

BRB No. 08-0608 BLA

R.S.)
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 Claimant-Respondent)
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 v.)
)
 C&O MINING, INCORPORATED) DATE ISSUED: 08/27/2009
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 and)
)
 HARTFORD CASUALTY INSURANCE)
 COMPANY)
)
 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 on Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (04-BLA-5217) of Administrative Law Judge Alice M. Craft (the administrative law judge) awarding benefits on a claim filed on May 8, 2002 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 the original Decision and Order, the administrative law judge credited claimant with 25.32 years of coal mine

employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b). The administrative law judge also found that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's first appeal, the Board affirmed the administrative law judge's unchallenged length of coal mine employment finding and her finding that the evidence established total disability at 20 C.F.R. §718.204(b). [*R.C.S.*] v. *C&O Mining, Inc.*, BRB No. 06-0504 BLA, slip op. at 2 n.2 (Feb. 28, 2007)(unpub.). However, the Board vacated the administrative law judge's findings that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4), and remanded the case for further consideration of the evidence thereunder. [*R.C.S.*], slip op. at 4-6. The Board also vacated the administrative law judge's finding that the evidence established that the pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), and instructed the administrative law judge, on remand, to reconsider whether claimant's pneumoconiosis arose out of coal mine employment, if reached. [*R.C.S.*], slip op. at 7. Further, the Board vacated the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and remanded the case for further consideration of the evidence thereunder, if reached. *Id.*

On remand, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), (4)¹ and 718.203(b). The administrative law judge also found that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge again awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the x-ray evidence established that the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). Employer also challenges the administrative law judge's finding that the medical opinion evidence established the existence of both clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Further, 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 has not responded. The Director, Office of Workers' Compensation Programs, declines to participate in this appeal.

¹ The administrative law judge found that the evidence established both clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.² 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 (1989).

Employer contends that the administrative law judge erred in finding that the x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). The record consists of eight interpretations of five x-rays dated September 27, 2002,³ April 3, 2003, April 16, 2003, February 3, 2004, and July 21, 2004. While Dr. Forehand, a B reader, read the September 27, 2002 x-ray as positive for pneumoconiosis, Director's Exhibit 14, Dr. Wiot, a B reader and a Board-certified radiologist, read this x-ray as negative, Director's Exhibit 41. Dr. Patel, a B reader and a Board-certified radiologist, read the April 3, 2003 x-ray as positive for pneumoconiosis. Director's Exhibit 40. Dr. Castle, a B reader, read the April 16, 2003 x-ray as positive for pneumoconiosis. Director's Exhibit 42. While Dr. Robinette, a B reader, read the February 3, 2004 x-ray as positive for pneumoconiosis, Claimant's Exhibit 1, Dr. Wheeler, a B reader and a Board-certified radiologists, read this x-ray as negative, Employer's Exhibit 3. Dr. Mullens found that the February 3, 2004 x-ray showed nodular interstitial lung disease consistent with coal workers' pneumoconiosis/silicosis. Claimant's Exhibit 1. Lastly, Dr. Wheeler read the July 21, 2004 x-ray as positive for pneumoconiosis. Employer's Exhibit 5.

In finding that the x-ray evidence established clinical pneumoconiosis, the administrative law judge considered the B reader and Board-certified radiologist status of the readers of the x-rays. 20 C.F.R. §718.202(a)(1). In so doing, the administrative law judge gave greater weight to the x-ray readings of the physicians who were dually qualified as B readers and Board-certified radiologists than to the readings of the

² The record indicates that claimant was last employed in the coal mining industry in Virginia. Director's Exhibit 4. Accordingly, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

³ Dr. Navani, a B reader and a Board-certified radiologist, read the September 27, 2002 x-ray for quality only. Director's Exhibit 15.

physicians who were only B readers. The administrative law judge found that the September 27, 2002 x-ray was negative for pneumoconiosis because Dr. Forehand's positive reading was outweighed by Dr. Wiot's negative reading, "[b]ased on the superior qualifications of Dr. Wiot." 2008 Decision and Order on Remand at 14. The administrative law judge also found that the April 3, 2003 x-ray was positive for pneumoconiosis because there were no negative readings of this x-ray. *Id.* Similarly, the administrative law judge found that the April 16, 2003 x-ray was positive for pneumoconiosis because there were no negative readings of this x-ray. *Id.* The administrative law judge additionally found that the February 3, 2004 x-ray was negative for pneumoconiosis because Dr. Robinette's positive reading was outweighed by Dr. Wheeler's negative reading, "[b]ased on the superior qualifications of Dr. Wheeler."⁴ *Id.* Further, the administrative law judge found that the July 21, 2004 x-ray was positive for pneumoconiosis because Dr. Wheeler's equivocal comments did not rule out the possibility that some of the nodules that he observed were due to pneumoconiosis and the increase in the profusion of the opacities suggested that there was progression from the prior profusions of the opacities. *Id.* In addition, the administrative law judge gave greater weight to Dr. Wheeler's positive reading of the July 21, 2004 x-ray than to Dr. Wheeler's negative reading of the February 3, 2004 x-ray because she found that the July 21, 2004 x-ray was "the more recent of the two [films] read by Dr. Wheeler." *Id.* The administrative law judge therefore found that the preponderance of the x-ray evidence established clinical pneumoconiosis at Section 718.202(a)(1). *Id.*

Employer argues that the administrative law judge erred in failing to follow the Board's instructions on remand in considering the x-ray evidence. Specifically, employer asserts that the administrative law judge mischaracterized Dr. Wheeler's comments with respect to the February 3, 2004 and July 21, 2004 x-rays by finding that they were equivocal. Employer maintains that a fact-finder is prohibited from discrediting a medical opinion as equivocal merely because a doctor cannot provide a diagnosis with absolute certainty. Employer's Brief at 9-10. On the July 21, 2004 x-ray report, Dr. Wheeler classified the profusion of the small opacities as 2/1 and commented that "small calcified granulomata...in lower lungs [were] compatible with healed TB or histoplasmosis," that "TB can explain all lung disease," and that "TB or histoplasmosis caused the calcified granulomata but some small nodules could be CWP." Employer's Exhibit 5. Dr. Wheeler also commented that "[claimant should] get CT for better evaluation." *Id.* The administrative law judge previously found that Dr. Wheeler's positive reading of the July 21, 2004 x-ray was the most probative x-ray reading of record

⁴ The administrative law judge stated, "[a]s the positive reading [of the February 3, 2004 x-ray] by Dr. Mullens has not been classified as required by the regulations, I have not weighed it along with the other readings." 2008 Decision and Order on Remand at 14. No party challenges the administrative law judge's consideration of Dr. Mullens' reading of the x-ray dated February 3, 2004.

and, therefore, that it supported a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(1). 2006 Decision and Order at 19.

In its Decision and Order, the Board vacated the administrative law judge's prior finding that the x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) because the administrative law judge did not consider Dr. Wheeler's comments in determining whether Dr. Wheeler had positively diagnosed pneumoconiosis by the July 21, 2004 x-ray. [*R.C.S.*], slip op. at 4. The Board held that "[b]ecause Dr. Wheeler commented that 'TB can explain all lung disease,' and that 'some small nodules *could* be CWP,' Employer's Exhibit 5 (emphasis added), those comments address whether pneumoconiosis exists."⁵ *Id.* The Board therefore remanded the case to the administrative law judge for further consideration of the July 21, 2004 x-ray in light of Dr. Wheeler's comments. *Id.*

In her Decision and Order on Remand, the administrative law judge noted that Dr. Wheeler classified the small opacities on the July 21, 2004 x-ray as 2/1. 2008 Decision and Order on Remand at 14. The administrative law judge also noted that Dr. Wheeler rendered comments on the July 21, 2004 x-ray that did not lead her to conclude that the x-ray was negative for pneumoconiosis, by stating:

In his comments, [Dr. Wheeler] stated, "Some small nodules could be CWP [coal workers' pneumoconiosis] but pattern...favors TB." He made a similar comment in his reading of the February 3, 2004 x-ray. Although these statements were equivocal, in the final analysis, Dr. Wheeler did not rule out the possibility that some of the nodules he observed were due to pneumoconiosis on either x-ray.

Id.

In addition, the administrative law judge found that although Dr. Ghio suggested that claimant has granulomatous disease, none of the examining physicians diagnosed

⁵ Citing *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5-6 (1999)(*en banc*), the Board noted that "[a] physician's comment that does not undermine the physician's x-ray diagnosis, but merely addresses the source of the diagnosed pneumoconiosis, need not be considered at Section 718.202(a)(1), but is to be considered by the fact finder at Section 718.203, where the issue is whether the pneumoconiosis arose out of coal mine employment." [*R.C.S.*] v. *C&O Mining, Inc.*, BRB No. 06-0504 BLA, slip op. at 4 (Feb. 28, 2007)(unpub.). Citing *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991) (*en banc*), the Board further noted that "[o]n the other hand, a physician's comment that may represent an alternative diagnosis, thereby calling into question the physician's x-ray diagnosis of pneumoconiosis, must be considered at Section 718.202(a)(1)." *Id.*

either TB or histoplasmosis. *Id.* Further, the administrative law judge found that the profusion of opacities increased in the July 21, 2004 x-ray and that a chronological observation of all the x-rays suggested a progression of the profusion of opacities. *Id.* The administrative law judge therefore found that the July 21, 2004 x-ray was positive for pneumoconiosis. *Id.*

As the trier-of-fact, the administrative law judge has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). In this case, the administrative law judge reasonably found that the July 21, 2004 x-ray was positive for pneumoconiosis, because Dr. Wheeler's equivocal comments regarding alternative diagnoses did not call into question his positive ILO classification of this x-ray. *Kuchwara*, 7 BLR at 1-170. Thus, we reject employer's assertion that the administrative law judge mischaracterized Dr. Wheeler's comments.

Employer also argues that the administrative law judge erred in applying the "later evidence" rule in this case to accord greater weight to Dr. Wheeler's July 21, 2004 x-ray than to his February 3, 2004 x-ray, because the period of time that separates the x-rays is not significant. Specifically, employer asserts that the record does not support the administrative law judge's finding that there is a progression of opacities in the x-rays. Dr. Wheeler classified the profusion of the small opacities on the February 3, 2004 x-ray as 0/1. Employer's Exhibit 3. By contrast, Dr. Wheeler classified the profusion of the small opacities of the July 21, 2004 x-ray as 2/1. Employer's Exhibit 5.

The administrative law judge previously found that Dr. Wheeler's positive reading of the July 21, 2004 x-ray was more probative than his negative reading of the February 3, 2004 x-ray, "[g]iven the temporal proximity of the studies." 2006 Decision and Order at 19. The administrative law judge therefore found that the July 21, 2004 x-ray supported a finding of pneumoconiosis at Section 718.202(a)(1). *Id.*

In its Decision and Order, however, the Board held that the administrative law judge erred by discounting Dr. Wheeler's negative reading of the February 3, 2004 x-ray because of its "temporal proximity" with Dr. Wheeler's reading of the July 21, 2004 x-ray, which the administrative law judge had treated as positive for pneumoconiosis. [*R.C.S.*], slip op. at 4. The Board stated that while the administrative law judge had found that the "temporal proximity" of the February 3, 2004 and July 21, 2004 x-rays caused the positive reading of the July 21, 2004 film to affect the validity of the negative reading of the February 3, 2004 film, she had also treated the other x-rays as separate, independent x-rays. *Id.* at 3-4. The Board additionally stated that the administrative law judge did not explain how the "temporal proximity" of the February 3, 2004 and July 21, 2004 x-rays rendered the positive reading more probative than the contemporaneous, negative reading. *Id.* at 4. Hence, the Board vacated the administrative law judge's

finding with respect to Dr. Wheeler's readings of the February 3, 2004 and July 21, 2004 x-rays. *Id.* at 5.

In her Decision and Order on Remand, the administrative law judge gave greater weight to Dr. Wheeler's positive reading of the July 21, 2004 x-ray than to Dr. Wheeler's negative reading of the February 3, 2004 x-ray because the July 21, 2004 x-ray was "the more recent of the two [films] read by Dr. Wheeler." 2008 Decision and Order on Remand at 14.

While an administrative law judge may credit the most recent x-ray of record, *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), she, nevertheless, must provide more of an explanation for her finding that the later x-ray is more credible where the x-rays are only separated by a short period of time. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge stated that "the profusion of opacities increased in the most recent x-ray, and looking at all of the x-rays chronologically also suggests progression of the profusion of opacities." 2008 Decision and Order on Remand at 14. The administrative law judge therefore found that Dr. Wheeler's positive reading of the July 21, 2004 x-ray was entitled to greater weight than Dr. Wheeler's negative reading of the February 3, 2004 x-ray, because the July 21, 2004 film was the more recent of the two films by Dr. Wheeler. *Id.*

However, because the administrative law judge credited classifications of the profusion of opacities that varied from 2/2 on the April 3, 2003 x-ray to 2/1 on the July 21, 2004 x-ray,⁶ the administrative law judge did not provide an adequate explanation for finding that a chronological review of the x-rays suggested progression of the profusion of the opacities. *Wojtowicz*, 12 BLR at 1-165. Consequently, the administrative law judge erred in giving greater weight to Dr. Wheeler's positive reading of the July 21, 2004 x-ray than to Dr. Wheeler's negative reading of the February 3, 2004 x-ray based on the "later evidence" rule, where the films are separated by a short period of time.

In view of the foregoing, we vacate the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), and remand the case for further consideration of the x-ray evidence thereunder. *Adkins*,

⁶ Dr. Wiot found that the September 27, 2002 x-ray was completely negative. Director's Exhibit 41. Dr. Patel classified the profusion of the small opacities on the April 3, 2003 x-ray as 2/2. Director's Exhibit 40. Dr. Castle classified the profusion of the small opacities on the April 16, 2003 x-ray as 1/2. Director's Exhibit 42. While Dr. Wheeler classified the profusion of the small opacities on the February 3, 2003 x-ray as 0/1, Employer's Exhibit 3, the doctor classified the profusion of the small opacities on the July 21, 2003 x-ray as 2/1, Employer's Exhibit 5.

958 F.2d at 52-53, 16 BLR at 2-66; *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994).

Employer also contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of both clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the reports of Drs. Forehand, Rasmussen, Robinette, Castle, and Ghio. Dr. Forehand opined that claimant has coal workers' pneumoconiosis and chronic bronchitis related to coal dust exposure and cigarette smoking. Director's Exhibit 10. Dr. Rasmussen opined that claimant has coal workers' pneumoconiosis and chronic obstructive lung disease, including emphysema and bronchitis, related to coal dust exposure and cigarette smoking. Director's Exhibit 40. Dr. Robinette opined that claimant has occupational pneumoconiosis and severe airflow obstruction related to coal dust exposure. Claimant's Exhibit 1. Dr. Castle opined that claimant has coal workers' pneumoconiosis, bronchial asthma, and tobacco smoke-induced airway obstruction. Director's Exhibit 42. Dr. Ghio opined that claimant does not have medical or legal pneumoconiosis. Employer's Exhibit 1.

The administrative law judge found that all of the medical opinions were documented and reasoned. 2008 Decision and Order on Remand at 16. Nevertheless, the administrative law judge gave greater weight to the opinions of Drs. Forehand, Rasmussen, and Robinette than to the opinions of Drs. Castle and Ghio, because she found that "Drs. Forehand, Rasmussen, and Robinette better explained how all of the evidence they developed supported their conclusions." *Id.* at 18. In addition, the administrative law judge gave greater weight to the opinions of Drs. Forehand, Rasmussen, and Robinette because she found that "their opinions [were] in better accord both with the evidence underlying their opinions, the overall weight of the medical evidence of record, and the premises underlying the regulations." *Id.* The administrative law judge therefore found that the medical opinion evidence established both clinical and legal pneumoconiosis at Section 718.202(a)(4).

Initially, we will address employer's contentions regarding the administrative law judge's finding that the preponderance of the medical opinion evidence established the existence of clinical pneumoconiosis at Section 718.202(a)(4).⁷ Employer argues that

⁷ Whereas Drs. Forehand, Rasmussen, Robinette, and Castle opined that claimant has clinical pneumoconiosis, Director's Exhibits 10, 40, 42; Claimant's Exhibit 1, Dr. Ghio opined that claimant does not have clinical pneumoconiosis, Employer's Exhibit 1. The administrative law judge found that the opinions of Drs. Forehand, Rasmussen, and Robinette outweighed Dr. Ghio's contrary opinion. 2008 Decision and Order on Remand at 18. Although the administrative law judge found that Dr. Castle's opinion, that claimant has clinical pneumoconiosis, was documented and reasoned, she found that the

because the opinions of the doctors who diagnosed clinical pneumoconiosis are merely restatements of x-ray interpretations, the administrative law judge erred in finding that the medical opinion evidence established clinical pneumoconiosis at Section 718.202(a)(4). Contrary to employer's assertion, Dr. Forehand opined that claimant has clinical pneumoconiosis, based on claimant's coal dust exposure history, a physical examination, a chest x-ray, and a pulmonary function study. Director's Exhibit 10. Additionally, Drs. Rasmussen and Robinette opined that claimant has clinical pneumoconiosis, based on claimant's coal dust exposure history, a chest x-ray, and a physical examination. Director's Exhibit 40; Claimant's Exhibit 1. Although the administrative law judge gave probative weight to Dr. Castle's opinion that claimant has radiographic evidence of simple coal workers' pneumoconiosis, she found that Dr. Castle's opinion was outweighed by the opinions of Drs. Forehand, Rasmussen, and Robinette because "[Dr. Castle's] opinion is less well reasoned." 2008 Decision and Order on Remand at 17-18; Director's Exhibit 42. Thus, we reject employer's assertion that because the opinions of the doctors who diagnosed clinical pneumoconiosis are merely restatements of x-ray interpretations, the administrative law judge erred in finding that the medical opinion evidence established clinical pneumoconiosis at Section 718.202(a)(4).

Employer also argues that the administrative law judge erred in finding that the opinions of Drs. Forehand, Rasmussen, and Robinette were well-reasoned and well-documented. 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, Rasmussen, and Robinette opined that claimant has coal workers' pneumoconiosis. Director's Exhibits 10, 40; Claimant's Exhibit 1. The administrative law judge considered the documentation and the explanations that Drs. Forehand, Rasmussen, and Robinette provided for their conclusions.⁸ Thus, the administrative law judge acted within her discretion in finding

opinion of Dr. Castle was "less well reasoned" than the opinions of Drs. Forehand, Rasmussen, and Robinette. *Id.* at 17-18.

⁸ The administrative law judge stated that "Dr. Forehand was of the opinion that the [c]laimant has pneumoconiosis, based on the x-ray, work history, physical examination and ventilatory testing." 2008 Decision and Order on Remand at 16. The administrative law judge also stated that "Dr. Rasmussen was of the opinion that the [c]laimant has pneumoconiosis, based on the x-ray and the results of his examination." *Id.* at 17. Further, the administrative law judge stated that "Dr. Robinette was of the opinion that the [c]laimant has pneumoconiosis, based on the x-ray and the results of his examination." *Id.* The administrative law judge therefore found that the opinions of Drs.

that the opinions of Drs. Forehand, Rasmussen, and Robinette were documented and reasoned. 2008 Decision and Order on Remand at 16-17; *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 erred in finding that the opinions of Drs. Forehand, Rasmussen, and Robinette were well-reasoned and well-documented.

In addition, employer argues that the administrative law judge erred in giving greater weight to the opinions of Drs. Rasmussen and Robinette than to Dr. Ghio's contrary opinion based on their credentials in pulmonary disease. Specifically, employer asserts that Dr. Ghio is Board-certified in pulmonary disease and is a professor in pulmonary medicine, while Dr. Rasmussen is neither Board-certified in pulmonary disease nor a professor of pulmonary medicine.

In weighing the conflicting medical opinion evidence at Section 718.202(a)(4), the administrative law judge stated that "both Drs. Rasmussen and Robinette possess excellent credentials in the field of pulmonary disease." 2008 Decision and Order on Remand at 18. Dr. Rasmussen is Board-certified in internal medicine. Director's Exhibit 40. Dr. Robinette is Board-certified in internal medicine and the subspecialty of pulmonary disease. Claimant's Exhibit 1. Like Dr. Robinette, however, Dr. Ghio is also Board-certified in internal medicine and the subspecialty of pulmonary medicine. Employer's Exhibit 2. Moreover, Dr. Ghio gives lectures on pulmonary and critical care medicine to second year students at Duke University School of Medicine. *Id.*

An administrative law judge may accord greater weight to the opinions of physicians based on their superior qualifications. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In this case, however, the administrative law judge did not explain why she gave greater weight to the opinions of Drs. Rasmussen and Robinette than to the opinion of Dr. Ghio, based on their "excellent credentials," when Dr. Ghio possessed the same credentials as Dr. Robinette. *See* Claimant's Exhibit 1; Employer's Exhibit 2; *Wojtowicz*, 12 BLR at 1-165. Thus, the administrative law judge erred in finding that the opinions of Drs. Rasmussen and Robinette outweighed Dr. Ghio's opinion on the basis of their credentials.

Employer further argues that the administrative law judge erred in giving more weight to the opinions of Drs. Forehand, Rasmussen, and Robinette than to Dr. Ghio's opinion because she found that they examined claimant. In her summary of the medical opinion evidence, the administrative law judge noted that Dr. Ghio, like Drs. Forehand, Rasmussen, and Robinette, examined claimant. 2008 Decision and Order on Remand at 16-18. However, in weighing the medical opinion evidence, the administrative law judge

Forehand, Rasmussen, and Robinette were supported by the evidence available to them. *Id.* at 16-17.

gave greater probative weight to the opinions of Drs. Forehand, Rasmussen, and Robinette, because she found that “[a]ll three had the opportunity to examine the [c]laimant.” *Id.* at 18. The administrative law judge’s reliance on the examination of claimant by Drs. Forehand, Rasmussen, and Robinette, in giving greater probative weight to their opinions, contrasted with her treatment of Dr. Ghio’s contrary opinion. Thus, the administrative law judge irrationally weighed the conflicting opinions of Drs. Forehand, Rasmussen, Robinette, and Ghio. *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999) (*en banc*). Consequently, substantial evidence does not support the administrative law judge’s finding that the opinions of Drs. Forehand, Rasmussen, and Robinette outweighed Dr. Ghio’s contrary opinion because the former physicians examined claimant.

Employer additionally argues that substantial evidence does not support the administrative law judge’s finding that the opinions of Drs. Forehand, Rasmussen, and Robinette were better reasoned than Dr. Ghio’s opinion. In according greater probative weight to the opinions of Drs. Forehand, Rasmussen, and Robinette at Section 718.202(a)(4), the administrative law judge stated:

I find their reasoning and explanation in support of their conclusions more complete and thorough than that provided by the physicians who concluded that the [c]laimant does not have pneumoconiosis, or has only clinical pneumoconiosis. Drs. Forehand, Rasmussen, and Robinette better explained how all of the evidence they developed supported their conclusions. I also find their opinions to be in better accord both with the evidence underlying their opinions, the overall weight of the medical evidence of record, and the premises underlying the regulations.

2008 Decision and Order on Remand at 18.

However, the administrative law judge selectively analyzed the medical opinion evidence by failing to address whether Dr. Ghio’s opinion was supported by the evidence available to him.⁹ *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-297 (1984). Further, the

⁹ The administrative law judge noted that Dr. Rasmussen relied on Dr. Patel’s positive reading of the April 3, 2003 x-ray, and that she found that this x-ray was positive for pneumoconiosis. 2008 Decision and Order on Remand at 17. As noted by the administrative law judge, “[Dr. Ghio] relied on his own reading of an inadmissible x-ray, and negative readings by Drs. Wiot and Wheeler of admissible x-rays, in finding that the [c]laimant does not have clinical pneumoconiosis.” *Id.* at 18. Dr. Wiot read the September 27, 2002 x-ray as negative, Director’s Exhibit 41, and Dr. Wheeler read the February 3, 2004 x-ray as negative, Employer’s Exhibit 3. At Section 718.202(a)(1), the administrative law judge found that both of these x-rays were negative for

administrative law judge's conclusion that the opinions of Drs. Forehand, Rasmussen, and Robinette were supported by the evidence available to them was undermined by her consideration of their reports.¹⁰ 2008 Decision and Order on Remand at 16-17.

The Administrative Procedure Act (APA), 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*, 12 BLR at 1-165. In this case, the administrative law judge did not sufficiently explain why the reasoning provided by Drs. Forehand, Rasmussen, and Robinette for diagnosing clinical pneumoconiosis was superior to Dr. Ghio's reasoning in support of his opinion that claimant does not have clinical pneumoconiosis. *Wojtowicz*, 12 BLR at 1-165. Thus, the administrative law judge erred in failing to provide a valid basis for finding that the opinions of Drs. Forehand, Rasmussen, and Robinette outweighed Dr. Ghio's contrary opinion with regard to the issue of clinical pneumoconiosis.

In light of the forgoing, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). On remand, the administrative law judge must consider all of the medical opinion evidence regarding the issue of clinical pneumoconiosis in accordance with the APA.

Next, we address employer's contentions regarding the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).¹¹ Employer argues that the administrative

pneumoconiosis. 2008 Decision and Order on Remand at 14.

¹⁰ The administrative law judge noted that Dr. Forehand read the September 27, 2002 x-ray as positive for pneumoconiosis, but she found that this x-ray was negative for pneumoconiosis, based on Dr. Wiot's negative re-reading of the same x-ray. 2008 Decision and Order on Remand at 16. In addition, the administrative law judge noted that Dr. Robinette read the February 3, 2004 x-ray as positive for pneumoconiosis, but she found that this x-ray was negative. *Id.* at 17.

¹¹ Drs. Forehand, Rasmussen, and Robinette opined that claimant has legal pneumoconiosis, Director's Exhibits 10, 40; Claimant's Exhibit 1, while Drs. Castle and Ghio opined that claimant does not have legal pneumoconiosis, Director's Exhibit 42; Employer's Exhibit 1. The administrative law judge found that the opinions of Drs. Forehand, Rasmussen, and Robinette outweighed the opinions of Drs. Castle and Ghio. 2008 Decision and Order on Remand at 18.

law judge's finding that claimant established the existence of legal pneumoconiosis was contrary to the law of the case. Specifically, employer asserts that "[the administrative law judge] provides no explanation for her complete reversal from her prior decision that all of the medical opinions finding legal pneumoconiosis are conclusory, are not well reasoned, and are not persuasive."¹² Employer's Brief at 12.

The doctrine of the law of the case is a discretionary rule of practice based on the policy that once an issue is litigated and decided, the matter should not be relitigated. *United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186 (1950), *reh'g denied*, 339 U.S. 972 (1950). Specifically, "the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983); *see also Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting). However, under the law of the case doctrine, it is proper for a court to depart from a prior holding if there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was erroneous, or the decision is clearly erroneous and not in the interest of justice. *Cale v. Johnson*, 861 F.2d 943 (6th Cir. 1988); *Brinkley*, 14 BLR at 1-150-151; *Williams*, 22 BRBS at 237; *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

The administrative law judge previously found that the medical opinion evidence established the existence of clinical pneumoconiosis, and not legal pneumoconiosis, at Section 718.202(a)(4). 2006 Decision and Order at 21, 23.

In its Decision and Order, the Board vacated the administrative law judge's finding that the medical opinion evidence established clinical pneumoconiosis at Section 718.202(a)(4), and remanded the case for further consideration of the evidence thereunder. [*R.C.S.*], slip op. at 6. The Board declined to address employer's assertion that the administrative law judge erred by finding that Dr. Ghio's opinion, that claimant does not have legal pneumoconiosis, was less persuasive.¹³ *Id.* Rather, the Board held

¹² Employer also argues that the administrative law judge erred in discrediting the opinions of Drs. Ghio and Castle on the ground that they were contrary to the regulations. Employer additionally argues that Dr. Ghio's opinion is not contrary to the notion that the effects of coal dust exposure and cigarette smoking are additive. Further, employer argues that the administrative law judge erred in rejecting the opinions of Drs. Ghio and Castle because neither physician adequately explained why claimant's history of almost 26 years of coal dust exposure was not a factor in his obstructive disease.

¹³ In her prior Decision and Order, the administrative law judge stated that "[Dr. Ghio] relies on an imprecise smoking history and offers confusing reasoning in concluding that [claimant] does not suffer from legal coal workers' pneumoconiosis such

that because the administrative law judge found that the medical opinion evidence did not establish the existence of legal pneumoconiosis at Section 718.202(a)(4), any error in the administrative law judge's consideration of Dr. Ghio's opinion concerning the absence of legal pneumoconiosis was harmless. *Id.*

In her Decision and Order on Remand, however, the administrative law judge found that the medical opinion evidence established both clinical and legal pneumoconiosis at Section 718.202(a)(4), by stating:

The [Board] did not address the issue of the [c]laimant's smoking history because it considered the issue moot given my finding that the [c]laimant had failed to establish the presence of legal pneumoconiosis. However, the Board instructed that I must revisit the issue if it becomes relevant. Upon reviewing the medical evidence on remand, for the reasons stated below, I have found that the [c]laimant has established the presence of both clinical and legal pneumoconiosis. As a result, the issue of the [c]laimant's smoking history becomes relevant after all. Considering the medical evidence, including the carboxyhemoglobin test results, I conclude that the [c]laimant underreported his smoking history somewhat in his testimony. I find that the [c]laimant smoked 3/4 to 1 pack per day for 40 years, for a total of 30-40 pack years.

2008 Decision and Order on Remand at 11-12.

As previously noted, the APA, 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*, 12 BLR at 1-165. In this case, the administrative law judge did not adequately explain why she revisited the issue of legal pneumoconiosis on remand. *Wojtowicz*, 12 BLR at 1-165. Moreover, the administrative law judge's acknowledgement that claimant's testimony underrepresented his smoking history does not support a finding that the administrative law judge previously erred in finding that claimant failed to establish the existence of legal pneumoconiosis.¹⁴ Thus, because the administrative law judge has not explained

that his opinion loses probative force." 2006 Decision and Order at 23.

¹⁴ In her prior Decision and Order, the administrative law judge characterized the smoking histories of the physicians as follows: 1) Dr. Forehand noted 22.5 pack years; 2) Dr. Rasmussen noted 17 pack years; 3) Dr. Robinette noted 17.5 pack years; 4) Dr. Castle noted 30 pack years; and 5) Dr. Ghio noted 20-40 pack years. 2006 Decision and Order at 21-22. The administrative law judge found that claimant had a 19 pack-year smoking

why the law of the case doctrine is inapplicable, or how an exception to its application has been demonstrated, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Cale*, 861 F.2d at 947; *Brinkley*, 14 BLR at 1-150-151; *Williams*, 22 BRBS at 237; *Bridges*, 6 BLR at 1-989-990. On remand, before the administrative law judge may find that the medical opinion evidence establishes the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), she must explain why the law of the case doctrine is inapplicable, or an exception to its application has been demonstrated, in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

Finally, 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). Employer asserts that the administrative law judge's disability causation finding relies on her erroneous finding that the evidence established the existence of legal pneumoconiosis. Employer also asserts that the administrative law judge's bare statements regarding disability causation do not comport with the APA. Employer further asserts that the disability causation opinions of Drs. Rasmussen and Robinette are not reasoned and documented. Employer additionally asserts that the administrative law judge erred in discrediting the disability causation opinions of Drs. Ghio and Castle because they did not diagnose pneumoconiosis.

At Section 718.204(c), the administrative law judge considered the opinions of Drs. Forehand, Rasmussen, Robinette, Castle, and Ghio. Dr. Forehand opined that "coal workers' pneumoconiosis and chronic bronchitis combine to impair lung function," and that "[t]he effect of each is additive and chronic bronchitis also aggravates preexisting coal workers' pneumoconiosis." Director's Exhibit 10. Dr. Rasmussen opined that claimant's coal mine dust exposure is a significant contributing factor to his impaired lung function. Director's Exhibit 40. Dr. Robinette opined that "[a]s a consequence of this severe airflow obstruction [claimant] would be unable to work as an underground

history. *Id.* at 22. Both Drs. Ghio and Castle opined that claimant does not have legal pneumoconiosis. Director's Exhibit 42; Employer's Exhibit 1. Although the administrative law judge gave less probative value to Dr. Ghio's opinion because Dr. Ghio relied on a widely disparate smoking history, 2006 Decision and Order at 22, she found that Dr. Castle's opinion "ha[d] merit despite the inaccurate smoking history reported by Dr. Castle," *id.* at 23. In her Decision and Order on Remand, however, the administrative law judge found that claimant has a 30-40 pack-year smoking history. 2008 Decision and Order on Remand at 12. On remand, the administrative law judge should consider the credibility of all the medical opinions in light of her new finding regarding claimant's smoking history. *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984).

coal miner,” and that “at least part of his airflow obstruction is directly related to his coal dust inhalation and associated airflow obstruction.” Claimant’s Exhibit 1. By contrast, Dr. Castle opined that claimant is totally disabled as a result of bronchial asthma¹⁵ and tobacco smoke-induced airway obstruction, and not as a result of coal workers’ pneumoconiosis. Director’s Exhibit 42. Dr. Ghio opined that claimant has a respiratory impairment related to his cigarette smoking, and not related to any coal dust exposure he might have had while mining. Employer’s Exhibit 1.

In finding that the preponderance of the evidence established total disability due to pneumoconiosis at Section 718.204(c), the administrative law judge stated:

Dr. Castle found that the [c]laimant has simple clinical pneumoconiosis, but not legal pneumoconiosis. Dr. Ghio did not believe that the [c]laimant has any form of pneumoconiosis. I can find no specific and persuasive reasons for concluding that their judgment that exposure to coal dust did not cause or contribute to the [c]laimant’s obstructive disability did not rest upon their disagreement with my finding that the [c]laimant has both clinical and legal pneumoconiosis. Drs. Forehand, Rasmussen and Robinette, on the other hand, all concur that the [c]laimant’s exposure to coal dust contributed to his disabling obstructive impairment.

2008 Decision and Order on Remand at 19.

Because we vacate the administrative law judge’s findings that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4), we also 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 all the evidence in accordance with the APA, if reached.¹⁶ *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

¹⁵ Dr. Castle noted that “[b]ronchial asthma is a condition of the general public at-large and is unrelated to coal mining employment and coal dust exposure.” Director’s Exhibit 42.

¹⁶ 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:

If, on remand, the administrative law judge finds that the evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a), then she must consider whether the evidence establishes that the pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203.¹⁷ Further, the administrative law judge must consider whether the evidence establishes total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), if reached.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

(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).

¹⁷ Employer does not explicitly challenge the administrative law judge's finding at 20 C.F.R. §718.203. Nevertheless, because we vacate the administrative law judge's findings that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4), we also vacate the administrative law judge's finding that the evidence established that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203.

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the administrative law judge's Decision and Order on Remand awarding benefits and to remand the case for reconsideration. I would instead affirm the administrative law judge's Decision and Order on Remand awarding benefits in all respects. The majority believes that the administrative law judge did not sufficiently address the Board's concerns on remand regarding the existence of clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4). I disagree.

Specifically, the majority holds that the administrative law judge did not consider Dr. Wheeler's comments when she determined that Dr. Wheeler diagnosed pneumoconiosis on the July 21, 2004 x-ray. Employer's Exhibit 5. The administrative law judge did, however, consider Dr. Wheeler's comments when considering this x-ray. She noted:

The x-ray taken on July 21, 2004, has been classified by Dr. Wheeler as 2/1. In his comments, he stated, "Some small nodules could be CWP...*but pattern...favors TB.*" He made a similar comment in his reading of the February 3, 2004 x-ray. Although these statements were equivocal, in the final analysis, Dr. Wheeler did not rule out the possibility that some of the nodules he observed were due to pneumoconiosis on either x-ray. *None of the physicians who examined the [c]laimant and took his histories diagnosed either TB or histoplasmosis....* I therefore conclude that the July 21, 2004, x-ray is positive for pneumoconiosis, and *as the more recent of the two* read by Dr. Wheeler, it is entitled to greater weight than his negative reading of the February 3, 2004, x-ray.

Decision and Order on Remand at 14 (emphasis added).

The administrative law judge clearly explained why she properly credited the July 21, 2004 positive x-ray, specifically noting that she was persuaded by the fact that none of the several physicians who examined claimant and took his histories diagnosed either TB or histoplasmosis. Further, I would find the administrative law judge did not abuse her discretion in finding that the more recent of the readings by Dr. Wheeler (the first being of the February 3, 2004 x-ray, which predates the July 21, 2004 x-ray by nearly six months) was entitled to greater weight than his reading of the earlier x-ray.

The majority also holds that the administrative law judge erred in considering Dr. Wheeler's February 3, 2004 negative x-ray and his July 21, 2004 positive x-ray together, because they were taken only six months apart, when she treated the x-rays taken on April 3 and on April 16, 2003, taken approximately two weeks apart, as separate and

independent x-rays. However, the majority overlooks the fact that the April 3 and April 16, 2003 x-rays were read as positive by two different readers, while the February and July 2004 x-rays were read as negative and positive, respectively, by the same reader, Dr. Wheeler, who had noted that the February 3, 2004 x-ray, while classified as negative, 0/1, could have shown some small nodules of coal workers' pneumoconiosis.¹⁸ Thus, contrary to the view of the majority, I would hold that the administrative law judge properly considered the February and July 2004 x-rays in light of each other.

The majority also holds that the administrative law judge does not adequately explain how the more recent positive July 21, 2004 x-ray outweighed the earlier negative February 3, 2004 x-ray. The majority holds that the administrative law judge's explanation that a chronological review of all of the x-ray evidence suggested a progression of profusion in opacities is not supported by the record. However, in my opinion, the administrative law judge properly credited the July 21, 2004 x-ray, read as positive, because it was more recent than an x-ray taken nearly six months earlier, read as negative. *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Accordingly, for these reasons, I would affirm the administrative law judge's finding that the x-ray evidence establishes the existence of clinical pneumoconiosis at Section 718.202(a)(1), as three out of the five x-rays were read as positive and the most recent x-ray of record was read as positive.¹⁹ See *Anderson v. Valley Camp of Utah, Inc.*, 11 BLR at 1-112 (1989).

¹⁸ The administrative law judge also noted that this x-ray was read as positive by Dr. Robinette, a B reader. The administrative law judge, however, found it to be negative based on the negative reading by Dr. Wheeler, who was dually-qualified. Decision and Order on Remand at 14.

¹⁹ The x-ray evidence consisted of the following: a September 27, 2002 x-ray that was read as positive by Dr. Forehand, a B reader, and as negative by Dr. Wiot, a dually-qualified reader; an April 3, 2003 x-ray that was read as positive by Dr. Patel, a dually-qualified reader; an April 16, 2003 x-ray that was read as positive by Dr. Castle, a B reader; a February 3, 2004 x-ray that was read as positive by Dr. Robinette, a B reader, but subsequently read as negative by Dr. Wheeler, a dually-qualified reader; and the most recent x-ray of July 21, 2004 that was read as positive by Dr. Wheeler.

The administrative law judge found the September 27, 2002 x-ray to be negative, based on the negative reading of a dually-qualified physician. She found the April 3, 2003 and April 16, 2003 x-rays to be positive, as they were read as positive by a dually-qualified reader and a B reader, respectively. The administrative law judge found the February 3, 2004 x-ray to be negative and the July 21, 2004 x-ray to be positive, based on the respective readings of Dr. Wheeler, a dually-qualified reader.

Turning to Section 718.202(a)(4), the majority vacates the administrative law judge's finding that the medical opinion evidence established clinical pneumoconiosis because the medical opinion evidence relied on the x-ray evidence. Consequently, the majority remands the case for reconsideration of the medical opinion evidence. I disagree.

I would affirm the administrative law judge's finding that the medical opinion evidence establishes the existence of clinical pneumoconiosis at Section 718.202(a)(4), based on the reasoned and documented opinions diagnosing clinical pneumoconiosis. To start, the administrative law judge noted that all five of the physicians who have given opinions as to whether claimant has pneumoconiosis provided medical opinions which are "documented and reasoned opinions." She then noted that four of the five physicians, Drs. Forehand, Rasmussen, Robinette and Castle, believe that claimant has pneumoconiosis, while one, Dr. Ghio, believes that he does not. Decision and Order on Remand at 16. Specifically, the administrative law judge noted that even though Drs. Forehand and Robinette relied on positive x-rays, that were subsequently found to be negative by better qualified physicians, their findings of clinical pneumoconiosis were nonetheless reasoned as they were based on other factors as well, such as taking relevant histories, conducting physical examinations and conducting objective tests. The administrative law judge therefore properly found that their reliance on x-rays, that were subsequently interpreted as negative, did not render their opinions, as a whole, unreasoned. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). Further, the administrative law judge properly credited the opinion of Dr. Rasmussen, who found clinical pneumoconiosis, as he relied, in part, on an x-ray that was read as positive.²⁰ The administrative law judge also found that Dr. Castle diagnosed clinical pneumoconiosis and that the only physician who did not diagnose clinical pneumoconiosis, Dr. Ghio, relied, in part, on an inadmissible x-ray he read and the negative x-ray readings of Drs. Wiot and Wheeler. Decision and Order on Remand at 18. Consequently, I would affirm the administrative law judge's finding that the weight of the medical opinion evidence established the existence of clinical pneumoconiosis at Section 718.202(a)(4), based on her consideration of the evidence. See *Anderson*, 11 BLR at 1-113.

I would also affirm the administrative law judge's finding of legal pneumoconiosis at Section 718.202(a)(4), based on her consideration of the medical opinion evidence. The administrative law judge properly found that all of the physicians of record, including Dr. Ghio, examined claimant. Decision and Order on Remand at 10, 18. The administrative law judge also considered the credentials of all of the physicians. *Id.* at

²⁰ The administrative law judge noted that, in addition to a positive x-ray reading, Dr. Rasmussen's finding of clinical pneumoconiosis was based on histories, a physical examination, and objective tests. Decision and Order on Remand at 16-17.

16-18. Further, the administrative law judge noted that she found that all of the opinions were documented and reasoned. Nonetheless, she accorded greater weight to the opinions of Drs. Forehand, Rasmussen and Robinette finding legal pneumoconiosis because she found:

[T]heir reasoning and explanation in support of their conclusions [are] more complete and thorough than that provided by the physicians who concluded that the [c]laimant does not have pneumoconiosis [Ghio], or has only clinical pneumoconiosis [Castle].” Drs. Forehand, Rasmussen and Robinette better explained how all of the evidence they developed supported their conclusions. I also find their opinions to be in better accord both with the evidence underlying their opinions, the overall weight of the medical evidence of record, and the premises underlying the regulations. Neither of the physicians who testified on behalf of the Employer [Drs. Castle and Ghio] adequately explained why almost 26 years of coal dust exposure was not a factor in [claimant’s] obstructive disease.

Id. at 18.

Thus, contrary to the majority’s view, I would hold that the administrative law judge properly accorded greater weight to the opinions of Drs. Forehand, Rasmussen and Robinette, on the issue of legal pneumoconiosis, as they found, in well-reasoned and documented opinions, that both smoking and coal dust exposure contributed to claimant’s chronic obstructive pulmonary disease (COPD) and bronchitis. *See* 20 C.F.R. §718.201. The administrative law judge properly accorded less weight to the opinion of Dr. Castle on legal pneumoconiosis because Dr. Castle discounted, without explanation, that claimant’s lengthy coal mine employment could have contributed to his COPD and Dr. Castle offered no explanation for the irreversible portion of claimant’s COPD, other than smoking. *See Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991). Likewise, regarding the opinion of Dr. Ghio, the administrative law judge properly accorded it less weight, as Dr. Ghio’s assertion, that severe COPD due to coal mine employment is rare, does not explain why coal mine employment could not have contributed to claimant’s COPD in this case. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *see also Barnes v. Director, OWCP*, 19 BLR 1-71 (1995)(*en banc*).

In conclusion, therefore, I would hold that the administrative law judge properly accorded less weight to the opinions of Drs. Castle and Ghio because they were not as well-reasoned as the opinions of Drs. Forehand, Rasmussen and Robinette, and fully explained her reasons for doing so. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21

BLR 2-323 (4th Cir. 1998); *Anderson*, 12 BLR at 1-113; *Clark*, 12 BLR at 1-155. Accordingly, I would affirm the administrative law judge's finding of legal pneumoconiosis at Section 718.202(a)(4).

Moreover, I note that the administrative law judge properly found that the x-ray and medical opinion evidence, when weighed together, established the existence of both clinical and legal pneumoconiosis by a preponderance of the evidence. *See* Decision and Order on Remand at 18; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Finally, because the majority vacated the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(1), (4) and remanded the case for reconsideration thereunder, they also vacated the administrative law judge's findings that pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b) and that claimant was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). Because I would affirm the administrative law judge's findings of pneumoconiosis at Section 718.202(a)(1), (4), I would also affirm the administrative law judge's findings at Sections 718.203(b) and 718.204(c). *See Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

BETTY JEAN HALL
Administrative Appeals Judge