BRB No. 08-0551 BLA

F.J. (Deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 04/29/2009
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Second Decision and Order on Remand Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Legal Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Second Decision and Order on Remand Awarding Benefits (03-BLA-5265) of Administrative Law Judge Daniel L. Leland rendered 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 miner's claim filed on September 11, 2001, and is before the Board for the third time. In the initial decision, the administrative law judge credited claimant with thirty-four years of coal

mine employment[1] and found that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment, and legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) related to coal mine dust exposure.[2] *See* 20 C.F.R. §§718.202(a)(1),(4); 718.203(b). The administrative law judge further found that claimant was totally disabled by a respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2),(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[3] [*F.J.*] *v. Consolidation Coal Co.*, BRB No. 05-0338 BLA (Dec. 29, 2005)(unpub.). However, the Board agreed with employer's contention that the administrative law judge did not adequately consider the CT scan evidence that was negative for clinical pneumoconiosis. *Id.* The Board also vacated the administrative law judge's findings that the medical opinion evidence established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.* In light of its decision to vacate the administrative law judge's findings regarding the CT scan evidence and the medical opinion evidence, the Board also vacated the

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

[2] Clinical pneumoconiosis is a disease "characterized by [the] permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[3] The Board rejected employer's challenge to the validity of the evidentiary limitations set forth at 20 C.F.R. §725.414, and affirmed, as unchallenged, the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2),(3), that claimant's clinical pneumoconiosis established by x-ray arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). [*F.J.*] *v. Consolidation Coal Co.*, BRB No. 05-0338 BLA (Dec. 29, 2005)(unpub.).

administrative law judge's overall finding that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and instructed the administrative law judge to reconsider all of the relevant evidence pursuant to 20 C.F.R. §718.202(a) on remand. *Id.* Consequently, the Board also vacated the administrative law judge's finding that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.*

On remand, in a Decision and Order issued on July 5, 2006, the administrative law judge noted that the Board had affirmed his finding that the x-ray evidence established the existence of clinical pneumoconiosis. Although the administrative law judge found that the CT scan evidence was negative for clinical pneumoconiosis, he accorded the CT scan evidence diminished weight due to its suboptimal resolution. The administrative law judge also accorded diminished weight to the medical opinion evidence regarding whether claimant had clinical pneumoconiosis, because each physician had based his opinion upon an incomplete review of the x-ray evidence of record. Consequently, the administrative law judge relied on the positive x-ray evidence to find that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the evidence established that claimant's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.[4]

Pursuant to employer's second appeal, the Board vacated the administrative law judge's finding that clinical pneumoconiosis was established by the positive x-ray evidence, because the administrative law judge failed to adequately explain the weight he accorded to the negative CT scan evidence, relative to the positive x-ray evidence. [*F.J.*] *v. Consolidation Coal Co.*, BRB No. 06-0828 BLA (Aug. 27, 2007)(unpub.). The Board also vacated the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), because the administrative law judge had not resolved relevant conflicts in the medical opinions of Drs. Cohen, Koenig, Crisalli, and Zaldivar regarding whether the miner had COPD arising out of coal mine employment, or asthma and emphysema unrelated to coal mine employment. Consequently, the Board vacated the administrative law judge's findings of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and remanded the case to the administrative law judge for reconsideration of these issues. In light of the determination to vacate the administrative law judge's finding of

[4] Employer informs the Board that claimant died on the following day, July 6, 2006. Employer's Brief at 2 n.2.

pneumoconiosis, the Board also vacated the finding that claimant's disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[5]

In a Second Decision and Order on Remand issued on March 20, 2008, which is the subject of the current appeal, the administrative law judge again discounted the negative CT scan evidence, finding that the "poor quality" of the CT scan rendered it "subordinate" to the positive x-ray evidence. The administrative law judge also found that Dr. Wiot's testimony, that CT scans provide a better look at the lungs than chest x-rays, was contrary to the regulations and case law. Thus, the administrative law judge again concluded that claimant had established the existence of clinical pneumoconiosis based on the positive x-ray evidence. Turning to the issue of legal pneumoconiosis, the administrative law judge addressed and resolved each issue the Board had instructed him to consider, and he again credited the opinions of Drs. Cohen and Koenig, that claimant had COPD related to his coal mine dust exposure, over those of Drs. Crisalli and Zaldivar, that claimant had asthma and emphysema unrelated to coal mine employment. Having concluded that claimant established the existence of both clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge reinvoked his prior determination that claimant's totally disabling respiratory impairment 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 his evaluation of the CT scan evidence relevant to the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.107. Employer further argues that the administrative law judge erred in according greater weight to the opinions of Drs. Cohen and Koenig than to those of Drs. Crisalli and Zaldivar, in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Finally, employer asserts that this case has reached the point of administrative gridlock, necessitating reassignment to a different administrative law judge. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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,

[5] The Board affirmed the administrative law judge's finding that the medical opinion evidence merited diminished weight with regard to the existence of clinical pneumoconiosis, because none of the doctors rendering an opinion had reviewed all of the x-ray evidence. [*F.J.*] *v. Consolidation Coal Co.*, BRB No. 06-0828 BLA (Aug. 27, 2007)(unpub.), slip op. at 4-5.

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

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

We first address employer's assertion that the administrative law judge erred in his evaluation of the negative readings of a December 9, 2002 CT scan in finding clinical pneumoconiosis established pursuant to 20 C.F.R. §718.202(a). In our prior decision, we held that although the administrative law judge reasonably concluded that the CT scan was not of optimal resolution because it was performed with ten-millimeter cuts, rather than seven-millimeter cuts or smaller, he failed to address the relevant issue, *i.e.*, whether the negative CT scan evidence, while not of the highest resolution available, was still nonetheless equivalent or superior to the positive x-ray evidence in revealing the presence of clinical pneumoconiosis. [2007][*F. J.*], BRB No. 06-0828, slip op. at 5.

On remand, the administrative law judge attempted to resolve the conflicting evidence, concluding that the "poor quality" of the CT scan evidence "renders it subordinate to the x-ray evidence of record." Second Decision and Order on Remand at 3. As employer correctly asserts, however, substantial evidence does not support the administrative law judge's finding that the CT scan evidence was of "poor quality." *See Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir 1997); Employer's Brief at 10. Rather, as we previously held, the evidence supports a conclusion that the CT scan evidence was not of the most optimal resolution available for CT scans; there was no medical evidence that the December 9, 2002 CT scan was of poor quality.

We further find merit in employer's assertion that the administrative law judge erred in discrediting Dr. Wiot's testimony, that the CT scan provides a "far better look at the lungs than the chest x-ray," on the ground that the testimony was contrary to the regulations and case law. Second Decision and Order on Remand at 3. While Dr. Wiot stated that a CT scan affords a better look at the lungs than an x-ray, and that, generally, a CT scan is more sensitive than an x-ray, Dr. Wiot emphasized that x-rays and CT scans are complementary procedures, and that occasionally he has seen a positive x-ray of early simple pneumoconiosis when the CT scan is negative. Employer's Exhibit 20 at 11, 17-18. Contrary to the administrative law judge's finding, Dr. Wiot never expressed the opinion that a negative CT scan precludes a diagnosis of pneumoconiosis. *See*

Consolidation Coal Co. v. Director, OWCP [*Stein*], 294 F.3d 885, 892, 22 BLR 2-409, 2-422 (7th Cir. 2002); *Yogi Mining v. Fife*, 159 F. App'x. 441, 450-51 (4th Cir. 2005); 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000). Consequently, Dr. Wiot's testimony is not contrary to the regulations and case law. We, therefore, must vacate the administrative law judge's finding that the negative CT scan evidence was entitled to diminished weight, and, consequently, we vacate the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

Employer next contends that in finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge erred in according greater weight to the opinions of Drs. Koenig and Cohen than to those of Drs. Zaldivar and Crisalli. For the reasons that follow, employer's contention lacks merit.

On remand, the administrative law judge reconsidered the medical opinions of Drs. Koenig, Cohen, Zaldivar, and Crisalli. Drs. Koenig and Cohen opined that claimant suffered from COPD attributable to his coal dust exposure,[6] and did not have asthma. Drs. Zaldivar and Crisalli opined that claimant did not suffer from any lung disease related to his coal dust exposure, but rather suffered from asthma and emphysema.[7] The administrative law judge accurately noted that the Board had instructed him to reconsider and clarify several aspects of his prior findings concerning these medical opinions.[8]

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[6] Dr. Koenig opined that claimant suffered from chronic obstructive pulmonary disease (COPD) caused by coal dust exposure. Claimant's Exhibit 4. Dr. Cohen opined that claimant suffered from COPD caused in part by coal dust exposure. Claimant's Exhibit 1.

[7] Dr. Zaldivar opined that claimant's pulmonary impairment was attributable to asthma and a component of emphysema due to smoking. Employer's Exhibit 4. Dr. Crisalli diagnosed both asthma and emphysema, neither of which he related to claimant's coal dust exposure. Director's Exhibit 25.

[8] Specifically, the administrative law judge accurately summarized the Board's instructions that, on remand, he was to: (1) identify which studies, or which findings in those studies, Drs. Koenig and Cohen used to support their conclusions on the reversibility of COPD; (2) address Drs. Zaldivar's and Crisalli's criticisms of the studies cited by Drs. Koenig and Cohen; (3) explain the significance of Dr. Crisalli's statements that an absence of a treatment history of asthma did not preclude a finding of the disease; (4) explain how the fact that some forms of COPD may be reversible supports a finding that claimant's lung disease was attributable to coal dust; and (5) assess whether Dr. Cohen's and Dr. Koenig's opinions are sufficiently reasoned. Second Decision and Order on Remand at 2; [2007][*F. J.*], BRB No. 06-0828, slip op. at 6-9.

First, the administrative law judge reconsidered his prior finding that the opinions of Drs. Koenig and Cohen were entitled to greater weight than those of Drs. Zaldivar and Crisalli on the issue of legal pneumoconiosis because Drs. Koenig and Cohen cited extensively to medical literature in support of their conclusion that claimant did not have asthma but had COPD related to coal dust exposure, and because Drs. Zaldivar and Crisalli did not refute the studies or the data underlying the studies with sufficient specificity. Second Decision and Order on Remand at 4; Decision and Order on Remand at 13-16. The administrative law judge noted, correctly, that the Board vacated that finding because the administrative law judge did not elaborate upon which studies or which findings in the studies cited by Drs. Koenig and Cohen supported their respective conclusions, or adequately discuss the opinions of Dr. Zaldivar and Crisalli, criticizing the physicians' reliance on those studies. Thus, the Board instructed the administrative law judge to more fully explain his reasons for finding that the studies cited by Drs. Koenig and Cohen supported their conclusions, and to address the deposition testimony of Drs. Zaldivar and Crisalli questioning the validity of the studies cited by Drs. Koenig and Cohen. Second Decision and Order on Remand at 4; [2007][*F.J.*], BRB No. 06-0828, slip op. at 6-7.

In response to the Board's instructions, the administrative law judge identified by title the three studies and one medical textbook cited by Dr. Koenig for his conclusion that intermittent improvement in lung function after bronchodilators is not definitive evidence of asthma. Second Decision and Order on Remand at 4. The administrative law judge also identified the articles relied upon by Dr. Cohen that concluded that reversibility after the administration of bronchodilators is not definitive of asthma, but is also seen in miners with obstructive lung disease due to coal dust exposure. Second Decision and Order on Remand at 4. Contrary to employer's assertion that "[t]itles of articles cannot prove such a proposition," the administrative law judge did not rely on the titles of the articles. Employer's Brief at 26. Rather, as instructed, the administrative law judge identified the studies he found supportive of the opinions of Drs. Koenig and Cohen, and he explained that Drs. Koenig and Cohen had relied upon these studies' findings to support their opinions that the improvement of claimant's spirometry after the administration of bronchodilators did not definitively establish that claimant suffered from asthma, but that such improvement was also consistent with COPD due to coal dust exposure. This determination was reasonable. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Second Decision and Order on Remand at 4; Claimant's Exhibit 1 at 10; Claimant's Exhibit 4 at 4.

Further, the administrative law judge concluded that Dr. Crisalli's and Dr. Zaldivar's criticisms of the medical studies relied upon by Drs. Koenig and Cohen did not undermine the validity of the physicians' conclusions. Second Decision and Order on Remand at 6-7. Employer asserts that, in so finding, the administrative law judge erred in

his consideration of Dr. Crisalli's deposition testimony criticizing Dr. Cohen's reliance on a publication from the National Heart Lung and Blood Institute (NHLBI). Employer's Brief at 26. Specifically, Dr. Crisalli testified that a NHLBI study from which Dr. Cohen drew the conclusion that asthma can be "fully" reversible actually stated that airflow obstruction associated with asthma is "often reversible." Employer's Exhibit 21 at 44; Claimant's Exhibit 1 at 10. In instructing the administrative law judge to consider the criticisms put forth by Drs. Crisalli and Zaldivar, the Board specifically noted that the administrative law judge had previously acknowledged Dr. Cohen's misstatement of the NHLBI study finding, but failed to address whether this incorrect statement affected the credibility of Dr. Cohen's opinion that claimant did not have asthma, but rather, had COPD related to coal dust exposure. [2007][*F.J.*], BRB No. 06-0828, slip op. at 6-7; Decision and Order on Remand at 15 n.2.

On remand, the administrative law judge found that Dr. Cohen's misstatement that asthma can be "fully" reversible did not affect the administrative law judge's weighing of the evidence, because the administrative law judge "did not exclude a diagnosis of asthma based on the lack of full reversibility in claimant's pulmonary exams." Second Decision and Order on Remand at 5. Employer contends that this was an impermissible medical determination by the administrative law judge. Employer's Brief at 26. We disagree.

In the next sentence of the administrative law judge's decision, he went on to explain that Dr. Cohen's misstatement did not decrease the weight to be accorded to his opinion, because Dr. Cohen himself had not ruled out asthma on the basis that claimant's condition was not fully reversible. Second Decision and Order on Remand at 5. Rather, the administrative law judge found that Dr. Cohen had simply acknowledged that reversibility alone is not sufficient to make a differential diagnosis of asthma, and had, therefore, credibly relied on other factors, including claimant's symptomology, the onset date of his obstructive impairment in his adulthood, following years of coal mine dust exposure, and the nature of claimant's diffusion impairment, which is not typical of asthmatics, to conclude that claimant did not suffer from asthma, but instead suffered from COPD due to coal dust exposure. Second Decision and Order on Remand at 5-6. Thus, it is clear from the context of the administrative law judge's decision that, contrary to employer's contention, the administrative law judge was not making a medical determination, but rather, was explaining his permissible determination to credit Dr. Cohen's conclusion that claimant did not suffer from asthma.[9] *See Piney Mountain Coal*

[9] Employer does not challenge the administrative law judge's finding that Dr. Zaldivar's criticism of the medical literature was not persuasive. That finding is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Co. v. Mays, 176 F.3d 753, 762, 21 BLR 2-587, 2-603 n.10 (4th Cir. 1999); *Lane*, 105 F.2d at 170, 21 BLR at 2-41.

The administrative law judge next reconsidered, as instructed by the Board, his prior conclusion that claimant's lack of treatment with asthma medications and the absence of evidence in the record pertaining to any personal or family history of asthma indicated that claimant's condition was not asthma. The Board had held that, in so finding, the administrative law judge failed to consider the significance of Dr. Crisalli's statement that an absence of asthma in claimant's family history would not preclude a finding that claimant suffered from the disease. The Board also held that the administrative law judge failed to consider Dr. Crisalli's observation that claimant had not taken *any* respiratory medications at all for his lung disease, not just medications used to treat asthma. [2007][*F.J.*], BRB No. 06-0828, slip op. at 7-8; *see* Employer's Exhibit 21 at 88.

On remand, the administrative law judge concluded that Dr. Crisalli's statements regarding the significance of the absence of any history of medication or treatment for asthma did not refute the conclusions of Drs. Koenig and Cohen:

> Dr. Crisalli's statement undermines his conclusion, as opposed to providing support for his diagnosis. If [c]laimant's asthma is, as Dr. Crisalli suggests, severe enough to cause COPD, than [sic] [c]laimant should have a documented treatment history of severe acute exacerbations. Yet, as Dr. Cohen noted, [c]laimant's personal treatment records are devoid of any such reference or treatment. Dr. Crisalli has not persuasively explained this absence, aside from stating that it does not disprove his conclusion.

Second Decision and Order on Remand at 7. Employer specifically challenges the administrative law judge's statement, asserting that there is "no legal or medical basis necessitating acute exacerbations and hospitalizations to diagnose asthma." Employer's Brief at 27.

Employer has taken the administrative law judge's statement out of context. After stating that, if Dr. Crisalli were correct, the treatment record should have documented treatment for exacerbations of asthma and COPD, the administrative law judge indicated that he was referring to Dr. Cohen's medical observation that "claimant's personal treatment records are devoid of any such reference or treatment,"[10] and he found that Dr.

[10] During his deposition, Dr. Cohen explained that a "remodeling" of claimant's lungs due to an asthmatic condition was "a very unlikely diagnosis" because claimant was never diagnosed with asthma, was never treated for asthma, and developed his

Crisalli did not persuasively explain the absence of any treatment for asthma. Second Decision and Order on Remand at 7. The administrative law judge therefore additionally found that "the fact that [c]laimant was not medicated for asthma, logically, points to the conclusion that [c]laimant did not suffer from asthma." Second Decision and Order on Remand at 7. Moreover, the administrative law judge further explained that Dr. Crisalli's statement did not negatively affect the weight he accorded to Dr. Cohen's opinion "because Dr. Cohen ha[d] relied on numerous other factors to exclude asthma, not just an absence of a personal or family history. Specifically, Dr. Cohen based his conclusion on [c]laimant's symptomology, onset date, and the nature of his diffusion impairment, which is not typical of asthmatics." Second Decision and Order on Remand at 7. Thus, contrary to employer's assertion, the administrative law judge fully complied with the Board's instruction to consider the significance of Dr. Crisalli's statements, and reasonably explained, based on his analysis of the conflicting medical opinions, why he continued to credit the opinions of Drs. Cohen and Koenig that claimant did not have asthma. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Second Decision and Order on Remand at 7; Employer's Brief at 27.

We also reject employer's contention that, in reconsidering the overall weight to be accorded to the medical opinions, the administrative law judge erred in according less weight to the opinions of Drs. Zaldivar and Crisalli, than to the opinions of Drs. Koenig and Cohen. On remand, the administrative law judge correctly summarized the Board's instruction that he address whether the opinions of Drs. Koenig and Cohen are sufficiently reasoned to carry claimant's burden of proof. [2007][*F.J.*], BRB No. 06-0828, slip op. at 8-9; Second Decision and Order on Remand at 2, 8. The administrative law judge permissibly concluded that the opinion of Dr. Cohen "is well reasoned and well documented and is entitled to great weight," because, in concluding that claimant suffered from COPD due to coal dust exposure, Dr. Cohen had considered and analyzed all of the medical evidence of record, had "utilized the medical literature and [c]laimant's symptoms, onset date, and diffusion impairment to exclude asthma as a diagnosis," and had "excellent credentials to render an opinion." *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Second Decision and Order on Remand at 9.

Similarly, the administrative law judge permissibly found the opinion of Dr. Koenig to be "well reasoned and well documented" in light of Dr. Koenig's "superior credentials," the physician's consideration of "[c]laimant's work history, his relatively minor smoking history, [c]laimant's symptoms, the time of their onset, the arterial blood

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symptoms in adulthood, only after more than twenty years of exposure to coal mine dust. Claimant's Exhibit 14 at 96.

gas studies, and the x-ray evidence of record," and his explanation as to why the medical literature supported his conclusion that claimant's condition was caused by coal dust exposure and not asthma. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Second Decision and Order on Remand at 9.

The administrative law judge further found that "[b]y contrast," while Drs. Zaldivar and Crisalli also possessed excellent credentials, their opinions were not well-reasoned or well-documented, and were entitled to little weight. Second Decision and Order on Remand at 10. The administrative law judge permissibly discredited Dr. Zaldivar's opinion, that claimant suffered from asthma, and emphysema caused by asthma and smoking, because the administrative law judge found Dr. Zaldivar's conclusions to be unsupported by the objective medical evidence or the medical literature, and because Dr. Zaldivar's deposition testimony was "rife with contradictions which undermine his credibility."[11] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Second Decision and Order on Remand at 10. Thus, contrary to employer's contentions, in stating that "the mere fact that the Claimant showed reversibility is not enough for a differential diagnosis of asthma and does not rule out the presence of legal pneumoconiosis when there is a residual disabling impairment," the administrative law judge was not making a medical determination, or shifting the burden of proof to employer. Employer's Brief at 28. Rather, the context of the administrative law judge's decision reveals that he was contrasting Dr. Zaldivar's opinion with the better reasoned and documented opinions of Drs. Cohen and Koenig. *See Mays*, 176 F.3d at 762, 21 BLR at 2-603 n.10; *Lane*, 105 F.2d at 170, 21 BLR at 2-41; Second Decision and Order on Remand at 10.

We further reject employer's contention that, in discrediting Dr. Crisalli's opinion, the administrative law judge "simply ignored Dr. Crisalli's testimony and . . . appl[ied] an incorrect legal standard requiring the employer to rule out coal dust exposure as causing any obstructive disease." Employer's Brief at 28-9. Dr. Crisalli attributed claimant's emphysema to either asthma aggravated by smoking or to a hereditary condition, but he acknowledged both that claimant's smoking history was too minimal to have caused claimant's COPD, and that he had not tested claimant for the presence of any hereditary conditions. Contrary to employer's contention, the administrative law judge acted within his discretion in discrediting Dr. Crisalli's diagnosis of asthma because it was based on the proposition that the reversibility of claimant's obstructive impairment was inconsistent with the irreversible nature of pneumoconiosis, a proposition that the administrative law judge found outweighed by the credible opinions of Drs. Koenig and

[11] Employer has raised no specific challenge to the administrative law judge's determination that Dr. Zaldivar's testimony was contradictory. It is therefore affirmed. *Skrack*, 6 BLR at 1-711.

Cohen and the medical literature upon which they relied. *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); Second Decision and Order on Remand at 7. Thus, the administrative law judge permissibly concluded that, despite his excellent credentials, Dr. Crisalli's opinion, that claimant's COPD was due to asthma and unrelated to claimant's thirty-four years of coal mine employment, was not persuasive. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Second Decision and Order on Remand at 7.

Employer finally asserts that the administrative law judge relied in part on his erroneous finding of clinical pneumoconiosis to credit the opinions of Drs. Koenig and Cohen that claimant had legal pneumoconiosis. Employer's Brief at 30. Employer does not identify the basis for this assertion, nor is one apparent from our review of the administrative law judge's decision, wherein he considered separately the issues of clinical and legal pneumoconiosis. We therefore decline to further address employer's allegation. *See* 20 C.F.R. §802.211(b).

In sum, with respect to the issue of legal pneumoconiosis, the administrative law judge fully complied with each of the Board's specific remand instructions, reasonably analyzed the medical opinions, and explained his reasons for crediting or discrediting the opinions he reviewed. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Consequently, we affirm the administrative law judge's conclusion that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

With respect to whether all of the relevant evidence weighed together established the existence of pneumoconiosis, *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000), although we have determined that the administrative law judge erred in his evaluation of the CT scan evidence, and, therefore, erred in finding that the negative CT scan readings did not outweigh the positive x-ray evidence of clinical pneumoconiosis, we find that the circumstances of this case do not warrant a third remand to the administrative law judge for further consideration of the existence of clinical pneumoconiosis. Specifically, employer concedes that in this case, "the issue is not whether the CT scan evidence 'rules out' legal pneumoconiosis." Employer's Brief at 14; *see Compton*, 211 F.3d at 210, 22 BLR at 2-172-73. Moreover, as we will discuss, the administrative law judge credited medical opinions that claimant was totally disabled due to legal pneumoconiosis. Therefore, in the circumstances presented here, we conclude that employer presents no reason for us to remand this case to the administrative law judge for a fourth decision on whether the negative CT scan readings outweigh the x-ray evidence of clinical pneumoconiosis, and if so, to then weigh them against the evidence of legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985). Consequently, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20

C.F.R. §718.202(a), and we turn to the administrative law judge's analysis of whether claimant established that he was totally disabled due to pneumoconiosis.

Regarding the issue of the cause of claimant's totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(c),[12] the administrative law judge did not reweigh the medical opinions of record. Rather, he reinvoked, by reference, his prior determination that claimant was totally disabled due to pneumoconiosis. Second Decision and Order on Remand at 10. A review of the administrative law judge's prior findings reveals that the administrative law judge based his determination on the opinions of Drs. Koenig and Crisalli, who "each opined that coal dust exposure was a significant contributing factor to the miner's pulmonary impairment." Decision and Order on Remand at 10. In crediting their opinions as to the cause of claimant's total disability, the administrative law judge specifically found that while "[n]either Dr. Cohen nor Dr. Koenig determined that [c]laimant had clinical pneumoconiosis" this did "not necessarily conflict with [his] conclusion, and their conclusions, that [c]laimant suffered from legal pneumoconiosis in the form of COPD." Decision and Order on Remand at 17. The administrative law judge then concluded:

> Drs. Koenig and Cohen rendered comprehensive assessments of [c]laimant's history of smoking, employment, symptomology, and diagnostic testing. Each physician also incorporated medical literature in his opinion in support of his conclusion. Based on the foregoing, I find that [c]laimant [was] totally disabled due to pneumoconiosis.

Id. Thus, the administrative law judge credited medical opinions that claimant was totally disabled due to legal pneumoconiosis. Further, the administrative law judge discounted the contrary opinions of Drs. Crisalli and Zaldivar because they had not

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[12] A miner is totally disabled due to pneumoconiosis if pneumoconiosis:

> 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).

diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding. *Id*.; *see Scott v. Mason Coal Co*., 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). As employer raises no specific arguments regarding the administrative law judge's findings at 20 C.F.R. §718.204(c), we affirm the administrative law judge's determination that claimant was totally disabled due to legal pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Finally, employer asserts that this case has reached "administrative gridlock," warranting reassignment to a new administrative law judge. Employer's Brief at 30. In light of our determination to affirm the administrative law judge's award of benefits, we need not address employer's request for reassignment.

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge