BRB No. 02-0265 BLA

WILLARD J. EWING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: _____
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
	)	
Employer-Petitioner	)	
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (00-BLA-0955) of Administrative Law Judge Daniel L. Leland (the administrative law judge) on a duplicate claim[1]

[1]Claimant filed the instant claim on October 5, 1999. Director's Exhibit 1. Claimant's first claim, filed on July 1, 1981, was denied by Administrative Law Judge Rudolph L. Jansen on December 21, 1988, based on claimant's failure to establish total respiratory or pulmonary disability. Director's Exhibits 43-1, 43-30. Claimant filed a second claim on March 16, 1990, which the district director denied on September 11, 1990, based on claimant's failure to establish a material change in conditions under 20 C.F.R. §725.309

pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[2] The administrative law judge initially found that claimant, the now deceased miner,[3] established total pulmonary disability under 20 C.F.R. §718.204(b)[4] and thereby established a material change in conditions under 20 C.F.R. §725.309 (2000).[5] The administrative law judge, considering the evidence of record on the merits of the claim, found that claimant established the existence of pneumoconiosis, as defined in 20 C.F.R. §718.201, under 20 C.F.R. §718.202. The administrative law judge also found that claimant established total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, benefits were awarded. The administrative law judge further ordered benefits augmented for claimant's wife and adult disabled son. On appeal, employer argues that the instant duplicate claim is time-barred. Employer also challenges the administrative law judge's findings that claimant established a material change in conditions, the existence of pneumoconiosis and total disability due to pneumoconiosis. Employer further contests the administrative law judge's determination that benefits are properly augmented for claimant's adult disabled son. Claimant responds, and seeks affirmance of the decision below. Employer has filed a reply to claimant's response brief. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent

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(2000) or total disability due to pneumoconiosis. Director's Exhibits 42-1, 42-12. Claimant took no further action on this claim.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended (the Black Lung Act). These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]By letter dated April 26, 2002, claimant's attorney advised the Board that claimant passed away on April 7, 2002. Counsel indicated that claimant's widow retained his firm to continue representation of her late husband's claim. Counsel attached claimant's death certificate and a letter of representation signed by claimant's widow, Violet Ewing.

[4]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[5]The amendments to the regulation at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057.

with applicable law, they are binding upon this Board and may not be disturbed. 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).

Employer contends that the instant claim is time-barred under the decision of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). Employer argues that the instant claim, filed in 1999, does not meet the three-year statute of limitations for filing a claim under Section 422(f) of the Act, 30 U.S.C. §932(f), as implemented by 20 C.F.R. §725.308, because it was not filed within three years of Dr. Craft's April 18, 1988 report, in which he found that claimant's pneumoconiosis prevented him from performing any type of gainful employment in or around the coal mining industry, *see* Director's Exhibit 43-21. Employer seeks a denial of the claim on this basis. Claimant disagrees with employer's contention and asserts that employer withdrew its controversion to the timeliness issue at the time of the hearing and cannot now raise the issue. Claimant also argues that the regulations provide for the filing of a duplicate claim and claimant has, in the instant case, established a material change in conditions. Employer replies that parties do not waive arguments that were not previously available but which later become viable due to developments in the law, and that is what happened in this case.

Employer's contention lacks merit. Section 422(f) of the Act, 30 U.S.C. §932(f), provides:

> Any claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later-
>
> (1) a medical determination of total disability due to pneumoconiosis; or
>
> (2) March 1, 1978.

Section 422 of the Act, 30 U.S.C. §932(f). The implementing regulation at 20 C.F.R. §725.308 provides in part:

> (a) A claim for benefits... shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner...
>
> (c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However,... the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

20 C.F.R. §725.308. With regard to the time limitation of 20 C.F.R. §725.308, the Sixth Circuit, in its September 6, 2001 decision in *Kirk*, held:

> The three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled due to pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to *Sharondale*, the clock may only be turned back if the miner returns to the mines after a denial of benefits. There is thus a distinction between premature claims that are unsupported by a medical determination... and those claims that come with or acquire such support. Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.

Kirk, 264 F.3d at 608, 22 BLR at 2-298. We reject employer's contention that the Sixth Circuit's decision in *Kirk* applies to the instant claim, which arises outside the jurisdiction of the United States Court of Appeals for the Sixth Circuit.[6] The Board has held that the three-year statute of limitations for filing a claim set forth at Section 422(f) of the Act, 30 U.S.C. §932(f), as implemented by 20 C.F.R. §725.308, does not bar the filing of a duplicate claim. *See Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990); *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990); *see also Wyoming Fuel Co. v. Director, OWCP* [*Brandolino*], 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996). The Board consequently has held that the statute of limitations contained in 20 C.F.R. §725.308 applies only to the filing of a claimant's initial Part C claim and that the filing of any subsequent claim need not comply with the statute of limitations. *Andryka, supra; Faulk, supra.* Because the instant claim is the third claim filed by claimant, it need not meet the three-year statue of limitations for the filing of claims. Accordingly, we hold that the instant claim is not time-barred and reject employer's arguments to the contrary.

Employer next argues that the actual basis for the prior denial of benefits was claimant's failure to establish total disability due to pneumoconiosis and thus, claimant must establish total disability due to pneumoconiosis in order to a material change in conditions. The administrative law judge initially summarized the evidence developed since the

[6]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

December 21, 1988 Decision and Order of Administrative Law Judge Rudolf L. Jansen, in which Judge Jansen denied benefits in the *original claim*, filed in 1981, based on claimant's failure to establish total respiratory or pulmonary disability. *See* Director's Exhibit 43-30. The administrative law judge then determined that the district director had denied claimant's second claim, filed in 1990, because claimant failed to establish total disability *due to pneumoconiosis*. *See* Director's Exhibit 42-12. The administrative law judge then stated, "Therefore, if a preponderance of the recent evidence proves that claimant is totally disabled, a material change in conditions will be established." Decision and Order at 10. The administrative law judge next found that a preponderance of the evidence developed since the denial of claimant's "most recent claim," *Id.*, established a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b). The administrative law judge specifically found:

> Although the two recent ventilatory studies do not have qualifying values and there is no evidence of cor pulmonale, the blood gas studies performed by Dr. Rasmussen on December 1, 1999 and by Dr. Zaldivar on March 8, 2000 are qualifying with exercise. The medical opinions are also supportive of a finding of total disability. Dr. Rasmussen concluded that claimant's oxygen transfer and diffusion impairment render him incapable of performing the duties of his last coal mine job as a belt man. Dr. Zaldivar found claimant disabled from a pulmonary standpoint. Dr. Boustani diagnosed severe end stage pneumoconiosis and severe hypoxemia. Dr. Branscomb stated that the miner is totally disabled due to pulmonary and cardiovascular disease. To the extent Dr. Branscomb's opinion can be construed as not finding the presence of a totally disabling pulmonary impairment, it is against the weight of the evidence. A finding of total pulmonary disability is also supported by claimant's frequent hospitalizations for pulmonary problems, his use of oxygen, and his treatment with inhalers and a nebulizer.

Decision and Order at 10. The administrative law judge thus found that claimant established total pulmonary disability and thereby established a material change in conditions under 20 C.F.R. §725.309 (2000). Employer, in support of its contention, relies on the fact that the district director, in denying the second claim filed in 1990, checked, *inter alia*, the box which reads:

> You do not qualify for benefits because the evidence in your claim (3.) does not show that you are totally disabled by the disease. Totally disabled means you are unable to perform the type of work required by your coal mine work because of a breathing impairment caused by pneumoconiosis (black lung disease). The results of your medical evidence are shown on the enclosed explanation.

Director's Exhibit 42-12. Claimant responds that the administrative law judge correctly characterized the basis for the denials of claimant's two prior claims, properly determining that claimant established a material change in conditions by establishing total pulmonary disability. Claimant asserts, moreover, that the administrative law judge properly found that claimant established total disability and total disability due to pneumoconiosis in the instant case. Employer replies, reiterating its arguments challenging the administrative law judge's findings of a material change in conditions and that claimant established total disability and total disability due to pneumoconiosis.

We find no error in the administrative law judge's finding that claimant established a material change in conditions under 20 C.F.R. §725.309 (2000) by establishing total pulmonary disability. The record shows that Judge Jansen denied the original claim, filed in 1981, based on claimant's failure to establish total respiratory or pulmonary disability. Director's Exhibit 43-30. The district director denied claimant's second claim, filed in 1990, based on claimant's failure to establish a material change in conditions under 20 C.F.R. §725.309 (2000) or total disability due to pneumoconiosis. Director's Exhibits 42-12. This form denial issued by the district director does not separate the elements of total disability and total disability due to pneumoconiosis. Notwithstanding this fact, we note that indications in the record identify total disability as the basis for the denial. First, the evidence considered by the district director, as set forth in the denial, consists of pulmonary function study and blood gas study evidence. Second, the district director indicated that claimant failed to establish a material change in conditions since claimant's previous claim was denied, and that the previous claim, the original claim filed in 1981, was denied by Judge Jansen based on claimant's failure to establish total respiratory or pulmonary disability. We, therefore, reject employer's assignment of error to the administrative law judge's finding that claimant established a material change in conditions under 20 C.F.R. §725.309 (2000) by establishing total pulmonary disability in this case.

Employer next contends that the substance of the administrative law judge's finding of a material change in conditions, based on claimant establishing total disability, is unexplained and thus not in accordance with law. Employer argues that the administrative law judge merely summarized the evidence and did not explain why he discredited Dr. Branscomb's opinion that non-occupational problems were the cause of claimant's impairment. Employer also argues that the administrative law judge failed to determine whether the physicians who opined that claimant was totally disabled from performing his usual coal mine employment were aware of the actual exertional requirements of claimant's usual coal mine employment which, employer asserts, were those of a cutting machine operator and not a beltman, as the administrative law judge determined. Employer argues that there is no also indication that Dr. Boustani had any familiarity with the exertional requirements of claimant's usual coal mine employment and that Dr. Rasmussen erroneously

based his opinion, that claimant was totally disabled, on claimant's work as a beltman which, employer asserts, required greater exertion than working the cutting machine. Employer seeks a remand of the case on this basis for reevaluation of the medical opinions of record. Claimant contends that the administrative law judge's finding of total respiratory disability is explained and supported by substantial evidence. Claimant argues that employer's argument regarding the nature of claimant's usual coal mine employment "is meaningless" as even employer's experts admit that claimant is totally disabled. Employer replies that the administrative law judge did not explain why he was not persuaded by the non-qualifying pulmonary function studies and Dr. Branscomb's opinion. Employer adds that to the extent the administrative law judge did provide an explanation for his total disability finding, he improperly relied on "head-counting" to reject Dr. Branscomb's opinion. Employer further argues that the administrative law judge impermissibly substituted his opinion for that of the medical experts when he indicated that "[a] finding of total pulmonary disability is also supported by claimant's frequent hospitalizations for pulmonary problems, his use of oxygen, and his treatment with inhalers and a nebulizer." Decision and Order at 10.

We affirm the administrative law judge's finding of a material change in conditions, based on claimant's having established total respiratory disability, and hold that, contrary to employer's contention, the administrative law judge provided an adequate explanation for his findings. The administrative law judge duly considered the fact that the recent pulmonary function studies resulted in non-qualifying values and that there is no evidence that claimant had cor pulmonale, while the blood gas studies performed by Dr. Rasmussen on December 1, 1999 and by Dr. Zaldivar on March 8, 2000 produced qualifying values on exercise. *See* Decision and Order at 10. He then properly found that the medical opinions "are also supportive of a finding of total disability," *id.*, including the opinions of Drs. Rasmussen[9] and Zaldivar,[10] as supported by Dr. Boustani's[11] opinion.[12] *See Shedlock v. Bethlehem Mines*

[9]Dr. Rasmussen opined that claimant was totally disabled and that claimant's coal workers' pneumoconiosis contributed to his disabling lung disease and claimant's exposure to coal mine dust was a major risk factor. Director's Exhibits 11, 12, Claimant's Exhibit 4.

[10]Dr. Zaldivar opined that claimant was disabled from a pulmonary standpoint but did not attribute claimant's disability to pneumoconiosis because claimant had no obstructive impairment. Rather, he attributed claimant's disability to idiopathic pulmonary fibrosis unrelated to claimant's coal mine employment. Director's Exhibits 27, 42-17, Employer's Exhibit 16.

[11]Dr. Boustani diagnosed severe to end stage coal workers' pneumoconiosis and found moderate restrictive lung disease with severe decreased diffusing capacity. Claimant's Exhibits 1, 2, 5.

Corp., 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). In this regard, the administrative law judge permissibly found that to the extent Dr. Branscomb's opinion "can be construed as not finding the presence of a totally disabling pulmonary impairment, it is against the weight of the evidence." *See Fuller v. Gibraltar Coal Co.*, 6 BLR 1-1291 (1984); Employer's Exhibits 2, 15.

Further, we reject employer's assignment of error to the administrative law judge's reliance on claimant's last coal mine employment as his usual coal mine employment. The administrative law judge found that claimant's last coal mine employment was as a beltman and relied on the exertional requirements of this job to determine the weight and credibility of the medical opinion evidence. The administrative law judge also found that this work required "heavy exertion." Decision and Order at 3. The administrative law judge, however, as employer correctly asserts, did not make a specific finding that claimant's work as a beltman, his *last* coal mine coal mine employment, constituted his *usual* coal mine employment, and further correctly contends that a miner's last coal mine employment is not necessarily his usual coal mine employment. The Board has defined an individual's usual coal mine employment as "the most recent job the miner performed regularly and over a substantial period of time." *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). The mere fact that claimant changed jobs, however, does not establish that his

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[12]The administrative law judge summarized, but did not weigh, Dr. Daniel's opinion dated April 25, 1990. Director's Exhibit 42-9; Decision and Order at 6. Dr. Daniel diagnosed pneumoconiosis due to claimant's coal mine employment. Dr. Daniel found evidence of a moderate pulmonary dysfunction when claimant "has to perform moderate manual work (5.9 mets of work) which would working (sic) as a Belt Man: could do light manual labor." He added, "No disabling condition other than pneumoconiosis detected." Director's Exhibit 42-9. Because Dr. Daniel's opinion supports the administrative law judge's finding that claimant established total respiratory or pulmonary disability in this case, his failure to weigh the opinion is harmless and does not *per se* require a remand of the case. *See generally Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984)

latest coal mine employment is not his usual coal mine employment, unless he changed jobs because of respiratory inability to do his usual coal mine employment. *See Yauk v. Director, OWCP*, 912 F.2d 192, 12 BLR 2-339 (8th Cir. 1989). The administrative law judge's error in failing to make a specific finding that claimant's last coal mine employment constituted his usual coal mine employment is, however, harmless in this case because the record supports the administrative law judge's reliance on claimant's last coal mine employment as his usual coal mine employment. Specifically, claimant testified that he worked as a beltman for a year and described the exertional requirements of this work. He testified that he performed this work until employer laid him off. Director's Exhibit 43-29 at 15-17, 29; Hearing Transcript at 25. Claimant also testified that prior to working as a beltman, he worked as a roof bolter for about a year. Director's Exhibit 43-29 at 15-16. The record contains no evidence that claimant changed jobs for any health-related reason. The record thus supports the administrative law judge's reliance on claimant's coal mine employment as a beltman to determine claimant's entitlement to benefits in this case. *Yauk, supra*; *Shortridge, supra*. Moreover, employer, in attacking the administrative law judge's reliance on claimant's last coal mine employment, merely asserts that the fact that claimant worked "on the belt for only one year" means that it was not his usual coal mine employment, and merely suggests that claimant's previous twelve-years' work as a cutting machine operator was his usual coal mine employment. Employer's Brief at 16-17. We, therefore, deny employer's request to remand the case for the administrative law judge to reconsider the medical opinions of record, based on the findings of the physicians of record regarding the nature and the exertional requirements of claimant's usual coal mine employment.

We further find no merit in employer's argument that the administrative law judge impermissibly substituted his opinion for that of the medical experts when he indicated that "[a] finding of total pulmonary disability is also supported by claimant's frequent hospitalizations for pulmonary problems, his use of oxygen, and his treatment with inhalers and a nebulizer." Decision and Order at 10. The administrative law judge did not make a medical determination. Rather, he simply stated how other evidence of record supported his ultimate finding, based on the medical evidence of record, that claimant established total respiratory or pulmonary disability.

Employer next contends that, on the merits of the claim, the administrative law judge failed to explain his credibility findings, failed to consider all the relevant evidence, and failed to summarize accurately the relevant evidence when he found the existence of pneumoconiosis established. The administrative law judge initially determined that the record contained x-ray evidence and medical opinion evidence relevant to the issue of the existence of pneumoconiosis, that there is no biopsy or autopsy evidence, and that the presumptions referred to in 20 C.F.R. §718.202(a)(3) are not applicable. *See* 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge found that the x-ray evidence is "highly contradictory." Decision and Order at 10. He then considered the qualitative and

quantitative nature of the positive and negative readings. The administrative law judge next noted, "Dr. Skeens found that the CT scan was consistent with occupational pneumoconiosis although Drs. Spitz, Shipley, Wheeler and Scott, determined that it was negative." Decision and Order at 11. He further observed that the [West Virginia] Occupational Pneumoconiosis Board and Drs. Daniel, Starr, Craft, Rasmussen and Boustani diagnosed coal workers' pneumoconiosis and that Dr. Zaldivar's opinion "shifted from first finding radiographic evidence of pneumoconiosis to finding only radiographic evidence of pulmonary fibrosis, but he agreed in his deposition testimony that claimant may have pneumoconiosis." Decision and Order at 11. The administrative law judge next found that Dr. Branscomb's conclusion that the miner does not have pneumoconiosis is based on his negative x-ray interpretations "which due to his lack of qualifications are entitled to little weight." *Id.* The administrative law judge stated that, after weighing the x-ray readings and the medical opinions, he concluded that claimant established the existence of pneumoconiosis as defined in 20 C.F.R. §718.201.[13]

[13]20 C.F.R. §718.201(a) defines "pneumoconiosis" as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis." 20 C.F.R. §718.201(a).

Employer argues that the administrative law judge failed to explain his reasoning for crediting the positive x-ray evidence and rejecting the negative x-ray evidence, and impermissibly relied on a head count of experts to resolve the conflict. Employer also argues that the administrative law judge did not consider "that the positive readers did not interpret the films in a series," Employer's Brief at 18, did not consider the CT scan evidence, reviewed only 4 of the 14 films taken after 1993, and did not consider any of the negative films before or after their positive readings. Employer further contends that the administrative law judge failed to consider the physicians' relevant qualifications and mischaracterized Drs. Bassali and Daniel as Board-certified radiologists.[14] Employer also argues that the administrative law judge failed to assess whether the physicians' opinions of record were documented and reasoned, as required in *U.S. Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999). In addition, employer argues that the administrative law judge mischaracterized Dr. Zaldivar's opinion as including a diagnosis of pneumoconiosis, and mistakenly held that Dr. Branscomb relied solely on x-ray evidence to find the absence of pneumoconiosis. Employer also asserts that the administrative law judge selectively analyzed the evidence by discrediting Dr. Branscomb's opinion that claimant does not have pneumoconiosis, based on Dr. Branscomb's lack of credentials to interpret x-ray evidence, while crediting the opinions of Drs. Daniel, Starr, Craft, Rasmussen and Boustani, who do not have radiological qualifications. Employer thus seeks a remand of the case on these bases.

We first address employer's challenge to the administrative law judge's weighing of the x-ray evidence at 20 C.F.R. §718.202(a)(1). The record reveals that the administrative law judge fully considered the x-ray evidence, including the x-ray readings rendered after 1993, analyzed its qualitative as well as its quantitative nature, and did not rely exclusively on a head count of experts. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); Decision and Order at 3-4, 10-11. Contrary to employer's contention that the administrative law judge mischaracterized Drs. Bassali and Daniel as Board-certified radiologists, the administrative law judge permissibly relied on evidence in the record showing that Dr. C. Richard Daniel, Sr. was a Board-certified radiologist at the time he read claimant's April 25, 1990 x-ray, *see* Director's Exhibit 42-11, and that Dr. Bassali was a B-

[14]Employer also argues that the administrative law judge erred by not considering that Dr. Wiot interpreted as "unreadable" the September 13, 1982 x-ray taken by Dr. Bassali, or that Dr. Wheeler interpreted as "unreadable" the October 2, 1981 x-ray taken by Dr. C. R. Daniel. Employer's Brief at 20-21. Employer's argument is specious. An x-ray read as "unreadable" is, necessarily, not evidence of either the absence of pneumoconiosis or the existence of the disease. 20 C.F.R. §718.202(a)(1). The administrative law judge, therefore, was under no obligation to weigh these readings.

reader at the time he read claimant's September 13, 1982 x-ray, Director's Exhibit 43-13.[15]

[15]The administrative law judge considered Dr. Bassali's reading in his Decision and Order dated December 21, 1988, Director's Exhibit 43-30, and incorporated by reference all evidence considered therein in his Decision and Order dated November 19, 2001 which is the subject of the instant appeal. Decision and Order at 3.

We next address employer's assignment of error to the administrative law judge's failure to address the CT scan evidence of record. Employer correctly contends that the administrative law judge did not indicate the weight, if any, he accorded to the CT scan evidence and this error constitutes reversible error. On remand, the administrative law judge must make findings at 20 C.F.R. §718.202(a)(4) regarding the weight and credibility to be assigned Dr. Skeen's opinion that claimant's March 14, 2000 CT scan is consistent with occupational pneumoconiosis, Director's Exhibit 27, as well as the opinions of Drs. Spitz, Shipley, Wheeler and Scott, who found no evidence of pneumoconiosis on this CT scan. Employer's Exhibits 12, 13, 14. Further, employer correctly contends that the administrative law judge did not indicate his reasons for crediting the medical opinion evidence supportive of claimant's burden at 20 C.F.R. §718.202(a)(4), including the opinions of the West Virginia Occupational Pneumoconiosis Board, and the opinions of Drs. Daniel, Starr, Craft, Rasmussen and Boustani. APA; Decision and Order at 11. We thus vacate this finding and remand the case for reconsideration of the medical opinion evidence at 20 C.F.R. §718.202(a)(4). In this regard, contrary to employer's assertion, the administrative law judge's did not determine that Dr. Zaldivar found the existence of pneumoconiosis because he could not rule out the existence of the disease. Rather, the administrative law judge's correctly noted that Dr. Zaldivar's relevant opinion shifted from the physician finding no radiographic evidence of pneumoconiosis, to the physician stating on deposition that while pneumoconiosis may be present radiographically, it is obscured by pulmonary fibrosis.[16] Employer's Exhibit 16 at 42-43; Decision and Order at 7, 8, 11.

On remand, the administrative law judge is further instructed to make findings at 20 C.F.R. §718.202(a)(1)-(4) and at 20 C.F.R. §718.202(a) consistent with the decision of the United States Court of Appeals fo the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Employer next contends that the administrative law judge erred in applying the regulation at 20 C.F.R. §718.104(d) in support of his decision to credit the opinion of claimant's treating physician, Dr. Boustani to find that claimant met his burden to establish total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). The regulation at 20 C.F.R. §718.104(d) applies only to medical evidence developed after January 19, 2001. 20 C.F.R. §718.101(b). Claimant was treated by Dr. Boustani during his hospitalization at Raleigh General Hospital from January 16-21, 2001, Claimant's Exhibit 2, and Dr. Boustani was deposed on September 27, 2001, where she testified that she had treated claimant in

[16]Because we herein vacate the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) as he did not make the necessary credibility findings thereunder, we do not address employer's arguments which address the administrative law judge's further weighing of the evidence at 20 C.F.R. §718.202(a)(4).

March 1999 and had seen him previously, Claimant's Exhibit 5 at 5. The administrative law judge found:

> Dr. Boustani treats claimant for respiratory as well as non-respiratory problems, she has been claimant's treating physician for at least two and one half years prior to her deposition testimony, she sees him at least once every three months and sometimes more frequently, and she administers a wide range of tests to him. *See* [20 C.F.R.] §718.104(d). Although I decline to accord Dr. Boustani's opinion controlling weight due to her status as claimant's treating physician, I believe that her opinion is well reasoned and entitled to significant weight because she treats claimant on a regular basis. Dr. Boustani determined that claimant has coal workers' pneumoconiosis rather than pulmonary fibrosis based on a number of factors including his symptoms, the fact that his condition is not as severe as one would expect with pulmonary fibrosis, and the absence of the rapid progression common with cases of pulmonary fibrosis. Because she is claimant's treating physician, she is able to observe his symptoms in a manner that a non-treating physician could not do.

Decision and Order at 11. Employer argues that Dr. Boustani first diagnosed pneumoconiosis before the regulation's effective date, and thus, "she should not be permitted to benefit from the possible upgrade provided by the revised regulations because she restated her opinion again after their effective date." Employer's Brief at 25.

We affirm the administrative law judge's crediting of Dr. Boustani's opinion at 20 C.F.R. §718.204(c), based on his substantive analysis of it and the fact that Dr. Boustani was claimant's treating physician. Whether Dr. Boustani's relevant opinion is considered to have been rendered before or after January 19, 2001, the administrative law judge's weighing of Dr. Boustani's report is both consistent with the regulation at 20 C.F.R. §718.104 and with the decision of the United States Court of Appeals for the Fourth Circuit in *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Employer next contends that the administrative law judge discredited the opinions of Drs. Zaldivar and Branscomb, who found no total disability due to pneumoconiosis, based on his erroneous finding that these opinions are contrary to the revised regulations. Employer also argues that the administrative law judge's finding at 20 C.F.R. §718.204(c) is not supported by substantial evidence and employer challenges the administrative law judge's weighing of the opinions of Drs. Zaldivar, Branscomb, Boustani and Rasmussen.

Employer's contention that the administrative law judge erred in discrediting Dr. Zaldivar's opinion lacks merit. Dr. Zaldivar attributed claimant's pulmonary problems to

non-occupationally related pulmonary fibrosis and not pneumoconiosis and stated that his opinion was based, in part, on the lack of obstructive impairment. Director's Exhibits 27, 42-17, Employer's Exhibit 16. The administrative law judge correctly indicated that 20 C.F.R. §718.201 does not require the presence of an obstructive impairment in order to be considered "pneumoconiosis" thereunder, and correctly determined that "[t]here is also nothing in the Act or regulations that precludes a finding of total disability due to pneumoconiosis when the miner's pulmonary impairment is manifested by hypoxemia or a diffusion impairment as Dr. Zaldivar suggests." Decision and Order at 12; 20 C.F.R. §§718.201, 718.204(c). This evidentiary finding by the administrative law judge was proper and does not amount to a medical determination. The administrative law judge also properly found that Dr. Zaldivar, as well as Dr. Branscomb, discounted exposure to coal mine dust as a factor in claimant's pulmonary impairment because the impairment became noticeable:

> long after claimant's retirement from coal mining. However, [20 C.F.R.] §718.201(c) recognizes pneumoconiosis as a latent and progressive disease which may become detectable only after the cessation of coal mine dust exposure. Dr. Zaldivar's conclusion would appear to be based on a premise that is inconsistent with the regulations.

Decision and Order at 12; 20 C.F.R. §718.201(c).

Further, the administrative law judge's weighing of Dr. Zaldivar's opinion at 20 C.F.R. §718.202(a)(4) is consistent with *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996)(medical opinions that are based on a thorough review of all the medical evidence, rather than on an assumption that contravenes the Act and regulations, are not precluded from an administrative law judge's consideration). The record shows that Dr. Zaldivar, while finding no obstructive impairment in the instant case, testified as follows:

> Physiologically he does not have a pneumoconiosis from coal dust exposure. If we accept, as I think is widely accepted, that coal workers' pneumoconiosis causes an obstructive impairment, then even looking at the physiological findings, pneumoconiosis is ruled out completely.
>
> There is no obstructive impairment in this case. It is a purely restrictive impairment...
>
> If we also accept, as it should be accepted because it is everywhere in the medical literature, that progressive interstitial fibrosis or idiopathic pulmonary fibrosis is unrelated to coal workers' pneumoconiosis, then by definition he could not have coal workers' pneumoconiosis either, as the process that is causing the lung damage.

Employer's Exhibit 16 at 26. While Dr. Zaldivar referred to claimant's medical record, we hold that it is evident from his testimony that his opinion in this case *is based on his acceptance of the theories that*: (1) coal workers' pneumoconiosis causes an obstructive impairment and does not cause a restrictive impairment, and (2) progressive interstitial fibrosis or idiopathic pulmonary fibrosis is unrelated to coal workers' pneumoconiosis. Therefore, the administrative law judge permissibly discredited Dr. Zaldivar's opinion based on his determination that it reflects theories which are contrary to the Act and implementing regulations. *See Stiltner, supra*; *cf. Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

We also reject employer's arguments that the administrative law judge summarily discredited Dr. Branscomb's opinion regarding disability causation and misstated the basis for Dr. Rasmussen's opinion that claimant's pneumoconiosis contributed to his totally disabling lung disease. The administrative law judge properly discredited Dr. Branscomb's opinion on disability causation because he found that it is based on findings that claimant does not have pneumoconiosis and does not have a totally disabling pulmonary impairment and that it is, therefore, against the weight of the evidence. *See Fuller v. Gibraltar Coal Co.*, 6 BLR 1-1291 (1984). The administrative law judge also found, within his discretion, that Dr. Rasmussen's opinion on disability causation is well reasoned and supports claimant's burden at 20 C.F.R. §718.204(c). 20 C.F.R. §718.204(c); *Clark, supra*. The administrative law judge correctly characterized Dr. Rasmussen's opinion that a "relatively slow rather than fast" progression of the disease process is more consistent with pneumoconiosis than interstitial pulmonary fibrosis, and that this slower progression is what the physician observed in claimant's case. Claimant's Exhibit 4, Deposition Transcript at 15-17; Decision and Order at 11. In this regard, we note that employer offers no evidentiary support for its argument that Dr. Rasmussen's opinion should be dismissed as "conjecture" under *Jarrell*, Employer's Brief at 32-33, and the record contains no support for employer's argument.

Employer next contends that the administrative law judge was precluded from augmenting benefits on behalf of claimant's adult disabled son. Claimant responds that the administrative law judge properly augmented benefits for claimant's adult disabled son. The administrative law judge found that claimant's son, Curtis, was injured in an automobile accident in 1995 at the age of 19. He determined that because the regulations incorporate the Social Security Administration's definition of "disability," Curtis' receipt of "SSI" benefits "renders him disabled for purposes of augmenting benefits" under the Act. Decision and Order at 12. The administrative law judge thus concluded that claimant was entitled to augmented benefits for his wife and Curtis. Employer notes that claimant never previously claimed his son as a dependent under the Act. Employer notes that claimant did not appeal from, nor file for modification of, the administrative law judge's finding in his 1988 Decision and Order, that claimant had no dependent children at the time the claim was filed.

Director's Exhibit 43-30. Employer further contends that the administrative law judge's determination that the Social Security Administration declared Curtis disabled is contrary to the record.

The record shows that the Social Security Administration awarded Curtis "SSI" benefits but denied him continuing "SSI" benefits because of his financial resources. *See* Director's Exhibit 9. Employer correctly contends that the record does not reveal the basis for the Social Security Administration's award. In light of the foregoing, we further remand the case for the administrative law judge to set forth the evidentiary basis for his decision to award augmented benefits to claimant's adult son, Curtis, if the administrative law judge again finds, on remand, that claimant is entitled to benefits on the merits of the claim.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge