U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 23-0396 BLA
and 23-0397 BLA

MAXIE BARBER (o/b/o and Widow of CHARLES BARBER) Claimant-Respondent v. TRIPLE B CORPORATION and KENTUCKY CENTRAL INSURANCE COMPANY c/o AMERICAN RESOURCES INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 12/06/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Modification and Order Denying Employer's Request for Reconsideration of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Austin), Norton, Virginia, for Claimant.

Matthew J. Zanetti and Thomas L. Ferreri (Ferreri Partners, PLLC), Louisville, Kentucky, for Employer and its Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and BUZZARD, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits on Modification and Order Denying Employer's Request for Reconsideration (2019-BLA-05591 and 2021-BLA-05727) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on February 7, 2014,[1] and a survivor's claim filed on December 10, 2015.

In a June 7, 2018 Decision and Order Denying Benefits, ALJ Patrick M. Rosenow found the Miner had 11.72 years of coal mine employment and therefore determined Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] June 7, 2018 Decision and Order at 15. Considering entitlement under 20 C.F.R. Part 718, ALJ Rosenow found, based on Employer's concession, that the Miner was totally disabled by a respiratory or pulmonary impairment, but he determined Claimant did not establish the Miner had either clinical or legal pneumoconiosis. *Id.* at 18, 23. Thus, ALJ Rosenow denied benefits in the miner's claim and concluded Claimant also failed to establish entitlement to survivor's benefits. *Id*. at 23-24. On July 10, 2018, Claimant timely requested modification of the denials and the claims were ultimately referred to the Office of Administrative Law Judges.

[1] The Miner filed a prior claim on December 10, 1986, which the district director denied on March 4, 1987, for failure to establish any element of entitlement. Miner's Director's Exhibit 1. Claimant is the widow of the Miner, who died on November 20, 2015. Survivor Director's Exhibit 1. She is pursuing the miner's claim on his behalf, along with her own survivor's claim.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability or death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

In his June 1, 2021 Decision and Order on Modification, the subject of the current appeal, ALJ Sellers (the ALJ) found Claimant established that the Miner suffered from complicated pneumoconiosis arising out of his coal mine employment. The ALJ therefore determined she established a change in applicable condition of entitlement at 20 C.F.R. §725.309(c),[3] and invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); *see* 20 C.F.R. §718.304. Thus, he also found Claimant established grounds for modification based on a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Further, he determined that granting modification would render justice under the Act. Consequently, the ALJ awarded benefits in the miner's claim and found Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[4] Employer filed a motion for reconsideration, which the ALJ denied on June 7, 2023.

On appeal, Employer argues the ALJ erred by considering evidence in excess of the evidentiary limitations. Additionally, it argues the ALJ erred in finding the Miner had complicated pneumoconiosis and in concluding modification would render justice under the Act. Claimant responds in support of the award.[5] The Director, Office of Workers' Compensation Programs, declined to file a substantive response.

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the ALJ must also deny the subsequent claim unless he finds "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); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the Miner failed to establish any element of entitlement in his prior claim, Claimant had to submit new evidence establishing at least one element to obtain a review of the Miner's subsequent claim on the merits. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); Miner Director's Exhibits 1, 3.

[4] Section 422(*l*) of the Act provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established the Miner had 11.74 years of coal mine employment. *See Skrack v. Island Creek Coal Co.*,

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Modification

The sole basis on which an ALJ may grant modification in a deceased miner's claim or a survivor's claim is that a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). An ALJ has broad discretion to grant modification based on a mistake of fact, including the ultimate fact of entitlement to benefits. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). Here, the ALJ acted well within his discretion in granting modification.

Evidentiary Limitations

Employer first argues the ALJ erred in relying on Dr. DePonte's medical opinion, contending her review of sixteen different chest x-rays in forming her opinion and preparing her medical report resulted in her opinion exceeding the numerical evidentiary limitations for x-rays at 20 C.F.R. §725.414(a)(1), (2).[7] Employer's Brief at 2-3. Claimant responds, asserting Dr. DePonte appropriately reviewed the x-rays in preparing her medical report, as they were taken in conjunction with the Miner's medical treatment and therefore neither the x-rays nor her medical report run afoul of the numerical evidentiary limitations. Claimant's Brief at 5-7. We agree with Claimant's position.

During modification proceedings, each party is entitled to submit "one additional medical report in support of its affirmative case . . . ." 20 C.F.R. §725.310(b). Relevant to

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6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 9; Claimant's Brief at 15.

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine work in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 20-21.

[7] Employer did not raise this argument to the ALJ; however, the Board has held that the numerical evidentiary limitations set forth in the regulations are mandatory and, therefore, cannot be waived. *See Smith v. Martin Cnty. Coal Corp*., 23 BLR 1-69, 1-74 (2004); Employer's Post-Hearing Brief before the ALJ; Employer's Petion for Reconsideration. Thus, we will consider Employer's arguments.

this appeal, 20 C.F.R. §725.414(a)(1) of the regulations defines a "medical report" as "a physician's written assessment of the miner's respiratory or pulmonary condition" and clearly states that such report "may be prepared by a physician who examined the miner and/or *reviewed the available admissible evidence*." 20 C.F.R. §725.414(a)(1) (emphasis added). The type of "available admissible evidence" a physician may review in formulating her opinion and preparing her medical report is not limited to the radiography the parties designate as affirmative or rebuttal evidence under the evidentiary limitations for x-rays at 20 C.F.R. §725.414(a)(2) and (a)(3). It also includes "any record" of a miner's hospitalization or treatment for a respiratory or pulmonary disease, *including x-rays performed in the course of that treatment*, which are not subject to the numerical limitations. 20 C.F.R. §725.414(a)(4).

Here, Dr. DePonte's opinion was submitted as Claimant's "one additional medical report" under Section 725.310(b). In formulating her opinion and preparing her medical report, Dr. DePonte appropriately reviewed the "available admissible evidence," including sixteen x-rays dating from June 16, 2008, to November 18, 2015, which were contained in the Miner's treatment records. Those treatment records, in turn, were submitted by Claimant and properly admitted by the ALJ as evidence in this claim.[8] Claimant's Exhibit 11; *see* Claimant's Exhibits 1-2. The ALJ then considered, as he must, the credibility of Dr. DePonte's medical report in conjunction with the other medical reports of record, to determine whether that category of evidence as a whole supports a finding that the Miner had complicated pneumoconiosis. 30 U.S.C. §923(b) ("all relevant evidence shall be

[8] We note, moreover, that all of the parties understood Dr. DePonte's report was admissible as a medical report and Employer was given the opportunity to submit similar evidence consisting of its medical report from Dr. Meyer. Specifically, at the hearing, the ALJ admitted Dr. DePonte's report into the record as Claimant's Exhibit 11. Employer and the ALJ characterized this report as a "serial read" of multiple x-rays contained in Claimant's treatment records at Claimant's Exhibits 1 and 2. Hearing Transcript at 10-13. The ALJ, counsel for Claimant, Employer, and the Director all agreed that Dr. DePonte's opinion constituted Claimant's one affirmative medical report permitted on modification. HT at 12-13. The ALJ noted that Employer's Exhibit 1 would count as its one medical report on modification. That exhibit contained Dr. Meyer's "serial read" of the same treatment record x-rays that Dr. DePonte reviewed, as well as additional readings by Dr. Meyer of other x-rays. *Id*. at 10-11, 13. However, unlike Dr. Deponte's opinion, which consists of her overall impression of or conclusion regarding all of the radiography in general, Dr. Meyer actually provided separate individual readings of all of the x-rays. Thus, the alleged error Employer identifies with respect to the admission of Dr. DePonte's report – that her opinion constitutes separate individualized x-ray readings, not one medical report – applies more squarely to its own evidence.

considered"); *see* Decision and Order on Modification at 14-16; Hearing Transcript at 11-13.

Our dissenting colleague asserts that Dr. DePonte is prohibited from offering a "medical report" because, in reviewing the treatment record x-rays, Dr. DePonte offered "her interpretation" of those x-rays.[9] *See infra* at 17-21. This, of course, ignores the plain

[9] Our dissenting colleague also alleges that the x-ray images Dr. DePonte reviewed were not actually admitted into evidence and, therefore, Dr. DePonte "did not review evidence of record." *See infra* at 19 n.20. Our colleague's basis for raising this issue *sua sponte* is that the numerical evidentiary limitations at 20 C.F.R. §725.414 are mandatory and thus are not subject to waiver or forfeiture. *Smith*, 23 BLR at 1-74. However, her argument – that the x-ray images themselves were not admitted into the record – is unrelated to the numerical evidentiary limitations. She does after all concede that x-rays like these, performed as part of a miner's medical treatment, are not subject to the evidentiary limitations and therefore are admissible. Her argument, rather, relates to an alleged procedural defect, i.e., although the Miner's treatment records were duly admitted into evidence and the x-rays taken during that treatment are admissible, the parties neglected to admit the actual x-ray films into the record, thereby undermining the conclusions of any physician who offered an opinion on them. This view may come as a surprise to the parties, neither of whom alleged that these x-rays are not part of the record in this claim and both of whom had access to the actual radiographic images *and* submitted the opinions of medical experts who personally reviewed them. *See* Claimant's Exhibit 11 at 1; Employer's Exhibits 1 at 1-2.

Under our colleague's analysis, apparently *every* x-ray interpretation in this claim (and seemingly numerous other claims) suffers from the same defect given that actual radiographic images underpinning physicians' opinions or interpretations are rarely, if ever, part of a claim's record transmitted to the Board. Nor is it clear what evidentiary value those actual radiographic images (or, more likely, photocopies) would have if they were provided to the Board in this claim, beyond the physicians' opinions or interpretations regarding what the images reveal. Neither the Board nor the ALJ has the medical expertise or technical capability to interpret actual radiographic images; we instead necessarily rely on the interpretations and opinions of the medical experts. *See Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23-24 (1993); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987); Claimant's Exhibit 11 at 1 (Dr. DePonte reviewed the disc images "on a PACS workstation with medical grade monitors"). On that point, the regulations discuss the circumstances in which the parties must make "the original [x-ray] film[s] . . . available to [the Office of Workers' Compensation Programs] and the other parties." *See* 20 C.F.R. §718.102(f), (g). But, as an evidentiary matter, when the parties have access to the x-ray films in question, as in this claim, the regulations are concerned with the parties'

language of the regulation which, as discussed, very clearly states that a physician's "written assessment" of the miner's condition may be based on that physician's "review [of] the available admissible evidence" which, in this case, indisputably includes the very treatment record x-rays Dr. DePonte reviewed in formulating her opinion.[10] 20 C.F.R. §725.414(a)(1).

Notably, had Dr. DePonte *not offered* her own opinion as to why those treatment record x-rays support her diagnosis of complicated pneumoconiosis, an ALJ might rightly find her medical report to be unreasoned. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000); *Anderson*, 12 BLR at 1-113 (mere restatement of an x-ray reading is not a reasoned medical opinion). The fact that she *did offer* an explanation regarding her own assessment of the underlying admissible evidence neither detracts from the credibility of her medical report nor renders it inadmissible under the regulations. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6 (6th Cir. 1983) (The determination of whether a

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submission of the physicians' "reports," "interpretations," or "classification" of those radiographic images. *See* 20 C.F.R. §§718.102(f), (g), (h), 718.202(a), 725.414.

[10] The Board's decision in *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (en banc) does not support our dissenting colleague's position. There, the employer submitted a report from Dr. Bush and specifically designated it to rebut an autopsy report the claimant had submitted from Dr. Plata. Because Dr. Bush's opinion specifically addressed the pathology evidence and attempted to rebut Dr. Plata's pathological conclusions, the Board held *that aspect* of Dr. Bush's opinion could properly be submitted as a rebuttal autopsy report. However, the Board further held that because Dr. Bush's report also set forth conclusions based upon additional, non-autopsy evidence, i.e., "materials beyond the scope of the autopsy submitted by claimant," this *other aspect* of his opinion should have been designated as a medical report. Thus, *Keener* simply stands for the basic proposition, set forth in the regulations, that a party may designate a "physician's written assessment of a single objective test" according to the numerical evidentiary limitations for that specific type of evidence – but, when the physician's "written assessment" includes a broader "review[] [of] the available admissible evidence," it also must be admissible under the numerical evidentiary limitations for medical reports. 20 C.F.R. §725.414(a)(1). Here, consistent with the holding in *Keener*, Claimant properly designated, as x-ray evidence, Dr. DePonte's International Labour Organization (ILO) classification x-ray form for the May 8, 2014 x-ray – it is, after all, a "written assessment of a single objective test." Miner Director's Exhibit 16. Also consistent with *Keener*, if not required by it, Claimant designated, as a medical report, Dr. DePonte's broader narrative conclusions that were based upon her review of multiple pieces of evidence in Claimant's treatment records. Claimant's Exhibit 11.

medical opinion is reasoned and documented requires the fact finder to examine the validity of the physician's reasoning in light of the studies conducted and the objective indications upon which the opinion is based.); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987) (A reasoned opinion is one in which the ALJ finds the underlying documentation adequate to support the physician's conclusions.).

Thus, at its core, our dissenting colleague's approach reflects a fundamental misunderstanding of the regulatory definition of a medical report and the evidentiary rules governing their admission.[11] As the ALJ's consideration of Dr. DePonte's medical report is consistent with the law, we affirm it.[12]

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[11] Our dissenting colleague's misunderstanding as to why Dr. DePonte's opinion is a "medical report," instead of several individualized "x-ray interpretations," may stem from the fact that Dr. DePonte often participates in black lung claims as an interpreter of affirmative or rebuttal x-ray evidence. However, there is no basis in law or fact to suggest that a party cannot ask Dr. DePonte to review the admissible evidence, including treatment record x-rays, and offer her own "written assessment" of that evidence as part of a properly admitted "medical report." Nor is there any dispute that Dr. DePonte, a Board-certified radiologist and B reader, is qualified to review the admissible evidence and offer her opinion on whether it substantiates a diagnosis of complicated pneumoconiosis.

Here, the ALJ demonstrated a proper understanding of the difference between an individual x-ray interpretation that has been designated by the parties as affirmative x-ray evidence and a physician's written assessment of a variety of admissible evidence as part of a medical report. In weighing the x-ray evidence at 20 C.F.R. §718.304(a), the ALJ considered only the interpretations Claimant designated as affirmative or rebuttal x-ray evidence under the evidentiary limitations at 20 C.F.R. §725.414(a)(2). Thus, with respect to Dr. DePonte, he considered only her separate, properly-designated ILO classification of the May 8, 2014 x-ray. Decision and Order on Modification at 11, 13-14; Miner Director's Exhibit 16. Thus, he did not consider x-ray interpretations at 20 C.F.R. §718.304(a) in excess of the evidentiary limitations. Then, when weighing the "other evidence" at 20 C.F.R. §718.304(c), he appropriately considered Dr. DePonte's medical report, i.e., her "written assessment" of the "available admissible evidence," which conveyed her opinion on why the Miner's treatment record x-rays and CT scan support a diagnosis of complicated pneumoconiosis.

[12] Even if Employer and our dissenting colleague were correct that Dr. DePonte's medical report should have been excluded from the record for exceeding the evidentiary limitations, neither explains why the alleged error requires remand. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it]

Miner's Claim - Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffered 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 invoked the irrebuttable presumption, the ALJ must weigh together all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The ALJ found the x-rays, medical opinions, and the Miner's treatment records support a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(a), (c);[13] Decision and Order on Modification at 11-21. Weighing all the evidence together, the ALJ concluded Claimant established the Miner had complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order on Modification at 21-22.

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points could have made any difference"). As discussed, the ALJ did not weigh (and thus did not credit) Dr. DePonte's medical report in finding the specifically designated x-ray evidence establishes complicated pneumoconiosis at 20 C.F.R. §718.304(a). With respect to the ALJ's weighing of the medical reports at 20 C.F.R. §718.304(c), Employer does not challenge his finding that Dr. Mettu's opinion diagnosing complicated pneumoconiosis is entitled to probative weight because it is consistent with the ALJ's finding that the designated x-ray evidence supports a finding of complicated pneumoconiosis. Nor does Employer challenge the ALJ's findings that Drs. Broudy's, Rosenberg's, and Meyer's contrary medical opinions, which do not diagnose complicated pneumoconiosis, are entitled to little probative weight because they are inconsistent with the ALJ's findings that the designated x-ray evidence is positive for the disease. Thus, although we hold the ALJ *did not* err in considering Dr. DePonte's medical report diagnosing complicated pneumoconiosis, the alleged error that Employer and our dissenting colleague attempt to identify is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[13] The record contains no biopsy or autopsy evidence; thus, Claimant cannot establish complicated pneumoconiosis at 20 C.F.R. §718.304(b).

X-rays – 20 C.F.R. §718.304(a)

The ALJ considered six readings of two x-rays taken on April 11, 2014, and May 8, 2014.[14] Decision and Order on Modification at 11-14; Miner Director's Exhibits 12, 16; ALJ Exhibit 5[15] (Employer's Exhibits 1-4). He found all the physicians who interpreted the x-rays are dually qualified as B readers and Board-certified radiologists. Decision and Order on Modification at 12.

Dr. Halbert read the April 11, 2014 x-ray as positive for simple and complicated pneumoconiosis, Category A, while Drs. Shipley and Meyer read it as negative for both diseases. Miner Director's Exhibit 12; ALJ Exhibit 5 (Employer's Exhibits 1, 4). Specifically, Dr. Shipley identified a "stellate nodular lesion in the right upper zone associated with apical pleural thickening, parenchymal bands and architectural distortion." ALJ Exhibit 5 (Employer's Exhibit 4 at 1). He also observed that there "is no background of small, rounded opacities" and that the appearance of the lesion "is atypical of a large opacity of pneumoconiosis." *Id*. Instead, he indicated the changes in the right lung are "suspicious for lung cancer." *Id*. Dr. Meyer also identified "right apical thickening with a spiculated opacity projecting in the right upper zone and parenchymal distortion" and stated "suspect lung cancer with changes of radiation fibrosis." ALJ Exhibit 5 (Employer's Exhibit 1 at 1). In addition, he observed scattered calcified granulomas and ill-defined nodules in the lower lung zones that he indicated "may be parenchymal metastasis" and recommended a chest computed tomography (CT) scan or clinical correlation. *Id*.

Dr. DePonte read the May 8, 2014 x-ray as positive for simple and complicated pneumoconiosis, Category A, while Drs. Shipley and Meyer read it as negative for simple and complicated pneumoconiosis. Miner Director's Exhibit 16; ALJ Exhibit 5 (Employer's Exhibits 2, 3). Dr. DePonte also noted "[s]evere right apical thickening" and recommended "comparison with old films or chest CT" to exclude malignancy as a cause. Miner Director's Exhibit 16. Dr. Shipley again noted the lack of small, rounded opacities

[14] The ALJ stated that he also considered numerous x-rays contained in the Miner's treatment records diagnosing the Miner with ground glass opacities, fibrosis, and scarring. Decision and Order on Modification at 14; Claimant's Exhibit 1. However, he permissibly gave them "little probative weight" because none of the radiologists offered an opinion on the presence or absence of complicated pneumoconiosis. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070 (6th Cir. 2013); *Marra v. Consolidation Coal Co*., 7 BLR 1-216, 1-218-19 (1984); Decision and Order on Modification at 14.

[15] At the hearing the ALJ admitted Employer's Exhibits 1 through 9 from the record before ALJ Rosenow as ALJ Exhibit 5. Hearing Transcript at 7.

in the background and the atypical appearance of the large nodule and commented that the large nodule is "suspicious" for lung cancer. ALJ Exhibit 5 (Employer's Exhibit 2 at 1). Dr. Meyer's interpretation was consistent with his previous findings, and he again attributed the changes in the right lung apex as "suspicious for lung cancer" and the nodules at the lung bases as "likely metastasis," recommending clinical correlation. ALJ Exhibit 5 (Employer's Exhibit 3 at 1).

The ALJ found the April 11, 2014 x-ray and May 8, 2014 x-ray positive for complicated pneumoconiosis because he found the opinions of Drs. Meyer and Shipley to be equivocal and speculative, and thus outweighed by the opinions of Drs. Halbert and DePonte. Decision and Order on Modification at 12-14. Having found both x-rays positive for complicated pneumoconiosis, the ALJ concluded the x-ray evidence supports a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(a). *Id.* at 14.

Employer argues the ALJ erred in finding Drs. Shipley's and Meyer's readings were equivocal or speculative merely because they recommended a CT scan to rule out lung cancer as a cause for Claimant's large opacity. Employer's Brief at 5-6. However, Employer points to no evidence in the record to support its argument that the Miner may have had lung cancer, and we see no error in the ALJ's conclusion that neither physician credibly explained why Claimant's large opacity was due to another disease process. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287 (4th Cir. 2010) (it is permissible to discredit a radiological interpretation that is negative for complicated pneumoconiosis and presents "alternative etiologies" for any large opacities if the record contains no evidence of the suggested alternatives); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

The ALJ also properly discredited Dr. Shipley's interpretations as contrary to the legal definition of complicated pneumoconiosis, which does not require that a Category A, B, or C large opacity be accompanied by a finding of simple pneumoconiosis. Decision and Order on Modification at 12, *citing Keene v. G&A Coal Co.*, BRB No. 96-1689 BLA-A, slip op. at 3-4 (Sept. 27, 1996) (unpub.) (definition of complicated pneumoconiosis does not require a background of simple pneumoconiosis). In addition, the ALJ permissibly gave less weight to Dr. Shipley's interpretations because he did not adequately explain how he concluded that Claimant's large opacity was "atypical" for complicated pneumoconiosis. ALJ Exhibit 5 (Employer's Exhibits 2, 4); *see Rowe*, 719 F.2d at 255; Decision and Order on Modification at 12.

We consider Employer's arguments relevant to the x-ray evidence to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the ALJ's finding the x-ray evidence supports a finding of

complicated pneumoconiosis. *See* 20 C.F.R. §718.304(a); Decision and Order on Modification at 14.

Other Medical Evidence – 20 C.F.R. §718.304(c)

The ALJ next considered the "other medical evidence" in the form of medical opinions and the Miner's treatment records. Decision and Order on Modification at 14-21.

Medical Opinions

The ALJ considered the medical opinions of Drs. Mettu, DePonte, Broudy, Rosenberg, and Meyer. Decision and Order on Modification at 14-20. Dr. Mettu conducted the Department of Labor (DOL)-sponsored examination of the Miner on April 2, 2014, and prepared an initial report diagnosing complicated pneumoconiosis based on the April 11, 2014 x-ray conducted as part of the exam. Miner Director's Exhibit 12. In his supplemental report requested by the DOL, Dr. Mettu indicated that even if the Miner had only 8.5 years of coal mine employment, he would still diagnose him with complicated pneumoconiosis. Miner Director's Exhibit 50. Dr. DePonte reviewed several x-rays and a chest CT scan in the Miner's treatment records and found "multiple opacities exceeding one [centimeter] in longest dimension any of which may represent a large opacity of complicated coal workers' pneumoconiosis." Claimant's Exhibit 11.

In contrast, Drs. Broudy, Rosenberg, and Meyer opined the Miner did not have complicated pneumoconiosis. Miner Director's Exhibit 13; ALJ Exhibit 5 (Employer's Exhibits 5, 6); Employer's Exhibit 1. Dr. Broudy conducted a review of records and explained in his initial and supplemental opinions that if the lesion observed was due to complicated pneumoconiosis, the Miner would have a background of simple pneumoconiosis, which was not observed on Dr. Shipley's or Dr. Meyer's interpretations. Miner Director's Exhibit 13; ALJ Exhibit 5 (Employer's Exhibit 5 at 2 (unpaginated)). Dr. Rosenberg also conducted a review of the Miner's records and determined there was "no conclusive evidence" of complicated pneumoconiosis, noting that the Miner's coal mine employment history of 8.5 years "is not expected to be associated with sufficient coal dust exposure to cause complicated disease." ALJ Exhibit 5 (Employer's Exhibit 6 at 4). Dr. Meyer reviewed chest x-rays from the Miner's treatment records taken between June 16, 2018, and November 18, 2015, as well as a May 20, 2014 treatment CT scan, and concluded that the scarring in the right apex and the calcified nodules are "most consistent with post-inflammatory scarring as sequelae of prior granulomatous infection," and he observed "no associated mass of conglomerate fibrosis or surrounding small opacities to suggest sequelae of coal dust." Employer's Exhibit 1 at 4.

The ALJ found Drs. Mettu's and DePonte's opinions entitled to probative weight as they are consistent with and supported by his determination that the x-rays the parties

designated are positive for the disease. He also found the physicians sufficiently explained why the large opacities they observed are complicated pneumoconiosis. Decision and Order on Modification at 14-16. On the other hand, the ALJ determined Drs. Broudy's, Rosenberg's, and Meyer's opinions are entitled to little probative weight because they are inconsistent with his findings regarding the x-ray evidence and do not sufficiently explain the alternative diagnoses they offered for the large nodules they observed. *Id*. at 17-20.

Employer argues the ALJ erred in relying on Dr. DePonte's report because her opinion is equivocal. Employer's Brief at 3-4. We disagree.

The ALJ acknowledged that Dr. DePonte identified multiple large opacities, "any one of which may represent a large opacity of complicated coal workers' pneumoconiosis." Decision and Order on Modification at 15-16; Employer's Brief at 4. However, he permissibly found Dr. DePonte's use of the term "may" was not an equivocal diagnosis of complicated pneumoconiosis because: she observed that one of the opacities in the right upper lobe on the CT scan she reviewed had the "classic contour" of complicated pneumoconiosis; she explained how she excluded alternative diagnoses of malignancy or acute process for a right upper lobe opacity seen on x-ray "given the stability of the opacity over a period of seven years;" and she "provided measurements of the opacities she observed, all of which exceed one centimeter." Decision and Order on Modification at 15-16; *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012).

As the ALJ adequately explained his reasons for crediting Dr. DePonte's opinion, we see no error in his giving probative weight to it. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305-06 (6th Cir. 2005) (ALJ must adequately explain the reason for crediting certain evidence over other evidence); *Peabody Coal Co. v. Hill*, 123 F.3d 412, 415 (6th Cir. 1997) (same); Decision and Order on Modification at 16. As Employer does not otherwise challenge the ALJ's determinations concerning the medical opinions, we affirm them. *Skrack*, 6 BLR at 1-711.

Treatment Records

The ALJ also considered the Miner's treatment records from Paul B. Hall Medical Center, Highlands Regional Medical Center, Dr. Ayesha Sikder, and Dr. Mark Caruso. Decision and Order on Modification at 20-21. He gave "little probative weight" to the May 20, 2014 treatment CT scan because the radiologist conducting the scan did not offer an opinion on the presence or absence of complicated pneumoconiosis. *Id*. at 20; Claimant's Exhibit 1 at 22. In addition, he found that although Dr. Sikder, the Miner's treating pulmonologist, diagnosed coal workers' pneumoconiosis ("CWP"), "progressive CWP, advanced CWP, and severe CWP," she did not specifically address whether the Miner had complicated pneumoconiosis or progressive *massive* fibrosis, or set forth the basis for her

diagnoses, even if they could be interpreted as a finding of complicated pneumoconiosis. Decision and Order on Modification at 20-21; Claimant's Exhibit 1. Thus, he determined Dr. Sikder's treatment records, in isolation, do not establish complicated pneumoconiosis. Decision and Order on Modification at 21.

In addition, the ALJ reviewed treatment records from Dr. Caruso, the Miner's treating physician, who diagnosed the Miner with pneumoconiosis. Although the ALJ found Dr. Caruso had not previously offered an opinion on whether the Miner's pneumoconiosis was the more severe "complicated" form, *see* ALJ Exhibit 5 (Employer's Exhibit 9), he credited Dr. Caruso's more recent May 21, 2014 treatment note specifically diagnosing the Miner with "severe complicated coal workers[']s pneumoconiosis" based, in part, on the physician's "personal review" of the May 20, 2014 CT scan revealing "chronic infiltrates disfiguring suggestive of advance coal workers[']s pneumoconiosis complicated with progressive massive fibrosis." Decision and Order on Modification at 21; Claimant's Exhibit 1 at 20-21. The ALJ determined Dr. Caruso's opinion is entitled to "paramount weight" because he "treated the Miner for many years" and "was familiar with the Miner's condition." Decision and Order on Modification at 21. The ALJ gave the remining treatment records little weight because they did not address the presence or absence of complicated pneumoconiosis. *Id*.

Employer contends the ALJ erred in crediting Dr. Caruso's treatment note, alleging it is "equivocal and vague" because it states the Miner's CT scan is only "suggestive" of complicated pneumoconiosis and does not explain the basis for the diagnosis. Employer's Brief at 4-5. We are not persuaded by Employer's argument since the ALJ has discretion to determine the persuasiveness of a medical opinion and whether the statements by the physician are equivocal. *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006) ("refusal to express a diagnosis in categorical terms is candor, not equivocation").

As an additional matter, our dissenting colleague, not Employer, asserts the ALJ mischaracterized the May 21, 2014 treatment note as being authored by Dr. Caruso rather than Dr. Sikder. Even if true, she fails to explain why remand is required.[16] *Johnson*, 12 BLR at 1-55; *Larioni*, 6 BLR at 1-1278. As we have explained, the ALJ did not consider any x-ray interpretations in excess of the evidentiary limitations in finding Claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). And, as discussed, Employer does not challenge the ALJ's crediting of Dr. Mettu's opinion

[16] The May 21, 2014 treatment note indicates that it was "requested by" Dr. Caruso as the "consulting physician" but "dictated by" Dr. Sikder. *See infra* at 21-22; Claimant's Exhibit 1 at 20-21. Both physicians were treating Claimant and attempting to diagnose his condition. *See* Claimant's Exhibit 1.

diagnosing the disease or discrediting of the contrary medical reports of its experts at 20 C.F.R. §718.304(c). Having permissibly found that the remaining treatment records are entitled to no weight because they do not address the presence or absence of complicated pneumoconiosis, even if the ALJ had given no weight to the May 21, 2014 treatment note diagnosing complicated pneumoconiosis, such a finding still would not contradict the evidence the ALJ credited as establishing the disease.

Conclusion

Because it is supported by substantial evidence, and Employer raises no further argument, we affirm the ALJ's overall finding that Claimant established complicated pneumoconiosis by the x-ray and medical opinion evidence. *See Melnick*, 16 BLR at 1-33; 20 C.F.R. §718.304; Decision and Order on Modification at 21-22. We further affirm, as unchallenged, the ALJ's finding that the Miner's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack*, 6 BLR at 1-711; Decision and Order on Modification at 22. Consequently, we affirm the ALJ's finding that Claimant established a change in an applicable condition of entitlement and a mistake in determination of fact in ALJ Rosenow's decision and order denying benefits. 20 C.F.R. §§725.309, 725.310; Decision and Order on Modification at 22.

Justice Under the Act

Employer next argues the ALJ erred in determining that granting modification renders justice under the Act because all the evidence submitted on modification could have been submitted when the case was assigned to ALJ Rosenow, as the Miner died prior to his decision. Employer's Brief at 6-7.

Determining whether granting modification would render justice under the Act is committed to the broad discretion of the ALJ. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255-56 (1971). Therefore, the Board reviews an ALJ's findings in this regard under an abuse of discretion standard. *See Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996). Employer has not demonstrated an abuse of discretion in this case.

In *Kinlaw v. Stevens Shipping & Terminal Co.*, the Board held that an ALJ's authority to reopen a case based on any mistake in fact "is discretionary and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice." 33 BRBS 68, 72 (1999) (citing *Wash. Soc'y for the Blind v. Allison*, 919 F.2d 763, 769 (D.C. Cir. 1991)). Courts have recognized that, in considering whether to reopen a claim, an adjudicator must exercise the discretion granted under 20 C.F.R. §725.310 by assessing factors relevant to rendering justice under the Act. *Sharpe v. Director, OWCP* (*Sharpe I*), 495 F.3d 125, 132-33 (4th Cir. 2007); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 547 (7th Cir. 2002); *D.S.* [*Stiltner*] *v. Ramey*

Coal Co., 24 BLR 1-33, 1-38 (2008). These factors include the need for accuracy, the quality of the new evidence, the diligence and motive of the party seeking modification, and the futility or mootness of a favorable ruling. *Sharpe I*, 495 F.3d at 132-33; *Hilliard*, 292 F.3d at 547; *Stiltner*, 24 BLR at 1-38.

The ALJ properly applied the factors relevant to determining whether granting modification renders justice under the Act. Decision and Order on Modification at 23-24. Although Employer cites a prior, unpublished Board case to support its assertion that Claimant's motive, diligence, and accuracy are suspect, it does not explain how the ALJ's findings in that case, with a different set of facts,[17] mandate the same result in the current case. *See* Employer's Brief at 6-7. Moreover, as discussed, new evidence is specifically permitted in modification proceedings, as the ALJ has "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence or merely further reflection on the evidence initially submitted." *See O'Keeffe*, 404 U.S. at 256. Further, modification favors accuracy over finality, and modification may be employed to present argument or evidence that could have been presented at an earlier stage of litigation. *See Sharpe I*, 495 F.3d at 141; *see Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968); *Hilliard*, 292 F.3d at 547.

In this case, the ALJ permissibly found that the need for accuracy weighs in favor of granting the request for modification because the evidence shows that the Miner was entitled to benefits. *See Hilliard*, 292 F.3d at 547; Decision and Order on Modification at 23. In addition, the ALJ found the quality of the evidence weighs in favor of granting the Claimant's modification request as the newly submitted evidence "persuasively establishes that the Miner had complicated pneumoconiosis." Decision and Order on Modification at 23. Further, he found Claimant's diligence weighs in favor of granting modification as she filed a timely request and Employer did not offer any evidence that she had an improper motive. *Id*. at 24. Finally, the ALJ permissibly concluded that Claimant's request is neither futile nor moot given his decision to award benefits. *Sharpe I*, 495 F.3d at 132-33; *Hilliard*, 292 F.3d at 547; *Stiltner*, 24 BLR at 1-38; Decision and Order on Modification at 24.

Because Employer has not established the ALJ abused his discretion, we affirm the ALJ's determination that granting modification renders justice under the Act. *See Worrell*,

[17] Employer relies on *Wilson v. Peabody Coal Co.*, BRB No. 09-0770 BLA (Aug. 11, 2010) (unpub.), where the Board affirmed, as within the ALJ's discretion, his determination that granting modification was not warranted based on Employer's repeated failure to submit the curriculum vitae of its radiologists and its attempt to correct that oversight through its request for modification. Employer's Brief at 6-7.

27 F.3d at 230; *Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996); Decision and Order on Modification at 24. Consequently, we affirm the award of benefits in the miner's claim.

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim, and Employer raises no specific challenge to the award in the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co*., 25 BLR 1-121, 1-126 (2013).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits on Modification and Order Denying Employer's Request for Reconsideration.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the ALJ's determination that Dr. DePonte properly reviewed the x-rays referenced in the Miner's treatment records. The ALJ erred in considering and relying on Dr. DePonte's opinion because she personally reviewed sixteen treatment chest x-rays, created her own interpretations of those x-rays, and incorporated those interpretations in her medical report. The x-ray interpretations made by Dr. DePonte exceeded the number of x-ray interpretations Claimant was entitled to submit under the Department's regulations. Since the ALJ relied on Dr. DePonte's report to find entitlement and determine that modification would render justice under the Act, this error was not harmless. Moreover, the ALJ erred in his consideration of Dr. Caruso's treatment note. Since the ALJ also relied on Dr. Caruso's note to find entitlement

and determine modification would render justice under the Act, those errors, too, were not harmless. Decision and Order on Modification at 21-24.

Consequently, I would vacate the ALJ's findings as to the medical opinion evidence and his consideration of all the relevant evidence together on the issue of complicated pneumoconiosis, as well as his ultimate determination of entitlement. I thus would remand for further consideration in accordance with the statutory and regulatory requirements. 20 C.F.R. §718.304; *Melnick*, 16 BLR at 1-33.

Dr. DePonte's interpretations were not admissible because in modification proceedings, Claimant is "entitled to submit no more than one additional chest X-ray interpretation . . . in support of its affirmative case along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of §725.414."[18] 20 C.F.R. §725.310(b).[19]

In this case, Claimant initially submitted Dr. Halbert's interpretation of the x-ray dated April 11, 2014, and Dr. DePonte's interpretation of the x-ray dated May 8, 2014. Miner Director's Exhibits 12, 16. Following her request for modification, Claimant submitted Dr. DePonte's report. Claimant's Exhibit 11. Dr. DePonte reviewed sixteen x-rays from Claimant's treatment records and incorporated her own interpretations of those x-rays in that report. *Id*. The x-rays themselves were not admitted into evidence. Contrary to the majority's assertion, the fact that the x-rays were part of the Miner's treatment records is irrelevant. The regulation limits the number of x-ray *interpretations* that may be

[18] The evidentiary limitations at 20 C.F.R. §725.414 apply to modification proceedings, and work in tandem with the evidentiary limitations governing the submission of new evidence on modification at 20 C.F.R. §725.310(b). *Rose v. Buffalo Mining Co*., 23 BLR 1-221, 1-227 (2007). On modification, therefore, "each party may submit its full complement of medical evidence allowed by 20 C.F.R. §725.414, *i.e.*, additional evidence to the extent the evidence already submitted in the claim proceedings is less than the full complement allowed, plus the party may also submit the additional medical evidence allowed by 20 C.F.R. §725.310(b)." *Id.* at 1-228.

[19] The regulations permit the evidentiary limitations to be exceeded if the ALJ finds good cause for doing so. *See* 20 C.F.R. §725.456(b)(1). The parties do not contend good cause exists, and the ALJ did not make any such finding here. It should be noted that relevancy alone is an insufficient basis for a good cause finding. *See Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d. 278, 297 n.18 (4th Cir. 2007) (if relevancy were enough to meet the good cause standard for exceeding black lung evidentiary limitations at Section 725.414, it would render those limitations "meaningless").

submitted. While x-ray interpretations made for treatment purposes are treatment record evidence not subject to limitation,[20] Dr. DePonte created *her* interpretations of the x-rays solely for purposes of this litigation. Because Dr. DePonte interpreted sixteen x-rays (in addition to her previously properly admitted interpretation of the May 8, 2014 x-ray), and those interpretations were entered into evidence as incorporated in her report, Claimant unquestionably exceeded the evidentiary limitations on x-ray interpretations. *See* 20 C.F.R. §§725.414(a), 725.310(b).

The majority contends this does not matter because the ALJ did not consider the x-ray interpretations as such when looking solely at the x-ray evidence. To the contrary,

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[20] In this case the evidentiary record contains interpretations of the sixteen x-rays made by physicians (not Dr. DePonte) who were involved in Claimant's treatment. Those interpretations are not subject to the evidentiary limits. 20 C.F.R. §725.414(a)(4). The x-ray images themselves were not admitted into evidence. *See* Claimant's Exhibits 1, 2. Thus Dr. DePonte did not review evidence of record (which would have been the case had she merely reviewed the x-ray interpretations prepared for treatment purposes). Dr. DePonte was furnished the x-ray images and interpreted them solely for purposes of presenting Claimant's case for entitlement to benefits. Her readings constitute interpretations that are affirmative evidence subject to, and exceeding, the evidentiary limitations. 20 C.F.R. §§725.310(b), 725.414. Further, contrary to the majority's statements, I have not argued that every x-ray reading would be inadmissible if the actual radiographic image is not in the record. *See supra* at 6-7 n.9. Rather, I note that the x-rays themselves were not in evidence in order to emphasize what the reality is in this case. The crux of the matter in this case is that instead of relying on the interpretations of the treatment x-rays that are in the record, Drs. DePonte and Meyer independently read the treatment x-ray images. Their readings are x-ray interpretations conducted to support their respective positions in this claim (i.e. not made for treatment purposes) and therefore subject to the evidentiary limitations. The majority seeks to confuse the matter by referring to the x-rays as treatment records and saying that what Dr. DePonte did was to opine as to treatment records. However, they ignore that an x-ray interpretation is in fact an opinion as to what the x-ray shows, as demonstrated by the ILO form. The regulations limit the number of x-ray interpretations made for purposes of litigation that a party may introduce into evidence. Drs. DePonte and Meyer made interpretations of sixteen x-rays in addition to the interpretations specifically entered into the record as x-ray interpretations. They then provided documents reporting those sixteen x-ray interpretations. When those documents were introduced and accepted into the record, the parties placed x-ray interpretations exceeding the limits set by the regulations into evidence. That was a violation of the regulations, an error by the ALJ, and, because of the ALJ's reliance on that evidence, not harmless.

however, the interpretations had an impact on the record and on the ALJ's decision-making. The ALJ considered *all* of Dr. DePonte's report, which incorporated her interpretations of the sixteen x-rays, when considering the medical opinion evidence and in determining whether the evidence as a whole supported a finding of complicated pneumoconiosis. *See* Decision and Order on Modification at 15-16, 21-22. Thus, the excessive x-ray interpretations had an impact in the forming of Dr. DePonte's opinion, the weight the ALJ gave Dr. DePonte's report, the ALJ's consideration of the opinions of Employer's experts,[21] *id*. at 18-20, and the ALJ's consideration of the evidence as a whole. Moreover, they affected the ALJ's consideration of whether finding entitlement would render justice under the Act, since he gave considerable weight to the quality of Dr. DePonte's report. *Id*. at 23.[22]

Because the parties did not argue, and the ALJ did not find, good cause existed to exceed the evidentiary limitations of x-ray evidence, and the ALJ's consideration of Dr.

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[21] The majority attempts to excuse the ALJ's erroneous admission and consideration of Dr. DePonte's serial x-ray readings in her medical report because the parties did not specifically object to the admission of Dr. DePonte's medical report at the hearing and Employer submitted Dr. Meyer's medical report which included readings of the treatment record x-rays. But, as the majority acknowledges, evidentiary limitations cannot be waived. *See Smith*, 23 BLR at 1-74; *supra* at 4 n.7. Thus, a party's failure to object to the admission of evidence in excess of the limitations at 20 C.F.R. §725.414 is irrelevant. Rather, absent a finding of "good cause," this evidence must be excluded. *J.V.S.* [*Stowers*] *v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-84 (2008). Thus, on remand, the ALJ would also need to address the admissibility of Dr. Meyer's report, including whether good cause exists to waive the evidentiary limitations for either report. 20 C.F.R. §§725.310, 725.414, 725.456(b)(1); *see* 65 Fed. Reg. 79,920, 79,976 (Dec. 20, 2000) (Opposing parties should be governed by the same evidentiary rules, so a goal of the evidentiary limitations in 20 C.F.R. §§725.310 and 725.414 "is to ensure that claimant and the responsible operator have an equal opportunity to present the highest quality evidence to the factfinder.").

[22] The majority also overlooks Board precedent requiring any report that 1) considers a range of evidence as to the Claimant's condition and 2) also incorporates the authoring physician's interpretations of particular evidence must fit within the evidentiary limitation for interpretation of the particular type of evidence as well as the evidentiary limitation for a medical report. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-239 (2006) (en banc). Contrary to the interpretation of the majority, the Board held in *Keener* that Dr. Bush's report, reviewing both pathological and clinical evidence, constituted *both* an autopsy report *and* a medical report. As such it was subject to the evidentiary limitations pertinent to *both* categories. Had the Board interpreted the evidence

DePonte's opinion affected his weighing of the medical opinion evidence and the evidence as a whole, I would vacate his findings that the medical opinion evidence and the evidence as a whole support a finding of complicated pneumoconiosis, as well as his determination that modification would render justice under the Act. 20 C.F.R. §718.304(c); *Melnick*, 16 BLR at 1-33; *Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968).

Further, there is merit to Employer's assertion that the ALJ erred in his consideration of Dr. Caruso's opinion as expressed in a note in the treatment records.[23] Employer argues Dr. Caruso's treatment note is "equivocal and vague." Employer's Brief at 4-5.

It is unclear how the ALJ construed Dr. Caruso's note as diagnosing complicated pneumoconiosis. According to the ALJ, Dr. Caruso opined that the Miner's CT scan showed "complicated pneumoconiosis with progressive massive fibrosis." Decision and Order on Modification at 21. However, that diagnosis does not appear anywhere in Dr. Caruso's note, and the ALJ does not explain how he concluded that was Dr. Caruso's opinion. Further, the basis for any such opinion by Dr. Caruso also is unclear. The ALJ stated that Dr. Caruso reviewed the May 2014 CT scan; however, Dr. Caruso's note does not indicate he did so, and none of the CT scan readings produced as radiology test information or radiology results during the Miner's hospitalization in May reported that the Miner had complicated pneumoconiosis or massive pulmonary fibrosis. Decision and Order on Modification at 21; Claimant's Exhibit 1. The ALJ is required to examine the reasoning and documentation underlying any medical opinion, and it is not evident that he has done so here. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

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according to the majority's view, it would have held Dr. Bush's report constituted a medical report but *did not* count as an autopsy report. In accordance with *Keener*, Dr. DePonte's review and interpretations of the x-rays and CT scan are subject to the limitations pertinent to x-rays and CT scans, just as Dr. Bush's report was subject to the autopsy report limitations. *Id*. Further, contrary to the majority's interpretation of *Keener*, *see supra* at 7 n.10, a party cannot circumvent the evidentiary limitations by labeling its evidence as a medical report. *Keener*, 23 BLR at 241-42; *Harris v. Old Ben Coal Co*., 23 BLR 1-98, 1-103-09 (2006). The majority creates a strawman argument by suggesting that I would preclude consideration of Dr. DePonte's report as a medical report; however, whether Dr. DePonte's report is a medical report is not the issue. Rather, the point is that regardless of whether it is also a medical report, it constitutes x-ray interpretations and is subject to the limitations on such interpretations.

[23] There is only one document dated May 21, 2014, authored by Dr. Caruso in the record. It is headed "History and Physical." Claimant's Exhibit 1.

Specifically, he has not explained how he concluded Dr. Caruso actually diagnosed complicated pneumoconiosis with progressive massive fibrosis, let alone why (besides being a treating physician) Dr. Caruso should be credited in this regard. Thus, the ALJ's opinion does not satisfy the Administrative Procedure Act (APA).[24] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Contrary to the assertions of the majority, the errors with respect to consideration of Dr. Caruso's report were not harmless. The ALJ gave "paramount weight" to Dr. Caruso's treatment note and relied on it to find the evidence established entitlement and modification rendered justice under the Act.[25] Decision and Order on Modification at 21-23. Therefore, I also would remand the case for the ALJ to reconsider the weight he accorded Dr. Caruso's treatment note and to explain his reasoning in compliance with the APA.

Although the majority contends error, if any, by the ALJ in considering Dr. DePonte's opinion and Dr. Caruso's May 2014 treatment note is harmless, I disagree. The Board's review authority is limited; it does not permit acceptance of an ultimate finding or inference if the decision appealed discloses that it was reached in a manner that cannot be accepted as valid. *Howell v. Einbinder*, 350 F.2d 442, 444 (D.C. Cir. 1965). Thus, I would

[24] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[25] It is possible that the ALJ mistakenly considered a consultation note authored by Dr. Sikder on May 21, 2014, to be a treatment note prepared by Dr. Caruso. Claimant's Exhibit 1. However, the relationship of the two physicians to Claimant was not identical (Dr. Caruso was Claimant's primary physician, while Dr. Sikder was a consultant whose opinion was requested by Dr. Caruso). It is within the purview of the ALJ to determine the weight to be given the opinion of a physician and to make requisite findings. *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011). It is not within the purview of the Board to do so. Particularly given the different relationships of the physicians to the Miner, it would be improper and speculative for the Board to determine what the ALJ would have done had he properly analyzed the evidence.

vacate the ALJ's award of benefits and remand this case for further consideration and explanation.

JUDITH S. BOGGS
Administrative Appeals Judge