U.S. Department of Labor

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

BRB No. 17-0552 BLA

KATHLEEN A. BENNETT (o/b/o LEONARD BENNETT)	)	
Claimant-Respondent	)	
v.	)	
SLAB FORK COAL COMPANY	)	DATE ISSUED: 09/20/2018
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe, Williams & Reynolds), Norton, Virginia, for claimant.

Andrea L. Berg and Ashley M. Harman (Jackson Kelly, PLLC), Morgantown, West Virginia, for employer/carrier.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2014-BLA-05875) of Administrative Law Judge Daniel F. Solomon awarding benefits on a claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on March 24, 2004, which is now being considered pursuant to the miner's third request for modification.[2]

The miner filed four prior claims for benefits, each of which was finally denied. Director's Exhibits 1-4. The miner's most recent prior claim was denied by the district director because the evidence did not establish total disability. Director's Exhibit 4. After the miner filed this subsequent claim, Administrative Law Judge Edward Terhune Miller denied benefits because the new evidence did not establish total disability and, thus, did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Director's Exhibit 49.

The miner requested modification, which was denied by Administrative Law Judge Daniel L. Leland, because the miner failed to establish a change in conditions or mistake in a determination of fact at 20 C.F.R. §725.310. Director's Exhibits 52, 75. The miner's second request for modification was denied by Administrative Law Judge Lystra A. Harris

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[1] The miner died on February 6, 2010, while his case was pending before the Office of Administrative Law Judges. Director's Exhibit 93; Claimant's Exhibit 4. Claimant, the widow of the miner, is pursuing the miner's claim on his behalf. Decision and Order at 2; Director's Exhibit 93.

[2] The amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this claim, based on its filing date. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

on the same basis. Director's Exhibits 76, 123. Claimant filed the current request for modification on the miner's behalf. Director's Exhibit 124.

After crediting the miner with twenty-five years of coal mine employment,[3] the administrative law judge accepted the parties' stipulation that the miner had simple clinical pneumoconiosis at 20 C.F.R. §718.202(a). The administrative law judge found that the x-ray, biopsy, and autopsy evidence supported the finding of simple pneumoconiosis. He further found that the miner had complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The administrative law judge further found that the miner's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Alternatively, the administrative law judge found that the miner was totally disabled by a respiratory or pulmonary impairment due to simple pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge found that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 and a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the miner had complicated pneumoconiosis and that the miner was totally disabled due to simple pneumoconiosis. Employer also argues that the administrative law judge erred in failing to consider whether granting modification would render justice under the Act. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, requesting that, if the Board remands this case, it instruct the administrative law judge that he may take official notice of documents pertaining to the credibility of Dr. Wheeler's x-ray interpretations. Employer has filed a consolidated reply brief, reiterating its arguments and asking that the Director's request be stricken.[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 rational, supported by substantial evidence,

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[3] The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 10. Accordingly, this cases arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had twenty-five years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310, authorizes modification of an award or denial of benefits in a miner's claim, based on a mistake in a determination of fact or a change in conditions. The administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993). The administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

Additionally, because claimant requested modification of the denial of a subsequent claim for failure to satisfy the requirements of 20 C.F.R. §725.309, the administrative law judge is required to determine whether the new evidence submitted on modification, considered with the evidence originally submitted in the subsequent claim, establishes a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(c); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). The miner's prior claim was denied because he failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 4. Consequently, the miner had to submit new evidence establishing this element of entitlement.

I. Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has 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. The administrative law judge must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether claimant has invoked the irrebuttable presumption. *See E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge found that claimant established complicated pneumoconiosis based on the x-ray evidence at 20 C.F.R. §718.304(a) and the CT scan evidence at 20 C.F.R. §718.304(c).

A. X-ray Evidence

The administrative law judge considered twelve interpretations of three x-rays taken on April 14, 2004, December 15, 2004, and June 8, 2005. Decision and Order at 7-9. Dr. Navani, dually-qualified as a Board-certified radiologist and B reader, interpreted the April 14, 2004 x-ray as positive for Category A large opacities. Director's Exhibit 107. Dr. Alexander, also a dually-qualified radiologist, interpreted this x-ray as revealing no large opacities.[5] *Id.* Drs. Patel, Binns, and Wiot, all dually-qualified radiologists, interpreted this x-ray as negative for large opacities of complicated pneumoconiosis. Director's Exhibits 16, 31, 71. Dr. Zaldivar, a B reader, provided the only interpretation of the December 15, 2004 x-ray, and interpreted it as negative for large opacities of complicated pneumoconiosis. Director's Exhibit 31. Dr. Cappiello, a dually-qualified radiologist, and Dr. Aycoth, a B reader, interpreted the June 8, 2005 x-ray as positive for Category A large opacities. Director's Exhibit 30. Drs. Wiot, Scatarige, Scott, and Wheeler, all dually-qualified radiologists, interpreted this same x-ray as negative. Director's Exhibit 71.

In resolving the conflict in the x-ray evidence, the administrative law judge accorded greater weight to the interpretations rendered by dually-qualified radiologists. Decision and Order at 9-10. He assigned greatest weight to the June 8, 2005 x-ray because it was the most recent x-ray.[6] *Id.* He assigned reduced weight to Dr. Zaldivar's "dispositive" reading of the December 15, 2004 x-ray because Dr. Zaldivar was not a Board-certified radiologist. *Id.* The administrative law judge also noted that Dr. Zaldivar interpreted this x-ray as negative for simple pneumoconiosis, contrary to the administrative law judge's finding that the miner had the disease. *Id.* Thus, the administrative law judge focused his inquiry in resolving the conflict between the readings of the June 8, 2005 x-ray. *Id.*

The administrative law judge found that all of the readers of the June 8, 2005 x-ray identified a large opacity but disagreed as to its etiology. Decision and Order at 9. He therefore found that this x-ray established the presence of a "qualifying sized mass" pursuant to 20 C.F.R §718.304(a). *Id.* He next found that the negative readings by Drs.

[5] However, he opined that a fifteen by five millimeter density could represent either complicated pneumoconiosis or a fissure. Director's Exhibit 107.

[6] Specifically, the administrative law judge determined that the June 8, 2005 x-ray was entitled to more weight than the April 14, 2004 x-ray because the June 8, 2005 x-ray was taken one year and two months more recently. Decision and Order at 9-10.

Wiot, Scatarige, Scott, and Wheeler of the June 8, 2005 x-ray were equivocal, and thus entitled to diminished weight. *Id*. at 9-10. He credited Dr. Cappiello's positive x-ray reading because it was buttressed by Dr. Aycoth's positive interpretation, and because it was consistent with the miner's treatment records. *Id*. at 10. Therefore, the administrative law judge found that the June 8, 2005 x-ray was positive for large opacities of complicated pneumoconiosis. Because he assigned more weight to this x-ray than to the April 14, 2004 and December 15, 2004 x-rays, the administrative law judge found that claimant established complicated pneumoconiosis at 20 C.F.R §718.304(a). *Id*.

Employer argues that the administrative law judge erred in discrediting Dr. Zaldivar's interpretation of the December 15, 2004 x-ray. Employer's Brief at 11-13. We disagree. The administrative law judge permissibly accorded greater weight to the readings by physicians with superior radiological qualifications and, therefore, permissibly assigned diminished weight to Dr. Zaldivar's negative reading because he was only a B reader. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Decision and Order at 9-10.[7]

In addition, the administrative law judge accurately noted that employer stipulated that the evidence established the existence of simple pneumoconiosis.[8] Decision and Order at 3; Hearing Transcript at 13-14; Employer's Brief at 20. Moreover, as discussed *infra*, all of the physicians who rendered biopsy and autopsy reports diagnosed simple pneumoconiosis. Director's Exhibits 17, 70, 107. The administrative law judge permissibly found that Dr. Zaldivar's failure to diagnose simple pneumoconiosis, contrary to employer's stipulation and the pathology evidence, diminished the credibility of his x-ray reading. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 10.

Employer next argues that the administrative law judge erred in resolving the conflict between the radiologists who interpreted the June 8, 2005 x-ray. Employer's Brief

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[7] However, we note that in giving greater weight to Dr. Cappiello's reading, the administrative law judge considered the positive interpretation of Dr. Aycoth, who, like Dr. Zaldivar, is a B reader. When using reader qualifications to determine the weight given physicians' interpretations, the administrative law judge must treat similarly qualified physician readers alike. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992).

[8] Employer argues that the x-ray evidence is negative for simple pneumoconiosis. Employer's Brief at 13 n.3. Because employer is bound by its stipulation, we decline to address this argument. *See Richardson v. Director, OWCP*, 94 F.3d 164, 167 (4th Cir. 1996).

at 13-14. Employer's argument has merit. The administrative law judge correctly found that all the radiologists who interpreted the June 8, 2005 x-ray identified a large opacity measuring at least one centimeter in diameter but disagreed as to its etiology. Decision and Order at 10; Director's Exhibits 30, 71. The administrative law judge erred, however, in crediting the positive readings by Drs. Cappiello and Aycoth.

Specifically, the administrative law judge erred in failing to address the additional comments by Drs. Cappiello and Aycoth in the narrative portion of their x-ray readings when crediting this evidence as establishing large opacities of complicated pneumoconiosis. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016); *Melnick*, 16 BLR at 1-37. Dr. Cappiello indicated that there are multiple opacities in the lungs "varying in size from a fraction of a millimeter up to approximately 1.5" centimeters. *Id*. He stated that the large opacity measuring 1.5 centimeters was located in the "right mid lung zone." Director's Exhibit 30. After diagnosing a Category A large opacity of complicated pneumoconiosis, he stated that "[n]eoplasm in the right mid lung zone cannot be excluded." *Id*. He recommended a CT scan for further evaluation of the 1.5 centimeter density. *Id*. Dr. Aycoth also indicated that the x-ray revealed a 1.5 centimeter mass and diagnosed Category A complicated pneumoconiosis. *Id*. However, he stated that he could not rule out a neoplasm. *Id*. Because these comments are relevant to the weight that the administrative law judge assigns the x-ray readings of Drs. Cappiello and Aycoth, *see Melnick*, 16 BLR at 1-37, we vacate the administrative law judge's finding that the x-ray evidence established complicated pneumoconiosis at 20 C.F.R §718.304(a) and his finding that the evidence as a whole established complicated pneumoconiosis at 20 C.F.R §718.304.[9]

We also vacate the administrative law judge's credibility finding with respect to the contrary readings by Drs. Wiot, Scatarige, Scott, and Wheeler of the June 8, 2005 x-ray.[10]

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[9] Further, we vacate the administrative law judge's finding that the miner's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b).

[10] Dr. Wiot identified a "mass density" in the right mid-lung field, but stated that its "significance" was "unknown." Director's Exhibit 71. Based on the absence of small opacities, he excluded complicated pneumoconiosis. *Id*. Moreover, because the mass did not increase in size over a specific time interval, he stated that it was not a malignancy, but probably an inflammatory process. *Id*. Dr. Scatarige indicated that the x-ray revealed a one and one-half centimeter nodule in the right mid lung that was "probably calcified, and a granuloma." *Id*. Dr. Scott identified a two-centimeter mass in the mid right lung and indicated that it was "probably calcified and probably a granuloma," but stated that this should be confirmed with CT scan. *Id*. Dr. Wheeler opined that the x-ray revealed a two-

In finding these contrary x-ray readings to be equivocal, the administrative law judge cited the holding of the United States Court of Appeals for the Fourth Circuit in *Westmoreland Coal Co. v. Cox*, 602 F.3d 276 (4th Cir. 2010). In *Cox*, the Fourth Circuit explained that an administrative law judge has discretion to reject, as speculative and equivocal, the opinions of physicians who exclude coal mine dust exposure as the cause for large opacities or masses identified by x-ray, and attribute the radiological findings to conditions, such as tuberculosis, histoplasmosis, granulomatous disease or sarcoidosis, if they fail to point to evidence in the record indicating that the miner suffers, or suffered, from any of the alternative diseases. *Id*. The administrative law judge, however, has not adequately explained his basis for finding that the readings by Drs. Wiot, Scatarige, Scott, and Wheeler of the June 8, 2005 x-ray are equivocal. Thus, his basis for discrediting these x-ray readings is not in accordance with the Administrative Procedure Act (APA),[11] 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).[12]

Further, we agree with employer that the administrative law judge erred in his consideration of the x-rays contained in the miner's treatment records pursuant to 20 C.F.R §718.304(a). The administrative law judge found that this evidence supported Dr. Cappiello's positive reading of the June 8, 2005 x-ray. Decision and Order at 10, 18-19. The administrative law judge explained:

> The prior Decision and Orders noted treatment records from Raleigh General Hospital on [August 1, 2008 and September 29, 2008], the treatment records of Dr. Rodney L. Fink from [February 9, 2004 to January 12, 2007], and the treatment records of Dr. Mullins from [June 2, 2004 to May 29, 2007]. The

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centimeter mass in the right mid lung zone "compatible with granuloma or tumor." *Id*. He recommended that a CT scan be done to verify. *Id*.

[11] The Administrative Procedure Act 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).

[12] The Director has requested that the Board instruct the administrative law judge that he may take official notice on remand of items pertaining to the credibility of Dr. Wheeler's x-ray interpretation. The decision to reopen the record or take official notice of a matter are procedural issues committed to the administrative law judge's discretion. *See Troup v. Reading Anthracite Coal Co*., 22 BLR 1-14, 1-21 (1999) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

> [administrative law judges] did not discuss them further. However, in reviewing them, I note that the prior [administrative law judges] did not comment on records of Dr. Patel at Beckley Medical Imagining [who] noted [a] 2.0 cm by 1.0 cm masses on x-rays and CT scans dated January 11, 2005, March 23, 2005, September 21, 2005, June 21, 2005, January 11, 2006 and April 12, 2006. A similar sized mass was also noted [on] an x-ray taken at Raleigh Radiology in Beckley November 3, 2004. A report from the same clinic dated July 14, 2004, noted the mass to be 1.8 cm by 2.5 cm. The June 16, 2004 pathology report from Beckley-ARH Hospital showed the mass as an aggregate, sized 1.2 cm by 0.1 cm by 0.1 cm.

Id. at 17. However, the administrative law judge erred in failing to consider contrary x-rays in the miner's treatment records taken after the June 8, 2005 x-ray that are relevant to the issue of complicated pneumoconiosis. *See Addison*, 831 F.3d at 252-53. Specifically, Dr. Patel interpreted a February 28, 2007 x-ray as revealing a granuloma in the right lung mass. Director's Exhibit 70 at 128. Further, Dr. Goodwin interpreted a September 30, 2008 x-ray and stated that the "nodular density present in the right mid lung field on previous examination is no longer evidenced." *Id*. at 10.

On remand, the administrative law judge must reconsider whether the x-ray evidence establishes complicated pneumoconiosis under 20 C.F.R. §718.304(a). He should consider the 2004 and 2005 x-rays,[13] including the physicians' comments, and address whether the additional comments by the physicians, including Drs. Cappiello and Aycoth, undermine the credibility of their interpretation of the June 8, 2005 x-ray. *See Melnick*, 16 BLR at 1-37. He should also address all relevant evidence and adequately explain his credibility determinations in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

B. Pathology Evidence

We next address employer's argument that the administrative law judge erred in weighing the autopsy evidence pursuant to 20 C.F.R. §718.304(b).[14] The administrative

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[13] The administrative law judge should resolve the conflict in the readings of the April 14, 2004 x-ray, and then reconsider the weight he assigns this x-ray. *See Adkins*, 958 F.2d at 52. He should adequately explain his credibility findings. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[14] The administrative law judge also summarized two reports of the miner's June 15, 2004 right lung mass biopsy. Director's Exhibits 17, 70. Dr. Imbing identified two tissue fragments showing fibrosis and anthracotic pigment deposition with no malignancy

law judge considered autopsy reports from Drs. Dennis, Bush, and Oesterling. Director's Exhibit 107. Dr. Dennis diagnosed progressive massive fibrosis, while Drs. Bush and Oesterling both diagnosed simple pneumoconiosis and disagreed with Dr. Dennis that the miner had progressive massive fibrosis. *Id.* The administrative law judge determined that Dr. Dennis's opinion was more consistent with the x-rays and CT scans of record, as neither Dr. Oesterling nor Dr. Bush diagnosed the large opacity established by these objective tests. Decision and Order at 19, 21. However, he also noted that Dr. Dennis did not address whether the large areas of progressive massive fibrosis would appear on x-ray as a nodule measuring greater than one centimeter in diameter. *Id.* at 19. Consequently, the administrative law judge found that the autopsy evidence was in equipoise and did not establish complicated pneumoconiosis pursuant to 20 C.F.R §718.304(b). *Id.* at 21.

Employer contends that the administrative law judge erred in discounting the autopsy findings of Drs. Oesterling and Bush that the miner did not have complicated pneumoconiosis as inconsistent with the positive x-ray and CT scan evidence.[15] Employers' Brief at 17. In light of our decision to vacate the administrative law judge's

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present. *Id.* He stated that the deposits were consistent with coal workers' pneumoconiosis. *Id.* Dr. Caffrey reviewed a pathology slide and opined that the biopsy was consistent with coal workers' pneumoconiosis with a moderate to heavy amount of anthracotic pigment and a moderate amount of collagen. Director's Exhibit 71. The administrative law judge reiterated the findings of Administrative Law Judge Daniel L. Leland that this evidence, standing alone, was insufficient to establish complicated pneumoconiosis at 20 C.F.R. §718.304(b). Decision and Order at 16-17.

[15] Employer contends that Dr. Dennis's autopsy report should not have been considered in this claim. Employer's Brief at 8, 15. Employer argued before the administrative law judge that, in the second modification proceeding, Administrative Law Judge Lystra A. Harris excluded this autopsy report because the miner did not timely exchange the evidence. Decision and Order at 2; Employer's Brief at 8. Arguing that modification should not be used as a tool to correct mistakes made in earlier litigation, employer moved for the administrative law judge to exclude the autopsy report in the instant modification proceeding. *Id.* Contrary to employer's argument, the administrative law judge acted within his discretion in admitting Dr. Dennis's autopsy report, notwithstanding employer's objection. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); Decision and Order at 2 n. 1. The administrative law judge explained that "the interests of justice require that [he] evaluate all competent evidence" and that he is not "bound by Judge Harris's evidentiary rulings." *Id.* The administrative law judge also found that employer "had plenty of notice that the autopsy existed and had developed rebuttal evidence to confront it, and therefore is not prejudiced by surprise." *Id.*

finding that the x-ray evidence established complicated pneumoconiosis at 20 C.F.R. §718.304(a) (and, as will be discussed *infra*, our decision to vacate the finding that the CT scan evidence established complicated pneumoconiosis at 20 C.F.R. §718.304(c)), we must vacate the administrative law judge's credibility findings with respect to the autopsy review reports of Drs. Oesterling and Bush. Decision and Order at 19-21. On remand, when weighing all of the relevant evidence together, the administrative law judge should reconsider the weight he assigns the autopsy reports of Drs. Oesterling and Bush. The administrative law judge should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Akers*, 131 F.3d at 441.

C. Other Medical Evidence

Employer argues that the administrative law judge erred in weighing the CT scan and medical opinion evidence pursuant to 20 C.F.R. §718.304(c). Employer's Brief at 18-21. The administrative law judge considered two interpretations of CT scans conducted on June 15, 2004 and August 1, 2008. Dr. Wiot read the June 15, 2004 CT scan as negative for simple and complicated pneumoconiosis, and opined that it showed an irregular mass in the right lung consistent with granulomatous disease or neoplasm. Director's Exhibit 71. Dr. Lintala interpreted the August 1, 2008 CT scan as showing a large "speculated" collection of soft tissue in the right lung measuring 5.2 x 1.5 centimeters, which "may" represent a focal area of pulmonary fibrosis.[16] Director's Exhibit 70 at 13. He indicated that another CT scan may be helpful to evaluate whether the density was malignant. *Id.*

The administrative law judge assigned little weight to Dr. Wiot's interpretation because he failed to diagnose simple pneumoconiosis. Decision and Order at 17, 18. The administrative law judge further found that Dr. Lintala's CT scan interpretation established complicated pneumoconiosis:

> In his interpretation of the August 1, 2008 CT scan, Dr. Lintala noted a lesion that was [two by one and one half centimeters]. Prior judges found that it was not identified as coal workers' pneumoconiosis nor as having any relation to [c]laimant's coal mine employment. I disagree. The records from Raleigh General Hospital include CT scans dated August 27, 2007, April 4, 2008 and September 8, 2008, and all show a huge mass, 5.2 by 1.5 cm, repeatedly described as pulmonary fibrosis.

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[16] In a separate part of his report, Dr. Lintala noted that the mass was two by one and one-half centimeters. Director's Exhibit 70 at 14.

Decision and Order at 17. Moreover, the administrative law judge found that Dr. Lintala's CT scan was entitled to more weight because it was more recent than Dr. Wiot's CT scan. *Id*. at 21. The administrative law judge further found that Dr. Lintala's CT scan reading established the presence of "a condition which could reasonably be expected" to appear on x-ray as greater than one centimeter. *Id*. at 21. Therefore, the administrative law judge found that claimant established complicated pneumoconiosis based on the CT scan evidence. *Id*. at 17, 21.

We agree with employer that the administrative law judge erred in his analysis of Dr. Lintala's CT scan reading.[17] Employer's Brief at 18-21. First, the administrative law judge erred in failing to address whether Dr. Lintala's CT scan reading was equivocal in light of his statement that the opacity "may" represent pulmonary fibrosis. *See Addison*, 831 F.3d at 252-53; *Cox*, 602 F.3d at 283. Moreover, the administrative law judge did not adequately explain his basis for finding that Dr. Lintala's diagnosis of pulmonary fibrosis was consistent with a diagnosis of complicated pneumoconiosis. *Wojtowicz*, 12 BLR at 1-165. Nor did he explain his basis for finding that Dr. Lintala's CT scan reading was sufficient to establish the existence of an opacity that would appear on x-ray measuring greater than one centimeter in diameter.[18] *Scarbro*, 220 F.3d at 255-56; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999).

Thus, we vacate the administrative law judge's finding that the CT scan evidence established complicated pneumoconiosis at 20 C.F.R. §718.304(c). On remand, the administrative law judge should reconsider the weight he assigns Dr. Lintala's CT scan reading and adequately explain his basis for finding that this CT scan establishes complicated pneumoconiosis at 20 C.F.R. §718.304(c). *See Addison*, 831 F.3d at 252-53; *Wojtowicz*, 12 BLR at 1-165. The administrative law judge should address Dr. Lintala's credentials, the explanations for his conclusions, the documentation underlying his medical

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[17] Contrary to employer's argument, the administrative law judge permissibly assigned diminished weight to Dr. Wiot's CT scan interpretation based on its age. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Decision and Order at 9-10.

[18] We agree with employer that the administrative law judge mischaracterized the treatment records when he found that they include CT scans taken on August 27, 2007, April 4, 2008, and September 8, 2008 which showed a large mass of pulmonary fibrosis. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985); Decision and Order at 17. As part of his August 1, 2008 CT scan interpretation, Dr. Lintala noted that CT scans taken on April 4, 2008 and September 25, 2007 were reviewed. Director's Exhibit 70. However, neither interpretation is in the record. *Id*. Moreover, the record does not contain an August 27, 2007 CT scan. *Id*.

judgments, and the sophistication of, and bases for, his diagnoses. *See Akers*, 131 F.3d at 441.

The administrative law judge also considered the medical opinions of Drs. Mullins, Zaldivar, Rosenberg, Hippensteel, and Castle. Dr. Mullins opined that the large mass described by Dr. Patel on the April 14, 2004 x-ray was complicated pneumoconiosis, based upon the miner's June 15, 2005 biopsy. Director's Exhibit 18. Drs. Zaldivar, Rosenberg, Hippensteel, and Castle each opined that the miner did not have complicated pneumoconiosis. Director's Exhibits 71, 106; Employer's Exhibit 1. The administrative law judge discredited Dr. Mullins's opinion because the physician did not have access to the autopsy evidence. Decision and Order at 21. The administrative law judge further found that the opinions of Drs. Zaldivar, Rosenberg, Hippensteel, and Castle were poorly reasoned because these physicians "did not note [that] the x-ray evidence and CT scan evidence is positive for complicated pneumoconiosis." *Id.* at 19, 21. Further, he discredited Dr. Castle's opinion for failing to diagnose clinical pneumoconiosis on x-ray. *Id*. at 19. Therefore, the administrative law judge found that claimant failed to established complicated pneumoconiosis based on the medical opinion evidence.

Employer argues that the administrative law judge erred in assigning diminished weight to the medical opinions of Drs. Zaldivar, Rosenberg, Hippensteel, and Castle. Employer's Brief at 23-26. In light of our decision to vacate the administrative law judge's finding that the x-ray and CT scan evidence established complicated pneumoconiosis at 20 C.F.R. §718.304(a), (c), we must vacate the administrative law judge's credibility findings with respect to the opinions of Drs. Zaldivar, Rosenberg, Hippensteel, and Castle.[19] Decision and Order at 19-21. On remand, the administrative law judge should reconsider the weight he assigns all of the medical opinions. The administrative law judge should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Akers*, 131 F.3d at 441.

II. Total Disability

Employer argues that the administrative law judge erred in finding that claimant established total disability. A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine

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[19] In discrediting Dr. Castle's opinion, the administrative law judge erred in failing to address the fact that Dr. Castle conceded that the pathology evidence was consistent with "minimal, simple coal workers' pneumoconiosis." Employer's Exhibit 1 at 25; *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016).

work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv).

The administrative law judge found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 13. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge concluded that claimant "offers no medical opinion evidence to support" a finding of total disability. *Id*. at 20. The administrative law judge further found, however, that claimant's testimony established that the miner needed supplemental oxygen for the last two years of his life. *Id*. at 15, 20. He also noted that the miner's death certificate indicates that the immediate cause of death was pneumonia, respiratory failure, chronic renal failure, and coronary artery disease. *Id*. at 18; Director's Exhibit 93. Based on this analysis, the administrative law judge concluded that the evidence established total disability:

> Weighing all of the evidence as to total respiratory disability together, because the [m]iner had to take oxygen all day every day for the last two years of his life when he had no testing, although he has no qualifying testing and offers no medical opinion evidence to support it, but where the records of his death show he died of respiratory failure and competent medical testimony shows that he had a respiratory condition, i.e. pneumonia, prior to death, I find that he was totally disabled. I also note as discussed below that the [c]laimant established complicated pneumoconiosis.

Decision and Order at 19-20.

We agree with employer that the administrative law judge erred in finding total disability established in this case. A physician need not phrase his or her opinion in terms of "total disability" in order to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990), *citing Black Diamond Coal Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985) ("[i]t is not essential for a physician to state specifically that an individual is totally impaired . . . ."). Diagnoses, statements and notes set forth in treatment records or other documents regarding limits on a miner's activities due to a pulmonary condition may be relevant to a total disability determination, even if the records do not use the phrase "totally disabled" or specifically address the miner's ability to perform his prior coal mine job. A medical opinion may support a finding of total disability if it provides sufficient information from which the administrative law judge can

reasonably infer that a miner is or was unable to do his last coal mine job.[20] *See Poole,* 897 F.2d at 894; *Scott v. Mason Coal Co*., 60 F.3d 1138, 1142 (4th Cir. 1995); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988).

The administrative law judge, however, did not adequately explain which medical evidence he credited to support the existence of a chronic[21] respiratory or pulmonary impairment.[22] Moreover, the administrative law judge failed to explain how the evidence

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[20] It is claimant's burden to establish the exertional requirements of the miner's usual coal mine employment in order to provide the administrative law judge with a basis of comparison in which to evaluate a medical assessment of disability, and reach a conclusion regarding total disability. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986) (en banc); *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984).

[21] The administrative law judge correctly noted that a non-respiratory or non-pulmonary condition shall only be considered in determining whether a miner was totally disabled if, in turn, it "causes a *chronic* respiratory or pulmonary impairment." 20 C.F.R. §718.204(a) (emphasis added); *see* Decision and Order at 13. The administrative law judge should address employer's argument that the evidence does not establish the existence of a chronic respiratory or pulmonary impairment, but rather an acute condition at the time of death. Employer's Brief at 31-32. Specifically, to the extent the administrative law judge found that the miner was totally disabled by pneumonia, the administrative law judge should explain his basis for finding that the pneumonia was a chronic disease, rather than an acute condition existing at the time of the miner's death.

[22] Review of the record reflects that none of the pulmonary function and arterial blood gas studies is qualifying for total disability. Director's Exhibits 16, 31. The record also includes the medical opinions of Drs. Mullins, Zaldivar, Rosenberg, Hippensteel, and Castle. Dr. Mullins opined that the miner was "100% disabled" because he had complicated pneumoconiosis. Director's Exhibit 18. Drs. Zaldivar, Rosenberg, Hippensteel, and Castle opined that the miner was not totally disabled by a respiratory or pulmonary impairment prior to his death, but was disabled by a cardiac condition. Director's Exhibits 71, 106; Employer's Exhibit 1. The record also includes the autopsy reports of Drs. Oesterling and Bush. Based on his review of the autopsy slides, Dr. Oesterling opined that the miner's lung sections "clearly show evidence of extensive passive congestion with intraalveolar hemorrhage." Director's Exhibit 107. He stated that this condition "resulted in an opportunistic pneumonia which involved major portions of [the miner's] lung." *Id*. He further indicated that due "to the passive congestion there was also evidence of venous stasis with thromboembolic change within the pulmonary vasculature," and that the latter condition "resulted in areas of acute pulmonary infarction."

supports an inference that the miner was totally disabled from his usual coal mine employment by that respiratory or pulmonary impairment. Accordingly, the administrative law judge's total disability analysis does not comport with the APA. *Wojtowicz*, 12 BLR at 1-165. We must therefore vacate the administrative law judge's finding that the evidence established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). On remand, the administrative law judge must reconsider this issue and adequately explain his basis for finding that the miner was totally disabled by a *chronic* respiratory or pulmonary impairment.[23] Because we vacate his finding that claimant established total disability, we must further vacate his finding that the miner was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c).[24]

III. Render Justice Under the Act

Finally, we agree with employer that the administrative law judge erred in failing to address whether granting claimant's request for modification would render justice under the Act. The modification of a claim does not automatically flow from a finding that a mistake was made in an earlier determination. Rather, modification should be granted only where doing so will render justice under the Act. *See Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968); *Westmoreland Coal Co. v. Sharpe*, 692 F. 3d 317, 327-28 (4th Cir. 2012), *cert. denied,* 133 S.Ct. 2852 (2013). Here, the administrative law judge failed to make this necessary determination. On remand, if reached, the administrative law judge must determine whether granting claimant's request for modification would render justice under the Act.

Id. He opined that the miner's coal mine dust exposure did not result in any significant alteration of lung function, and that the miner's cardiovascular disease led to his pneumonia and respiratory failure. *Id*. Dr. Bush opined that the miner may have suffered "some degree of respiratory impairment prior to his death due to chronic obstructive pulmonary disease." *Id*. He opined that the miner was totally disabled during his lifetime due to the extensive acute pulmonary disease related to aspiration. *Id*.

[23] Employer correctly notes that lay evidence may only be used to establish total disability "if no other medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition," and cannot be based upon the testimony of anyone who would be eligible for augmented benefits, such as claimant. 20 C.F.R. §718.204(d)(3).

[24] Based on the foregoing errors, we also vacate the administrative law judge's finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and a mistake in a determination of fact at 20 C.F.R. §725.310.

IV. Remand Instructions

On remand, the administrative law judge should first reconsider whether the new x-ray, medical opinion, and CT scan evidence establishes complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), (c). The administrative law judge must then weigh together all medical evidence relevant to the issue of complicated pneumoconiosis, after considering whether the weight to be accorded evidence from one section is affected by evidence offered in another.[25] *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46 (4th Cir. 1993). If the evidence does not establish complicated pneumoconiosis, the administrative law judge should reconsider whether claimant has established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). The administrative law judge must address all relevant evidence and explain his findings in compliance with the APA. *See Wojtowicz*, 12 BLR at 1-165. If the administrative law judge again finds that claimant has established a mistake in a determination of fact at 20 C.F.R. §725.310, he should also address whether granting modification would render justice under the Act. *See Sharpe*, 692 F. 3d 317 at 327-28.

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[25] If reached, the administrative law judge should address whether the miner's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge