BRB No. 07-0880 BLA

C.H.P.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 07/31/2008
	)	
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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (06-BLA-5917) of Administrative Law Judge Linda S. Chapman awarding benefits on a claim filed 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). This case is before the Board for the second time. In a Decision and Order dated December 31, 2003, Administrative Law Judge Pamela Lakes Wood credited claimant with thirty-eight and one-quarter years of coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Judge Wood found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203. Judge Wood also found that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, Judge Wood awarded benefits. Director's Exhibits 58, 59. By Decision and Order dated January 27, 2005, the Board affirmed

Judge Wood's findings that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4) and that he established a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b). [*C.H.P.*] *v. Westmoreland Coal Co*., BRB No. 04-0379 BLA, slip op. at 2 n.3 (Jan. 27, 2005)(unpub.). However, the Board vacated Judge Wood's finding that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). [*C.H.P.*], slip op. at 5. The Board instructed Judge Wood to ensure that the parties' evidence was in compliance with the evidentiary limitations set forth at 20 C.F.R. §725.414. [*C.H.P.*], slip op. at 6.

By Order dated May 20, 2005, Judge Wood remanded the case to the district director for further development of the evidence. Director's Exhibit 77. The district director awarded benefits on March 20, 2006.[1] Director's Exhibit 84. In a Decision and Order dated July 9, 2007, Administrative Law Judge Linda S. Chapman (the administrative law judge) credited claimant with thirty-eight and one-quarter years of coal mine employment,[2] and found that employer, in effect, conceded that claimant has simple pneumoconiosis and total disability.[3] 20 C.F.R. §§718.202(a), 718.204(b). The administrative law judge also found that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[4]

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[1] The district director also returned the case to the Office of Administrative Law Judges for completion of a hearing that was previously requested. Director's Exhibit 84.

[2] Pursuant to the Board's instructions on remand, Administrative Law Judge Linda S. Chapman (the administrative law judge) considered the medical evidence under the evidentiary limitations set forth at 20 C.F.R. §725.414.

[3] The administrative law judge noted that "[e]mployer does not dispute that [claimant] has simple pneumoconiosis, and that he has a totally disabling respiratory impairment. (See Employer's Brief at 9)." Decision and Order at 12. The administrative law judge also noted that "[a]though [employer's counsel] was not willing to formally stipulate on these issues [at the hearing], he conceded that the only issue was whether [claimant's] disability was due to pneumoconiosis." *Id*. at 2 n1.

[4] Because the administrative law judge's finding that claimant established thirty-eight and one-quarter years of coal mine employment is not challenged on appeal, we

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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 718.204(c)

Employer contends that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge considered the reports of Drs. Forehand, Robinette, Dahhan, and Spagnolo. Dr. Forehand opined that coal dust exposure contributed to claimant's respiratory impairment. Director's Exhibits 11, 82. Similarly, Dr. Robinette opined that claimant's total disability from working was a consequence of his occupational pneumoconiosis. Director's Exhibit 48; Claimant's Exhibits 1, 2. By contrast, Dr. Dahhan opined that claimant's pulmonary disability was a result of his hyperactive airway disease and previous smoking history, and not simple pneumoconiosis. Director's Exhibit 27; Employer's Exhibit 2. Lastly, Dr. Spagnolo opined that claimant does not have a pulmonary or respiratory impairment that has been aggravated in any way by the inhalation of coal mine dust.[5] Employer's Exhibits 3, 4.

The administrative law judge gave no weight to Dr. Dahhan's disability causation opinion for three reasons: (1) because Dr. Dahhan did not explain why he ruled out claimant's significant coal mine dust exposure history as a contributing factor of claimant's obstructive respiratory impairment, (2) because he assumed that claimant's chronic bronchitis could not be related to coal mine dust since 1994 was the last time that claimant had been exposed to coal mine dust, and (3) because he failed to address claimant's significantly decreased diffusion capacity, hypoxemia, and profound oxygen desaturation with even minimal exercise as a component of his respiratory disability. Decision and Order at 14. The administrative law judge also gave no weight to Dr. Spagnolo's disability causation opinion. Specifically, the administrative law judge found

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affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The administrative law judge stated that "Dr. Forehand's reports, as do those of Dr. Robinette, clearly reflect that [claimant] has *two* 'patterns of impairment': his gas exchange impairment, as reflected by his arterial blood gas studies and his dyspnea on even slight exertion, and his obstructive impairment, or chronic bronchitis, as reflected on pulmonary function studies." Decision and Order at 14. The administrative law judge also stated that "Dr. Dahhan and Dr. Spagnolo, in contrast, only addressed one pattern of impairment, that is, [claimant's] obstructive impairment." *Id*. at 15.

that Dr. Spagnolo failed to explain why he excluded claimant's coal dust exposure history as a contributing factor in his respiratory impairment, and he failed to address the etiology of claimant's significantly decreased diffusion capacity, hypoxemia, and profound oxygen desaturation with even minimal exercise as a component of his respiratory disability. *Id*. Further, the administrative law judge alternatively found:

> [E]ven if I were to accept their [Dr. Dahhan's and Dr. Spagnolo's] conclusions, I find that Dr. Forehand's and Dr. Robinette's detailed reports are well reasoned and supported by the objective medical evidence of record, and their conclusions that [claimant] suffers from a totally disabling gas exchange impairment due in significant part to his exposure to coal mine dust are persuasive, and indeed not contradicted, and I accord them determinative weight.

Id. at 15 (footnote omitted).

Dr. Dahhan

Initially, we will address employer's assertion that the administrative law judge erred in discrediting Dr. Dahhan's disability causation opinion. Specifically, employer argues that the administrative law judge erred by substituting her opinion for that of the physician. Employer also argues that the administrative law judge erred by requiring the physician to "rule out" coal mine dust exposure as a cause of claimant's chronic obstructive pulmonary disease. Further, employer argues that the administrative law judge erred by making factually incorrect findings with regard to Dr. Dahhan's disability causation opinion. However, employer does not challenge the administrative law judge's finding that Dr. Dahhan's opinion conflicts with the regulations, because Dr. Dahhan assumed that claimant's chronic bronchitis could not be related to coal mine dust since 1994 was the last time that claimant had been exposed to coal mine dust. In a September 19, 2001 report, Dr. Dahhan opined that claimant's obstructive airway disease was not caused by, related to, contributed to, or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis. Director's Exhibit 27. Dr. Dahhan noted that "[claimant] has not had any exposure to coal dust since 1994, a duration of absence sufficient to cause cessation of any industrial bronchitis that he may have had."[6] *Id*. As noted above, the

[6] The record contains evidence of chronic bronchitis. In a report dated October 11, 2001, Dr. Forehand diagnosed coal workers' pneumoconiosis and chronic bronchitis related to coal dust exposure and cigarette smoking. Director's Exhibit 11. Dr. Forehand opined that coal workers' pneumoconiosis was the predominate factor that contributed to claimant's respiratory impairment. *Id*. Dr. Forehand also opined that chronic bronchitis related to smoking was not as important because there was no x-ray evidence of lobar emphysema. *Id*. Nevertheless, in a subsequent report dated October 11, 2005, Dr.

administrative law judge gave no weight to Dr. Dahhan's opinion, because Dr. Dahhan "ignores the recognized concept that pneumoconiosis, even disabling pneumoconiosis, can develop long after exposure to coal mine dust ceases." Decision and Order at 14. Because employer does not challenge the administrative law judge's finding that Dr. Dahhan's opinion conflicts with the regulations, *see* 20 C.F.R. §718.201(c); *Stephens v. Bethlehem Mines Corp*., 8 BLR 1-350 (1985); *see also Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998)(recognizing that pneumoconiosis is a progressive and irreversible disease), we affirm this finding. *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Employer argues that the administrative law judge erred by substituting her opinion for that of the physicians. Employer maintains that the administrative law judge, rather than Dr. Robinette, emphasized reduced diffusion capacity, hypoxemia, and oxygen desaturation with exercise as the most important component of claimant's respiratory impairment. In considering Dr. Robinette's opinion, the administrative law judge stated:

> Although Dr. Robinette's treatment notes reflect that [claimant's] pulmonary function studies showed obstructive impairment, it is clear from reviewing his notes and reports that [claimant's] most serious impairment is reduced diffusion capacity, hypoxemia, and oxygen desaturation with exercise, as a result of his diffuse nodular interstitial disease.

Decision and Order at 12.

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw her own conclusions and inferences from it. *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). In this case, the administrative law judge determined that "Dr. Robinette's notes clearly reflect that while [claimant] had an obstructive condition, his most significant problem was with his oxygenation on even minimal exercise." Decision and Order at 14. Dr. Robinette's office notes and reports from March 16, 2001 through May 5, 2006 noted reduced diffusion capacity, hypoxemia and oxygen desaturation. Claimant's Exhibits 1, 2.

Forehand opined that "[b]y giving more weight to the effects of coal mine dust exposure..., I did not mean to imply that the effects of cigarette smoking were not substantially aggravating [claimant's] respiratory impairment, as they may very well be." Director's Exhibit 82.

In an April 10, 2001 report, Dr. Robinette stated that "[i]f [claimant] does not desire his supplemental oxygen, I suspect that he will have significant morbidity as a consequence of intercurrent hypoxemia from his intrinsic lung disease." Claimant's Exhibit 2. In an August 28, 2003 office note, Dr. Robinette noted that "[claimant] remains ambulatory but his primary complaint is persistent and severe dyspnea, particularly with minimal exertion." *Id*. In a July 5, 2005 office note, Dr. Robinette observed that claimant's arterial blood gas study results were "consistent with profound and severe oxygen desaturation on minimal exercise." *Id*. Dr. Robinette also opined that "[claimant] has endstage lung disease due to his black lung with profound reduction of his diffusion capacity and evidence of intercurrent hypoxemia and severe airflow obstruction." *Id*. Further, Dr. Robinette opined that "[claimant's] condition is chronic [sic] an irreversibility requiring maximal medical therapy and he will continue to require supplemental oxygen on a regular basis at 2 liter per minute 24 hours per day." Claimant's Exhibit 1. Lastly, in a May 5, 2006 office note, Dr. Robinette observed that "[claimant] continues to struggle with severe oxygen desaturation on exertional activity." *Id*. Based on her consideration of Dr. Robinette's notes and reports, the administrative law judge acted within her discretion in determining that claimant's reduced diffusion capacity, hypoxemia, and oxygen desaturation with exercise were the most important component of his respiratory impairment. The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Consequently, we reject employer's assertion that the administrative law judge substituted her opinion for that the physicians.

Employer also argues that the administrative law judge erred in finding that Dr. Dahhan did not explain why he excluded coal dust exposure as a cause claimant's respiratory impairment.[7] In the September 19, 2001 report, Dr. Dahhan opined that claimant's pulmonary disability resulted from his obstructive airway disease, which was not caused, contributed to, or aggravated, by the inhalation of coal dust or coal workers' pneumoconiosis. Director's Exhibit 27. In the November 3, 2006 report, Dr. Dahhan diagnosed pulmonary disability resulting from hyperactive airway disease and previous

[7] Employer additionally asserts that the administrative law judge erred by requiring the physicians to "rule out" coal mine dust exposure as a cause of claimant's chronic obstructive pulmonary disease. Employer maintains that the administrative law judge shifted the burden to employer to prove that coal dust exposure did not cause claimant's impairment. Contrary to employer's assertion, a review of the administrative law judge's evaluation of the opinions of Drs. Dahhan and Spagnolo indicates that the administrative law judge did not shift the burden to employer to disprove that claimant was totally disabled due to pneumoconiosis. Decision and Order at 12-15. Specifically, the administrative law judge found that claimant established that he was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). *Id*. at 15.

smoking habit, and opined that claimant's simple coal workers' pneumoconiosis had no impact on his pulmonary disability. Employer's Exhibit 2. The administrative law judge gave no weight to Dr. Dahhan's disability causation opinion, because Dr. Dahhan failed to explain why he excluded claimant's coal dust exposure as a contributing factor in his obstructive respiratory impairment. The administrative law judge specifically stated:

> Dr. Dahhan did not address the fact that while [claimant's] obstruction responded to bronchodilator medication, it did not disappear. In other words, he did not explain why he ruled out [claimant's] significant history of exposure to coal mine dust as a co-existent factor in his obstructive respiratory impairment.

Decision and Order at 13-14.

Contrary to the administrative law judge's finding, in the September 19, 2001 report, Dr. Dahhan explained that "[claimant's] obstructive ventilatory defect demonstrates significant response to bronchodilator therapy as indicated by the treatment provided by his family physician,"[8] and "[t]hese findings are inconsistent with the permanent adverse affects [sic] of coal dust on the respiratory system." Director's Exhibit 27. Dr. Dahhan further noted, in the November 3, 2006 report, that "[c]oal dust exposure induced obstructive lung disease if [sic] fixed and does not demonstrate improvement following the administration of bronchodilators; such would be the case in hyperactive airway disease or bronchial asthma," and then explained that "[claimant] has a disabling obstructive ventilatory impairment which demonstrates significant response to bronchodilator administration despite already being on multiple bronchodilator agents[,] including Atrovent and Ventolin." Employer's Exhibit 2. Because substantial evidence does not support the administrative law judge's finding that Dr. Dahhan did not explain why he excluded coal dust exposure as a cause of claimant's respiratory impairment, *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985), the administrative law judge erred in discrediting Dr. Dahhan's disability causation opinion on this basis.

[8] Dr. Dahhan observed that "[s]pirometry showed a moderately severe obstructive ventilatory defect with partial response to bronchodilator therapy…." Director's Exhibit 27. Dr. Dahhan also observed that although "[d]iffusion capacity was 59% of predicted[,]…[a]fter correction for alveolar ventilation, it was 90% of predicted." *Id*. Hence, Dr. Dahhan concluded that "[o]verall, the studies were consistent with a moderately severe partially reversible obstructive ventilatory defect." *Id*.

Employer further argues that the administrative law judge erred by making factually incorrect findings with regard to Dr. Dahhan's disability causation opinion. In considering Dr. Dahhan's opinion, the administrative law judge stated:

> Finally, and most significantly, Dr. Dahhan simply failed to address the most important components of [claimant's] respiratory disability, his significantly decreased diffusion capacity, his hypoxemia, and his profound oxygen desaturation with even minimal exercise. Dr. Dahhan's arterial blood gas testing, done in 2001, showed "moderate" hypoxemia; but Dr. Dahhan did not address the consistent and repeated notations in Dr. Robinette's files of severe hypoxemia on testing.

Decision and Order at 14.

However, in his September 19, 2001 report, Dr. Dahhan observed that "[a]rterial blood gases at rest showed mild hypoxemia with adequate ventilation, p02 of 65.7 and pC02 of 41.8" and "[e]nd of exercise blood gases showed moderate hypoxemia with adequate ventilation, p02 of 60.7 and pC02 of 41.8." Director's Exhibit 27. Although Dr. Dahhan's November 3, 2006 report was based on a review of records, Dr. Dahhan did not indicate that the reports of Dr. Robinette were a part of the records submitted for his review. Employer's Exhibit 2. Thus, the administrative law judge mischaracterized Dr. Dahhan's disability causation opinion. *Tackett*, 7 BLR at 1-706.

Dr. Spagnolo

Next, we address employer's assertion that the administrative law judge erred in discrediting Dr. Spagnolo's disability causation opinion. Specifically, employer argues that the administrative law judge erred by making factually incorrect findings with regard to Dr. Spagnolo's opinion. In considering Dr. Spagnolo's opinion, the administrative law judge stated:

> Although he conceded that it was "likely" that [claimant] had simple pneumoconiosis, Dr. Spagnolo concluded that his lung impairment and respiratory disability were not caused either in whole or in part by pneumoconiosis. Dr. Spagnolo took Dr. Forehand to task for excluding cigarettes as a possible cause for [claimant's] lung impairment, yet he did not discuss why he totally excluded [claimant's] significant history of coal dust exposure as a factor in his respiratory impairment.

Decision and Order at 14.

However, in his November 11, 2006 report, Dr. Spagnolo observed that "[t]he spirometry testing shows that there is a significant reversible component of the airflow obstruction," and that "[t]he reversibility of the airflow obstruction is not a feature of coalmine associated lung disease." Employer's Exhibit 3. Dr. Spagnolo also observed that "[s]uch reversibility is a hallmark of obstructive airways disease caused by bronchial asthma and is also frequently found in individuals with chronic bronchitis caused by cigarette smoking." *Id*. In addition, during a deposition on December 7, 2006, Dr. Spagnolo opined that claimant's pulmonary impairment was primarily due to bullous emphysema and asthmatic bronchitis, based on the reversibility of a pulmonary function test. Employer's Exhibit 4. (Dr. Spagnolo Deposition at 16). Dr. Spagnolo observed that the significant reversible component of the airflow that had been shown by spirometry testing was a feature of asthmatic bronchitis, rather than a feature of a coal dust induced disease. Employer's Exhibit 4 (Dr. Spagnolo Deposition at 17, 18). Dr. Spagnolo specifically stated, "[u]sually in coal dust disease you'll have a fixed – either if you have an obstructive problem or a restrictive problem, there're [sic] usually fixed" and "[t]here're [sic] usually not reversible." Employer's Exhibit 4 (Dr. Spagnolo Deposition at 18). Thus, substantial evidence does not support the administrative law judge's finding that Dr. Spagnolo did not explain why he excluded coal dust exposure as a cause of claimant's respiratory impairment. *Tackett*, 7 BLR at 1-706.

Further, substantial evidence does not support the administrative law judge's finding that "like Dr. Dahhan, Dr. Spagnolo failed to even address the etiology of [claimant's] significantly decreased diffusion capacity, his hypoxemia, and his profound oxygen desaturation with even minimal exercise." *Tackett*, 7 BLR at 1-706. In the November 11, 2006 report, Dr. Spagnolo observed:

> In 2001, [claimant's] resting PaO2 is above the lower limit of normal for age at a barometric pressure of 707 mm Hg. In 2002, [claimant's] resting PaO2 is slightly below the lower limit of normal for age at a barometric pressure of 715 mm Hg. On two occasions the exercise PaO2 had a slight decrease with exercise.

Employer's Exhibit 3. Further, during a December 7, 2006 deposition, Dr. Spagnolo indicated that claimant was totally disabled by a gas exchange impairment, based on arterial blood gas studies. Employer's Exhibit 4 (Dr. Spagnolo Deposition at 53). Dr. Spagnolo also indicated that while coal dust exposure and cigarette smoking can simultaneously cause a respiratory impairment, claimant's respiratory impairment was not caused by both of these factors. *Id*. Dr. Spagnolo opined that claimant does not have a pulmonary or respiratory impairment arising out of coal mine dust exposure. *Id*. (Dr. Spagnolo's Deposition at 23, 24, 54). Thus, because substantial evidence does not support the administrative law judge's finding that Dr. Spagnolo failed to address the etiology of claimant's diffusion capacity, hypoxemia, and oxygen desaturation, *Tackett*, 7

BLR at 1-706, the administrative law judge erred in discrediting Dr. Spagnolo's disability causation opinion.

Drs. Forehand & Robinette

Employer also asserts that because the administrative law judge failed to adequately explain why she credited the disability causation opinions of Drs. Forehand and Robinette, she violated the Administrative Procedure Act.[9] An administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based. *See generally Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). In this case, as discussed, *supra*, Drs. Forehand and Robinette opined that coal dust exposure contributed to claimant's respiratory impairment. Director's Exhibits 11, 48, 82; Claimant's Exhibits 1, 2. The administrative law judge considered the documentation and the explanations that Dr. Forehand provided for his conclusions. Thus, the administrative law judge acted within her discretion in finding that "Dr. Forehand's…detailed reports are well reasoned and supported by the objective medical evidence of record." Decision and Order at 15; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Consequently, we reject employer's assertion that the administrative law judge failed to adequately explain why she credited Dr. Forehand's disability causation opinion. However, unlike Dr. Forehand, Dr. Robinette does not address claimant's smoking history as a possible cause of his respiratory impairment. Because the administrative law judge did not consider whether Dr. Robinette's opinion was entitled to any probative weight at 20 C.F.R. §718.204(c) in light of Dr. Robinette's failure to discuss all of the etiological factors of claimant's totally disabling respiratory impairment, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), the administrative law judge did not provide an affirmable basis for her finding that Dr. Robinette's disability causation opinion is reasoned.

Qualifications

Finally, employer asserts that the administrative law judge erred in weighing of the experts' credentials. Specifically, employer argues that "Dr. Forehand does not have the same level of expertise as Drs. Spagnolo and Dahhan." Employer's Brief at 9.

[9] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for her findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Employer also argues that "the [administrative law judge] erred by going outside the record in weighing the physicians' credentials." *Id*. at 10. In considering the qualifications of Drs. Forehand and Spagnolo, the administrative law judge stated:

> It is accurate to state that Dr. Forehand is not [B]oard certified in pulmonary medicine. As Dr. Forehand explained *in a previous case*, he is not allowed to sit for the adult pulmonary treatment boards, because his initial training and his certification were in pediatrics. However, other than the [B]oard certification, Dr. Forehand has performed all of the requirements necessary to sit for [B]oard certification, and keeps current with the continuing education requirements for that specialty. He keeps current with publications in the field, and has submitted abstracts on his clinical research to the American Thoracic Society.

Decision and Order at 13 (citation omitted) (emphasis added).

We agree with employer that the administrative law judge erroneously took what amounts to judicial notice of testimony provided in another case. The Federal Rules of Evidence provide that a judicially noted fact must be one that is not subject to reasonable dispute in that it is either generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See* Fed. R. Evid. 201(b). An administrative law judge may therefore take administrative judicial notice of facts only if it is done in the proper manner. In so doing, the administrative law judge must provide the parties with "the opportunity to contradict the noticed facts" with evidence to the contrary. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990). As the record does not indicate that employer was present during the case referenced by the administrative law judge to cross-examine the testimony cited in support of the administrative law judge's ruling, we fail to see how employer was provided the opportunity to contradict the noticed facts in this case. Consequently, the administrative law judge erred by citing to testimony that was not of record.

Further, because the comparative qualifications of the physicians are relevant to the reliability of their opinions, the administrative law judge erred by failing to weigh the physicians' respective qualifications. *Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

In view of the foregoing, we vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and remand the case for further consideration of the evidence in accordance with the

disability causation standard set forth at 718.204(c).[10] On remand, when considering the medical opinion evidence, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See generally Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

[10] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> > (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> >
> > (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

Accordingly, the administrative law judge's Decision and Order awarding benefits 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.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge