

BRB Nos. 03-0270 BLA  
and 03-0270 BLA-A

MARVIN DAN KINGERY	)		
	)		
Claimant-Respondent	)		
	)		
v.	)		
	)		
RANGER FUEL CORPORATION	)	DATE	ISSUED:
02/27/2004	)		
	)		
Employer-Petitioner	)		
Cross-Respondent	)		
	)		
CEMENTATION COMPANY OF	)		
AMERICA, INCORPORATED	)		
	)		
Employer-Respondent	)		
	)		
GUNTHER-NASH MINING	)		
CONSTRUCTION COMPANY	)		
	)		
Employer-Cross-Petitioner	)		
Cross-Respondent	)		
	)		
DIRECTOR, OFFICE OF WORKERS'	)		
COMPENSATION PROGRAMS, UNITED	)		
STATES DEPARTMENT OF LABOR	)		
	)		
Party-in-Interest	)	DECISION	and ORDER

Appeal of the Decision and Order of Richard E. Huddleston,  
Administrative Law Judge, United States Department of Labor.

William D. Turner (Crandall Pyles Haviland & Turner, LLP),  
Lewisburg, West Virginia, for claimant.

Dorothea J. Clark and William S. Mattingly (Jackson Kelly PLLC),  
Morgantown, West Virginia, for Ranger Fuel Corporation.

William H. Howe and Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for Gunther-Nash Mining Construction Company.

Jennifer U. Toth (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer, Ranger Fuel Corporation (Ranger Fuel), appeals, and employer, Gunther-Nash Mining Construction Company, Inc. (Gunther-Nash), cross-appeals the Decision and Order (99-BLA-0834) of Administrative Law Judge Richard E. Huddleston awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).<sup>1</sup> Claimant filed a claim for benefits on October 17, 1995. In a Decision and Order dated November 26, 2002, the administrative law judge credited claimant with fourteen and one-half years of coal mine employment, and determined that Ranger Fuel is the responsible operator liable for the payment of any benefits because it was the most recent employer that employed claimant as a “miner” for at least one year. With regard to the merits of the claim, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), but determined that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found claimant entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and concluded that the presumption was not rebutted. The administrative law judge also found the

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<sup>1</sup>The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

evidence sufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(ii), (iv). Finally, the administrative law judge found the evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, he awarded benefits.

On appeal, Ranger Fuel challenges the administrative law judge's finding that it is the responsible operator, and his findings with regard to the existence of pneumoconiosis, total disability and disability causation. In its cross-appeal, Gunther-Nash contends that the administrative law judge properly determined that it is not the responsible operator because it did not employ claimant as a "miner" for at least one year. Gunther-Nash thus urges affirmance of the administrative law judge's responsible operator finding. In addition, Gunther-Nash states that, in the alternative, it challenges the administrative law judge's findings on the merits for the same reasons set forth in Ranger Fuel's Petition for Review and Brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a consolidated brief in response to both appeals, urging the Board to vacate the administrative law judge's finding that Ranger Fuel is the responsible operator and to remand the case for further consideration of the issue. The Director states he does not otherwise intend to participate in these appeals, specifically with respect to the administrative law judge's findings on the merits of the claim. Ranger Fuel filed a brief in response to Gunther-Nash's Petition for Review and Brief, reiterating its contentions on the responsible operator issue. Claimant filed a response brief, urging affirmance of the administrative law judge's award of benefits. Ranger Fuel filed a reply brief, reiterating its contentions raised in its Petition for Review and Brief with respect to the administrative law judge's findings on the merits of the claim. Cementation Company of America (Cementation) has not filed a brief in this case.<sup>2</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. '932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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<sup>2</sup>We affirm, as unchallenged on appeal, the administrative law judge's finding of fourteen and one half years of coal mine employment, and his findings of no pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), entitlement to the rebuttable presumption and no rebuttal of the presumption under 20 C.F.R. §718.203(b), and no total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 6-7, 24-27, 29.

On appeal, Ranger Fuel first contends that the administrative law judge erred in dismissing Gunther-Nash and Cementation as responsible operators in this case. In its cross-appeal, Gunther-Nash argues that the administrative law judge properly dismissed it as a potentially responsible operator. The Director agrees with Ranger Fuel's contention, and urges the Board to remand the case for further consideration of the issue.

The regulations provide that the properly designated potential responsible operator which is the most recent employer of a miner for a cumulative period of not less than one year shall be the responsible operator. 20 C.F.R. §725.493(a)(1) (2000). The administrative law judge found that the dates of claimant's employment with the three identified potential responsible operators in this case are as follows: Claimant worked in coal mine construction, as a welder and an electrician, for Ranger Fuel from September 27, 1965 to May 31, 1972. Decision and Order at 7; Director's Exhibits 2, 3, 6; Hearing Tr. at 36. Claimant then worked for Cementation in coal mine construction, as an electrician, from June 1, 1972 until May 1974. Decision and Order at 7; Director's Exhibits 2, 3, 5; Hearing Tr. at 36. Subsequently, claimant worked for Gunther-Nash on two coal mine construction projects – the Maple Meadow site and the USX site. Claimant worked as a welder and an electrician for Gunther-Nash at the Maple Meadow site from October 27, 1983 to August 17, 1984, and as an electrician and a shot firer at the USX site from April 8, 1986 to December 23, 1986. Decision and Order at 7; Director's Exhibits 2, 7; Hearing Tr. at 37.

The regulations at 20 C.F.R. §725.202 include special provisions for coal mine construction workers. 20 C.F.R. §725.202(b). Construction workers are considered to be "miners" under the Act if they are exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b). Such workers are entitled to a rebuttable presumption that they were exposed to coal mine dust during all periods of such employment. 20 C.F.R. §725.202(b)(1). The presumption may be rebutted by evidence which demonstrates either a) a worker was not regularly exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility, or b) a worker did not work regularly in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b)(2)(i), (ii).

As the administrative law judge found, Gunther-Nash was claimant's most recent employer. Claimant worked for Gunther-Nash for a cumulative period of more than one year – *i.e.*, eighteen months. Director's Exhibits 2, 7; Hearing Tr. at 37. The administrative law judge found that the presumption that claimant was exposed to coal mine dust during his entire eighteen month tenure with Gunther-Nash was rebutted, however, and that Gunther-Nash could not be held to be the responsible operator, since claimant was exposed to "coal dust" for a total of only

nine of the eighteen months during which he worked for Gunther-Nash. Claimant testified that he was not exposed to coal dust until the final month of his work at the Maple Meadow site, when the coal seam was reached, and that during his first nine months of work at the Maple Meadow site, he was exposed to “rock dust.” Hearing Tr. at 59-60.

Ranger Fuel and the Director contend that the administrative law judge erred in finding that Gunther-Nash could not be the responsible operator on the ground that claimant was exposed to “coal dust” for only nine of the eighteen months during which he worked for Gunther-Nash. Ranger Fuel and the Director argue that the administrative law judge failed to recognize that, for purposes of determining whether claimant worked as a “miner” for Gunther-Nash, the issue is not whether claimant was exposed to coal dust, but whether claimant was exposed to “coal mine dust” pursuant to 20 C.F.R. §725.202(b), which includes rock dust. In taking the opposite view in its cross-appeal, Gunther-Nash argues that the Act specifies that it is exposure to “coal dust,” and not just any dust in a coal mine environment, that gives rise to coal mine construction employer liability.<sup>3</sup> Gunther-Nash thus challenges the validity of the phrase “coal mine dust” in the implementing regulations, and argues that the Department impermissibly rewrote the statute. In support of its position that the regulations adopted by the Director contravene the intent of the statute, Gunther-Nash relies upon the decision of the United States Court of Appeals for the Eleventh Circuit in *William Bros., Inc. v. Pate*, 833 F.2d 261, 10 BLR 2-333 (11th Cir. 1987), where the court rejected the argument that any dust exposure at a coal mine site is coal mine dust, and interpreted the definition of a miner to include construction workers only if they are exposed to dust from the extraction and preparation of coal. Gunther-Nash further contends that the implementing regulation, referring to coal mine dust, contravenes the intent of the statute notwithstanding the decision of the United States Court of Appeals for the Third Circuit in *Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865, 9 BLR 2-79 (3d Cir. 1986).

The position taken by Ranger Fuel and the Director has merit. In promulgating the amended regulations, the Department of Labor substituted the term “coal mine dust” for “coal dust” to make the regulations consistent with the Department’s long-held position that the occupational dust exposure at issue under

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<sup>3</sup>The Black Lung Benefits Reform Act of 1977, which amended the Black Lung Benefits Act of 1969, made certain construction workers eligible for black lung benefits by broadening the definition of a “miner” to include “an individual who works...in coal mine construction...to the extent such individual was exposed to coal dust as a result of such employment.” 30 U.S.C. §902(d) (emphasis added).

the Act is not just coal dust exposure, but the total exposure arising from coal mining – *i.e.*, any dust generated in the course of coal mining operations, including construction. 65 Fed. Reg. at 79962 (Dec. 20, 2000). The Department of Labor concluded that the court’s decision in *Pate*, upon which Gunther-Nash relies, did not provide compelling authority to depart from the proposed regulation at 20 C.F.R. §725.202(b). 65 Fed. Reg. at 79961 (Dec. 20, 2000). The Department stated it believes that the regulation’s focus on coal mine construction work, rather than extraction or preparation of coal, is consistent with Congressional intent in extending coverage to construction workers under the Act. *Id.*

Furthermore, the United States Court of Appeals for the Third Circuit has held in *Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865, 9 BLR 2-79 (3d Cir. 1986), that the Department’s implementing regulation, referring to coal mine dust, is a permissible interpretation of the statute. The court in *Phillips* rejected the employer’s argument, identical to Gunther-Nash’s argument in this case, that the Secretary of Labor impermissibly rewrote the statute by including the phrase “coal mine dust” in promulgating the implementing regulations. 20 C.F.R. §725.202(a) (2000). Gunther-Nash argues that the reason the court in *Phillips* upheld the Department’s interpretation of the statute was simply because the court viewed “coal dust” and “coal mine dust” as synonymous terms. Gunther-Nash suggests that the “court did not know that the Director would take the matter one step further by reading out any requirement that ‘coal mine dust’ ever contain any ‘coal’.” Gunther-Nash’s Reply Brief at 7. The court in *Phillips* held, however, that Congress did not ever understand “coal dust” to have the “plain meaning” that the employer in *Phillips* attributed to it. *Phillips*, 794 F.2d at 869, 9 BLR at 2-87. The court stated that, in enacting the Act in 1969, “Congress understood the terms [“coal dust” and “coal mine dust”] as interchangeable *and as referring to the various dusts around a coal mine.*” *Id.* (emphasis added). Thus, contrary to Gunther-Nash’s suggestion that the court in *Phillips* did not appreciate that the Director was interpreting “coal mine dust” to include any dust, the court clearly recognized the Director’s interpretation, and held that it was consistent with the statute. Accordingly, we vacate the administrative law judge’s finding that Gunther-Nash cannot be held as the responsible operator, and remand the case for the administrative law judge to reconsider whether the evidence establishes that claimant was exposed to “coal mine dust,” and was, therefore, a miner, for more than one year while employed by Gunther-Nash pursuant to 20 C.F.R. §§725.101(19), 725.202(b).

Ranger Fuel and the Director also contend that the administrative law judge erred in dismissing the next most recent employer, Cementation, as the responsible operator. This contention has merit. The administrative law judge found that claimant was not exposed to coal dust in or around a coal mine or coal preparation facility because the coal production facility Cementation was constructing was not

in operation until near the end of claimant's employment with Cementation. Decision and Order at 10. As Ranger Fuel and the Director contend, it is not relevant that the coal mine under construction was not yet operational. The regulations define a coal mine as "an area of land and all structures, facilities...and other property...placed upon, under or above the surface of such land...used in, *or to be used in*...[the extraction of coal]." 20 C.F.R. §725.101(a)(12) (emphasis added). Moreover, in promulgating the amended regulations, the Department of Labor stated that the fact that a claimant worked at non-operational mines is not, by itself, sufficient to establish a lack of coal mine dust exposure. 65 Fed. Reg. 79961 (Dec. 20, 2000). We vacate, therefore, the administrative law judge's finding that claimant was not a "miner" under the Act for at least one year while working for Cementation. If the administrative law judge finds on remand that Gunther-Nash is not the responsible operator, he must reconsider whether the evidence establishes that claimant was exposed to coal mine dust, and was, therefore, a miner, while working in mine construction for Cementation pursuant to Sections 725.101(19) and 725.202(b), and whether Cementation may properly be designated the responsible operator in this case. We vacate, therefore, the administrative law judge's determination that Ranger Fuel is the responsible operator and remand the case for the administrative law judge to reconsider the issue.

We next address the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Ranger Fuel argues that the administrative law judge provided no specific reasons for crediting the opinions of Drs. Rasmussen, Porterfield and Gaziano other than stating his agreement with each doctor's finding that claimant suffers from pneumoconiosis. Ranger Fuel further argues that the administrative law judge failed to provide any specific reason for discounting the contrary opinions of Drs. Castle, Fino and Zaldivar, and provided irrational reasons for discounting the opinions of Drs. Jarboe, Spagnolo and Morgan, which indicate that claimant does not have pneumoconiosis. Ranger Fuel also contends that the administrative law judge offered no explanation as to why the medical opinion evidence outweighs the negative x-ray evidence as required by the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), before ultimately concluding that claimant established the existence of pneumoconiosis.<sup>4</sup>

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<sup>4</sup>Because claimant's coal mine employment occurred in West Virginia, 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 (1989)(*en banc*).

There is merit to Ranger Fuel's contention that the administrative law judge did not provide a sufficient explanation for crediting the opinions of Drs. Rasmussen, Porterfield and Gaziano in finding that claimant suffers from pneumoconiosis, but merely stated that these opinions established that claimant's chronic obstructive pulmonary disease is due to both coal dust exposure and cigarette smoking. Decision and Order at 28; Director's Exhibits 14, 64, 67, 68; Claimant's Exhibit 1. Moreover, the administrative law judge did not explain why the contrary opinions of Drs. Castle, Fino and Zaldivar, which attribute claimant's condition to cigarette smoking, but not coal dust exposure, were entitled to no weight under Section 718.202(a)(4). In considering the medical opinion evidence, the administrative law judge must address the relevant factors bearing on the credibility of the medical opinions, including the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Because the administrative law judge did not adequately address the factors bearing on the credibility of the conflicting opinions under Section 718.202(a)(4), his finding that claimant established the existence of pneumoconiosis thereunder cannot be affirmed.

Ranger Fuel also argues that the administrative law judge improperly rejected the opinions of Drs. Jarboe, Spagnolo and Morgan under Section 718.202(a)(4), because these physicians attributed claimant's condition to cigarette smoking and concluded that claimant's coal dust exposure did not play a role in his chronic obstructive pulmonary disease and impairment. This contention has merit. In rejecting the conclusions of Drs. Jarboe and Morgan, that claimant's smoking history was more significant than the smoking history to which claimant testified at the hearing,<sup>5</sup> conclusions which were based on the doctors' review of the medical reports of record and on claimant's carboxyhemoglobin values, the administrative law judge improperly substituted his opinion for that of the medical experts. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); Decision and Order at 27-28; Director's Exhibit 111; Employer's Exhibit 4. Furthermore, the record does not support the administrative law judge's finding that Drs. Jarboe, Spagnolo

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<sup>5</sup>At the hearing, on May 16, 2000, claimant testified that he began smoking in 1962, and "smoked half a package a day since that time." Hearing Tr. at 44. Claimant further stated that he "quit briefly and went back," and on some days only smokes one or two cigarettes. Hearing Tr. at 44-45. On cross-examination, claimant testified that he still smokes "a little bit from time to time." Hearing Tr. at 60.

and Morgan are of the opinion that coal dust exposure does not cause damage or long lasting effects on lungs, and thus the administrative law judge has mischaracterized their opinions. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); Decision and Order at 28; Director's Exhibit 111; Employer's Exhibits 3, 4, 13.

Consequently, we vacate the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). In considering the medical opinion evidence on remand, the administrative law judge must address the relevant factors bearing on the credibility of each opinion. *Hicks*, 138 F.3d at 532, 536, 21 BLR at 2-335, 2-341; *Akers*, 31 F.3d at 441, 21 BLR at 2-275. If on remand, the administrative law judge finds the medical opinion evidence sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), he must again weigh together all of the relevant evidence, like and unlike, under Section 718.202(a)(1)-(4) prior to making his ultimate determination as to whether claimant has established the existence of pneumoconiosis under Section 718.202(a). *Compton*, 211 F.3d at 208-209, 22 BLR at 2-170.

Ranger Fuel further argues that the administrative law judge erred in finding that the arterial blood gas study evidence of record supports a finding of total disability under Section 718.204(b)(2)(ii). Ranger Fuel contends that the administrative law judge failed to explain why he credited the studies with qualifying results over those with non-qualifying results.<sup>6</sup> We disagree. The administrative law judge correctly stated that the most recent study, which Dr. Rasmussen administered on February 17, 2000 while claimant was at rest, yielded qualifying results for total disability, and that the most recent exercise study, administered by Dr. Castle on August 27, 1997, also produced qualifying values. Decision and Order at 29; Director's Exhibit 92; Claimant's Exhibit 2. The administrative law judge further stated that "there were qualifying studies all along, mixed in with the non-qualifying ones," Decision and Order at 29, and substantial evidence supports the administrative law judge's ultimate conclusion that the weight of the arterial blood gas studies demonstrates total disability. Of the six blood gas studies of record, which were administered between 1995 and 2000, five studies produced qualifying results at rest and/or after exercise. Director's Exhibits 15, 46, 67, 92; Claimant's Exhibits 1, 2. We affirm, therefore, the administrative law judge's finding at Section 718.204(b)(2)(ii).

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<sup>6</sup>A "qualifying" pulmonary function study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718. See 20 C.F.R. ' 718.204(b)(2)(i) and (b)(2)(ii). A "non-qualifying" study yields values which exceed the requisite table values.

Ranger Fuel next challenges the administrative law judge's finding that the medical opinion evidence is sufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). Ranger Fuel correctly contends that the administrative law judge failed to provide a sufficient reason for crediting the opinions of Drs. Rasmussen and Gaziano, merely noting that both physicians found claimant to be totally disabled. Decision and Order at 30. In addition, there is merit to Ranger Fuel's contention that the administrative law judge erred in discounting the opinions of Drs. Castle, Zaldivar, Jarboe, Fino, Spagnolo and Morgan pursuant to Section 718.204(b)(2)(iv) on the basis that the doctors only addressed the cause of claimant's impairment, without addressing the initial issue of whether claimant's impairment is totally disabling. Decision and Order at 29, 30. Contrary to the administrative law judge's finding, each of these physicians addressed the issue of total disability, and concluded that claimant is not totally disabled from a pulmonary or respiratory standpoint. Director's Exhibits 46, 92, 111; Employer's Exhibits 14, 3, 4, 7, 11-14. We vacate, therefore, the administrative law judge's finding that the medical opinion evidence is sufficient to establish total disability under Section 718.204(b)(2)(iv), and remand the case for the administrative law judge to reconsider all of the relevant medical opinion evidence thereunder. On remand, the administrative law judge must address the relevant factors bearing on the credibility of the opinions of record, and provide an adequate explanation for crediting or discounting each opinion. *Hicks*, 138 F.3d at 532, 536, 21 BLR at 2-335, 2-341; *Akers*, 131 F.3d at 441, 21 BLR at 2-275. After making a finding at Section 718.204(b)(2)(iv), the administrative law judge must then weigh all of the relevant evidence, like and unlike, pursuant to Section 718.204(b)(2)(i)-(iv) to determine whether it establishes total disability. 20 C.F.R. §718.204(b)(2)(i)-(iv); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

Finally, Ranger Fuel contends that the administrative law judge erred in finding the evidence sufficient to establish disability causation under Section 718.204(c). Specifically, Ranger Fuel contends that the administrative law judge failed to discuss why he concluded that Dr. Rasmussen's disability causation opinion is well-reasoned and documented, and failed to adequately consider the contrary medical opinions of Drs. Castle, Zaldivar, Fino, Spagnolo, and Morgan. The administrative law judge noted that Dr. Rasmussen opined that cigarette smoking and coal dust exposure are the two causes of claimant's totally disabling respiratory impairment, and that claimant's coal dust exposure is the most significant factor in view of claimant's disturbed gas exchange and reduced diffusing capacity. The administrative law judge then stated that he found the opinion to be documented and well-reasoned. Decision and Order at 31; Director's Exhibits 14, 67. Contrary to Ranger Fuel's contention, the administrative law judge provided a rationale for finding Dr. Rasmussen's opinion documented and well-reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149

(1989)(*en banc*); Decision and Order at 30. We agree, however, that the administrative law judge failed to adequately consider the contrary medical opinion evidence before concluding that claimant established disability causation. The administrative law judge discounted the opinions of “those physicians who cited the continuing cigarette smoking to the exclusion of coal dust exposure” because the physicians believed claimant’s smoking history was greater than that to which he testified, and claimant’s testimony was not impeached at the hearing. Decision and Order at 30. As discussed above, in rejecting the conclusions of Drs. Jarboe and Morgan under Section 718.202(a)(4), that claimant’s smoking history was more significant than the smoking history to which claimant testified at the hearing, the administrative law judge improperly substituted his opinion for that of the medical experts. *Marcum*, 11 BLR at 1-24; Decision and Order at 30. Furthermore, because the administrative law judge failed to adequately consider the entirety of the opinions of Drs. Castle, Zaldivar, Fino, Spagnolo, and Morgan in weighing the evidence under Section 718.204(c), we vacate the administrative law judge’s finding that claimant established total disability due to pneumoconiosis. If he reaches the issue on remand, the administrative law judge must reconsider the relevant evidence, in a manner that comports with *Hicks* and *Akers*. 20 C.F.R. §718.204(c);<sup>7</sup> *Hicks*, 138 F.3d at 532, 536, 21 BLR at 2-335, 2-341; *Akers*, 131 F.3d at 441, 21 BLR at 2-275.

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<sup>7</sup>Revised Section 718.204(c) provides that:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner’s totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a “substantially contributing cause” of the miner’s disability if it:

(i) Has a material adverse effect on the miner’s respiratory or pulmonary condition; or

(ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge