U.S. Department of Labor

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

BRB No. 15-0315 BLA

CHUCKY R. BAILEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HART HAT COAL COMPANY, INCORPORATED	)	DATE ISSUED: 02/27/2017
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Christopher M. Green (Jackson Kelly, PLLC), Charleston, West Virginia, for employer.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

GILLIGAN, Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-05493) of Administrative Law Judge Theresa C. Timlin, rendered on a subsequent claim filed on

September 28, 2009, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge found that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis, based on evidence establishing the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. While the administrative law judge did not find complicated pneumoconiosis, based on the x-ray or CT scan readings when considered in a vacuum, she did find that they established the presence of a mass in claimant's right upper lobe large enough to meet the statutory definition of the disease. Weighing the evidence as a whole, she then credited Dr. Gaziano's medical opinion that the mass is complicated pneumoconiosis as the most thoroughly reasoned opinion on its etiology, based on the totality of the record. Accordingly, she awarded benefits.

On appeal, employer maintains that the manner in which the administrative law judge weighed the evidence is irrational and that her credibility determinations do not satisfy the Administrative Procedure Act (APA).[2] We disagree.[3] Prior to coming to her conclusion, the administrative law judge rationally weighed the items from the different statutory categories of evidence relevant to complicated pneumoconiosis, and she fully considered whether evidence from one category supports or undercuts evidence from other categories. This is exactly the type of analysis the statute requires in mandating that "all relevant evidence shall be considered." 30 U.S.C. §923(b); *see also Westmoreland*

[1] Claimant filed his first claim for benefits on January 17, 2003, which the district director denied on March 9, 2004. Director's Exhibit 1. The district director found that, although claimant established the existence of pneumoconiosis arising out of coal mine employment, he did not establish total disability or total disability causation. *Id.* Claimant took no further action until filing the current subsequent claim. Pursuant to 20 C.F.R. §725.309, claimant had to submit new evidence establishing at least one of those elements of entitlement in order to obtain a review of his subsequent claim on the merits. *See* 20 C.F.R. §725.309(c); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The administrative law judge determined here that claimant established complicated pneumoconiosis arising out of coal mine employment and that he, therefore, demonstrated a change in an applicable condition of entitlement.

[2] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[3] Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

Coal Co. v. Cox, 602 F.3d 276, 285-87, 24 BLR 2-269, 2-282-84 (4th Cir. 2010). Accordingly, we affirm.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, rational, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) 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, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The administrative law judge here addressed each of these categories of evidence individually prior to weighing them together as a whole.

I. The administrative law judge's weighing of the evidence

A. The x-ray readings, 20 C.F.R. §718.304(a)

The administrative law judge first considered the eight ILO-classified readings[6] of three x-rays, dated December 16, 2009, June 20, 2011, and April 19, 2012, in the record. Decision and Order at 9-10.

---

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-eight years of coal mine employment, and simple coal workers' pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 21, 24.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3-4, 6.

[6] For more than fifty years, the International Labor Office (ILO) has published guidelines for the classification of chest x-rays of pneumoconiosis. The classification system seeks to codify x-ray abnormalities of pneumoconioses in a simple, reproducible manner. *See* INTERNATIONAL LABOR OFFICE, GUIDELINES FOR THE USE OF THE ILO INTERNATIONAL CLASSIFICATION OF RADIOGRAPHS OF

Dr. Rasmussen read the December 16, 2009 x-ray as positive for complicated pneumoconiosis while Dr. Shipley read it as negative.[7] Director's Exhibits 11, 31. Dr. Rasmussen is a B-reader; Dr. Shipley is dually-qualified as a Board-certified radiologist and B reader. *Id.* The administrative law judge determined that the x-ray was negative based on Dr. Shipley's dual credentials. Decision and Order at 9.

Dr. Alexander, a dually-qualified radiologist, read the June 20, 2001 x-ray as positive for complicated pneumoconiosis. Claimant's Exhibit 1. He wrote on the ILO form: "[a]n area of coalescence is present in the right upper zone, and there is a 15 x 5 [millimeter] large opacity in the right upper zone consistent with Category A complicated pneumoconiosis." *Id.*

Dr. Rosenberg, a B reader, indicated that the June 20, 2011 x-ray showed small opacities consistent with simple pneumoconiosis in the upper, lower, and middle zones, but he found no large opacities that he considered to be consistent with complicated pneumoconiosis. Employer's Exhibit 1. He noted diffuse pleural thickening, scarring in the right apex, and a rounded density in the right lower lobe. *Id.* Dr. Shipley also read the film as negative for "large opacities" of complicated pneumoconiosis, but he observed a 3.0 centimeter rounded nodule at the base of the right lung that he opined could represent a malignancy. Employer's Exhibit 3. The administrative law judge determined that the two negative readings of the June 20, 2011 x-ray outweighed the sole positive reading. Decision and Order at 10.

Dr. Gaziano, a B reader, identified a Category A large opacity on the April 19, 2012 x-ray and noted the presence of a rounded density at the base of claimant's right lung, which he opined could represent possible carcinoma. Director's Exhibit 19; Claimant's Exhibit 4. Dr. Shipley read this film as negative for complicated pneumoconiosis, but identified a 2.8 centimeter soft tissue nodule at the right lung base. Employer's Exhibit 5. Based on Dr. Shipley's dual credentials, the administrative law judge found that the April 19, 2012 x-ray was negative for complicated pneumoconiosis. Decision and Order at 10.

PNEUMOCONIOSES (2000) at 1. In claims for benefits under the Black Lung Benefits Act, pneumoconiosis may be established by a chest x-ray that is "classified as Category 1, 2, 3, A, B, or C, according to" the ILO classification system. 20 C.F.R. §718.102(b). Categories 1, 2, and 3 indicate simple pneumoconiosis, while categories A, B, and C indicate complicated pneumoconiosis. *Id.*

[7] Dr. Gaziano, a B reader, read the December 16, 2009 x-ray for the sole purpose of determining the quality of the film. Director's Exhibit 19.

Given these findings, the administrative law judge concluded that claimant failed to establish complicated pneumoconiosis by a preponderance of the x-ray evidence under subsection (a), 20 C.F.R. §718.304(a), alone. Decision and Order at 10.

B. The CT guided biopsy, 20 C.F.R. §718.304(b)

Claimant underwent a CT guided biopsy of a pulmonary mass in the right lung, performed by Dr. Setliff on August 13, 2009. The biopsy report stated, *inter alia*, "no obvious malignancy" and "focal mild anthracotic change." Claimant's Exhibit 3. Because Dr. Setliff's credentials are not in the record, however, the administrative law judge was unable to determine whether he was "qualified to render an opinion on the issue of pneumoconiosis," and she therefore gave "little overall weight to the biopsy report." Decision and Order at 10. The administrative law judge thus concluded that claimant did not establish complicated pneumoconiosis under subsection (b), 20 C.F.R. §718.304(b), alone. *Id*.

C. Other means of diagnosis, 20 C.F.R. §718.304(c)

In addition to the ILO-classified x-ray readings, the administrative law judge considered evidence from claimant's treatment records, CT scan evidence, and medical opinion evidence under subsection (c). She found that claimant's hospital records "neither support nor weigh against a finding that [c]laimant has simple, complicated, or both types of pneumoconiosis." Decision and Order at 15; Director's Exhibit 22.

In reviewing the CT scan evidence, the administrative law judge observed that "the doctors discussed masses in two distinct areas of the lung." Decision and Order at 13. Dr. Ahmed read a CT scan dated July 24, 2009 as showing a "linear oriented bi[-]lobed density *in the right upper lobe* measuring 15 millimeters[, which] could be part of complicated pneumoconiosis." Claimant's Exhibit 3 (emphasis added). Dr. Ahmed also saw a 2.2 centimeter irregular node in the lower right lung. *Id*.

The administrative law judge noted that Dr. Shipley, on the other hand, "described only the nodule in the lower right lung" when he reviewed CT scans dated June 11, 2003, July 24, 2009, and February 5, 2010. Decision and Order at 13; Employer's Exhibit 5. Dr. Shipley concluded that the three CT scans show "moderately extensive simple coal workers' pneumoconiosis." Employer's Exhibit 5. Although Dr. Shipley noted "flattened nodular lesions" that "did not have the typical appearance of large opacities" of coal workers' pneumoconiosis, he did not specify the location and size of those nodular lesions. *Id*.

Because Drs. Shipley and Ahmed are both Board-certified radiologists, the administrative law judge gave their conflicting readings "equal weight based on their

qualifications." Decision and Order at 13. She therefore determined that the CT scan evidence "established simple, but not complicated, pneumoconiosis" under subsection (c), 20 C.F.R. §718.304(c).[8] *Id*.

Turning to the medical opinion evidence, the administrative law judge weighed the opinions of Drs. Rasmussen,[9] Rosenberg, Crisalli, and Gaziano. Decision and Order at 16-23. In his written report, Dr. Rosenberg opined that claimant does not have complicated pneumoconiosis because he did not observe a coalescence of micronodules merging into a large opacity on claimant's chest x-ray. Employer's Exhibit 1. Dr. Rosenberg also supplemented his written report with deposition testimony, however, wherein he repeatedly acknowledged the scarring in claimant's upper right zone that other physicians classified as complicated pneumoconiosis. Employer's Exhibit 8.

Based on his review of the CT scan reports, Dr. Rosenberg testified: "*there's, it's called a linear nodular change that's present in the right upper lung zone on the CT scan*" and "some readers have said that [it] represents [progressive massive fibrosis or complicated pneumoconiosis] and others have not." Employer's Exhibit 8 (emphasis added) at 14. Dr. Rosenberg further testified that he determined that the right upper lobe mass was not complicated pneumoconiosis, not because of its size, but because of its shape:

> Well, by definition, large opacities are opacities that are rounded, or oval, with pulling and distortion of tissue. This is a linear nodular change, and I

---

[8] The administrative law judge also found that Dr. Ahmed's positive CT scan reading was insufficient to establish complicated pneumoconiosis pursuant to subsection (c), 20 C.F.R. §718.304(c), as Dr. Ahmed did not address whether the 15 millimeter mass he identified in claimant's upper right lobe would appear as an opacity of greater than one centimeter in diameter on x-ray. Decision and Order at 13, *citing E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000)

[9] Dr. Rasmussen identified a Category A large opacity but indicated that "the film was atypical for complicated pneumoconiosis because of the location of the mass density." Director's Exhibit 11. The administrative law judge determined that Dr. Rasmussen's opinion diagnosing complicated pneumoconiosis was equivocal because he suggested a CT guided biopsy of the right lower lobe mass in order to rule out cancer. Decision and Order at 21. It appears that the administrative law judge concluded that Dr. Rasmussen did not see a large opacity in the upper lung in finding that his opinion was equivocal. The record reflects that subsequent to Dr. Rasmussen's x-ray reading, claimant underwent a lung biopsy which was negative for cancer. Claimant's Exhibit 3.

> think the dimension that qualifies it to be greater than one centimeter is in the linear dimension, horizontally, in other words, and it's not in a rounded type of diameter dimension. So it really doesn't have the characteristics, you know, of a rounded opacity related to [progressive massive fibrosis], as to how you would define that.

Id. at 25. When directly asked by employer's counsel if he had an opinion as to "what is causing *these two densities, one in the upper lung zone and one in the lower*," Dr. Rosenberg stated that they were "probably related to old granulomatous changes" or "some old infection in the right upper lobe." *Id*. at 17 (emphasis added).

In his written report dated August 30, 2010, Dr. Crisalli indicated that he had examined claimant and reviewed medical records from Raleigh General Hospital, Dr. Shipley's interpretation of the February 16, 2009 x-ray, the August 13, 2009 biopsy report, and Dr. Rasmussen's medical report. Director's Exhibit 25. Dr. Crisalli diagnosed simple coal workers' pneumoconiosis and concluded that there is a right lower lung field mass that was not consistent with complicated pneumoconiosis "based on the location of the mass," but that was consistent with a malignancy. *Id*. Dr. Crisalli also testified in a deposition on October, 22, 2012. Employer's Exhibit 7. In preparation he reviewed Dr. Shipley's three CT scan readings. *Id*. Dr. Crisalli testified that "progressive massive fibrosis develops in the upper lung field" and that it is usually "symmetrical and bilateral." *Id*. at 12. He concluded that claimant does not have complicated pneumoconiosis. *Id*.

In determining the weight to accord the medical opinion evidence under subsection (c), the administrative law judge gave "little probative weight" to Dr. Rosenberg's opinion that claimant does not have complicated pneumoconiosis because she considered it to be "speculative" regarding the etiology of the linear nodule described in Dr. Ahmed's CT scan report. Decision and Order at 22. She specifically observed that claimant's medical records do not support Dr. Rosenberg's assertion that the large density in the upper right lobe was caused by granulomatous changes. *Id.* She also considered Dr. Rosenberg's view that complicated pneumoconiosis presents *typically* with rounded opacities and not linear opacities to be "contrary to the regulations," noting that the "Department of Labor does not require a finding of primarily rounded opacities in the upper lung zones to support a finding of pneumoconiosis." *Id*. (citations omitted); Employer's Exhibit 1.

The administrative law judge also determined that Dr. Crisalli's exclusion of complicated pneumoconiosis was less persuasive since he had reviewed only Dr. Shipley's x-ray and CT scan readings. Decision and Order at 23. Given that none of those documents referred to the mass, she found that he "could not opine on the nature of

the large opacity in the upper right lung zone visible on [c]laimant's most recent CT scans and [x]-rays." *Id*.

In contrast, the administrative law judge found that Dr. Gaziano's opinion diagnosing complicated pneumoconiosis was "well-reasoned and well-documented" and supported by credible evidence in the record.[10] Decision and Order at 22. She noted that Dr. Gaziano's opinion is "internally consistent and unequivocal" and that his x-ray and CT scan interpretations are also consistent with the other evidence of record. *Id.* She therefore held that Dr. Gaziano's opinion supported a finding of complicated pneumoconiosis under subsection (c), 20 C.F.R. §718.304(c). *Id*.

D. Weighing all the evidence together

Interrelating the evidence from the different subsections, the administrative law judge concluded:

> I find that the most recent [x]-ray and CT scan evidence shows a large density in the upper right lobe, which is not properly ruled out as complicated pneumoconiosis by Dr. Rosenberg. All of the physicians who looked at [c]laimant's most recent [x]-rays have seen the large density except for Dr. Shipley. Dr. Shipley noted that he saw multiple nodular lesions but did not classify them as complicated pneumoconiosis. I give

[10] In Dr. Gaziano's report of his examination of claimant on April 19, 2012, he noted his own positive x-ray reading for complicated pneumoconiosis, and summarized Dr. Ahmed's report of the July 24, 2009 CT scan and Dr. Setliff's report of the August 13, 2009 needle biopsy of the miner's right lung. Claimant's Exhibit 4. Dr. Gaziano opined:

> I believe that the CT scan of 2009 showing a 15 [millimeter] lesion in the right upper lung zone is the lesion that I saw which would conform to a complicated pneumoconiosis. The occupational history of working at the face and the advanced round nodular densities throughout both lungs are quite characteristic of occupational pneumoconiosis. . . . [W]ith the advanced x-ray findings of complicated pneumoconiosis, I believe he has irrefutable evidence of complicated pneumoconiosis that has been established by prior CT scan.

Id.

> Dr. Shipley's interpretations less weight because he did not see the large mass that other physicians noted on [c]laimant's [x]-rays.

Decision and Order at 23. The administrative law judge concluded that claimant established complicated pneumoconiosis "based on Dr. Gaziano's medical opinion which is corroborated by evidence of a large mass in the upper right lung zone as seen by Drs. Rosenberg, Alexander, and Gaziano." *Id.* at 24.

II. The administrative law judge's decision is supported by substantial evidence and comports with the APA.

Employer asserts on appeal that the administrative law judge "erred by crediting Dr. Gaziano's diagnosis of complicated pneumoconiosis over all other evidence to find complicated pneumoconiosis where she found none of the other evidence supported such a finding." Employer's Brief at 9. Employer maintains that the administrative law judge's analysis does not constitute "reasoned decision-making" under the APA, and that it is impossible for the Board to reconcile her finding that claimant established complicated pneumoconiosis with her findings that the x-ray and CT scan evidence is "negative" under the individual subsections of 20 C.F.R. §718.304(a)-(c). *Id.* We disagree.[11]

The implicit gravamen of employer's position is that the administrative law judge should be bound by initial findings with regard to subsections (a) and (b). This argument is without merit. Dr. Gaziano's medical opinion is, itself, the type of objective evidence that falls within subsection (c)'s catch all "diagnosis made by other means." 20 C.F.R. §718.304(c). Such a diagnosis need not depend on ILO classified x-ray readings or biopsy/autopsy evidence to reach its conclusion -- it may do so by any acceptable "other

[11] Employer's characterization of the administrative law judge's findings with regard to the CT scan evidence is misleading, as she did not, as employer asserts, conclude that the CT scan evidence was negative. Rather, she determined that Drs. Ahmed and Shipley were equally qualified and found that they disagreed as to whether there is a large opacity in claimant's upper right lung. At best, this is a finding that the evidence is inconclusive. The administrative law judge also observed that because Dr. Ahmed had not given an equivalency assessment, his positive CT scan reading, *standing alone*, could not establish complicated pneumoconiosis at 20 C.F.R. §718.304(c), due to the Fourth Circuit's equivalency rule. Decision and Order at 13; *see Scarbro*, 220 F.3d at 255, 22 BLR at 2-100. Notably, the administrative law judge did not indicate that she discounted Dr. Ahmed's interpretation of the CT scan as showing a mass or density in claimant's right upper lung. Decision and Order at 14.

means." *Id*. Indeed, requiring substantiation by x-ray or biopsy would largely make subsection (c) redundant.

It is therefore axiomatic that a physician is free to consider any available evidence in making his or her diagnosis, and there is nothing in the statute prohibiting a physician from considering information beyond ILO classified x-ray readings, biopsy or autopsy results. The test in assessing a medical opinion is instead one of credibility and persuasiveness: whether the physician's opinion is reasoned and documented and comports with acceptable medical procedures. *See* 20 C.F.R. §718.304(c); *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).

We thus reject employer's underlying premise that it is necessarily irrational for an administrative law judge to determine that a claimant is unable to establish complicated pneumoconiosis under one or more of the individual subsections of 20 C.F.R. §718.304, but ultimately conclude that the evidence of record, as a whole, is sufficient to establish the existence of the disease. *See E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-1143, 1145-46 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc). Although an administrative law judge is obligated to make findings pursuant to 20 C.F.R. §718.304(a)-(c), as the administrative law judge did here, the United States Court of Appeals for the Fourth Circuit has made clear that the relevant analysis, prior to invocation of the irrebuttable presumption, is whether the evidence, considered as a whole, is sufficient to establish the existence of complicated pneumoconiosis. *See Cox*, 602 F.3d at 285-87, 24 BLR at 2-282-84; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; Decision and Order at 34. The Fourth Circuit emphasized in *Cox* that an administrative law judge must base a finding of complicated pneumoconiosis "on all of the available medical evidence." *Cox*, 602 F.3d at 283-85, 24 BLR at 2-282-83; *see also Pittsburg & Midway Coal Co.* [*Cornelius*], 508 F.3d 975, 986-87, 24 BLR 2-72, 2-92 (11th Cir. 2007) (an administrative law judge is required to "carefully examine the medical evidence presented to determine whether complicated pneumoconiosis exists on the unique facts of each case.").

In this case, although the administrative law judge found that claimant was unable to establish the existence of complicated pneumoconiosis based solely on her consideration of x-ray and CT scan evidence, she concluded that it was established based on Dr. Gaziano's medical opinion and in consideration of all of the relevant evidence together as a whole. We see no error in this conclusion. Indeed, the administrative law judge performed the exact type of evidentiary review contemplated by the Fourth Circuit in *Lester*, *Scarbro*, and *Cox*, prior to finding invocation of the irrebuttable presumption.

She weighed all of the evidence, both supportive and unsupportive, on the issue, together, and reached a rational finding that claimant has complicated pneumoconiosis.[12]

There thus is no merit to employer's APA challenge. If a reviewing court can discern what the administrative law judge did and why he or she did it, the duty of explanation under the APA is satisfied. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316, 25 BLR 2-115, 2-133 (4th Cir. 2012). We can here. The administrative law judge specifically identified the evidence she relied on to support her finding of complicated pneumoconiosis: Dr. Alexander's positive x-ray reading; Dr. Gaziano's positive x-ray reading; Dr. Ahmed's positive CT scan reading; Dr. Rosenberg's deposition testimony repeatedly referencing the lesion in the upper right lobe; and Dr. Gaziano's medical report. Decision and Order at 18. The administrative law judge credited the preponderance of the x-ray, CT scan, and deposition evidence as establishing the existence of the mass in the right upper lobe; she credited Dr. Gaziano's medical report to determine its etiology when considered with the totality of the record.[13] *Id*. at 24.

---

[12] Our dissenting colleague alleges that it is "simply not correct" that the administrative law judge's decision is consistent with *Lester*, *Scarbro*, and *Cox*, based on factual distinctions with this case, and that the administrative law judge was required to go back and revise her findings regarding subsections (a) and (b) in order to find the presence of complicated pneumoconiosis. We agree with our colleague that the facts of those cases are distinguishable. But the relevant aspect of those cases here is not their particular factual circumstances. Rather, it is the analytical legal framework the cases establish. Those cases counsel that, in every instance, the administrative law judge must interrelate the evidence, and consider whether evidence from one category supports or undercuts evidence from other categories. *See Scarbro*, 220 F.3d at 258, 22 BLR at 2-101; *see also Island Creek v. Compton*, 211 F.3d 203, 209, 22 BLR 2-162, 2-171 (4th Cir. 2000). The fundamental guideline is that relevant evidence must be rationally and meaningfully considered. Courts have drawn no distinction -- temporally or substantively -- in weighing together the different types of evidence. Precisely how or when that deliberation occurs instead depends on the circumstances of the individual case; while such a strict formulaic consideration of the categories urged by our colleague might be appropriate in some cases, it will not be in all. *See Compton*, 211 F.3d at 209, 22 BLR at 2-171 ("whether or not a particular piece of evidence or type of evidence actually is a sufficient basis for a finding of pneumoconiosis will depend on the evidence in each case"). Notably, neither our dissenting colleague nor employer has pointed to any evidence that the administrative law judge failed to consider. Rather, their arguments pertain to the weight accorded the evidence.

[13] Our dissenting colleague asserts that while Dr. Rosenberg noted a mass in the lower lung zone, he did not identify a mass in the upper right lung zone. This assertion is

Specifically, Dr. Alexander identified "a 15 x 5 [millimeter] large opacity in the right upper zone" on the June 20, 2011 x-ray. Claimant's Exhibit 1. Dr. Gaziano identified a Category A opacity on the April 19, 2012 x-ray. Claimant's Exhibit 4. These x-ray findings of a large opacity in the right upper lobe were consistent with what Dr. Ahmed found on an earlier July 24, 2009 CT scan, which showed a 15 millimeter density in the upper lobe. Although Dr. Ahmed did not address whether the mass he saw in the upper right lung would show as a greater than one centimeter opacity on x-ray, this deficiency was corrected by Dr. Gaziano, who specifically explained that the 15 millimeter mass reported by Dr. Ahmed on the July 24, 2009 CT scan was the equivalent of what he identified as a Category A opacity on x-ray:

> I believe that the CT scan of 2009 showing a 15 [millimeter] lesion in the right upper lung zone is the lesion that I saw which would conform to a

---

demonstrably belied by a plain reading of Dr. Rosenberg's deposition transcript. Dr. Rosenberg (and employer's counsel) repeatedly acknowledged the mass in the upper right lobe; Dr. Rosenberg simply asserts that its shape is not consistent with complicated pneumoconiosis. Employer's Exhibits 8 (Rosenberg Deposition Transcript) at 14 (noting a density in the upper right lobe and that the physicians disagreed as to its etiology), 15 (giving his reasons for why he believed the density in the upper right lobe is not complicated pneumoconiosis), 17 (explaining that the density is "just some old infection in the upper right lobe" and not a "lesion related to coal dust exposure"), 21-22 (noting a 15 millimeter lesion in the upper right lobe).

Our dissenting colleague further attempts to attach great meaning to her inference that Dr. Rosenberg did not actually see a large density in the upper right lobe; rather, according to our colleague, he testified about what others saw. The deposition transcript, however, speaks for itself. Regardless, we see no significance to this alleged distinction. At no point did Dr. Rosenberg deny the existence of a mass or density in the upper right lung, other than to repeatedly assert that its dimensions are not consistent with complicated pneumoconiosis. The administrative law judge's characterization of Dr. Rosenberg's view, given his extensive testimony regarding the etiology of the upper right lung mass, is eminently rational and entirely within her discretion. Our role is to determine whether the administrative law judge's factual determinations are reasonable, not whether other conclusions could have been reached. *National Elec. Mfrs. Ass'n v. U.S. Dept. of Energy*, 654 F.3d 496, 514-15 (4th Cir. 2011) (citation omitted) ("even when an [administrative law judge] explains [her] decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the [administrative law judge's] path may be reasonably discerned."). As discussed, the administrative law judge's path here is certainly discernable, and, we believe, correct.

> complicated pneumoconiosis. The occupational history of working at the face and the advanced round nodular densities throughout both lungs are quite characteristic of occupational pneumoconiosis. . . . [W]ith the advanced x-ray findings of complicated pneumoconiosis, I believe [claimant] has irrefutable evidence of complicated pneumoconiosis that has been established by prior CT scan.

Id.

Based on the opinions of Drs. Alexander, Ahmed and Gaziano, we are satisfied that substantial evidence supports the administrative law judge's finding that claimant has a large opacity in his right upper lobe that qualifies as complicated pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 23.[14]

Furthermore, we reject employer's contentions that the administrative law judge erred in her treatment of the opinions of Drs. Rosenberg and Crisalli in determining the etiology of the mass in the right upper lobe. The administrative law judge noted correctly that Dr. Rosenberg opined that claimant does not have complicated pneumoconiosis based on his belief that opacities for pneumoconiosis are typically rounded in appearance, while the opacity in claimant's upper lung zone is not rounded in appearance, but is linear in shape. Decision and Order at 22. The regulations at 20 C.F.R. §§718.102, 718.202(a)(1), and 718.304(a) that set forth what constitutes positive and negative x-ray

[14] Employer asserts that the administrative law judge erred in stating that the "most recent [x]-ray and CT scan evidence shows a large density in the upper lobe," when Dr. Shipley specifically read the most recent x-ray and the most recent CT scan as negative for complicated pneumoconiosis. Employer's Brief at 10, *quoting* Decision and Order at 9. Employer's assertion of error is without merit. First, each of the two recent x-rays has been read as showing a large Category A opacity by Drs. Alexander and Gaziano. Second, there are three CT scans in the record obtained in 2003, 2009 and 2010. The administrative law judge was correct in her description to the extent that one of the most recent CT scans dated July 24, 2009 was interpreted by Dr. Ahmed as showing a large density in the right upper lobe. Third, even though Dr. Shipley did not identify complicated pneumoconiosis, the passage cited by employer is taken out of context. The administrative law judge later explains that she gave "Dr. Shipley's interpretations less weight" because they were contrary to the findings of the other record physicians. Decision and Order at 9. An administrative law judge has discretion to find that a physician's opinion is simply outweighed by a preponderance of the otherwise credible evidence. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

readings for simple and complicated pneumoconiosis, do not require that opacities be rounded or appear in specific lung zones. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. The administrative law judge permissibly discounted Dr. Rosenberg's opinion on this basis alone. Decision and Order at 22.

The administrative law judge also permissibly determined that Dr. Rosenberg's opinion is not persuasive given its speculative nature. *See Cox*, 602 F.3d at 287, 24 BLR at 2-287. The Fourth Circuit made clear in *Cox* that an administrative law judge may reject expert opinions that exclude coal dust exposure as the cause for large masses identified by x-ray and that attribute those masses to alternate diseases, such as granulomatous disease, if they fail to point to evidence in the record indicating that the miner suffers or suffered from, any of those alternative diseases. *Id*. In this case, the administrative law judge rationally found that Dr. Rosenberg's opinion was entitled to less weight because his "conclusion that the large densities are probably due to granulomatous changes" is "unsupported by [c]laimant's medical records."[15] Decision and Order at 22.

Additionally, we disagree with our dissenting colleague that remand is necessary for the administrative law judge to explain why she gave less weight to Dr. Crisalli's opinion on the etiology of the mass. Employer's Brief at 14-15. The administrative law judge observed correctly that Dr. Crisalli "did not review Dr. Alexander's x-ray interpretation, Dr. Gaziano's x-ray interpretation or Dr. Ahmed's CT scan," all of which supported her finding that claimant has a density in his upper right lobe that meets the size requirements for complicated pneumoconiosis.[16] Decision and Order at 23. The administrative law judge acted within her discretion in giving more weight to Dr. Gaziano's opinion based on his more thorough review of the evidence. *Id.*; s*ee Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. The weight to accord conflicting medical evidence is within the discretion of the administrative law

[15] Our dissenting colleague argues that the administrative law judge mischaracterized Dr. Rosenberg's opinion by stating that he wrote that he saw "a linear nodular change in the right upper lung zone" when the phrase does not appear in his written documents. We see no significance to this distinction. As a legal matter, deposition testimony is considered the continuation or supplementation of a written medical report. 20 C.F.R. §725.414(c). As noted, Dr. Rosenberg testified extensively about what he described as "linear nodule change" and its etiology. Employer's Exhibit 8 at 14.

[16] At his deposition, Dr. Crisalli stated that he had reviewed Dr. Shipley's CT scan interpretations, and opined that the mass in claimant's lower lung was not complicated pneumoconiosis. Employer's Exhibit 7 at 11-12.

judge, as the trier-of-fact. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999). Because the administrative law judge discussed the evidence in detail and adequately explained her rationale for finding that claimant has complicated pneumoconiosis, her Decision and Order satisfies the APA. *See Looney*, 678 F.3d at 316, 25 BLR at 2-133.[17]

We thus conclude that substantial evidence supports the administrative law judge's finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, based on her consideration of all the relevant evidence. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34. Moreover, because it is unchallenged on appeal, we affirm the administrative law judge's finding that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Daniels Co. v. Mitchell*, 479 F.3d 321, 330, 24 BLR 2-1, 2-17 (4th Cir. 2007); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We further affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(c).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

RYAN GILLIGAN
Administrative Appeals Judge

I concur.

[17] In our view, both employer and our dissenting colleague have engaged in an extensive reweighing of the evidence in this case. But that is not our charge. *See, e.g., Doss v. Itmann Coal Co.*, 53 F.3d 654, 659, 19 BLR 2-181, 2-183 (4th Cir.1995) (substantial evidence means only evidence of sufficient quality and quantity as a reasonable mind might accept as adequate to support the finding under review: "[A] reviewing body may not set aside an inference merely because it finds the opposite conclusion more reasonable or because it questions the factual basis), *quoting Smith v. Director, OWCP*, 843 F.2d 1053, 1057, 11 BLR 2-125, 2-130 (7th Cir. 1988).

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from my colleagues' affirmance of the administrative law judge's award of benefits because I agree with employer that the administrative law judge's opinion is not supported by substantial evidence, and does not meet the requirements of the Administrative Procedure Act (APA).[18] The administrative law judge reached her conclusion that the claimant suffers from complicated pneumoconiosis, and is thereby entitled to the irrebuttable presumption of total disability due to pneumoconiosis, by fundamentally mischaracterizing the x-ray interpretation and medical opinion of Dr. Rosenberg, by improperly discrediting the opinions of Drs. Shipley, Rosenberg and Crisalli, and by failing to adequately explain her credibility determinations. Consequently, the basis on which the administrative law judge found complicated pneumoconiosis cannot stand and remand is required.

The administrative law judge's errors begin with her weighing of the medical opinion evidence and are compounded in her weighing of the evidence as a whole. I will discuss each in turn.

I. The administrative law judge erred in weighing the medical opinion evidence.

The administrative law judge considered the medical opinion evidence after finding that the x-ray evidence, [19] the CT-scan evidence,[20] and the biopsy evidence each

[18] The Administrative Procedure Act (APA), 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[19] In separately analyzing the x-ray evidence, the administrative law judge concluded that none of the three x-rays of record, dated December 16, 2009, June 20, 2011, and April 19, 2012, was positive for complicated pneumoconiosis. Decision and Order at 9-10.

The December 16, 2009 x-ray was read by Dr. Rasmussen, a B reader, as positive for simple and complicated pneumoconiosis. Director's Exhibit 11. On the ILO form that Dr. Rasmussen completed on December 16, 2009, although he did not specify the location of the Category A opacity, he noted a "2.5 [centimeter (cm)] mass; Rt. C-P Base Malignant?." Director's Exhibit 11. In his report of an examination performed the same day, under the heading "PHYSICAL EXAMINATION," Dr. Rasmussen stated, " *Chest x-ray* interpreted by the Undersigned . . . *indicated . . . a 2.5 cm. rounded mass in the right costophrenic region characterized as a Category A complicated pneumoconiosis*, but with reservations considering possible carcinoma. The film was however atypical for complicated pneumoconiosis because of the location of the mass density." *Id.* at 3 (emphasis added). Dr. Shipley, dually-qualified as a Board-certified radiologist and B reader, interpreted that x-ray as positive for simple pneumoconiosis with no large opacity. He noted a "2.5 cm ill-defined lesion at the right costophrenic sulcus," which he did not classify as a large opacity because it did not have the typical appearance or location of pneumoconiosis; however, he stated that it may represent cancer and recommended CT scanning for further evaluation. Director's Exhibit 31. The administrative law judge found that the December 16, 2009 x-ray was positive for simple pneumoconiosis, but not complicated pneumoconiosis, based on Dr. Shipley's superior credentials. Decision and Order at 9.

Regarding the June 20, 2011 film, on the International Labor Office (ILO) form, Dr. Alexander, a dually-qualified radiologist, identified simple pneumoconiosis, as well as a Category A opacity in the right upper zone, and a 25 millimeter nodule or mass in the right lower zone which "needs further evaluation to R/O cancer." Claimant's Exhibit 1. His accompanying narrative interpretation report described the opacity as "a 15 x 5 [millimeter (mm)] large opacity in the right upper zone consistent with Category A complicated pneumoconiosis." *Id.* Dr. Rosenberg, a B reader, found the film positive for simple pneumoconiosis, and marked that there were no large opacities; he commented that the film also showed diffuse lower left lung pleural thickening and scarring, as well as a rounded density at the right "CPA." Employer's Exhibit 1. Dr. Shipley read the film as positive for simple pneumoconiosis, but as negative for large opacities of complicated pneumoconiosis, and further observed a three centimeter rounded nodule at the base of the right lung which, he opined, could represent a malignancy. Employer's Exhibit 3. The administrative law judge found that the negative readings by Drs. Rosenberg and Shipley outweighed Dr. Alexander's positive reading, and concluded that the June 20, 2011 x-ray also was not positive for complicated pneumoconiosis. Decision and Order at 10.

Pertaining to the April 19, 2012 film, Dr. Gaziano, a B reader, found simple pneumoconiosis and identified a Category A large opacity. Claimant's Exhibit 4. He further commented that there was a rounded density at the right base which should be

ruled out for carcinoma. *Id.* Although Dr. Gaziano did not identify the location of the large opacity on the ILO form, in his medical report, under the heading, "Chest X-ray," he stated that "[t]here was a rounded density in the right upper lobe consistent with complicated pneumoconiotic lesion." *Id.* He further noted, "There was also a rounded density in the right lower lung zone that suggests neoplastic process." *Id.* Dr. Shipley interpreted this film as showing simple pneumoconiosis but no large opacities. Employer's Exhibit 5. He noted simple coal workers' pneumoconiosis and a 2.98 centimeter nodule at the right base, unchanged from 2003. *Id.* The administrative law judge determined that the April 19, 2012 x-ray was negative for complicated pneumoconiosis, based on Dr. Shipley's superior qualifications. Decision and Order at 10.

[20] Dr. Ahmed read a July 24, 2009 CT scan. Under "Comparison" he noted, "Enlarged lymph nodes in the mediastinum and calcified granulomas . . . Irregular nodule measuring 2.2 cm at right lung base is seen in the lateral costophrenic angle area, [M]alignancy cannot be excluded . . . Bullae in the upper lung fields. Calcified nodules are seen and focal scarring and linear oriented bilobed density in the right lobe measuring 15 mm could be part of complicated pneumoconiosis. Malignancy is considered less likely but cannot be excluded . . . ." Claimant's Exhibit 3. Under "Impression" he stated, "Multiple pleural-based irregular plaques with calcification is very likely part of pneumoconiosis. Lobulated irregular contour mass density in the right lower lung which has enlarged from before measuring 2.5 cm in widest diameter. Malignancy cannot be excluded . . . Possible complicated pneumoconiosis right upper lung. A linear nodular density measuring 14 mm in the apical region is seen . . . ." *Id.*

Dr. Shipley interpreted three CT scans, dated June 11, 2003, July 24, 2009, and February 5, 2010, as showing an increase in small rounded opacities over all lung zones, no large opacities, a lobulated approximately 2.8 centimeter nodule at the right base (possibly benign fibrous tumor of the pleura), and multiple subpleural flattened nodular lesions, some of which are associated with linear calcification, which do not have the typical appearance of large opacities of coal workers' pneumoconiosis and are likely asbestos related pleural plaques. Employer's Exhibits 5, 6.

The administrative law judge stated that she gave equal weight to the interpretations of Drs. Ahmed and Shipley since they are both dually-qualified radiologists. She noted that "Dr. Ahmed did not state whether the 15 mm mass he saw would have been observable as an opacity of 1.0 cm in diameter or larger on an X-ray" and that "Dr. Shipley interpreted the same CT scan and did not see any large opacity in the upper right lung zone." Decision and Order at 13. The administrative law judge found that the CT scan evidence establishes simple pneumoconiosis but does not establish the presence of complicated pneumoconiosis. *Id.*

did not establish the existence of complicated pneumoconiosis. After setting forth detailed summaries of the medical opinions of Drs. Rasmussen, Rosenberg, Crisalli and Gaziano, the administrative law judge analyzed each opinion in turn. She found Dr. Gaziano's medical opinion to be well-reasoned and well-documented because it is "internally consistent and unequivocal on the issue of complicated pneumoconiosis" and "his X-ray and CT scan interpretations are also consistent with the other evidence of record… ." Decision and Order at 22. The administrative law judge set forth as "the other evidence of record" that Drs. Rosenberg and Alexander both saw a large opacity in the upper right lung zone, and that Dr. Shipley did not see any large lesions in the upper lung zone; however, he saw "multiple sub-pleural flattened nodular lesions . . . ." *Id*. at 22-23. After reviewing all of the opinions, the administrative law judge concluded that Dr. Gaziano's opinion, which she found "well-reasoned and supported by the record," establishes that claimant has complicated pneumoconiosis. *Id*. at 23.

As employer maintains, when the administrative law judge considered the medical opinion evidence, she determined that Dr. Gaziano's opinion was sufficient to establish the existence of complicated pneumoconiosis without adequately explaining her finding. Although the administrative law judge credited Dr. Gaziano's diagnosis of complicated pneumoconiosis, observing that "[h]is [x]-ray and CT scan interpretations are . . . *consistent with the other evidence of record*,"[21] the record contains evidence, in the form of medical opinions, as well as x-ray and CT findings, which differ significantly from Dr. Gaziano's x-ray interpretation and medical opinion. Specifically, the record contains the contrary interpretations of Dr. Shipley, which the administrative law judge had fully credited in weighing the x-ray and CT scan evidence. Employer's Exhibits, 3, 5, 6. In addition, the record contains the contrary x-ray interpretation by Dr. Rosenberg, and the contrary opinions of both Drs. Rosenberg and Crisalli. Director's Exhibit 25; Employer's Exhibits 1, 7, 8. The administrative law judge erred by failing to adequately explain how any of the contrary evidence was consistent with Dr. Gaziano's opinion. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 22.

Moreover, the administrative law judge erred by mischaracterizing Dr. Rosenberg's x-ray interpretation and medical opinion. Claimant's Exhibit 4; Employer's Exhibits 1, 8. In her discussion and evaluation of the medical opinion evidence, the administrative law judge stated, "Dr. Rosenberg wrote that he saw . . . a linear nodular change in the right upper lung zone." Decision and Order at 22. To the contrary, neither

[21] The administrative law judge misstated the evidence by referencing Dr. Gaziano's "x-ray and *CT scan interpretations*" when, in fact, Dr. Gaziano did not personally interpret any of the CT scans in the record, and relied only on Dr. Ahmed's CT scan interpretation in rendering his opinion. Decision and Order at 22 (emphasis added).

Dr. Rosenberg's written report nor his x-ray report contains any notation that he saw a linear nodular change (or any large mass or similar entity) in the right upper lung zone. Employer's Exhibit 1. Dr. Rosenberg provided no other written documents.

Further, as a basis for finding that Dr. Gaziano's x-ray and CT scan interpretations were consistent with the other evidence of record, the administrative law judge stated, "Dr. Rosenberg and Dr. Alexander both *saw* a large opacity in the upper right lung zone." Decision and Order at 22 (emphasis added). However, there is record evidence directly contradicting this finding.[22] Dr. Rosenberg specifically testified, "I did not see large opacity formation."[23] Employer's Exhibit 8 at 13. Moreover, when claimant's counsel asked Dr. Rosenberg whether he noted a mass in the right upper lobe, Dr. Rosenberg corrected him by replying, "Right lower lobe, near the costophrenic angle." Employer's Exhibit 8 at 21.

[22] Even the administrative law judge's detailed summaries of Dr. Rosenberg's report and deposition make no mention of Dr. Rosenberg seeing a large opacity or lesion in the upper right lung zone. Decision and Order at 17-18. Further, in her summary of Dr. Rosenberg's x-ray interpretation, the administrative law judge did not make any mention of his reporting a large opacity or lesion in that location. *Id*. at 7.

[23] In his deposition testimony, on the ILO form, and in his written report, Dr. Rosenberg reported seeing a density in the lower lobe which was not characteristic of a coal mine dust related form of progressive massive fibrosis. Employer's Exhibits 1, 8 at 13. Dr. Rosenberg also marked the ILO form as negative for a large opacity. The density in the lower lobe was noted by all of the physicians reviewing the x-rays. However, the administrative law judge found complicated pneumoconiosis established based on an opacity in the upper right lobe, not on the density in the lower lobe. Decision and Order at 20, 22-23.

Claimant's counsel went on to ask Dr. Rosenberg whether there was something in the upper lobe, to which he replied, "Yes, *on the CT scan*, there was an area that some have stated as [progressive massive fibrosis]. Others, it really just looks like a linear nodular scar which does not have characteristics of [progressive massive fibrosis]." Employer's Exhibit 8 at 21 (emphasis added). Dr. Rosenberg did not read the CT scan, and thus could not have *seen* what was on it. At his deposition, Dr. Rosenberg identified all of the material he had reviewed. Although he noted Dr. Shipley's x-ray and CT scan interpretations (Employer's Exhibits 3, 5, 6) and Dr. Ahmed's CT scan interpretation (Claimant's Exhibit 4), his listing of reviewed material does not include the CT scan itself. Employer's Exhibit 8 at 6, Employer's Exhibit 1. There is no evidence to the contrary.

The administrative law judge also determined, without explanation, that Dr. Shipley's observation of "multiple subpleural flattened nodular lesions" was consistent with Dr. Gaziano's finding of a large upper lung opacity, even though Dr. Shipley opined that claimant's x-ray and CT scans showed no large opacity.[24] Decision and Order at 23, *quoting* Employer's Exhibits 5, 6. Despite this finding, the administrative law judge conversely concluded, when considering the evidence as a whole, that Dr. Shipley's opinion was entitled to less weight on the grounds that "he did not see the large mass other physicians noted on Claimant's x-rays." Decision and Order at 23. On their face, the administrative law judge's findings are internally inconsistent and cannot stand without adequate further explanation.

Based on the foregoing, it is clear that the administrative law judge did not explain the basis for her conclusion that the findings of Drs. Gaziano and Shipley were consistent, and she further misrepresented Dr. Rosenberg's observations and notations. Consequently, the administrative law judge failed to satisfy the APA requirement that she explain the basis for her credibility findings, and substantial evidence does not support her determination to credit Dr. Gaziano's opinion and her conclusion that the medical opinion evidence established complicated pneumoconiosis. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Bill Branch Coal Corp*. v. *Sparks*, 213 F.3d, 186, 193, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Milburn Colliery Co.* v. *Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-340 (4th Cir. 1998) (an administrative law judge must consider all the relevant evidence and adequately explain his or her rationale for crediting certain evidence).

Further, there is merit in employer's contention that the administrative law judge improperly discredited the medical opinions of Drs. Rosenberg and Crisalli. I agree with employer that the administrative law judge selectively analyzed the evidence and thereby erred in giving less weight to Dr. Crisalli's opinion, while fully crediting Dr. Gaziano's opinion. The administrative law judge explained that "Dr. Crisalli did not have a complete picture of [c]laimant's condition" because he did not review Dr. Alexander's x-ray interpretation, Dr. Gaziano's x-ray interpretation or Dr. Ahmed's CT scan

[24] In setting forth evidence ostensibly consistent with Dr. Gaziano's finding of an opacity in the upper right lung, the administrative law judge stated, "Dr. Shipley did not see any large lesions in the upper lung zone on his x-rays and CT scans, however, he did see 'multiple subpleural flattened nodular lesions' which he thought do not have the typical appearance of large opacities of coal worker's pneumoconiosis." Decision and Order at 22. Since the administrative law judge made this statement when setting forth evidence consistent with Dr. Gaziano's interpretation, the implication is that Dr. Shipley's observation of subpleural flattened nodular lesions was consistent with Dr. Gaziano's observation of an opacity in the upper right lung.

interpretation. Decision and Order at 23. In other words, Dr. Crisalli did not have a complete picture of claimant's condition because he did not review the interpretations which found or suggested that claimant had a large opacity or density in his upper right lung zone that was, or possibly could be, complicated pneumoconiosis. However, Dr. Gaziano comparably reviewed only a subset of the x-ray interpretations for complicated pneumoconiosis, and did not review the x-ray interpretations of Drs. Rosenberg and Shipley, and the CT scan interpretations of Dr. Shipley,[25] finding that claimant did not have an opacity consistent with complicated pneumoconiosis. Claimant's Exhibit 4. Indeed, as employer points out, Dr. Gaziano did not review Dr. Shipley's negative interpretation of the most recent CT scan, while Dr. Crisalli specifically considered it, along with more evidence than Dr. Gaziano, in rendering his opinion. Employer's Brief at 14-15; Employer's Exhibit 7. Despite recognizing that Dr. Gaziano did not review all the CT scans and x-rays of record, the administrative law judge found that Dr. Gaziano's opinion deserved probative weight "because it is well-reasoned and well-documented." Decision and Order at 22. The administrative law judge made no similar allowance for Dr. Crisalli's opinion, which, like Dr. Gaziano's opinion, was based on an examination, an x-ray and CT scan evidence. Although Drs. Crisalli and Gaziano each reviewed x-ray and CT scan evidence to support their respective conclusions, the administrative law judge credited one opinion, and discredited the other, for not reviewing the contrary x-ray and CT scan interpretations. Accordingly, employer's contention that the administrative law judge selectively analyzed and disparately treated the opinions of Drs. Gaziano and Crisalli has merit. *See Hicks*, 138 F.3d at 535, 21 BLR at 2-340; *Freeman United Coal Mining Co. v. Stone*, 957 F.2d 360, 362-63, 16 BLR 2-50, 2-57 (7th Cir. 1992); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-81 (1993); *Wright v. Director, OWCP*, 7 BLR 1-475, 477 (1984); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-297 (1984).

The administrative law judge also stated that she gave Dr. Crisalli's opinion on complicated pneumoconiosis little probative weight "because he could not opine on the nature of the large opacity in the upper right lung zone visible on [c]laimant's most recent CT scans and X-rays." Decision and Order at 23. To the extent that the administrative law judge gave little weight to Dr. Crisalli's opinion premised on the existence of a large opacity in claimant's upper lobe, she acted without adequate foundation and her determination was not supported by substantial evidence. As employer points out, the administrative law judge previously determined that the x-ray and CT scan evidence did not establish complicated pneumoconiosis, and she came to that determination based on interpretations which did not find a large opacity in claimant's right upper lobe. Decision

[25] Additionally, Dr. Gaziano did not consider Dr. Alexander's x-ray reading in rendering his opinion. He reviewed the x-ray that was read by Dr. Alexander only for quality. His report cites only his own x-ray reading and the CT scan interpretation of Dr. Ahmed. Claimant's Exhibit 4.

and Order at 6-16; Employer's Brief at 16. Moreover, the administrative law judge did not give an explanation regarding the basis on which she found the existence of a large opacity in the right upper lobe, and what little information she did set forth as to the existence of an opacity was not in accord with all of the relevant evidence,[26] and was based on a mischaracterization of Dr. Rosenberg's evidence. Decision and Order at 22-23. Consequently, the administrative law judge did not provide a proper basis for discrediting Dr. Crisalli's opinion. *See Hicks*, 138 F.3d at 535, 21 BLR at 2-340.

In addition, I agree with employer that the administrative law judge improperly dismissed Dr. Rosenberg's opinion by mischaracterizing it as equivocal and speculative because he mentioned the possibility of granulomatous disease or infection. Decision and Order at 22. Employer is correct that Dr. Rosenberg stated, without equivocation, that claimant does not have complicated pneumoconiosis. Moreover, his explanation of why claimant does not have complicated pneumoconiosis did not reference the existence of granulomatous disease or infection.[27] Employer's Exhibits 1, 8 at 13-15. Consequently, it was error to dismiss Dr. Rosenberg's opinion, that claimant does not have complicated pneumoconiosis, as equivocal.[28] Decision and Order at 22.

---

[26] The administrative law judge noted "Dr. Rosenberg and Dr. Alexander both saw a large opacity in the right upper lung zone. Decision and Order at 22. In fact, Drs. Rosenberg and Shipley found no large opacities on the x-rays. Director's Exhibit 31; Employer's Exhibits 1, 3, 5, 6. The administrative law judge's mischaracterization of Dr. Rosenberg's evidence is discussed *supra*.

[27] Dr. Rosenberg's remarks concerning granulomatous disease or infection were made in response to a question posed at his deposition about the masses seen on the CT scan. Employer's Exhibit 8 at 17. Read in context, it appears that Dr. Rosenberg is commenting on the possible source of what Dr. Ahmed reported in his CT scan report, since Dr. Rosenberg previously described his own findings without identifying a density in the upper lung (Employer's Exhibit 8 at 13), and Dr. Rosenberg did not, himself, read any of the CT scans. Although the administrative law judge found that Dr. Rosenberg's mention of granulomatous changes is unsupported by claimant's medical records, interestingly, in the "Comparison" section of Dr. Ahmed's CT scan report, which was prepared as a treatment record, Dr. Ahmed found "calcified granulomas." Claimant's Exhibit 3.

[28] The majority suggests that *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287, 24 BLR 2-269, 2-287 (4th Cir. 2010), supports the administrative law judge's discrediting of Dr. Rosenberg's opinion as equivocal. However, in *Cox* the Fourth Circuit found that the physicians agreed that there was a mass of the requisite size, and the issue was whether that mass was complicated pneumoconiosis - its etiology. The court held that an explanation of etiology that was speculative could be discredited. *Id.*

Regarding Dr. Rosenberg's comment that the large opacities of complicated pneumoconiosis are characteristically rounded or oval, I agree with my colleagues that the regulations at 20 C.F.R. §§718.102, 718.202(a)(1), and 718.304(a) do not specifically require that opacities be rounded or appear in specific lung zones in order to be classified as large opacities of complicated pneumoconiosis. However, the administrative law judge and the majority overlook that the pertinent statutory provision and implementing regulations require diagnosing a chronic dust disease of the lung arising out of coal mining employment which meets particular criteria. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Dr. Rosenberg's opinion is not contrary to the regulations if he was using the characteristic appearance of a dust disease of the lung arising out of coal mine employment, in conjunction with the measurement requirements of the statute and regulations, to assess whether claimant's condition should be diagnosed as a chronic dust disease of the lung meeting the required criteria.[29] Consequently, the administrative law judge erred by dismissing Dr. Rosenberg's opinion out of hand as contrary to the regulations.[30]

In light of the administrative law judge's mischaracterizations, insufficient explanations, and selective analysis, I would remand the case for the administrative law

---

That is not the case here, where there is a dispute among the physicians as to whether there is a mass of the requisite dimensions in claimant's right upper lobe.

[29] Under the statute and regulations, if complicated pneumoconiosis is diagnosed by x-ray there must be one or more opacities greater than one centimeter in *diameter*, which would be classified in ILO Category A, B, or C. 30 U.S.C. §921(c)(3); 20 C.F.R §718.304(a). Dr. Rosenberg testified that the mass, as described by Dr. Ahmed, was over a centimeter only in its linear horizontal measurement, which would not be a diameter measurement. Consequently, it did not meet the required definition. Employer's Exhibit 8 at 15. Under 20 C.F.R. §718.304(c), diagnoses by means other than x-ray, autopsy, or biopsy must be conditions reasonably expected to yield that result, or yield massive lesions in the lung. The administrative law judge in this case made her findings based on the greater than one centimeter in diameter requirement. Decision and Order at 22.

[30] If claimant's presentation is atypical for complicated pneumoconiosis, it would make it less likely that he has complicated pneumoconiosis, absent other evidence to the contrary. The question here is whether the claimant has complicated pneumoconiosis and therefore qualifies for the irrebuttable presumption under 30 U.S.C. §921(c)(3). The burden is on claimant to show by a preponderance of the evidence that he has complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993).

judge to properly consider the medical opinion evidence with respect to the existence of complicated pneumoconiosis, properly resolve the conflicts with regard to the evidence, and provide adequate explanations for her findings and conclusions in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165; *see also Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985) (if the adjudicator misconstrues either the quality or the quantity of relevant evidence, i.e., if the evidentiary analysis does not coincide with the evidence of record, the case must be remanded for reevaluation of the issue to which the evidence is relevant); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

II. The administrative law judge erred in weighing the evidence as a whole.

The administrative law judge compounded the errors previously described when she weighed the evidence in totality.

After acknowledging that the preponderance of the x-ray and CT scan evidence is negative for complicated pneumoconiosis, she stated:

> However, I find that *the most recent* [x]-ray and CT scan evidence shows a large density in the upper right lobe which is not properly ruled out as complicated pneumoconiosis by Dr. Rosenberg. *All of the physicians who looked at* [*c*]*laimant's most recent* [*x*]*-rays have seen the large density except for Dr. Shipley*. Dr. Shipley noted that he saw multiple nodular lesions but did not classify them as complicated pneumoconiosis. *I give Dr. Shipley's interpretations less weight because he did not see the large mass that other physicians noted on [c]laimant's* [*x*]*-rays* . . . Claimant has established that he has complicated pneumoconiosis based on Dr. Gaziano's medical opinion which is corroborated by evidence of a large mass in the upper right lung zone *as seen* by Drs. Rosenberg, Alexander, and Gaziano.

Decision and Order at 23 (emphasis added). Thus, the administrative law judge discounted Dr. Shipley's findings and opinions on the basis that he did not see a large mass or density in claimant's upper right lobe, which the other physicians who looked at claimant's "most recent" x-rays saw on the x-rays they reviewed.

Although the administrative law judge did not explain which were the "most recent x-rays" she was considering, there are positive interpretations specifically identifying an opacity in the right upper lobe for the June 2011 and April 2012 x-rays only.[31] Consequently, it appears that the administrative law judge was limiting her

[31] There was no upper lung Category A opacity or density reported on the December 16, 2009 x-ray. Dr. Rasmussen identified a Category A opacity but he was

consideration to the interpretations of those two x-rays. Only four doctors were involved in the consideration of the June 2011 and April 2012 x-rays. Drs. Shipley, Alexander, and Rosenberg reviewed the former. Drs. Shipley and Gaziano reviewed the latter. Only two of the four physicians, Drs. Alexander and Gaziano, identified an opacity in the right upper lobe.[32]

There are a number of problems with the administrative law judge's findings and procedures. The first problem with the administrative law judge's approach, as employer argues, is that she deviated from her earlier determinations with respect to the x-ray and CT scan evidence without adequate explanation. When the administrative law judge considered the x-ray evidence separately, she took into account the qualifications of the reviewers and determined that the x-ray and CT scan evidence did not support a finding of complicated pneumoconiosis. Decision and Order at 9, 10, 14. However, when weighing the evidence as a whole, she did not consider her prior determinations as to the x-ray and CT scan evidence. *Id*. at 23-24. Further, the administrative law judge's decisional process was defective. She merely counted heads (and, it appears, incorrectly at that, since she counted Dr. Rosenberg as seeing an upper lung density) in order to resolve the conflict she identified. *Id*. This is impermissible. *Adkins* v. *Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992).

To the extent that the administrative law judge provided an explanation for her reweighing, it is not supported by the evidence. The administrative law judge discredited Dr. Shipley's interpretations because he did not see an opacity, mass, or density in the upper right lung on the x-ray that *all* the other physicians *saw*. Decision and Order at 23. The other physicians reading the x-rays were Drs. Alexander, Gaziano, and Rosenberg. The administrative law judge did not identify any evidence that Dr. Rosenberg saw a large mass or density in the upper right lobe, and none is plain from the face of the record. Dr. Rosenberg's x-ray report, written report, and deposition testimony contain no mention of his seeing a large opacity, mass, or density in the upper right lung. The only density he reported seeing was a rounded density in the lower lobe.[33] Employer's

---

considering only a lower lobe lesion. Director's Exhibit 11. Dr. Shipley saw a lower lobe lesion on the December 16, 2009 x-ray, as well as on other x-rays. but did not find any large opacities consistent with pneumoconiosis. Director's Exhibit 31.

[32] The ILO form completed by Dr. Gaziano does not indicate the location of the Category A opacity he marked; however his examination report states, "[T]here was a rounded density in the right upper lobe consistent with [a] complicated pneumoconiotic lesion." Claimant's Exhibit 4.

[33] Dr. Rosenberg only personally interpreted one x-ray – the June 2011 x-ray. Consequently he could only have *seen* what was on that x-ray. Employer's Exhibit 8 at

Exhibits 1 at 5, 8 at 13, 21. Moreover, as noted *supra*, Dr. Rosenberg specifically testified that he did not see large opacity formation, and he corrected counsel when counsel's question intimated that Dr. Rosenberg saw a mass in claimant's right upper lobe.[34] Employer's Exhibit 8 at 13, 21. Further, in his deposition, Dr. Rosenberg

---

6, 13. Moreover, as noted *supra*, Dr. Rosenberg did not personally review any CT scans. Employer's Exhibits 1, 8 at 6. Dr. Rosenberg's previous interpretation of the chest x-ray made no note of a large upper lung mass, and he specifically found no large opacities. Employer's Exhibit 1. At the deposition he reiterated his support for his earlier findings. Employer's Exhibit 8 at 15-16.

[34] The majority suggests that, in his deposition testimony, Dr. Rosenberg embraced the existence of a large density in claimant's right upper lobe, citing his discussion of the CT scan evidence. However, when read in context, in the sections of the deposition cited by the majority, Dr. Rosenberg appears to be merely repeating and commenting on the CT scan observations, particularly those made by Dr. Ahmed. Employer's Exhibit 8. Dr. Rosenberg had no basis for disputing Dr. Ahmed's observations because he did not read the CT scans. He did dispute, however, Dr. Ahmed's conclusions and allied his findings with those of Dr. Shipley. (Q: Now, Dr. Shipley, you had an opportunity to review his series of interpretations spanning both chest x-rays and CT scans; is that correct? A: Correct. Q: Did Dr. Shipley's findings compare with yours? A: Yes, in fact he describes the rounded 2.8 centimeter nodule in the right that we talked about, and then with respect to the upper lobe . . . he specifically states there are no large opacities greater than one centimeter that represents [progressive massive fibrosis (PMF)] . . . He really doesn't describe anything in the right upper lobe that's suggestive of a PMF lesion. Q: And he, too, agrees, that at least simple coal workers' pneumoconiosis is present? A: Correct. Q: Do the CT scan interpretations help to clarify or solidify your review of the chest x-ray interpretations? A: They really solidify and further my previous interpretations of the chest x-ray). *Id.* at 15-16.

Although the majority tries to overlook it, the administrative law judge's stated basis for her determination of complicated pneumoconiosis, was her finding that, with the exception of Dr. Shipley, all of the physicians, including Dr. Rosenberg, *saw* a large upper lung mass, lesion, opacity or density on claimant's x-ray which Dr. Shipley *did not see*. It was Dr. Rosenberg's *seeing* such a large upper lobe entity which formed part of the stated basis for the administrative law judge's finding that there is a large density in claimant's upper right lobe and her determination that Dr. Crisalli's opinion was, therefore, based on incomplete information. Decision and Order at 23. It was also part of the stated basis on which the administrative law judge determined that, with respect to the medical opinion evidence, Dr. Gaziano's opinion credibly established that claimant has complicated pneumoconiosis. *Id.* at 22-23. It was the basis upon which she discredited Dr. Shipley, and ultimately found that Dr. Gaziano's opinion, as corroborated

confirmed his earlier x-ray interpretation (which included finding no Category A large opacities and which did not identify any large density or mass in the upper right lung) and allied his findings with those of Dr. Shipley. Employer's Exhibit 8 at 15-16. The administrative law judge did not explain how she divined that Dr. Rosenberg saw a large upper lobe mass or density. Consequently, the rationale she gave for discrediting Dr. Shipley - that all of the other physicians who looked at claimant's most recent x-rays have seen a large density in the upper right lobe - lacks adequate explanation and evidentiary support. Decision and Order at 23. Further, for the same reason, her finding that Dr. Gaziano's medical opinion is corroborated by evidence of a large mass in the upper right lobe, as seen by Dr. Rosenberg, also lacks adequate explanation and evidentiary support. *Id*. at 24. The administrative law judge relied on the existence of a large density in the upper right lobe seen by all of the physicians reviewing the x-rays, except Dr. Shipley,[35] to give greatest credit to Dr. Gaziano's opinion and to the x-ray opinion of Dr. Alexander.[36] Because it affected the administrative law judge's ultimate

---

by evidence of a large mass seen by Drs. Rosenberg, Alexander, and Gaziano establishes that claimant has complicated pneumoconiosis. *Id.* at 23-24. Thus, it was integral to her ultimate determination of claimant's entitlement to the irrebuttable presumption. However, the record does not support the underlying finding fundamental to her determinations, i.e., that Dr. Rosenberg *saw* a large mass (or as the administrative law judge variously describes it, "opacity", "lesion," or "density") in the claimant's upper right lung that Dr. Shipley *did not see*, and the administrative law judge has not explained otherwise.

The majority has done its best to set forth an explanation for the administrative law judge. Nevertheless, none of the passages cited by the majority establishes that Dr. Rosenberg saw a large mass that Dr. Shipley did not see. Further, the majority has not considered Dr. Rosenberg's statements in context and has ignored Dr. Rosenberg's contrary statements, set forth *supra*, including: his statement that he did not see large opacity formation; his correction of counsel when counsel implied that he had noted a mass in claimant's right upper lung; his description of his x-ray findings and his confirmation that his review of the CT scan interpretations solidified those findings; and his statements allying his findings with those of Dr. Shipley.

[35] I note that although Dr. Rosenberg testified that "everybody sort of noted the change in the right," Employer's Exhibit 8 at 22, Dr. Rosenberg did not explain what "the change" was. *Id*.

[36] The administrative law judge's discrediting of Dr. Shipley's opinion on the basis that he did not see a large opacity, Decision and Order at 23, also appears to conflict with her earlier findings that Dr. Shipley's x-ray and CT scan interpretations were consistent with those of Dr. Gaziano. *Id*. at 22-23.

determination that claimant established complicated pneumoconiosis, the error is not harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984), and her determination that claimant invoked the irrebuttable presumption is not supported by substantial evidence and adequate explanation.

I therefore disagree with the majority's conclusion that the administrative law judge could render specific credibility determinations under the individual subsections in this case and then, without adequate explanation and evidentiary support, discard those findings in considering the "evidence as a whole." The administrative law judge specifically found that none of the x-rays was positive for complicated pneumoconiosis, and determined that the x-ray, CT scan, and biopsy evidence did not establish complicated pneumoconiosis. Decision and Order at 9-14. She provided no reasonable explanation for altering those initial findings and determinations. As such, the administrative law judge's Decision and Order does not satisfy the APA and is not supported by substantial evidence. *Wojtowicz*, 12 BLR at 1-165.

Lastly, the majority asserts that the process by which the administrative law judge analyzed the evidence and her finding of complicated pneumoconiosis may be affirmed as consistent with *Lester*, *Scarbro*, and *Cox*. However, that is simply not correct.

In *Lester*, the United States Court of Appeals for the Fourth Circuit affirmed an administrative law judge's determination that all relevant evidence must be considered in determining whether complicated pneumoconiosis was established. The court rejected claimant's proposed interpretation of the Act -- that consideration of evidence contrary to entitlement was prohibited when claimant provides any evidence supporting a finding of a complicated pneumoconiosis – because it ignored Congress' purpose in creating the presumption, "namely to grant to the miner an irrebuttable presumption not because he provided a single piece of relevant evidence, but because he has a 'chronic dust disease of the lung,' commonly known as complicated pneumoconiosis. To make such a determination, the [Office of Workers' Compensation Programs] necessarily must look at all of the relevant evidence presented." *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117 (4th Cir. 1993). The administrative law judge's actions in this case violate the teachings of *Lester*, rather than embody them, because she failed to properly consider all the relevant evidence.

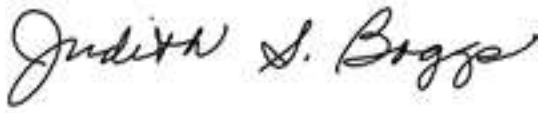
In *Scarbro*, unlike this case, seven physicians read the film at issue as positive for complicated pneumoconiosis, in that it showed one or more opacities larger than one centimeter in diameter, and the eighth physician observed "extensive pulmonary densities consistent with pneumoconiosis," but did not elaborate further. *E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 253, 22 BLR 2-93, 2-96 (4th Cir. 2000). The administrative law judge in *Scarbro* found that prong (a) of 20 C.F.R 718.304 was satisfied. The administrative law judge also found that the autopsy prosector's findings

satisfied prong (b) of the regulation, although doctors reviewing the autopsy slides concluded, using a medical definition, that the large number of lesions they saw were consistent only with simple coal workers pneumoconiosis. The Fourth Circuit affirmed the administrative law judge's rejection of the evidence, which was based on medical criteria, rather than the pertinent regulatory criteria, because it did not undercut the validity of the administrative law judge's prong (a) and prong (b) findings. *Scarbro*, 220 F.3d at 258, 22 BLR at 2-105.

Similarly, in *Cox*, all of the physicians agreed on the existence of a mass in excess of one centimeter in diameter but they offered differing opinions regarding its etiology. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 284, 24 BLR 2-269, 2-283 (4th Cir. 2010); Consequently, the administrative law judge and the Fourth Circuit considered *Cox*, in the same manner as described in *Scarbro*: Where, if the x-ray evidence meets the first prong of U.S.C. §921(c)(3) (which is also the first prong of 20 C.F.R §718.304), "'its probative force is not reduced because evidence under some other prong is inconclusive or less vivid. Instead, the x-ray evidence can lose force only if the other evidence affirmatively shows that the opacities are not there or are not what they seem to be . . . .'" *Cox*, 602 F.3d at 284, 24 BLR at 2-282, *quoting Scarbro*, 220 F.3d at 256 (emphasis added by the court in *Cox*). The court concluded that the administrative law judge in *Cox* permissibly found that the other evidence of record was insufficient to cause the claimant's evidence to lose force, since CT scans and other medical tests supported finding complicated pneumoconiosis, and the evidence to the contrary consisted of speculative alternative diagnoses. *Cox*, 602 F.3d at 287, 24 BLR at 2-286.

In this case, the administrative law judge found that none of the x-rays was positive for complicated pneumoconiosis, and that the x-ray, CT scan, and biopsy evidence did not establish pneumoconiosis. Thus, her initial determination was that none of the prongs of Section 718.304 was satisfied. Decision and Order at 9-10, 14. However, when weighing the medical opinion evidence and the evidence as a whole, she proceeded based on a faulty premise, and without adequate explanation, to reject the x-ray and CT scan evidence she previously found credible. *Id*. at 23-24. Further, without adequate explanation, she omitted, disregarded or mischaracterized other relevant evidence as to the existence of a mass of the requisite dimensions, as well as evidence relating to the etiology of the alleged mass, to determine that complicated pneumoconiosis was established. *Id*. Consequently, this is not a case of revising an initial finding in light of other strong relevant evidence to the contrary, as *Lester, Scarbro* and *Cox* would require. Rather, it is a case of: rejecting initial supportable findings because of an unexplained, and unsupported, re-characterization of evidence previously considered; failing to consider relevant evidence and improper weighing of evidence; and making an unsupportable and inadequately explained determination of eligibility.

In summary, in light of the unresolved conflicts, omissions and inaccuracies in the administrative law judge's consideration of the x-ray, CT scan, and medical opinion evidence, her determination that "claimant has established that he has complicated pneumoconiosis based on Dr. Gaziano's medical opinion which is corroborated by evidence of a large mass in the upper right lung zone as seen by Drs. Rosenberg, Alexander, and Gaziano," cannot be affirmed. Decision and Order at 24. Although the Board's review authority is limited, it does not require 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). The administrative law judge's analysis of the evidence in this case does not stand up to scrutiny under the APA. Therefore, I would vacate the administrative law judge's finding that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). I would further remand the case to the administrative law judge for reconsideration of the relevant evidence with instructions to properly resolve all material conflicts in the evidence, and to set forth her findings in detail, including the underlying rationale, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.



JUDITH S. BOGGS
Administrative Appeals Judge