BRB No. 07-1010 BLA

B.M. Claimant-Respondent v. HIGHLAND COAL COMPANY and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/29/2008 DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

W. Barry Lewis (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

Helen H. Cox (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; 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, Highland Coal Company (Highland), appeals the Decision and Order (06-BLA-5350) of Administrative Law Judge Ralph A. Romano 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). This case involves a claim filed on November 19, 2004. After crediting claimant with ten years of coal mine employment,[1] the administrative law judge found that the evidence established the existence of complicated pneumoconiosis, thereby entitling claimant to 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. Further, the administrative law judge found that the evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). The administrative law judge also found that claimant was entitled to the presumption that his simple pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b). The administrative law judge further found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, Highland argues that the administrative law judge erred in finding that it was the responsible operator. Highland 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. Highland also challenges the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203, and 718.204(c). The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, contending that the case must be remanded for the administrative law judge to address whether a subsequent employer should have been designated as the responsible operator. Claimant has not submitted a response brief.[2]

[1] The record reflects that claimant's coal mine employment was in Tennessee. Director's Exhibit 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 (1989)(*en banc*).

[2] Because no party challenges the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

Responsible Operator

Highland initially challenges the administrative law judge's determination that it is the responsible operator liable for payment of benefits. Highland asserts that it is not the responsible operator because claimant's most recent year of coal mine employment was with Rex Mining Company (Rex Mining) and its successor operator, Black Face Mining, Incorporated (Black Face Mining).[3]

In order to meet the regulatory definition of "a potentially liable operator," an operator must have employed the miner for a cumulative period of not less than one year and must also have the financial ability to assume liability for the payment of benefits. 20 C.F.R. §725.494(c), (e). If a miner worked for more than one operator who meets all the requirements of a potentially liable operator, then the operator for whom the miner worked most recently will be named the responsible operator. 20 C.F.R. §725.495(a)(2)(i). If the most recent operator demonstrates an inability to pay benefits, and there is no successor operator, then liability is assessed against the potentially liable operator that next most recently employed the miner. 20 C.F.R. § 725.495(a)(2)(ii), (iii).

A "successor operator" is defined as "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492. Additionally, Section 725.492(b) states that a successor operator is created when an operator ceases to exist by reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3). If the prior operator does not meet the conditions set forth in 20 C.F.R. §725.494, the

[3] Between 1973 and 1979, claimant worked for Rex Mining Company. Claimant subsequently worked for Highland Coal Company in 1981 and 1982. In 1984, claimant worked for Black Face Mining, Incorporated (Black Face Mining) and for H.M. McGlothlin Coal Company (McGlothlin Coal).

During 1984, Claimant earned $152 working for Black Face Mining and $3,447 working for McGlothlin Coal. Director's Exhibit 9. No party contends that McGlothlin Coal is a potentially liable operator, since this company employed claimant for less than one year. *See* Director's Exhibit 25.

successor operator is primarily liable for the payment of benefits to any miners previously employed by the prior operator. *See* 20 C.F.R. §725.492(d)(1).

In this case, the district director determined that Highland was the responsible operator. Director's Exhibit 25. After the case was forwarded to the Office of Administrative Law Judges for a formal hearing, Highland continued to contest its designation as the responsible operator.

The administrative law judge found that Highland was the responsible operator because it most recently employed claimant for one year:

> [Highland] contests that it is the responsible operator, however, the Social Security Administration's records clearly show that it was the last employer for whom [claimant] was employed for a period of at least one year. While there was coal mine employment after [c]laimant's employment with Highland . . . , none of it amounted to at least one year with any one employer. Accordingly, Highland . . . will be liable for the payment of black lung benefits if [c]laimant is found to be eligible for benefits.

Decision and Order at 4.

Highland asserts that, contrary to the administrative law judge's finding, Black Face Mining is the successor operator of Rex Mining because claimant testified at the hearing that these companies were (1) owned by members of the same family; (2) operated the same mine site; (3) employed the same supervisors and workers; and (4) used the same mine equipment. Highland's Brief at 9-10; Hearing Transcript at 24-26.

The Director responds that claimant's testimony is "contradictory, vague and ultimately unconvincing." Director's Brief at 5. However, the Director concedes that "[b]ecause the [administrative law judge] failed to specifically address Highland's assertion that a subsequent employer was a potentially liable operator, the case must be remanded." *Id.* Because the administrative law judge's Decision and Order does not reflect his consideration of Highland's argument that Black Face Mining is the successor operator of Rex Mining, and that claimant had combined coal mine employment with these companies of at least one year, we remand this case for further consideration. On remand, the administrative law judge must address the nature of the relationship between Rex Mining and Black Face Mining. If these companies operated as one entity, or if Black Face Mining is determined to be the successor operator of Rex Mining, the administrative law judge must further determine whether claimant worked as a coal miner for these companies for a cumulative period of not less than one year, so as to relieve Highland from liability for this claim. *See Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 565, 22 BLR 2-349, 2-366 (6th Cir. 2002) (aggregating the time a miner

worked for the predecessor and successor companies to determine whether miner's employment exceeded the one-year requirement).

Length of Coal Mine Employment

Highland next argues that the administrative law judge erred in crediting claimant with ten years of coal mine employment. Claimant bears the burden of proof to establish the number of years he actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Where an administrative law judge's computation of time is based on a reasonable method and is supported by substantial evidence, it will be upheld. *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988)(*en banc*); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

In his consideration of the length of claimant's coal mine employment, the administrative law judge stated:

> At the hearing, [Highland] stipulated to the fact that Claimant was a coal miner for a period of six years and eleven months, as found by the Director. (Tr. 10). In his application, Claimant listed twenty years of coal mine employment. (DX 2). The Social Security Administration's Itemized Statement of Earnings shows employment beginning in 1959 for United Green House Company. (DX 9). The first coal mine employment was in 1960, with the last coal mine employment being in 1984. Claimant testified that he began his coal mine employment at the age of fourteen years, working for a mine which did not have a name. (Tr. 11). He worked for his father, and did so for about four years, working five days per week. He drilled coal with a breast auger and shot it and loaded it. The coal was sold to Blue Diamond Coal Company. (Tr. 12). This was in 1956. In 1961, he went to work for Pearly Hatmaker. (Tr. 13). He worked there for about two and a half years and was paid in cash. Claimant also testified to working for several other coal mine employers, where he was paid in cash. (Tr. 16). I find, based upon the evidence of record, including Claimant's testimony and the affidavits submitted (CX 5) that Claimant was a coal miner, as that term is defined in the Act and regulations, for a total of ten years.

Decision and Order at 4.

Highland contends that the administrative law judge erred in failing to explain how he calculated the length of claimant's coal mine employment. We agree. Although the administrative law judge summarized the evidence regarding claimant's coal mine employment, he failed to explain how he arrived at a total of ten years of coal mine

employment. Consequently, the administrative law judge's analysis of the length of claimant's coal mine employment does not comport with the Administrative Procedure Act (APA), 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 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). Consequently, we vacate the administrative law judge's finding of ten years of coal mine employment and remand the case to the administrative law judge for further consideration.

Complicated Pneumoconiosis

Highland next 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 Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*).

In this case, the record contains eleven interpretations of five x-rays taken on September 30, 2004, December 29, 2004, March 22, 2005, June 16, 2005 and January 26, 2006.[4]

[4] While Dr. Ahmed, a B reader and Board-certified radiologist, interpreted the September 30, 2004 x-ray as positive for both simple and complicated pneumoconiosis, Director's Exhibit 13, Dr. Wheeler, an equally qualified physician, interpreted the x-ray as negative for both simple and complicated pneumoconiosis. Director's Exhibit 14.

The record also contains medical opinions from Drs. Baker, Dahhan, Hudson, Wheeler, and Ahmed. Despite interpreting the December 29, 2004 x-ray as revealing a Category A large opacity, Dr. Baker did not include a diagnosis of complicated pneumoconiosis in his December 29, 2004 report.[5] Director's Exhibit 13. In a March 29, 2005 report, Dr. Dahhan opined that claimant did not have any findings to indicate the presence of complicated pneumoconiosis. Director's Exhibit 14. In a June 20, 2005 report, Dr. Hudson discussed the x-ray finding of a 1.5 cm. noncalcified nodule in claimant's right upper lobe. Dr. Hudson stated, "I concur with Dr. Wheeler regarding the cause of his few upper lobe nodular opacities being more likely from old granulomatous disease than coal workers' pneumoconiosis, especially considering his past history of pulmonary tuberculosis, which was almost certain to leave some scarring." Director's Exhibit 14.[6]

Dr. Alexander, a B reader and Board-certified radiologist, interpreted the December 29, 2004 x-ray as positive for both simple and complicated pneumoconiosis, Claimant's Exhibit 3, and Dr. Wheeler, an equally qualified physician, interpreted the same x-ray as negative for both simple and complicated pneumoconiosis. Director's Exhibit 14. However, Dr. Baker, a B reader, also interpreted the December 29, 2004 x-ray as positive for both simple and complicated pneumoconiosis. Director's Exhibit 12.

Dr. Ahmed, a B reader and Board-certified radiologist, interpreted the March 22, 2005 x-ray as positive for both simple and complicated pneumoconiosis. Claimant's Exhibit 2. Although Dr. Dahhan, a B reader, interpreted the same x-ray as positive for simple pneumoconiosis, he interpreted it as negative for complicated pneumoconiosis. Director's Exhibit 14.

While Dr. Ahmed, a B reader and Board-certified radiologist, interpreted the June 16, 2005 x-ray as positive for both simple and complicated pneumoconiosis, Director's Exhibit 13, Dr. Hudson, a B reader, interpreted this x-ray as negative for both simple and complicated pneumoconiosis. Highland's Exhibit 1.

Finally, Dr. Alexander, a B reader and Board-certified radiologist, interpreted the January 26, 2006 x-ray as positive for both simple and complicated pneumoconiosis, Claimant's Exhibit 1, and Dr. Wheeler, an equally qualified physician, interpreted the same x-ray as negative for both simple and complicated pneumoconiosis. Highland's Exhibit 1.

[5] Dr. Baker noted a history of "old pulmonary tuberculosis with treatment." Director's Exhibit 13.

[6] Dr. Hudson noted that, in the early 1980s, claimant was treated for pulmonary tuberculosis for eighteen months with multiple drugs. Director's Exhibit 14.

In a letter dated July 19, 2005, Dr. Wheeler opined that Dr. Ahmed's positive interpretation of the September 30, 2004 x-ray was "seriously flawed." Director's Exhibit 14. In reference to Dr. Ahmed's x-ray interpretation, Dr. Wheeler explained:

> A probable 1.5 cm right subapical nodule overlain by anterior rib 1 was apparently reported as a "A" large opacity even though it is well above the zone where large opacities occur or [Dr. Ahmed] may have reported an obvious 1.5 cm calcified granuloma as the large "A" opacity." This is a serious mistake because no properly trained radiologist would report an obvious calcified granuloma as a large opacity and the probable 1.5 cm nodule partly hidden by first rib had a differential diagnosis between granuloma and tumor which should have been addressed under "OD." If that nodule is real, a CT scan should be done to see if it is calcified. If not calcified, a biopsy is needed unless it has not changed over several years.

Director's Exhibit 14.

Dr. Ahmed subsequently prepared a letter dated November 28, 2006, wherein he responded to Dr. Wheeler's letter:

> [Dr. Wheeler] stated that a CT scan would be useful in disproving my report and determining if there is a non-calcified nodule in subapical right upper lobe which should be biopsied. My last sentence in the impression portion of the evaluation was to inform [claimant's] personal physician regarding a 2 cm. mass in the right upper lung, which could also represent a malignancy, and a comparison with old films and chest CT is indicated for further evaluation.
>
> Basically, Dr. Wheeler is saying the same thing, except in his own language.

Claimant's Exhibit 4.

In considering whether the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, the administrative law judge stated:

> In this case, Drs. Baker, Ahmed and Alexander found an opacity which qualifies as complicated pneumoconiosis. Drs. Ahmed and Alexander specifically diagnosed their findings as complicated pneumoconiosis, while Dr. Baker listed a size A opacity on his x-ray reading but did not diagnose complicated pneumoconiosis in his medical examination report. Drs. Hudson, Dahhan and Wheeler did not find complicated pneumoconiosis to

> be present. Drs. Wheeler and Hudson explained that the findings were not complicated pneumoconiosis, but, as Dr. Hudson explained, "more likely from old granulomatous disease . . . [e]specially considering his past history of pulmonary tuberculosis." Dr. Ahmed, in reviewing the analysis by Dr. Wheeler, reiterated his opinion that complicated pneumoconiosis was present. I find, based upon the two positive readings for complicated pneumoconiosis, both rendered by dually qualified physicians, that complicated pneumoconiosis has been established by means of the x-ray evidence. Furthermore, when reviewing the contrary evidence of record, I do not find the medical opinions of Drs. Hudson and Wheeler sufficient to outweigh the positive readings and the report of Dr. Ahmed in response to Dr. Wheeler's review of Dr. Ahmed's reading. Accordingly, I find the presumption set forth at §718.304 has been triggered.

Decision and Order at 10-11.

Highland contends that the administrative law judge, in finding that the x-ray evidence established the existence of complicated pneumoconiosis, did not provide an explanation for his crediting of the positive x-ray evidence. Employer's Brief at 18. We agree. After noting that Drs. Baker, Ahmed, and Alexander "found an opacity which qualifies as complicated pneumoconiosis," the administrative law judge noted that Drs. Hudson, Dahhan, and Wheeler "did not find complicated pneumoconiosis to be present." Decision and Order at 10. The administrative law judge then stated, without further elaboration, "I find, based upon the two positive readings for complicated pneumoconiosis, both rendered by dually qualified physicians, that complicated pneumoconiosis has been established by means of the x-ray evidence." *Id.* at 11. We are unable to discern the basis for the administrative law judge's finding that the x-ray evidence established the existence of complicated pneumoconiosis. *Wojtowicz*, 12 BLR at 1-165. Consequently, the administrative law judge's analysis fails to comport with the APA. We therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.304(a).

The administrative law judge also erred in not addressing additional comments made by Drs. Ahmed and Alexander on their x-ray reports. In each of his x-ray reports, Dr. Ahmed commented that he could not exclude malignancy as an explanation for the large nodule seen in claimant's right upper lung field.[7] *See* Director's Exhibit 13;

[7] For example, Dr. Ahmed, in reporting his interpretation of the June 16, 2005 x-ray, stated:

Claimant's Exhibit 2. Dr. Alexander also commented upon the possibility of the large opacity being a calcified granuloma as opposed to complicated pneumoconiosis.[8] Claimant's Exhibit 1. Because the administrative law judge did not address the comments made by Drs. Ahmed and Alexander regarding the possibility of an alternative explanation for the large nodule seen on the x-rays, we instruct him 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, in reconsidering the x-ray evidence, the 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, and should explain the bases for his findings. *See* 5 U.S.C. §557(c)(3)(A); *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).

We also agree with Highland that the administrative law judge erred in his consideration of the medical opinion evidence. In evaluating the medical opinion evidence pursuant to 20 C.F.R. §718.304(c), the administrative law judge erred in failing to provide a basis for crediting Dr. Ahmed's opinion over those of Drs. Hudson and Wheeler. *Wojtowicz*, 12 BLR at 1-165. Consequently, the administrative law judge's analysis fails to comport with the APA. *Wojtowicz*, 12 BLR at 1-165. The administrative law judge also erred in not addressing the opinions of Drs. Baker and Dahhan. *See* 30 U.S.C. §923(b). We therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.304(c).

On remand, when considering whether the medical opinion evidence establishes the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c), the administrative law judge should address the comparative credentials of the respective

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> Nodule in the right upper lung seen which is very likely part of complicated pneumoconiosis but cannot exclude malignancy. Inform personal physician. Comparison with old examination or CT scan could be useful.

Director's Exhibit 13.

[8] In his interpretation of the December 29, 2004 x-ray, Dr. Alexander noted that the 1.3 cm. large opacity in the right upper lobe was compatible with complicated pneumoconiosis. Claimant's Exhibit 3. However, in his interpretation of claimant's subsequent January 26, 2006 x-ray, Dr. Alexander provided two alternative explanations for the large opacity: "calcified granuloma vs. complicated [coal workers' pneumoconiosis]." Claimant's Exhibit 1.

physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

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 medical opinion evidence at 20 C.F.R. §718.304(c),[9] support a finding of complicated pneumoconiosis, and should then weigh together all of the relevant evidence to determine whether the existence of complicated pneumoconiosis is established.[10] *See Gray*, 176 F.3d at 388, 21 BLR at 2-626; *Melnick*, 16 BLR at 1-33-34.

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.

The Administrative Law Judge's Alternative Findings of Entitlement

Where complicated pneumoconiosis is not established, claimant must establish 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. *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*).

Section 718.202(a)(1)

Highland argues that the administrative law judge, in finding that the x-ray

[9] Because there is no biopsy evidence in the record, 20 C.F.R. §718.304(b) is not applicable in this case.

[10] In this case, the administrative law judge addressed the opinions of Drs. Hudson and Wheeler, that the miner's opacities could be attributable to tuberculosis, pursuant to 20 C.F.R. §718.203, rather than initially addressing this evidence pursuant to 20 C.F.R. §718.304. *See* Decision and Order at 11. In doing so, 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. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994). The burden of proof remains at all times with claimant.

evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), did not provide a valid basis for crediting the positive x-ray readings. Employer's Brief at 20. In his consideration of whether the x-ray evidence established the existence of simple pneumoconiosis, the administrative law judge stated:

> While Dr. Wheeler is a dually qualified physician, and Dr. Hudson is a B-reader, Drs. Baker and Dahhan are also B-readers and Drs. Ahmed and Alexander are both B-readers and board-certified radiologists. Thus, the preponderance of the x-ray readings is positive for pneumoconiosis, as more physicians found the evidence positive than did negative. Additionally, two dually qualified physicians consistently found the evidence to be positive, while only one such physician found the evidence to be negative. Based upon the preponderance of positive readings, I find that the existence of pneumoconiosis has been established pursuant to 20 C.F.R. §718.202(a)(1).

Decision and Order at 10.

In his weighing of the x-ray evidence relevant to the issue of the existence of simple pneumoconiosis, the administrative law judge erred in focusing upon the number of individual readers rendering positive and negative x-ray interpretations. An administrative law judge should focus upon the weighing of positive and negative x-ray interpretations, as opposed to counting the number of individual readers rendering such interpretations. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *see also Rankin v. Keystone Coal Mining Corp.*, 8 BLR 1-54 (1985). Consequently, we vacate the administrative law judge's finding that the x-ray evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and remand the case for further consideration.

Section 718.202(a)(4)

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[11] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Highland argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) because he failed to "supply a valid rationale" for crediting the

[11] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

conclusions of claimant's experts over those of employer's experts. Employer's Brief at 20. In finding that the medical opinion evidence established the existence of clinical pneumoconiosis, the administrative law judge credited the opinions of Drs. Baker and Dahhan,[12] that claimant suffered from clinical pneumoconiosis, over Dr. Hudson's contrary opinion.[13] Decision and Order at 11. However, Drs. Baker and Dahhan based their respective diagnoses of clinical pneumoconiosis upon positive x-ray interpretations and/or claimant's coal dust exposure history. In light of our decision to vacate both the administrative law judge's length of coal mine employment finding, and his finding that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), we also vacate the administrative law judge's finding that the medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Highland argues that the medical opinion evidence does not establish the existence of legal pneumoconiosis. The administrative law judge, however, has not addressed this issue. Consequently, on remand, the administrative law judge is instructed to address whether the medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Sections 718.203 and 718.204(c)

In light our decision to vacate the administrative law judge's length of coal mine employment finding and his findings that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), we also vacate the

[12] In a report dated December 29, 2004, Dr. Baker diagnosed coal workers' pneumoconiosis. Director's Exhibit 12. Dr. Baker also diagnosed chronic bronchitis and chronic obstructive pulmonary disease, each of which he attributed to coal dust exposure, tuberculosis, and cigarette smoking. *Id.* Dr. Baker based these opinions on a coal mine employment history of 22 to 23 years. *Id.* In a subsequent report dated May 21, 2005, Dr. Baker opined that, if claimant had a coal mine employment history of only six years and eleven months, claimant's chronic obstructive airway disease and chronic bronchitis would not have been caused by coal dust inhalation. *Id.*

In a report dated March 29, 2005, Dr. Dahhan opined that claimant had radiological findings sufficient to justify a diagnosis of simple coal workers' pneumoconiosis. Director's Exhibit 14. Dr. Dahhan also diagnosed chronic obstructive lung disease attributable to cigarette smoking. *Id.*

[13] In a June 20, 2005 report, Dr. Hudson opined that claimant did not suffer from pneumoconiosis. Director's Exhibit 14. However, Dr. Hudson diagnosed chronic obstructive pulmonary disease attributable to cigarette smoking. *Id.*

administrative law judge's findings pursuant to 20 C.F.R. §§718.203(b) and 718.204(c).

On remand, the administrative law judge should initially reconsider whether complicated pneumoconiosis has been established pursuant to 20 C.F.R. §718.304. If the administrative law judge finds that it has not been established, he must reconsider 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(c). *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

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge