge to find modification based upon a mistake in a determination of fact. Instead, the administrative law judge has the authority to "reconsider *all the evidence* for any mistake of fact or change in conditions." *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993)(emphasis supplied). In this case, the administrative law judge stated, "I have reviewed the entire record in the living miner's claim and conclude that a mistake in fact has not been made." Decision and Order at 19. Under the circumstances of this case, the fact that the administrative law judge did not identify the evidence that he considered in rendering this finding prevents us from ascertaining whether it accords with the Fourth Circuit's holding in *Jessee*.

A review of the district director's June 2, 2003 denial of the most recent prior request for modification reveals that the district director did not properly consider the new evidence submitted by the miner. The district director noted that the denial of benefits was based upon the miner's failure to provide "the x-ray film dated February 12, 2003" to the Office of Workers' Compensation Programs, and the fact that employer's experts reread the film as negative for pneumoconiosis. MC Director's Exhibit 161. A review of the record establishes that there is no "x-ray film dated February 12, 2003." *Id*. The record does contain an x-ray obtained on February 11, 2003, which Dr. D. Patel interpreted as showing changes consistent with complicated coal workers' pneumoconiosis and which Drs. Scatarige and Scott read as negative for pneumoconiosis. MC Director's Exhibit 164; Employer's Exhibits 12, 13. However, the miner did not submit this film to the district director until he filed the current request for modification

on May 18, 2004. MC Director's Exhibit 164. It is possible that the district director meant to refer to the CT scan dated February 12, 2003, which Dr. D. Patel read as showing a worsening of changes in the right upper lobe that could be related to the miner's tuberculosis and as showing no alteration in the "complicated pneumoconiotic changes" elsewhere in the lungs. MC Director's Exhibit 154. Drs. Wheeler and Scott reread this scan on employer's behalf and indicated that coal workers' pneumoconiosis was "unlikely." MC Director's Exhibit 159. Because the administrative law judge rendered his finding on the issue of mistake in a determination of fact in summary fashion, we cannot determine whether he recognized this error in the district director's denial.

In addition, we cannot discern whether the administrative law judge was aware that the district director did not address, in his June 2, 2003 denial, all of the evidence submitted by the miner with his request for modification. The request for modification that was at issue in the district director's denial was filed by the miner on June 8, 2001. MC Director's Exhibit 114. The district director initially denied this request on July 26, 2001, on the ground that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis. The miner submitted a timely request for a hearing and the case was referred to the Office of Administrative Law Judges on November 14, 2001. MC Director's Exhibits 117, 121. Under a cover letter dated April 30, 2002, the miner submitted Dr. Ahmed's reading of an x-ray dated April 9, 2002, which contained a diagnosis of complicated pneumoconiosis, to Administrative Law Judge Pamela Lakes Wood, to whom the case was assigned. MC Director's Exhibit 128. The hearing was continued on three occasions before the case was reassigned to the administrative law judge, who scheduled the hearing for February 27, 2003. MC Director's Exhibits 129, 131, 142, 150. The hearing was convened on that date, but at the request of the miner's lay representative, the administrative law judge cancelled the proceedings and subsequently issued an Order, dated March 4, 2003, remanding the case to the district director for additional evidentiary development. MC Director's Exhibit 152.

A claims examiner then issued a letter to the miner in which she indicated that his claim had been denied on March 4, 2003 and, that in order to modify this denial, the miner was required to submit additional evidence. MC Director's Exhibit 153. The miner responded by sending the report of his hospitalization from February 11 to February 18, 2003, a reading of the CT scan obtained on February 12, 2003 by Dr. D. Patel, and pathology reports from Drs. J.G. Patel and Segen. Director's Exhibit 154. The claims examiner acknowledged receipt of this evidence and clarified that the miner's claim was not denied on March 4, 2003, but was remanded to permit the development of additional evidence. MC Director's Exhibit 157. Employer submitted evidence in response to the items proffered by the miner. MC Director's Exhibit 159.

Thus, when the district director issued his Proposed Decision and Order, the miner's June 8, 2001 request for modification, and all of the evidence submitted by the parties after that date, was before him. As indicated previously, however, the district director based the denial of the miner's request for modification upon the miner's alleged failure to produce an "x-ray film dated February 12, 2003" and the negative rereadings of this film submitted by employer. MC Director's Exhibit 161. In light of the administrative law judge's conclusory finding on the issue of mistake in a determination of fact, we cannot determine whether the administrative law judge was aware that the district director did not consider the full complement of evidence proffered in conjunction with the miner's June 8, 2001 request for modification.[6] We also cannot ascertain whether the administrative law judge considered this evidence anywhere in his Decision and Order due to the absence of citations to the specific evidence that he weighed. Finally, it is not clear that the administrative law judge actually reviewed the entire record in the miner's claim, particularly the evidence that Administrative Law Judge Jeffrey C. Tureck determined was sufficient to establish the existence of pneumoconiosis. *See* slip op. at 10 n. 6; MC Director's Exhibit 101; *see also* MC Director's Exhibits 70, 79.

Because the administrative law judge did not comply with the requirements of the APA in rendering his finding that there was no mistake in a determination of fact in the district director's denial of claimant's June 8, 2001 request for modification, we must vacate this finding. *See Wojtowicz*, 12 BLR at 1-165; *Fetterman*, 7 BLR at 1-690; *McCune*, 6 BLR at 1-998.

Accordingly, we vacate the administrative law judge's denial of the request for modification in the miner's claim and remand the case to the administrative law judge for

[6] We also note that the procedural history set forth in the administrative law judge's Decision and Order regarding the disposition of the June 8, 2001 request for modification is not entirely accurate. The administrative law judge indicated that the district director's finding that the miner did not establish the existence of pneumoconiosis "simply maintained the status quo" established in the denial of benefits issued by Administrative Law Judge Jeffrey C. Tureck in 1999. Decision and Order at 13. In fact, Judge Tureck determined that the newly submitted evidence supported a finding of pneumoconiosis, but also established that the miner was not totally disabled at the date of the hearing. MC Director's Exhibit 101. In addition, the administrative law judge was not correct in stating that, in a Decision and Order issued on May 10, 2002, Judge Wood denied the miner's June 8, 2001 modification request. Decision and Order at 2. Although the record contains a Decision and Order issued on that date by Judge Wood, in which she denied a request for modification, the case involved a different miner. MC Director's Exhibit 132.

reconsideration of whether the evidence supports a finding of a change in conditions or a mistake in a determination of fact at 20 C.F.R. §725.310 (2000). When addressing the issue of a change in conditions, the administrative law judge must identify the newly submitted evidence relevant to each subsection of 20 C.F.R. §718.202(a) and render a finding as to whether the existence of pneumoconiosis has been established pursuant to each individual subsection. The administrative law judge must then consider whether the newly submitted evidence, when weighed together, is sufficient to establish that the miner had pneumoconiosis. *Compton*, 211 F.3d at 211, 22 BLR at 2-174. In considering whether the irrebuttable presumption of total disability due to pneumoconiosis has been invoked pursuant to 20 C.F.R. §718.304(a)-(c), the administrative law judge must analyze the relevant evidence in the same manner. *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). When addressing the issue of a mistake in a determination of fact, the administrative law judge must base his finding upon a consideration of all of the evidence of record in the miner's claim. *Jessee*, 5 F.3d at 725, 18 BLR at 2-28. In rendering his determinations with respect to the prerequisites for modification on remand, the provisions of the APA require that the administrative law judge set forth his findings in detail, including the underlying rationale. *See Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987); *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987). If the administrative law judge finds a change in conditions or a mistake in a determination of fact established, he must then consider whether entitlement to benefits has been established on the merits in the miner's claim.

The Survivor's Claim

In order to establish entitlement to benefits in the survivor's claim, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivors' claims filed on or after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). A miner's death will be considered to be due to pneumoconiosis if the presumption set forth at 20 C.F.R. §718.304 is applicable. *See* 20 C.F.R. §§718.205(c)(3), 718.304. Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *see also*

Shuff v. Cedar Coal Co., 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge summarized the relevant evidence as including one reading of an x-ray dated April 9, 2002 and two readings of a film obtained on September 23, 2004. Decision and Order at 9; SC Director's Exhibit 13; Employer's Exhibit 1. The administrative law judge determined that Dr. Ahmed's positive reading of the April 9, 2002 x-ray for simple and complicated pneumoconiosis was uncontradicted. Decision and Order at 20; Survivor's Claim (SC) Director's Exhibit 13. With respect to the September 23, 2004 x-ray, the administrative law judge determined that Dr. Scatarige's negative reading outweighed the positive reading by Dr. H. Patel, based upon Dr. Scatarige's qualifications as a Board-certified radiologist and B reader. Decision and Order at 20; SC Director's Exhibit 13; Employer's Exhibit 1.

Regarding the biopsy evidence at 20 C.F.R. §718.202(a)(2), the administrative law judge indicated that the reports that Drs. Naeye, Patel, and Segen prepared, based upon their review of histological slides, do not contain any diagnoses of pneumoconiosis. Decision and Order at 20; Employer's Exhibit 2; Unmarked Exhibits.

With respect to 20 C.F.R. §718.202(a)(4), the administrative law judge accorded little probative weight to Dr. Fino's opinion, that the miner did not have clinical or legal pneumoconiosis, as the doctor reviewed medical evidence that was not admissible and the administrative law judge could not determine the extent to which the doctor's conclusions were based upon the inadmissible evidence. The administrative law judge further noted that the record contains "various treatment reports by Dr. J.G. Patel, Dr. H. Patel, Dr. Byer, and treatment [reports] from the Russell County TB Division Clinic." Decision and Order at 20; SC Director's Exhibits 12, 13. The administrative law judge determined that this evidence did not support a finding of legal pneumoconiosis, as "the nexus between the respiratory impairments and coal mine dust exposure is not fully addressed." Decision and Order at 20. With respect to the diagnoses of clinical pneumoconiosis and complicated pneumoconiosis contained in the treatment records, the administrative law judge determined that they were "negated by Dr. Naeye's findings, and Dr. Naeye's examination of the tissue slides is not rebutted." *Id*.

The administrative law judge determined correctly that the biopsy evidence was insufficient to satisfy claimant's burden at 20 C.F.R. §718.202(a)(2), as none of the physicians who reviewed lung biopsy material diagnosed the disease. Decision and Order at 20. Under 20 C.F.R. §718.202(a)(4), the administrative law judge acted within his discretion as fact-finder in according little weight to Dr. Fino's opinion, that the miner did not have any form of pneumoconiosis, because Dr. Fino relied upon evidence that was inadmissible in the survivor's claim and the administrative law judge could not

ascertain to what extent Dr. Fino had relied upon the inadmissible evidence in reaching his conclusion. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 23 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting); Decision and Order at 20. The administrative law judge also rationally found that the diagnoses of respiratory conditions contained in the treatment notes did not support a finding of legal pneumoconiosis, as the physicians did not indicate that the conditions were related to coal dust exposure or did not explain the causal connection. 20 C.F.R. §718.201(a)(2); *Compton*, 211 F.3d at 211-12, 22 BLR at 2-175; Decision and Order at 20.

However, we cannot affirm the administrative law judge's ultimate determination that claimant failed to establish the existence of pneumoconiosis in the survivor's claim, as the administrative law judge did not render complete findings under 20 C.F.R. §718.202(a)(1) and (a)(4). *See Mazgaj v. Valley Camp Coal Corp.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). With respect to 20 C.F.R. §718.202(a)(1), the administrative law judge did not make a finding as to whether Dr. Ahmed's positive reading of the film obtained on April 9, 2002, was outweighed by Dr. Scatarige's negative interpretation of the x-ray dated September 23, 2004. Moreover, the administrative law judge did not determine whether Dr. Ahmed's identification of Category C large opacities was sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis set forth in 20 C.F.R. §718.304. The administrative law judge also did not indicate that he was aware that the materials attached to Dr. Ahmed's report establish that he, like Dr. Scatarige, is a dually qualified Board-certified radiologist and B reader. SC Director's Exhibit 13. In addition, the administrative law judge's finding that Dr. Ahmed's positive reading of the April 9, 2002 film for simple and complicated pneumoconiosis "was not rebutted," is contradicted by the presence in the record of the negative reading of this same x-ray by Dr. Wheeler, who is a dually qualified radiologist. Decision and Order at 20; SC Director's Exhibit 14. Employer designated Dr. Wheeler's interpretation as part of its affirmative evidence in the survivor's claim. Employer's Evidence Summary Form dated April 25, 2007.

It also appears that the administrative law judge did not accurately summarize the interpretations of the film dated September 23, 2004. The administrative law judge found that Dr. Scatarige's negative interpretation of this x-ray outweighed the positive interpretation performed by Dr. H. Patel on October 7, 2004, because Dr. Scatarige is a dually qualified radiologist, and Dr. H. Patel has no radiological qualifications. Decision and Order at 9 n.14, 14, 19. On the evidence summary form submitted by claimant in the survivor's claim, however, she designated a reading of the September 23, 2004 x-ray that was performed by "Dr. Patel" on September 24, 2004 and cited to "Director's Exhibit 13." Claimant's Evidence Summary Form dated April 4, 2007. A review of Director's Exhibit 13 in the survivor's claim indicates that Dr. Dilip R. Patel, a Board-certified

radiologist, performed the reading of the September 23, 2004 film on September 24, 2004. SC Director's Exhibit 13.

Regarding the administrative law judge's consideration of the treatment records at 20 C.F.R. §718.202(a)(4), the administrative law judge stated that the diagnoses of clinical pneumoconiosis (including complicated pneumoconiosis) contained in the treatment records were "negated by Dr. Naeye's findings." Decision and Order at 20; Employer's Exhibit 1. The administrative law judge did not address, however, Dr. Naeye's statement that he could not make a determination as to the presence or absence of pneumoconiosis because the slides did not include parenchymal or pleural tissue.[7]

Because the administrative law judge did not fully or accurately address the evidence relevant to 20 C.F.R. §718.202(a)(1) and (a)(4), as required by the APA, we must vacate the administrative law judge's findings and his determination that, when weighed together, the evidence of record is insufficient to establish the existence of pneumoconiosis. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR at 1-165. The survivor's claim is remanded, therefore, to the administrative law judge for reconsideration of the issue of the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4), including whether claimant has established invocation of the irrebuttable presumption of death due to pneumoconiosis set forth in 20 C.F.R. §718.304. When weighing the x-ray evidence, the administrative law judge must consider the interpretations designated by the parties on their evidence summary forms and must address the qualifications of the readers. *See* 20 C.F.R. §718.202(a)(1). In addition, the administrative law judge must render a finding under each subsection of 20 C.F.R. §718.202(a) and then address the issue of whether the evidence, when weighed together, is sufficient to establish that the miner had pneumoconiosis. *See Compton*, 211 F.3d at 211, 22 BLR at 2-175.

If the administrative law judge determines that claimant has established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, he must then address whether the evidence establishes that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), unless he finds that claimant has established invocation of the irrebuttable presumption of death due to pneumoconiosis set forth in 20 C.F.R §718.304.

[7] The administrative law judge discredited this same report in the miner's claim on the grounds that Dr. Naeye's opinion, that the miner did not have pneumoconiosis, was "conclusory and internally inconsistent." Decision and Order at 17.

Accordingly, the Decision and Order of the administrative law judge denying the request for modification in the miner's claim is vacated and the denial of benefits in the survivor's claim is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge