

BRB No. 07-0230 BLA

A.J.H. )  
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 Claimant-Respondent )  
 )  
 v. )  
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 ENTERPRISE COAL COMPANY )  
 )  
 and ) DATE ISSUED: 11/29/2007  
 )  
 COASTAL STATES ENERGY COMPANY, )  
 c/o COASTAL STATES MANAGEMENT )  
 CORPORATION )  
 )  
 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 William S. Colwell, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

Helen H. Cox (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (04-BLA-5702) of Administrative Law Judge William S. Colwell 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 involves a subsequent claim filed on October 7, 2002.<sup>1</sup> After finding that claimant's 2002 claim was timely filed, the administrative law judge found that the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4),<sup>2</sup> thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which claimant's prior 1999 claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2002 claim on the merits. After crediting claimant with sixteen years of coal mine employment, the administrative law judge found that claimant was entitled to the

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<sup>1</sup> Claimant initially filed a claim for benefits on September 16, 1985. Director's Exhibit 1. The district director denied benefits on February 4, 1986 because claimant did not establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. *Id.* Claimant filed a second claim on January 30, 1990. Director's Exhibit 2. The district director denied the claim by reason of abandonment on May 17, 1990. *Id.* Claimant filed a third claim on October 28, 1994. Director's Exhibit 3. The district director denied the claim on March 24, 1995 because claimant did not establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. *Id.* The district director also found that the evidence did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Claimant filed a fourth claim on January 21, 1999. Director's Exhibit 4. In a Decision and Order dated September 29, 2000, Administrative Law Judge Thomas F. Phalen, Jr. found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id.* Consequently, Judge Phalen found that the evidence did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* Accordingly, Judge Phalen denied benefits. *Id.* By Decision and Order dated October 3, 2001, the Board affirmed Judge Phalen's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). *[A.J.H.] v. Enterprise Coal Co.*, BRB No. 01-0186 BLA (Oct. 3, 2001) (unpub.). The Board, therefore, affirmed Judge Phalen's finding that the evidence did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* Claimant filed a fifth claim on October 7, 2002. Director's Exhibit 6.

<sup>2</sup> After considering all of the new evidence, the administrative law judge further found that it established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant's 2002 claim was timely filed. Employer further challenges the administrative law judge's findings pursuant to 20 C.F.R. §§725.309, 718.202(a)(1), (4) and 718.204(b), (c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, arguing in support of the administrative law judge's finding that claimant's 2002 claim was timely filed.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

### **Timeliness of Claim**

Employer initially contends that claimant's 2002 claim was untimely filed. Employer, citing the decision of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001), argues that claimant's 2002 application for benefits is barred by the time limitations set forth in 20 C.F.R. §725.308. Section 725.308 provides in relevant part that:

(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.<sup>3</sup>

The Sixth Circuit, in *Kirk*, stated that it is “employer’s burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [the claimant]” more than three years prior to the filing of his or her claim. *Kirk*, 264 F.3d at 607, 22 BLR at 2-296. In this case, the administrative law judge noted that employer, while generally contesting the timeliness of claimant’s 2002 claim, did not identify, with any specificity, a medical determination of total disability due to pneumoconiosis that was communicated to claimant prior to October 7, 1999. On appeal, employer argues for the first time that Dr. Younes’s February 17, 1999 medical report is a medical determination of total disability due to pneumoconiosis that was effectively communicated to claimant sometime before October of 1999, thereby triggering the statute of limitations set forth at 20 C.F.R. §725.308.

In this case, the administrative law judge acted within his discretion in concluding that, because employer had an opportunity to cross-examine claimant, but did not ask claimant whether he had ever been told by a physician that he was totally disabled due to pneumoconiosis, the facts of this case do not support employer’s contention that the claim is untimely. Decision and Order at 5. Contrary to employer’s assertion, the mere existence, in the record, of a medical report discussing the results of a pulmonary evaluation of claimant or his pulmonary status, does not, in and of itself, establish that claimant had knowledge of the contents of the report or the diagnoses contained therein. *See Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-96, 1-99 (1993). Rather, employer had the burden of showing that Dr. Younes’s report had been communicated to claimant in order to rebut the presumption. The administrative law judge acted within his discretion in finding that such a requisite communication was not demonstrated in this case. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Consequently, we affirm the administrative law judge’s finding that claimant’s 2002 subsequent claim was timely filed. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

### **Section 725.309**

Employer next contends that the administrative law judge failed to properly apply the requirements of 20 C.F.R. §725.309. Citing *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), employer argues that the administrative law judge erred in not comparing the evidence in the prior claim to the new evidence in the subsequent

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<sup>3</sup> The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, indicated in *Kirk* that the three-year limitations period set forth in Section 725.308 applies to all claims, not just the first application for benefits.

claim to ensure that the new evidence differed qualitatively. The Sixth Circuit precedent relied on by employer construed the prior version of Section 725.309, while the current claim was filed after the effective date of the amendments to this regulation. Under the revised version of Section 725.309, claimant no longer has the burden of proving a “material change in conditions;” rather, claimant must show that one of the applicable conditions of entitlement has changed since the date upon which the prior denial became final by submitting new evidence developed in connection with the current claim that establishes an element of entitlement upon which the prior denial was based.<sup>4</sup> See 20 C.F.R. §725.309(d)(2), (3); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-64 (2004)(*en banc*). Consequently, we reject employer’s contention that the administrative law judge was required to conduct a qualitative comparison of the evidence pursuant to 20 C.F.R. §725.309.

Employer argues that the administrative law judge erred in finding that the new x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The new x-ray evidence consists of six interpretations of three x-rays taken on March 22, 2000, November 6, 2002, and March 12, 2003. In his consideration of the x-ray evidence, the administrative law judge properly noted that greater weight could be accorded to the interpretations rendered by B readers and/or Board-certified radiologists. See *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). The administrative law judge also properly noted that even greater weight could be accorded to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. See *Roberts*, 8 BLR at 1-213; *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 17.

The administrative law judge initially noted that Dr. Alexander, a B reader and Board-certified radiologist, interpreted claimant’s March 22, 2000 x-ray as positive for pneumoconiosis. Claimant’s Exhibit 1. Because there were no other interpretations of this x-ray, the administrative law judge found that this x-ray was positive for pneumoconiosis. Decision and Order at 17.

The administrative law judge next noted that while Dr. Alexander, a B reader and Board-certified radiologist, interpreted claimant’s November 6, 2002 x-ray as positive for pneumoconiosis, Claimant’s Exhibit 2, Dr. Wiot, an equally qualified reader, interpreted

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<sup>4</sup> In amending 20 C.F.R. §725.309, the Department of Labor adopted the standard set forth in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev’g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), which does not require a qualitative comparison of the old and new evidence.

this x-ray as negative for the disease.<sup>5</sup> Decision and Order at 17; Employer’s Exhibit 4. Because the interpretations of the best qualified readers were at odds, the administrative law judge considered that Dr. Baker, a B reader, also rendered a positive interpretation of this x-ray. *See* Director’s Exhibit 11. Based on the numerical superiority of the x-ray interpretations rendered by B readers, the administrative law judge found that claimant’s November 6, 2002 x-ray was also positive for pneumoconiosis. Decision and Order at 17.

Finally, the administrative law judge acted within his discretion in crediting Dr. Alexander’s positive interpretation of claimant’s March 12, 2003 x-ray, over Dr. Jarboe’s negative interpretation, based upon Dr. Alexander’s superior qualifications.<sup>6</sup> 20 C.F.R. §718.202(a)(1); *see Sheckler*, 7 BLR at 1-131; Decision and Order at 17. Consequently, the administrative law judge found that claimant’s March 12, 2003 x-ray was positive for pneumoconiosis. Therefore, the administrative law judge found that the new x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Employer contends that the administrative law judge improperly relied on a “head count” to weigh the conflicting x-ray evidence. Employer’s Brief at 19. Employer’s contention lacks merit. The administrative law judge based his finding on a proper qualitative analysis of the x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). We, therefore, affirm the administrative law judge’s finding that the new x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

In light of our affirmance of the administrative law judge’s finding that the new x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. 718.202(a)(1), we affirm the administrative law judge’s finding that one of the applicable conditions of entitlement has changed since the date upon which the denial of claimant’s prior 1999 claim became final.<sup>7</sup> 20 C.F.R. §725.309.

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<sup>5</sup> Dr. Barrett, a B reader and Board-certified radiologist, interpreted claimant’s November 6, 2002 x-ray for film quality only. Director’s Exhibit 11.

<sup>6</sup> While Dr. Alexander is a B reader and Board-certified radiologist, Dr. Jarboe is only a B reader. Director’s Exhibit 12; Claimant’s Exhibit 3.

<sup>7</sup> Employer also contends that the administrative law judge erred in finding that the new medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Section 718.202(a), however, provides alternative methods

## Section 718.202(a)

Employer also argues that “even if the [administrative law judge] could merely count heads, he failed to accurately do so” because he did not consider the x-ray evidence from the prior claims. Employer’s Brief at 20. Contrary to employer’s contention, the administrative law judge did not improperly count heads in his evaluation of the x-ray evidence. However, we agree with employer that the administrative law judge, after finding that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant’s prior 1999 claim became final, should have considered claimant’s 2002 claim on the merits, based on a weighing of *all* of the evidence of record. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992). In this case, the administrative law judge did not address whether all of the x-ray evidence of record (both the new x-ray evidence and the previously submitted x-ray evidence) established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Consequently, we remand the case to the administrative law judge for him to make a finding regarding whether the x-ray evidence established the existence of pneumoconiosis on the merits pursuant to 20 C.F.R. §718.202(a)(1).

Employer also argues that the administrative law judge erred in his consideration of whether the medical opinion evidence established the existence of pneumoconiosis. The administrative law judge found that the *new* medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer argues that the administrative law judge erred in according greater weight to the opinions of new medical opinions of Drs. Alam and Koura, that claimant suffered from pneumoconiosis, based upon their status as the miner’s treating physicians. Section 718.104(d) provides that the weight given to the opinion of a treating physician shall “be based on the credibility of the physician’s opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.” 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).<sup>8</sup> Employer argues

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by which a claimant may establish the existence of pneumoconiosis. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Consequently, the administrative law judge’s finding that the new x-ray evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is alone sufficient to establish that one of the applicable conditions of entitlement has changed since the date upon which the denial of claimant’s prior 1999 claim became final. 20 C.F.R. §725.309. Consequently, any error committed by the administrative law judge in his consideration of the new medical opinion evidence is harmless in regard to the administrative law judge’s finding pursuant to 20 C.F.R. §725.309. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

<sup>8</sup> In *Williams*, the Sixth Circuit Court held that there is no rule requiring deference to the opinion of a treating physician in black lung claims. *Eastover Mining Co. v.*

that the underlying objective evidence does not support the conclusions of Drs. Alam and Koura. The administrative law judge found that his weighing of the x-ray evidence supported the opinions of Drs. Alam and Koura. Decision and Order at 19. However, because the administrative law judge has not considered all of the x-ray evidence of record, his basis for according greater weight to the opinions of Drs. Alam and Koura cannot stand. The administrative law judge also failed to explain how Dr. Alam's and Dr. Koura's status as claimant's treating physicians provided them with an advantage over the other physicians. Consequently, before according additional weight to the opinions of Drs. Alam and Koura based upon their status as claimant's treating physicians, the administrative law judge, on remand, should initially address whether their opinions are sufficiently reasoned, and then should weigh their opinions, consistent with 20 C.F.R. §718.104(d) and *Williams*.

Moreover, as employer correctly notes, the administrative law judge, in considering the merits of claimant's 2002 claim, should have considered whether *all* of the medical opinion evidence (both the new medical opinion evidence and the previously submitted medical opinion evidence) established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Shupink*, 17 BLR at 1-28. Consequently, should the administrative law judge, on remand, find that the x-ray evidence of record does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), he must address whether the all of the medical opinion evidence of record establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).<sup>9</sup>

### **Total Disability**

Employer contends that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. 718.204(b). After finding that the evidence did not establish total disability pursuant to 20 C.F.R. 718.204(b)(2) (i)-(iii), the administrative law judge considered whether the medical opinion evidence

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*Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The court held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Williams*, 338 F.3d at 513, 22 BLR at 2-647. The court explained that the "case law and applicable regulatory scheme clearly provide that the [administrative law judge] must evaluate treating physicians just as they consider other experts." *Id.*

<sup>9</sup> Because the administrative law judge has not addressed whether claimant has established the existence of pneumoconiosis on the merits, we also vacate his finding that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b).

established total disability pursuant to 20 C.F.R. 718.204(b)(2)(iv). The administrative law judge stated:

Drs. Baker, Koura, Alam, and Jarboe opined that the Claimant does not retain the respiratory capacity to perform his last coal mining job. The opinions of all four physicians are supported by the Claimant's physical presentation and list of symptoms and complaints. The pulmonary function studies, though technically invalid, exhibited disability even in Dr. Jarboe's opinion. Because all four physicians maintain excellent credentials in pulmonary medicine, and their opinions are well documented and reasoned, I place great weight on them.

In conjunction with the prior duplicate claim, Judge Phalen considered the opinions of Drs. Younes, Alam, Broudy, and Fino. Drs. Younes and Alam asserted that the miner was totally disabled, while Drs. Broudy and Fino felt that the Claimant retained the pulmonary capacity to perform his last coal mining job. Judge Phalen placed greater weight on the opinions of Drs. Broudy and Fino and, thus, found that the miner had failed to establish total disability. Having reviewed the record, I agree with Judge Phalen's conclusions, but I find the current opinions to be of greater probative value because they contain a more accurate evaluation of the miner's current condition. *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985). For the same reason, I place no weight on the medical opinions that appear of record prior to those considered by Judge Phalen. *Bates v. Director, OWCP*, 7 BLR 1-113 (1984). I therefore conclude that the medical opinion evidence supports a finding of total disability.

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In the instant case, I find the medical opinion evidence to be more persuasive than the pulmonary function and blood gas studies. I also find that, although the three most recent pulmonary function studies were not technically valid, they produced values indicative of total disability and support the physicians' opinion. Therefore, I find that the Claimant has established, by a preponderance of the evidence, that he is totally disabled by a pulmonary or respiratory impairment.

Decision and Order at 21-22.

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer initially argues that the administrative law judge erred in

not addressing the significance of the fact that the medical opinions of total disability were based in part upon invalid pulmonary function studies. In this case, the administrative law judge noted that while claimant's three most recent pulmonary function studies conducted on March 12, 2003, June 5, 2003, and June 18, 2003 produced qualifying values, Dr. Jarboe invalidated each of these studies. Decision and Order at 21. The administrative law judge, therefore, found that each of these studies was invalid.<sup>10</sup> *Id.*

An administrative law judge may properly discredit a physician's finding regarding the extent of a miner's pulmonary impairment if it is based upon an invalid pulmonary function study. *See Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984). In this case, the administrative law judge did not address the significance of the fact that Drs. Koura, Alam, and Jarboe, in opining that claimant was totally disabled from a pulmonary standpoint, relied in part upon invalidated pulmonary function studies.<sup>11</sup> The administrative law judge also failed to explain the basis for his finding that "although the three most recent pulmonary function studies were not technically valid, they produced values indicative of total disability and support the physicians' opinion." Decision and Order at 22. The administrative law judge failed to explain how an invalid study could

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<sup>10</sup> The only other remaining new pulmonary function study is a non-qualifying study conducted on November 6, 2002 by Dr. Baker. Director's Exhibit 11. On the report, Dr. Baker noted that the claimant would not completely exhale and that the tracings were not producible. Director's Exhibit 11. During a subsequent deposition, Dr. Baker explained that:

Claimant had trouble with completely exhaling, and he was coughing, and he was short of breath. He had difficulty with the test – physically performing the test, and this sort of reflected on the flow volume loops and the lack of repeat reliability on some of the tests.

Claimant's Exhibit 4 at 9.

Although Dr. Younes validated the November 6, 2002 study, Dr. Jarboe invalidated the study because the two highest FEV1 values were not within five percent of each other. Employer's Exhibit 5 at 14-15. The administrative law judge did not address whether claimant's November 6, 2002 pulmonary function study was invalid.

<sup>11</sup> On remand, the administrative law judge should also address whether Dr. Baker relied upon an invalid pulmonary function study, *i.e.*, the November 6, 2002 pulmonary function study. *See* n.10, *supra*.

support a finding of total disability. *See* 20 C.F.R. §718.101(b). Consequently, the administrative law judge’s finding pursuant to 20 C.F.R. §718.204(b)(2)(iv) is vacated.<sup>12</sup>

On remand, should the administrative law judge find the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), he must weigh all the relevant evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff’d on recon.* 9 BLR 1-236 (1987) (*en banc*).

### **Total Disability Due to Pneumoconiosis**

Employer also argues that the administrative law judge erred in finding that the evidence established that claimant’s total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Revised 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

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<sup>12</sup> Employer also argues that the administrative law judge erred in finding that Dr. Jarboe’s opinion supported a finding of total disability. Employer contends that Dr. Jarboe was unable to opine with reasonable certainty whether claimant retained the respiratory capacity to perform his previous coal mine employment. Employer’s Brief at 26. Employer accurately notes that Dr. Jarboe repeatedly emphasized that he found it very difficult to determine the exact severity of claimant’s pulmonary impairment because of claimant’s inconsistency in performing pulmonary function tests. However, Dr. Jarboe explained that “*based on the totality of the information available to [him],*” it was his opinion that “claimant did not retain the functional respiratory capacity to do his last coal mining job.” Employer’s Exhibit 3 (emphasis added). Consequently, contrary to employer’s contention, Dr. Jarboe rendered an opinion regarding the extent of claimant’s pulmonary impairment. The critical issue is the administrative law judge must determine whether Dr. Jarboe’s opinion is supported by the objective evidence.

(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).

Employer contends that the administrative law judge erred by discounting the opinions of Drs. Broudy, Fino, and Jarboe because they did not diagnose the existence of pneumoconiosis. Because the administrative law judge has not rendered a finding on the merits regarding the existence of pneumoconiosis, this basis for discrediting the opinions of Drs. Broudy, Fino, and Jarboe cannot stand.

Employer also accurately notes that the administrative law judge failed to address the fact that Dr. Jarboe expressed an opinion regarding the cause of pneumoconiosis *assuming* the presence of simple pneumoconiosis. Employer's Brief at 29. Dr. Jarboe opined that claimant did not suffer from clinical or legal pneumoconiosis. Employer's Exhibits 1-3, 5 at 24-25. Dr. Jarboe attributed claimant's disabling respiratory impairment to a combination of cigarette smoking and asthma. Employer's Exhibit 3. Even assuming that claimant suffered from coal workers' pneumoconiosis radiographically, Dr. Jarboe stated that his opinion concerning the cause of claimant's pulmonary impairment would not change. Employer's Exhibit 5 at 26. Dr. Jarboe explained that simple coal workers' pneumoconiosis would not cause the patterns and changes of function abnormality present in claimant's case. *Id.* at 26-27. Consequently, should the administrative law judge, on remand, find that the x-ray evidence of record establishes the existence of pneumoconiosis, he cannot discredit Dr. Jarboe's disability causation opinion solely because the doctor did not diagnose pneumoconiosis. *See Abshire v. D & L Coal Co.*, 22 BLR 1-202, 1-214-15 (2002) (*en banc*).

Employer also argues that the administrative law judge erred in finding that the opinions of Drs. Younes, Alam, Koura, and Baker established that claimant's total disability was due to pneumoconiosis. In finding that the evidence established that claimant's total disability was due to pneumoconiosis, the administrative law judge stated:

I place some weight on Dr. Baker's opinion because it is supported by my conclusion that the miner suffers from pneumoconiosis, and it is logical given the Claimant's extensive exposure to coal mine dust, most of which was at the face of the mines. Dr. Alam's opinion is the same as Dr. Baker's. He found it difficult to distinguish between tobacco damage and pneumoconiosis as the causes of disability. Based on the miner's smoking and coal mine dust exposure histories, I find this reasoning sound. Furthermore, because of Dr. Alam's longstanding relationship as the

Claimant's treating physician, I place controlling weight on his opinion. Dr. Koura's opinion supports those of Dr. Baker and Dr. Alam. As another treating physician, I place some weight on his opinion too.

Decision and Order at 24.

After finding that the opinions of Drs. Younes and Alam were well documented and reasoned and supported by the x-ray evidence, the administrative law judge concluded:

I find the opinion of Dr. Alam, as supported by those of Drs. Baker, Koura, and Younes, to be the best reasoned and entitled to the most weight. Thus, I conclude that the Claimant has established that his pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment.

Decision and Order at 25.

Employer argues that the administrative law judge erred in according greater weight to the opinions of Drs. Alam and Koura based upon their status as the miner's treating physicians. As discussed *supra*, Section 718.104(d) provides that the weight given to the opinion of a treating physician shall "be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *Williams*, 338 F.3d at 513, 22 BLR at 2-647. Employer argues that the administrative law judge erred in finding that the opinions of Drs. Alam and Koura were sufficiently reasoned. Whether a medical report is sufficiently reasoned is for the administrative law judge as the fact-finder to decide. *See Clark*, 12 BLR at 1-155; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Although the administrative law judge found that Dr. Alam's opinion was the "best reasoned," *see* Decision and Order at 25, the administrative law judge did not address the validity of the specific reasoning that Dr. Alam provided for his disability causation opinion. The administrative law judge also did not address the basis for Dr. Koura's disability causation opinion. The administrative law judge also failed to explain how Dr. Alam's and Dr. Koura's status as claimant's treating physicians provided them with an advantage over the other physicians. Consequently, before according additional weight to the opinions of Drs. Alam and Koura based upon their status as claimant's treating physicians, the administrative law judge, on remand, should initially address whether their opinions are sufficiently reasoned, and then should weigh their opinions, consistent with 20 C.F.R. §718.104(d) and *Williams*.<sup>13</sup>

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<sup>13</sup> As employer accurately notes, the administrative law judge also erred in failing to address whether Dr. Koura's opinion was definitive enough to support a finding that

The administrative law judge similarly erred in failing to address the reasoning underlying the disability causation opinions of Drs. Younes and Baker. On remand, the administrative law judge should address whether the opinions of Drs. Baker and Younes are sufficiently reasoned.<sup>14</sup> *See Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47. In light of the above-referenced errors, we vacate the administrative law judge's determination that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and remand the case for further consideration. *See Adams*, 886 F.2d at 825, 13 BLR at 2-63.

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

I concur.

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ROY P. SMITH  
Administrative Appeals Judge

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claimant's total disability was attributable to his pneumoconiosis since Dr. Koura opined that claimant's pulmonary impairment "could be secondary to tobacco and coal dust inhalation." *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Director's Exhibit 28.

<sup>14</sup> The administrative law judge erred in according additional weight to Dr. Baker's opinion because it was supported by the fact that claimant suffered from pneumoconiosis. *See* Decision and Order at 24. A finding of pneumoconiosis alone does not support a finding that a miner's total disability is attributable to the disease. *See* 20 C.F.R. §718.204(c)(1).

HALL, Administrative Appeals Judge, concurring and dissenting:

I respectfully disagree with the majority's decision to remand the case to the administrative law judge to weigh the previously submitted x-ray evidence with the new x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). Employer argues that "if the [administrative law judge] could merely count heads, he failed to accurately do so" because he did not consider the x-ray evidence from the prior claims. Employer's Brief at 20. As the majority accurately notes, the administrative law judge did not improperly count heads in his evaluation of the x-ray evidence.

Moreover, I note that employer has not explained how the negative interpretations of claimant's 1999 x-rays from his 1999 claim call into question the positive x-rays taken on March 22, 2000, November 6, 2002, and March 12, 2003. Because pneumoconiosis is recognized as a latent and progressive disease, the courts have held that earlier, negative x-ray evidence for pneumoconiosis does not detract from the probative value of later, positive x-ray evidence. *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Consequently, under the facts of this case, I would reject employer's contention that the administrative law judge erred in not addressing the relevance of the previously submitted x-ray evidence. I would affirm the administrative law judge's implicit finding that the x-ray evidence established the existence of pneumoconiosis on the merits pursuant to 20 C.F.R. §718.202(a)(1).

I concur in all other respects with the majority's decision.

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BETTY JEAN HALL  
Administrative Appeals Judge