BRB No. 07-0996 BLA

O.J.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCH ON THE NORTH FORK	)	
	)	
and	)	
	)	
UNDERWRITERS SAFETY & CLAIMS	)	DATE ISSUED: 09/18/2008
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Motion for Reconsideration of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Motion for Reconsideration (05-BLA-6117) of Administrative Law Judge Donald W. Mosser rendered 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). Claimant's prior application for benefits, filed on August 1, 1980, was finally denied on February 25, 1988, because

claimant failed to establish the existence of a totally disabling respiratory impairment. Director's Exhibit 1. On June 18, 2004, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3.

In a Decision and Order dated February 27, 2007, the administrative law judge credited claimant with twenty years of coal mine employment[1] and initially found that the medical evidence developed since the prior denial of benefits did not establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge further found that the newly developed evidence did not establish the existence of complicated pneumoconiosis, and thus failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge therefore determined that claimant did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

Subsequently, both claimant and the Director, Office of Workers' Compensation Programs (the Director), filed Motions for Reconsideration challenging the administrative law judge's determination that the existence of complicated pneumoconiosis was not established pursuant to 20 C.F.R. §718.304. On reconsideration, the administrative law judge reiterated his prior finding that the medical evidence developed since the prior denial of benefits did not establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Reconsidering the evidence regarding the existence of complicated pneumoconiosis, however, the administrative law judge found that claimant established the existence of complicated pneumoconiosis, and, therefore, established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering all of the evidence of record, the administrative law judge accorded greatest weight to the evidence developed with the current claim, as the most probative, and found that claimant established the existence of complicated pneumoconiosis and therefore was entitled to the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits, commencing March 1, 2004.

On appeal, employer contends 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. Employer asserts that the administrative law judge's evaluation of the

[1] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 1, 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

x-ray, biopsy, computerized tomography (CT) scan, and medical opinion evidence does not comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated 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), or with the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer also contends that the administrative law judge erred in determining the date of onset of disability. Claimant responds in support of the administrative law judge's award of benefits. Employer has filed a reply brief reiterating its allegations of error. The Director has not filed a response brief.[2]

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Claimant's prior claim was denied because he failed to establish the existence of a totally disabling respiratory impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

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

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that the medical evidence developed since the prior denial of benefits did not establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

The record reflects that, after a CT scan revealed the presence of a suspicious left lung mass, on April 15, 2004, claimant underwent lung surgery, including bronchoscopy, left thoracotomy, left upper lobe wedge resection, left lower lobe wedge resection, and node dissection. Director's Exhibit 28. The administrative law judge noted that a biopsy of the lung specimen, performed by Dr. Dubilier, revealed the presence of a 1.5 centimeter lesion in claimant's left upper lung, described as an anthracotic nodule. Decision and Order on Reconsideration at 2. Dr. Dubilier's final diagnosis was nodular anthracosilicosis with marked fibrosis. Director's Exhibit 28. The administrative law judge found, correctly, that this constituted a diagnosis of pneumoconiosis. 20 C.F.R. §718.201(a)(1).

Turning to the issue of whether the lesion observed on biopsy would appear as an opacity measuring greater than one centimeter if seen on chest x-ray, the administrative law judge noted, correctly, that Dr. Baker read a July 29, 2004 x-ray as positive for a Category B large opacity. Director's Exhibits 16, 18. The administrative law judge also noted that Dr. Alexander reviewed several chest x-rays, a CT scan dated March 4, 2004, and the results of Dr. Dubilier's biopsy, and concluded that claimant has Category A complicated pneumoconiosis. Decision and Order on Reconsideration at 3-4; Claimant's Exhibit 1.

Finally, the administrative law judge considered the contrary opinion of Dr. Jarboe, that claimant does not suffer from complicated pneumoconiosis. Director's Exhibits 25, 35. The administrative law judge noted that in his original Decision and Order – Denying Benefits, he had accorded controlling weight to Dr. Jarboe's opinion that a lesion found on biopsy should measure at least two centimeters to be considered diagnostic of complicated pneumoconiosis. Decision and Order on Reconsideration at 2. On reconsideration, however the administrative law judge found, correctly, that the proper test for determining the existence of complicated pneumoconiosis is not whether a lesion revealed on biopsy measures two centimeters, but whether such a lesion would produce an opacity of greater than one centimeter if seen on x-ray. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 390, 21 BLR 2-615, 2-629-30 (6th Cir. 1999); Decision and Order on Reconsideration at 2. After reconsidering Dr. Jarboe's opinion, the administrative law judge accorded it diminished weight as based in part on an improper standard requiring a

lesion of two centimeters, and as otherwise speculative and indecisive in failing to "rule out" complicated pneumoconiosis. Decision and Order on Reconsideration at 4.

Considering the foregoing evidence together under the standard set forth in *Gray*, 176 F.3d at 389-90, 21 BLR at 2-629, the administrative law judge accorded greatest weight to the opinion of Dr. Alexander, as supported by the x-ray reading of Dr. Baker, and concluded that claimant established the existence of complicated pneumoconiosis. Decision and Order on Reconsideration at 5.

Employer contends that in relying on Dr. Baker's x-ray reading to support a finding of complicated pneumoconiosis, the administrative law judge failed to weigh Dr. Baker's x-ray reading against the remaining newly developed x-ray evidence pursuant to 20 C.F.R. §718.304(a). Specifically, employer contends that the administrative law judge erred in rejecting the negative x-ray readings of Drs. Wheeler, Scott, and Wiot, and erred in failing to consider that claimant's medical treatment records contain numerous x-rays that were not read as positive for the existence of complicated pneumoconiosis. We agree.

As the administrative law judge properly noted, Dr. Baker, a B reader, read a July 29, 2004 x-ray as positive for both simple pneumoconiosis 1/1, and complicated pneumoconiosis, Category B.[3] Dr. Wiot, who is a B reader and Board-certified radiologist, read the July 29, 2004 x-ray as negative for both small and large opacities of pneumoconiosis. Similarly, Drs. Scott and Wheeler, who are also B readers and Board-certified radiologists, each read a November 30, 2004 x-ray as completely negative for pneumoconiosis. The administrative law judge accorded little weight to the negative readings by Drs. Wiot, Scott, and Wheeler, as contrary to the finding, in the prior denied claim, that simple pneumoconiosis was established. Decision and Order on Reconsideration at 4 n.4. This was error.

As employer asserts, the finding of the existence of simple pneumoconiosis in claimant's prior claim was not essential to the judgment denying benefits, and employer had no incentive to challenge it. Thus, that finding lacks collateral estoppel effect in this claim. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(*en banc*).

[3] On his initial July 29, 2004 ILO form, Dr. Baker indicated the presence of small opacities of pneumoconiosis 1/1, with large opacities "O". Director's Exhibit 16. However, in his medical report of the same date, Dr. Baker listed his x-ray findings as "Coal Workers Pneumoconiosis 1/1 with B opacity." Director's Exhibit 16. In a supplemental report dated September 13, 2004, Dr. Baker clarified that his initial ILO form had been completed in error, and that in addition to small opacities 1/1, the July 29, 2004 x-ray revealed a Category B large opacity. Director's Exhibit 18.

Moreover, we note that in the prior claim, employer specifically contested the existence of pneumoconiosis, and, review of the record in the current claim reflects that employer contested the existence of pneumoconiosis.[4] Thus, the administrative law judge erred in discrediting the negative readings for complicated pneumoconiosis because they conflicted with a finding that the existence of simple pneumoconiosis had been established. Consequently, we vacate the administrative law judge's determination that the readings of Drs. Wiot, Scott, and Wheeler are entitled to little weight, and remand the case for further consideration of all of the relevant x-ray evidence, including any x-ray interpretations contained in claimant's medical treatment records, pursuant to 20 C.F.R. §718.304(a).

We reject, however, employer's contention that the administrative law judge erred in his evaluation of the biopsy evidence pursuant to 20 C.F.R. §718.304(b). Employer's Brief at 16. Contrary to employer's assertion that the administrative law judge did not explain his finding, the administrative law judge specifically cited to Dr. Dubilier's report, in finding that the biopsy documented the presence of multiple anthracotic nodules, the largest of which measured 1.5 centimeters, and which Dr. Dubilier described as nodular anthracosilicosis with marked fibrosis. Decision and Order on Reconsideration at 4, citing Director's Exhibit 28 at 24; Employer's Brief at 16. Employer asserts that Dr. Dubilier's report is legally insufficient, because Dr. Dubilier nowhere used the term "massive lesions" from Section 718.304(b) or any equivalent terminology. Contrary to employer's characterization, the administrative law judge did not find that Dr. Dubilier's biopsy results, standing alone, established "massive lesions" pursuant to Section 718.304(b), but simply found, correctly, that the biopsy confirmed the presence of a lesion of pneumoconiosis that could support a finding of complicated pneumoconiosis if the evidence established that the lesion would appear on x-ray as an opacity of greater than one centimeter. *See Gray*, 176 F.3d at 390, 21 BLR at 2-629-30; *see also Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999)(explaining that "massive lesions" on biopsy "are lesions that when x-rayed, show as opacities greater than one centimeter in diameter.") We therefore reject employer's contention that the administrative law judge erred in his discussion of the biopsy evidence.

[4] Contrary to the administrative law judge's statement, he did not find, in his initial decision, that claimant established the existence of simple pneumoconiosis. Decision and Order on Reconsideration at 2. Rather, in his initial decision, the administrative law judge found, correctly, that because claimant had established the existence of simple pneumoconiosis in his prior denied claim, this was not an applicable condition of entitlement. Decision and Order at 11. Thus, the administrative law judge has not weighed, either in his initial decision, or on reconsideration, the conflicting evidence relevant to the existence of simple pneumoconiosis.

Employer next contends that the administrative law judge erred in his evaluation of the CT scan evidence and medical opinion evidence pursuant to 20 C.F.R. §718.304(c). Specifically, employer contends that the administrative law judge failed to weigh Dr. Alexander's positive reading of the March 4, 2004 CT scan against Dr. Wheeler's negative reading of the same scan. Employer's Brief at 33. Employer also challenges the administrative law judge's reliance on Dr. Alexander's reading of the March 4, 2004 CT scan to find complicated pneumoconiosis established, when Dr. Alexander made no equivalency determination between the CT scan and a conventional x-ray. Employer argues further that the administrative law judge did not consider that Dr. Alexander relied on inadmissible evidence in rendering his opinion. Additionally, employer contends that the administrative law judge erred in discrediting Dr. Jarboe's medical opinion on the grounds that it was based on an improper standard and was speculative. Employer's Brief at 22-26. Employer's arguments have merit, in part.

Initially, as employer contends, a review of the administrative law judge's decision on reconsideration reveals that he did not consider Dr. Wheeler's negative reading of the March 4, 2004 CT scan.[5] Thus, the administrative law judge's Decision and Order on Reconsideration fails to comport with the requirements of the APA, 5 U.S.C. §557(c)(3)(A), that the administrative law judge consider all of the relevant evidence and provide reasoning in support of his findings on all issues. Consequently, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.304(c), and remand this case for him to consider all of the relevant CT scan evidence.

However, we reject employer's contention that Dr. Alexander's opinion is legally insufficient to be considered at 20 C.F.R. §718.304(c) because it lacks any evidence that the lesion Dr. Alexander saw on the CT scan would show as a greater than one centimeter opacity on x-ray. The record reflects that in a report dated September 15, 2006, Dr. Alexander interpreted a CT scan performed on March 4, 2004, prior to claimant's lung biopsy. Dr. Alexander explained that in addition to the March 4, 2004 CT scan itself, he had considered "AP and lateral digital chest x-rays used as scout images for the CT

[5] We note that Dr. Wheeler's interpretation of the March 4, 2004 computerized tomography (CT) scan is not contained in the copy of the record before the Board. However, the record reflects that Dr. Wheeler's report was admitted at the hearing as Employer's Exhibit 1, and it is listed as such on employer's evidence summary form. Hearing Tr. at 17, Administrative Law Judge's Exhibit 2. In addition, in his prior Decision and Order - Denying Benefits, the administrative law judge found that, like Dr. Alexander, Dr. Wheeler is a Board-certified radiologist and B reader, and that he interpreted the March 4, 2004 CT scan as showing no evidence of pneumoconiosis. Decision and Order at 11, 14. However, the administrative law judge did not state what weight he accorded to Dr. Wheeler's opinion.

scan," as well as "chest x-rays dated 7/29/04 and 11/30/04." Claimant's Exhibit 1. Dr. Alexander explained that the CT scan showed a large opacity in the same area where one appeared on x-ray:

> The digital chest x-ray images demonstrate a background of small round and irregular opacities and a large round opacity in the left upper zone measuring greater that 10.0mm, consistent with complicated Coal Workers' Pneumoconiosis, category A. On the CT images, there is a 20.0mm large opacity in the left upper zone . . . that corresponds in size and location to the large opacity seen on the digital chest x-ray, confirming the presence of complicated Coal Workers' Pneumoconiosis. Below this level . . . there is also a 15mm large opacity in the left upper zone which may also be caused by complicated Coal Workers' Pneumoconiosis.

Claimant's Exhibit 1 at 1. Dr. Alexander further stated that the July 29 and November 20, 2004 chest x-rays also revealed the presence of a smaller, 10.0 mm left upper zone mass, as well as the presence of small pneumoconiotic opacities with a profusion of 1/1. Dr. Alexander noted, however, that because the July 29 and November 20, 2004 chest x-rays were performed after claimant's lung biopsy, it was impossible to tell whether the smaller 10.0 mm left upper zone mass seen on those images was an abnormal mass or simply a post biopsy scar. Dr. Alexander concluded:

> On 04/15/04, [claimant] underwent a surgical wedge resection biopsy of the left upper zone mass seen on the 03/09/04 CT. Both surgical specimens demonstrated multiple anthracotic nodules, the largest of which measured 15.0mm. This confirms that the left upper zone large opacity seen on the pre-operative chest CT scan is in fact caused by complicated Coal Workers' Pneumoconiosis, and the final diagnosis of the surgical pathology report is nodular anthracosilicosis.
>
> Based on the information provided by the 03/09/04 chest CT scan, the 07/29/04 and 11/30/04 chest x-rays, and the surgical pathological report of the 04/15/04 open lung biopsy, [claimant] has category A complicated Coal Workers' Pneumoconiosis.

Claimant's Exhibit 1.

As Dr. Alexander fully explained his conclusion that claimant has Category A complicated pneumoconiosis, stating that the 1.5 centimeter lesion of pneumoconiosis removed on biopsy corresponded in size and location to the greater-than-one-centimeter opacity seen on the preoperative x-rays and CT scan, we reject employer's argument that Dr. Alexander "made no attempt to offer an equivalency determination." Employer's Brief at 30, 33.

We find merit, however, in employer's contention that the administrative law judge did not sufficiently consider the admissibility of Dr. Alexander's report, or address whether Dr. Alexander relied on inadmissible evidence. In crediting Dr. Alexander's opinion pursuant to 20 C.F.R. §718.304(c), the administrative law judge specifically noted, correctly, that the physician had relied in part on the digital x-rays to support his opinion that the pneumoconiotic mass observed on CT scan and biopsy equated to an opacity of greater than one centimeter, consistent with Category A complicated pneumoconiosis. Decision and Order on Reconsideration at 3-5. As employer asserts, however, the administrative law judge failed to consider whether Dr. Alexander's opinion, which takes into account his CT scan reading, readings of digital and conventional x-rays, and the biopsy evidence, is admissible as a CT scan reading, a medical report, or both.[6] *See* 20 C.F.R. §§718.107, 725.414(a)(2)(i), (ii). Employer's Brief at 33. Moreover, as employer further asserts, the administrative law judge did not consider whether Dr. Alexander's equivalency determination, to the extent it relies on readings of both the digital x-rays, and the x-rays dated July 29, and November 30, 2004, is based on inadmissible evidence.[7] Employer's Brief at 31-33.

The applicable regulation provides that any chest x-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report and physicians'

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[6] The record reflects that claimant designated Dr. Alexander's report as a CT scan reading that he sought to admit as "other medical evidence" under 20 C.F.R. §718.107. Administrative Law Judge's Exhibit 1 at 7.

[7] Claimant responds to employer's contention, initially asserting that Dr. Alexander's September 15, 2006 report, which was admitted into the record as Claimant's Exhibit 1, serves as both Dr. Alexander's interpretation of the March 4, 2004 CT scan, and his interpretation of the "accompanying digital scout x-ray dated March 4, 2004." Claimant's Brief at 7. Employer replies, noting correctly, that claimant has not identified any x-ray readings by Dr. Alexander on his evidence summary form. Employer's Reply Brief at 11. Nor are there any x-ray readings dating from March 2004 contained in the hospital treatment records. Director's Exhibit 28. Regarding the July 20 and November 30, 2004 x-rays, claimant asserts that Dr. Alexander was simply referencing the readings of those films by Drs. Baker, Scott, Wheeler, and Wiot, which are of record. Claimant's Brief at 8. Employer replies, correctly noting that only Dr. Baker's reading of the July 29, 2004 x-ray revealed small opacities 1/1, while Drs. Scott, Wheeler, and Wiot read the x-rays as completely negative. Thus, it is not clear that Dr. Alexander's conclusion, that the July 29 and November 30, 2004 chest x-rays "confirm the presence of small pneumoconiotic opacities with a profusion of 1/1," was based on these admissible readings, and not on his own readings of these x-rays. Employer's Reply Brief at 11.

opinions that appear in a medical report must each be admissible under 20 C.F.R. §725.414(a), or for good cause, as set forth at 20 C.F.R. §725.456(b)(1). 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). While the regulations are silent as to what an administrative law judge should do when evidence exceeding the limitations is referenced in an otherwise admissible medical opinion, if an administrative law judge determines that a physician's medical opinion relied upon inadmissible evidence, he has several available options including: excluding the report, redacting the objectionable content, asking the physician to submit a new report, or factoring in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinion is entitled. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-242 n.15 (2007)(*en banc*); *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

Therefore, on remand, the administrative law judge should reconsider the admissibility of Dr. Alexander's opinion, consistent with *Keener, Brasher*, and *Harris*, and reevaluate his opinion pursuant to 20 C.F.R. §718.304(c), together with the CT scan reading of Dr. Wheeler.[8]

Finally, employer contends that the administrative law judge erred in discrediting Dr. Jarboe's medical opinion on the grounds that it was both based on an improper standard, and was speculative. Employer's Brief at 22-26. Specifically, employer asserts that, contrary to the administrative law judge's finding, in referencing a "two centimeter" standard for diagnosing complicated pneumoconiosis, Dr. Jarboe was simply making an equivalency determination from the biopsy findings. Employer also asserts that in finding Dr. Jarboe's additional rationale to be speculative, the administrative law judge selectively analyzed Dr. Jarboe's opinion. Employer's arguments have merit.

In reevaluating Dr. Jarboe's opinion on reconsideration, the administrative law judge stated that the physician based his opinion, that claimant does not have complicated pneumoconiosis, on medical studies demonstrating that a lesion must measure two

[8] We additionally note employer's assertion that "there is an issue as to whether digital chest x-rays can satisfy the quality standards contained in the Part 718 regulations." Employer's Brief at 32 n.3. The Board has held that the quality standards for analog x-rays, set forth at Appendix A to Part 718, do not apply to digital x-rays. Therefore, the admission of digital x-rays is properly considered under 20 C.F.R. §718.107, and the administrative law judge must determine on a case-by-case basis whether the party proffering the digital x-ray, or "other medical evidence," has established its medical acceptability. *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-133 (2006)(*en banc*)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1, 1-7-8 (2007)(*en banc*).

centimeters in order to meet the definition of progressive massive fibrosis. Decision and Order on Reconsideration at 4. The administrative law judge noted that Dr. Jarboe provided additional rationale for his conclusions in his deposition testimony, but concluded that the physician's statements, that the shape of the nodules seen radiographically was "kind of unusual" and "perhaps" suggested calcification, which was not typical of complicated pneumoconiosis, were "speculative and somewhat indecisive," and did not "rule out" the presence of complicated pneumoconiosis. Decision and Order on Reconsideration at 4.

First, as employer contends, while Dr. Jarboe did reference, in his original report, a study defining progressive massive fibrosis as a lesion that is two centimeters on biopsy, in his supplemental report dated February 22, 2005, Dr. Jarboe listed several additional studies pertaining to the correlation between the size of pathological specimens and their appearance radiographically, and explained why he believed that these studies supported his conclusion that the 1.5 centimeter lesion removed on biopsy would not appear as an opacity measuring greater than one centimeter on x-ray. Employer's Brief at 22-24. It is not clear from the administrative law judge's decision whether he considered Dr. Jarboe's supplemental opinion.

Regarding the administrative law judge's determination that Dr. Jarboe's additional rationale was speculative and failed to "rule out" the existence of complicated pneumoconiosis, while a physician's opinion that is qualified or equivocal may properly be discredited by an administrative law judge, s*ee Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000)*; Griffith v. Director, OWCP*, 49 F.3d 184, 186-7, 19 BLR 2-111, 2-117 (6th Cir. 1995), as employer contends, Dr. Jarboe also stated that these additional factors were why he could not conclude, "within reasonable medical certainty" that the changes seen radiographically represented complicated pneumoconiosis. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-605 (4th Cir. 1999)(holding that a physician's use of cautious language is not necessarily equivocation); Director's Exhibit 35 at 16, 18-19; Employer's Brief at 26. As is not clear that the administrative law judge considered whether Dr. Jarboe was simply expressing his opinion in cautious, but affirmative terms, and as employer does not have the burden to "rule out" the existence of complicated pneumoconiosis, *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994), on remand, the administrative law judge should reconsider Dr. Jarboe's opinion as expressed in his original report, his supplemental report, and his deposition testimony.[9]

[9] In addition, we note claimant's contention, both in support of his request for reconsideration before the administrative law judge, and in his response brief before the Board, that Dr. Jarboe's deposition testimony is based in part on Dr. Jarboe's own

Based on the foregoing, we vacate the administrative law judge's finding that claimant established complicated pneumoconiosis. On remand, the administrative law judge must first determine whether the evidence in each category at 20 C.F.R. §718.304(a), (b), and (c) tends to establish the existence of complicated pneumoconiosis, and then weigh the evidence supportive of a finding of complicated pneumoconiosis against the contrary probative evidence, with the burden of proof remaining at all times on claimant. *Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12; *Gray*, 176 F.3d at 389-90, 21 BLR at 2-629; *Melnick*, 16 BLR at 1-33. We therefore also vacate the administrative law judge's finding of a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and his finding on the merits that all of the evidence established complicated pneumoconiosis. If the administrative law judge on remand again finds that the new medical evidence establishes complicated pneumoconiosis and thus a change in an applicable condition of entitlement, he should then consider whether all of the evidence of record establishes complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.304, 718.203.

Finally, we address employer's challenge to the administrative law judge's determination regarding the date of onset of total disability due to pneumoconiosis. The administrative law judge properly determined that a claimant is entitled to benefits from the first month the evidence establishes that he suffered from complicated pneumoconiosis. 20 C.F.R. §725.503; *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); Decision and Order on Reconsideration at 6. The administrative law judge found that the first evidence that established the presence of complicated pneumoconiosis was the March 4, 2004 CT scan, and, therefore, found claimant entitled to benefits beginning March 1, 2004. Decision and Order on Reconsideration at 6. Employer asserts that because the administrative law judge improperly weighed the medical evidence of record

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readings of x-rays, which were not submitted into evidence by employer and which exceed the evidentiary limitations. Claimant's Brief at 6. The administrative law judge overruled claimant's objection, finding that when the matter was addressed at the district director level, "employer correctly convinced the district director that the x-ray in question was initially submitted by the claimant as his evidence." Decision and Order on Reconsideration at 5 n. 5. A review of Dr. Jarboe's deposition testimony reflects that he personally read x-rays dated July 29 and November 30, 2004. Director's Exhibit 35 at 16, 18, 21, 22. Contrary to the administrative law judge's finding, the record does not reflect that either employer or claimant designated Dr. Jarboe's x-ray readings as affirmative or rebuttal evidence. Therefore, the administrative law judge on remand should take this factor into account when reconsidering Dr. Jarboe's opinion. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-242 n.15 (2007)(*en banc*); *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

in finding that claimant has complicated pneumoconiosis, he cannot rely on the March 4, 2004 CT scan to establish the date of onset. As we have vacated the administrative law judge's weighing of the medical evidence to find invocation of the irrebuttable presumption provided at 20 C.F.R. §718.304, we further vacate the administrative law judge's reliance on the March 4, 2004 CT scan to establish the date of onset of claimant's complicated pneumoconiosis. If, on remand, the administrative law judge again finds the existence of complicated pneumoconiosis established, he must reconsider the date of onset of the complicated pneumoconiosis based on all of the relevant evidence. *See* 20 C.F.R. §725.503(b); *Williams*, 13 BLR at 1-30.

Accordingly, the administrative law judge's Decision and Order on Motion for Reconsideration awarding benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge