U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0046 BLA

HARRY E. KIDWELL Claimant-Petitioner v. ICG, LCC and BLACKSTREET MUTUAL INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/29/2016 DECISION and ORDER

Appeal of the Decision and Order on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Paul E. Frampton and Michael J. Schessler (Bowles Rice LLP), Charleston, West, Virginia, for employer/carrier.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Maia Fisher, 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (12-BLA-5577) of Administrative Law Judge Drew A. Swank denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case, involving a claim filed on January 6, 2011, is before the Board for the second time.

In the initial decision, the administrative law judge found that the evidence did not establish the existence of complicated pneumoconiosis. Consequently, the administrative law judge found that claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The administrative law judge further found that the evidence did not establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Because claimant failed to establish that he is totally disabled, the administrative law judge found that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2012). The administrative law judge also found that claimant was not entitled to benefits pursuant to 20 C.F.R. Part 718. The administrative law judge, therefore, denied benefits. The administrative law judge denied claimant's subsequent motion for reconsideration.

Pursuant to claimant's appeal, the Board affirmed, as unchallenged on appeal, the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *Kidwell v. ICG, LLC*, BRB No. 14-0270 BLA (Mar. 31, 2015) (unpub.). In light of that affirmance, the Board also affirmed the administrative law judge's finding that claimant did not invoke the Section 411(c)(4) presumption. *Id.* However, the Board instructed the administrative law judge to reconsider the admissibility of certain medical evidence. *Id.* The Board also vacated the administrative law judge's findings that the evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), (c), and remanded the case for further consideration.

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

On remand, the administrative law judge found that the evidence did not establish the existence of complicated pneumoconiosis. Consequently, the administrative law judge again found that claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish the existence of complicated pneumoconiosis. Claimant also argues that the administrative law judge erred in excluding certain medical evidence from the record. Employer/carrier (employer) responds in support of the administrative law judge's evidentiary rulings, as well as his denial of benefits. The Director, Office of Workers Compensation Programs (the Director), has indicated that he will not file a substantive response in this appeal. However, in a footnote to his letter to the Board, the Director contends that the administrative law judge erred in determining that a 2006 biopsy finding of simple pneumoconiosis did not undermine the negative x-ray interpretations of physicians who diagnosed neither simple nor complicated pneumoconiosis. Director's Brief at 1 n.1. The Director contends that the administrative law judge's finding "makes little sense," and should be vacated. *Id.*

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.[2] 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).

Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a claimant is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due

[2] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

to pneumoconiosis, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis.[3] *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-1143, 1145-46 (4th Cir. 1993); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991) (en banc).

Section 718.304(a)

In his initial decision, the administrative law judge considered four interpretations of a February 1, 2011 analog x-ray pursuant to 20 C.F.R. §718.304(a). While all of the radiologists agreed that claimant has masses in his lungs exceeding one centimeter in diameter, they disagreed as to the etiology of those masses. Dr. Alexander, a B reader and Board-certified radiologist, interpreted the February 1, 2011 x-ray as positive for simple pneumoconiosis and category "A" large opacities. Claimant's Exhibit 6. Dr. Jaworski, a B-reader, interpreted the x-ray as positive for both simple pneumoconiosis and category "B" large opacities. Director's Exhibit 11. However, Drs. Wheeler and Scott, each dually qualified as a B reader and Board-certified radiologist, interpreted the x-ray as negative for both simple and complicated pneumoconiosis.[4] Director's Exhibit 12; Employer's Exhibit 1. Finding that the positive and negative x-ray readings were in equipoise, the administrative law judge found that claimant failed to establish the existence of complicated pneumoconiosis by a preponderance of the analog x-ray evidence. Decision and Order at 12.

In its previous decision, the Board agreed with the Director that, in finding that the preponderance of the analog x-ray evidence did not establish the existence of complicated pneumoconiosis, the administrative law judge failed to reconcile the opinions of Drs. Wheeler and Scott, that claimant does not have simple or complicated pneumoconiosis, with his own determination that the 2006 biopsy evidence established the existence of

[3] The Fourth Circuit has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition that is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999).

[4] Drs. Wheeler and Scott attributed the large masses they observed to histoplasmosis, tuberculosis, granulomatous disease, or mycobacterium avium complex. Director's Exhibit 12; Employer's Exhibit 1.

simple pneumoconiosis. Because the administrative law judge had not addressed this discrepancy, the Board vacated the administrative law judge's finding that the analog x-ray evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), and remanded the case for further consideration. *Kidwell*, BRB No. 14-0270 BLA, slip op. at 7.

On remand, the administrative law judge reconsidered whether the analog x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Based on his finding that there were an equal number of positive and negative interpretations for complicated pneumoconiosis, and his determination that the radiological qualifications of the physicians rendering negative interpretations (Drs. Wheeler and Scott) were slightly superior to those of the physicians rendering positive interpretations (Drs. Alexander and Jaworski), the administrative law judge found that the analog x-ray evidence did not establish the existence of complicated pneumoconiosis. Decision and Order on Remand at 9.

In finding that the analog x-ray evidence did not establish the existence of complicated pneumoconiosis, the administrative law judge determined that the credibility of the negative x-ray interpretations of Dr. Wheeler and Scott was not diminished by his finding that the 2006 biopsy evidence established the existence of simple pneumoconiosis:

> [I] previously concluded that the biopsy evidence shows simple, clinical pneumoconiosis, but this finding does not mean that Drs. Wheeler and Scott erred in reading the analog x-rays as negative for complicated pneumoconiosis because [I] also concluded that the biopsy evidence did not demonstrate complicated pneumoconiosis. Thus, while the analog x-ray readings of Drs. Wheeler and Scott for simple pneumoconiosis are inconsistent with the biopsy evidence, their x-ray readings for complicated pneumoconiosis are actually consistent with the biopsy evidence.
>
> Moreover, if [I] conclude[d] that the x-ray readings of Drs. Wheeler and Scott should be assigned less weight based on the biopsy evidence, then [I] would also have to give less weight to the analog readings by Drs. Jaworski and Alexander. These two physicians concluded that the analog x-rays show complicated pneumoconiosis, which is inconsistent with [my] biopsy findings.

Decision and Order on Remand at 9 (citation omitted).

We agree with claimant and the Director that the administrative law judge's analysis fails to account for both the nature of biopsy evidence as well as the progressive nature of pneumoconiosis. As the Director notes, because the 2006 biopsy samples cover

only a narrow range of the miner's lung, it is conceivable that the biopsy samples would not have detected the presence of complicated pneumoconiosis, even if it was present in 2006. *See* 20 C.F.R. §718.106(c) ("A negative biopsy is not conclusive evidence that a miner does not have pneumoconiosis."). Moreover, both claimant and the Director accurately note that the administrative law judge's analysis fails to take into consideration the Department of Labor's recognition that pneumoconiosis is "a latent and progressive disease." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987). Thus, the fact that the 2006 biopsy evidence revealed only simple pneumoconiosis does not mean that claimant could not have developed the complicated form of the disease by 2011.

The administrative law judge's analysis fails to adequately address the relevant credibility issue: whether the negative 2011 x-ray interpretations rendered by Drs. Scott and Wheeler are called into question by the 2006 biopsy results, which the administrative law judge found sufficient to establish the existence of simple pneumoconiosis.[5] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Because the administrative failed to adequately address this discrepancy, we vacate his finding that the analog x-ray evidence does not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), and remand the case for further consideration.

Claimant also contends that the administrative law judge erred in not considering additional analog x-ray evidence found in claimant's treatment records. The administrative law judge admitted Dr. Ghamande's treatment records into the record. Hearing Transcript at 18, 21; Claimant's Exhibit 2. These treatment records include a B reader's interpretation of a November 2, 2006 analog x-ray that was performed at Preston Memorial Hospital. Claimant's Exhibit 2. The B reader, who is identified only by the initials ("JKB"), interpreted the November 2, 2006 x-ray as positive for both simple and complicated pneumoconiosis. *Id.* The Board instructed the administrative law judge, on

[5] Claimant contends that, while the administrative law judge properly found that the biopsy evidence established the existence of clinical pneumoconiosis, he erred in finding that it did not also establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). Claimant's Brief at 35-36. Claimant, however, failed to challenge this finding when this case was previously before the Board. As a result, the Board did not disturb the administrative law judge's finding that the biopsy evidence did not support a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). Because claimant has not demonstrated any exception to the law of the case doctrine, we decline to address this contention of error. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

remand, to consider whether this x-ray interpretation constituted admissible evidence under the evidentiary limitations. *Kidwell*, BRB No. 14-0270 BLA, slip op. at 10-11 n.15.

On remand, the administrative law judge acknowledged that the positive interpretation of the November 2, 2006 x-ray "was properly admitted as a medical treatment record." Decision and Order on Remand at 15. The administrative law judge, however, did not consider the x-ray interpretation because neither claimant nor employer designated it as affirmative x-ray evidence. *Id.*; *see* 20 C.F.R. §725.414(a)(2), (a)(3).

Claimant contends that the administrative law judge provided an improper basis for not considering this x-ray interpretation. We agree. Claimant's Brief at 21-22. The regulations provide that "*[n]otwithstanding the limitations" of Section 725.414(a)(2), (a)(3)*, "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4) (emphasis added). In this case, the administrative law judge admitted the treatment records containing the interpretation of the November 2, 2006 x-ray into the record. Because treatment records are an exception to the evidentiary limitations, claimant was not required to designate the x-ray interpretation as affirmative evidence for it to be considered. We, therefore, agree with claimant that the administrative law judge erred in not weighing this x-ray interpretation along with the other analog x-ray evidence at 20 C.F.R. §718.304(a). 30 U.S.C. §923(b); *see Lester*, 993 F.2d at 1145, 17 BLR at 2-117.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the analog x-ray evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), and remand the case for further consideration.

Section 718.304(c)

1. Digital X-ray Evidence

In his initial decision, the administrative law judge considered two interpretations of a September 28, 2006 digital x-ray.[6] While Dr. Wheeler interpreted the September 28, 2006 digital x-ray as negative for simple and complicated pneumoconiosis,[7] Dr. Alexander read the x-ray as positive for both simple pneumoconiosis and category "B" large opacities. Claimant's Exhibit 13; Employer's Exhibit 2. Although the administrative law judge found that Drs. Wheeler and Alexander are both highly qualified, he found that Dr. Wheeler was "more qualified in that he has a much more extensive publication and lecture history than [Dr.] Alexander." *Id.* The administrative law judge, therefore, found that the digital x-ray evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).

As in the case of the analog x-ray evidence, the administrative law judge failed to initially consider whether Dr. Wheeler's digital x-ray reading was called into question by the biopsy evidence. The Board, therefore, vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.304(c), and remanded the case for him to do so. *Kidwell*, BRB No. 14-0270 BLA, slip op. at 8. On remand, the administrative law judge determined that the credibility of Dr. Wheeler's negative digital x-ray interpretation was not diminished by the administrative law judge's finding that the 2006 biopsy evidence established the existence of simple pneumoconiosis. Decision and Order on Remand at 10. Because the administrative law judge's analysis of this issue is identical to the one he provided in his consideration of the analog x-ray evidence, we are unable to affirm it for the same reason set forth above. Consequently, we vacate the administrative law judge's finding that the digital x-ray evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c), and remand the case for further consideration.

We also agree with claimant that the administrative law judge erred in crediting Dr. Wheeler's negative interpretation of the September 28, 2006 digital x-ray over Dr. Alexander's positive interpretation, based upon the fact that Dr. Wheeler has "a much

[6] The Board previously noted that the revised regulations regarding the admission and weighing of digital x-ray readings do not apply to the instant case. *Kidwell v. ICG, LLC*, BRB No. 14-0270 BLA, slip op. at 5 n.5 (Mar. 31, 2015) (unpub.).

[7] Dr. Wheeler described "nodular infiltrates . . . compatible with conglomerate granulomatous disease: histoplasmosis or mycobacterium avium complex (MAC) more likely than [tuberculosis]." Employer's Exhibit 2.

more extensive publication and lecture history." Decision and Order on Remand at 14. As claimant notes, the administrative law judge did not address how many of the Dr. Wheeler's publications and lectures were related to the diagnosis of pneumoconiosis. Claimant's Brief at 34. Moreover, the administrative law judge did not explain why he found that Dr. Wheeler's publication and lecture history was "much more extensive" than that of Dr. Alexander.[8] On remand, the administrative law judge is instructed to reconsider the relevant radiological qualifications of Drs. Wheeler and Alexander. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003).

Claimant also argues that the administrative law judge erred in failing to discount Dr. Wheeler's reading of the September 28, 2011 digital x-ray. Claimant asserts that the investigation by the Center for Public Integrity and ABC News, and the Department of Labor's issuance of Black Lung Benefits Act Bulletin No. 14-09,[9] call into question the credibility of Dr. Wheeler's x-ray readings. The administrative law judge admitted the Center for Public Integrity's report and the ABC News story into evidence, but ultimately found them unpersuasive because "they do not relate in any specific way to the findings of [Dr.] Wheeler on the particular x-ray evidence submitted [in this case]." Decision and Order at 11 n.9. It is for the administrative law judge to assess the credibility of the evidence and the Board is not empowered to reweigh the evidence. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 144-45 (4th Cir. 2015); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The administrative law judge fully considered the argument raised by claimant that Dr. Wheeler's x-ray readings are not credible. Under these specific facts, we conclude that the administrative law judge acted within his discretion in refusing to accord less weight to Dr. Wheeler's x-ray readings, based solely on the findings of the CPI and ABC News investigation. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335 (4th Cir. 1998); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76 (4th Cir. 1997).

Claimant next contends that the administrative law judge erred in not considering Dr. Renn's positive interpretation of the September 28, 2011 digital x-ray. Claimant specifically argues that this evidence was admissible as x-ray rebuttal evidence pursuant to 20 C.F.R. §725.414(a)(2)(ii). The administrative law judge, however, accurately found that claimant, despite an opportunity to do so, did not designate Dr. Renn's digital

[8] Although Dr. Alexander's curriculum vitae does not set forth any publications specifically related to pneumoconiosis, it documents that the doctor provided lectures on the radiological aspects of pneumoconiosis in 1997, 1999, and 2002. Claimant's Exhibit 6.

[9] The Black Lung Benefits Act Bulletin No. 14-09 was issued by the Department of Labor on June 2, 2014.

x-ray interpretation as evidence on its Evidence Summary Form prior to the hearing.[10] Decision and Order on Remand at 16; *see* Claimant's Evidence Summary Form dated August 2, 2013 at 7. Claimant also never designated Dr. Renn's x-ray interpretation as rebuttal evidence to Dr. Wheeler's interpretation of the September 28, 2011 digital x-ray after Dr. Wheeler's x-ray interpretation was admitted at the hearing. An administrative law judge's procedural rulings are reviewed for abuse of discretion. 20 C.F.R. §725.455(c); *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-236 (2007) (en banc); *Clark* 12 BLR at1-153. In this case, contrary to employer's assertion, the administrative law judge acted properly in requiring the parties to specifically designate evidence developed in conjunction with the claim. 20 C.F.R. §725.414. We, therefore, hold that the administrative law judge acted within his discretion in not considering Dr. Renn's digital x-ray interpretation pursuant to 20 C.F.R. §718.304(c).

2. Medical Opinion Evidence

The administrative law judge also considered the medical opinions of Dr. Jaworski, Dr. Renn, and the West Virginia Occupational Pneumoconiosis Board (West Virginia Board) pursuant to 20 C.F.R. §718.304(c), correctly noting that the physicians unanimously opined that claimant suffers from complicated pneumoconiosis. However, in his initial decision, the administrative law judge found that all of the opinions were based on coal mine employment histories "far longer than the 19.32 years supported by the record." Decision and Order at 21. The administrative law judge also found all of the opinions were inadequately reasoned or documented. The administrative law judge, therefore, concluded that the opinions of Dr. Jaworski, Dr. Renn, and the West Virginia Board were entitled to little weight. *Id.*

In its previous decision, the Board agreed with claimant that the administrative law judge erred in discounting all three medical opinions, as based upon inaccurate coal mine employment histories. Although the Board recognized that an administrative law judge may reject a report that is based on an erroneous assumption or which reflects an incomplete picture of the miner's health, the Board held that, under the circumstances of this case, the administrative law judge had not explained how the physicians' reliance on longer coal mine employment histories undermined the credibility of their opinions that claimant's x-rays show large opacities of complicated pneumoconiosis. *Kidwell*, BRB No. 14-0270 BLA, slip op. at 8-9. The Board also instructed the administrative law judge to reconsider the admissibility of Dr. Renn's interpretation of the September 28, 2011 digital x-ray, and to reevaluate the credibility of Dr. Renn's opinion, as appropriate. *Id.* at 10. The Board further instructed the administrative law judge to consider the extent

[10] Dr. Renn provided his interpretation of the September 28, 2011 digital x-ray in his December 6, 2011 medical report. Claimant's Exhibit 7.

to which the opinion of the West Virginia Board was based on evidence not contained in the record.[11] *Id.* at 10 n.15.

On remand, the administrative law judge found "that the physicians' mistaken belief that [c]laimant had a longer coal mine employment history reduces the persuasiveness of their opinions because a physician is more likely to diagnose complicated pneumoconiosis if [he believes] that a miner has been exposed to coal mine dust for a longer period of time." Decision and Order on Remand at 14. Because all of the doctors overestimated the length of claimant's coal mine employment, the administrative law judge found that their opinions merited less weight in assessing whether claimant suffers from complicated pneumoconiosis. *Id.* The administrative law judge also accorded less weight to Dr. Renn's opinion, that claimant suffers from complicated pneumoconiosis, because he found that the doctor relied upon evidence not admitted into the record, namely, Dr. Renn's positive interpretation of a September 28, 2011 digital x-ray. *Id.* at 14-15. The administrative law judge also found that the opinion of the West Virginia Board was unpersuasive because it was based upon an x-ray interpretation not admitted into evidence. *Id.* at 15. The administrative law judge, therefore, found that the medical opinion evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). *Id.* at 17.

Claimant contends that the administrative law judge erred in his consideration of Dr. Renn's opinion. We disagree. The administrative law judge permissibly accorded less weight to Dr. Renn's opinion because he relied upon an excluded x-ray interpretation (his own positive interpretation of the September 28, 2011 digital x-ray) in forming his

[11] In its November 15, 2007 opinion diagnosing progressive massive fibrosis, the West Virginia Occupational Pneumoconiosis Board (West Virginia Board) stated:

> [X-ray] views of the chest are compared to the . . . Board's previous study of 07-08-94 and again show parenchymal changes consistent with advanced occupational pneumoconiosis. There are now large opacities in both upper lung zones . . . . Impression: Progression of occupational pneumoconiosis. Progressive Massive Fibrosis is now present.

Claimant's Exhibit 4. As the Board previously noted, while the West Virginia Board did not indicate the date of the x-ray that now revealed large opacities, the West Virginia Board indicated that it had reviewed treatment records from Preston Memorial Hospital and Dr. Ghamande. Claimant's Exhibit 4. As noted, *infra*, Dr. Ghamande's treatment records contain a November 2, 2006 x-ray read by a B reader as positive for complicated pneumoconiosis.

opinion that the miner suffers from complicated pneumoconiosis.[12] *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-109 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting).

We agree, however, with claimant that the administrative law judge erred in according less weight to the opinions of Dr. Jaworski and the West Virginia Board. The administrative law judge accorded the opinions of Dr. Jaworski and the West Virginia Board "reduced weight" because they mistakenly believed that claimant worked as a coal miner for a longer period of time than he actually did, thereby "increasing the likelihood that they would diagnose . . . complicated pneumoconiosis." Decision and Order on Remand at 4. However, given the fact that the administrative law judge credited claimant with a substantial coal mine employment history of 19.32 years, the administrative law judge erred in failing to explain why, under the facts of this case, the reliance of Dr. Jaworski and the West Virginia Board upon inflated coal mine employment histories[13] compromised their respective diagnoses of complicated pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335 (4th Cir. 1998); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76 (4th Cir. 1997). We, therefore, remand the case to the administrative law judge to explain how the reliance of Dr. Jaworksi and the West Virginia Board on inflated coal mine employment histories undermines the credibility of these opinions.

The administrative law judge found that Dr. Jaworski's opinion was entitled to little weight because the doctor failed to consider other objective medical evidence in order to obtain a more accurate picture of claimant's medical condition. Dr. Jaworski, who conducted the Department of Labor-sponsored examination, diagnosed complicated pneumoconiosis based upon claimant's history of coal mine dust exposure, Dr. Jaworski's positive interpretation of a February 11, 2011 x-ray, and the results of a lung biopsy. Director's Exhibit 11. The administrative law judge erred in failing to explain why Dr. Jaworski's failure to consider certain unidentified medical evidence undermined his diagnosis of complicated pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335 (4th Cir. 1998); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76 (4th Cir. 1997).

[12] Because the administrative law judge provided a valid basis for according less weight to Dr. Renn's opinion, we need not address claimant's remaining arguments regarding the weight he accorded to Dr. Renn's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[13] Dr. Jaworski relied upon claimant's reported coal mine employment history (Form CM-911a). Director's Exhibits 2, 11. Claimant calculates the maximum amount of coal mine employment supported by claimant's Form CM-911(a) as twenty-five years and nine months. Claimant's Brief at 31-32. The West Virginia Board relied upon a coal mine employment history of 29.5 years. Claimant's Exhibit 4.

The administrative law judge noted that the Board had instructed him to consider whether the interpretation of a November 2, 2006 x-ray, found in claimant's treatment records, was admissible, and to reevaluate the opinion of the West Virginia Board. Decision and Order on Remand at 15. Because he excluded the positive interpretation of claimant's November 2, 2006 x-ray, the administrative law judge accorded less weight to the West Virginia's Board opinion, finding it was not sufficiently documented. However, in light of our holding that the administrative law judge erred in not considering the positive interpretation of the November 2, 2006 x-ray, we instruct the administrative law judge, on remand, to reconsider the West Virginia Board's opinion.

Claimant finally contends that the administrative law judge erred in excluding Dr. Alexander's December 8, 2013 narrative report. We disagree. At the hearing, the administrative law judge found that employer had violated his pre-hearing order by not exchanging a pre-hearing report fifty days prior to the hearing. Hearing Transcript at 11. Although the administrative law judge allowed employer to submit its evidence at the hearing,[14] he provided claimant with an opportunity to respond to this specific evidence. *Id.* at 11, 21-22. Claimant subsequently sought to admit Dr. Alexander's December 8, 2013 narrative report. *See* Claimant's Exhibit 14 (excluded). The administrative law judge found that Dr. Alexander's report was not responsive to the evidence submitted at the hearing, but instead constituted a new affirmative medical report. Because claimant had already designated his two affirmative medical reports, the administrative law judge excluded Dr. Alexander's report. We hold that the administrative law judge acted within his discretion in excluding Dr. Alexander's December 8, 2013 medical report. *See Keener*, 23 BLR at 1-236; *Clark*, 12 BLR at 1-153.

In summary, on remand, the administrative law judge must reconsider whether claimant has established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), (c). In rendering all of his findings on remand, the administrative law judge's analysis of the medical evidence must 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 on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[14] At the hearing, employer submitted Dr. Wheeler's interpretations of an analog x-ray taken on February 1, 2011, a digital x-ray taken on September 28, 2011, as well as Dr. Caffrey's December 6, 2011 biopsy report and Dr. Abraham's treatment records. Hearing Transcript at 21-22, 39; Employer's Exhibits 1-4.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge