BRB Nos. 07-0898 BLA
and 07-0898 BLA-A

S.G.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
KING JAMES COAL COMPANY	)	DATE ISSUED: 07/17/2008
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	*EN BANC*

Appeal of the Decision and Order of Pamela Lakes Wood, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky, Inc.), Barbourville, Kentucky, for claimant.

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

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor of Labor; 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, McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals and employer cross-appeals the Decision and Order (05-BLA-5161) of Administrative Law Judge Pamela Lakes Wood denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case involves a subsequent claim filed on July 29, 2002.[1] After crediting claimant with eleven years of coal mine employment,[2] the administrative law judge found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). However, the administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309(d). Consequently, the administrative law judge considered the merits of claimant's 2002 claim. However, in her consideration of all of the evidence of record, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer responds in support of the administrative law judge's denial of benefits. Employer has also filed a cross-appeal, contending that the administrative law judge (1) erred in crediting claimant with eleven years of coal mine employment; (2) erred in her consideration of Dr. Westerfield's opinion; and (3) erred in finding that claimant's usual coal mine employment involved

[1] Claimant's prior claim, filed on July 28, 1997, was finally denied by the district director on March 3, 1999, because claimant did not establish any of the elements of entitlement. Director's Exhibit 1.

[2] The record reflects that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

heavy labor. Pursuant to the Board's Order dated March 12, 2008, oral argument was held in this case on May 13, 2008, in Lexington, Kentucky. [3]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

Claimant argues that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[4] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[5] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

[3] In its March 12, 2008 Order, the Board requested that the Director, Office of Workers' Compensation Programs (the Director), file a brief addressing the issues raised in claimant's appeal and employer's cross-appeal. In response to the Board's request, the Director filed a response brief, requesting that the Board affirm the administrative law judge's finding that the evidence of record did not establish the existence of pneumoconiosis. However, the Director commented that, if the Board affirms the administrative law judge's finding that Dr. Baker's diagnosis of "legal pneumoconiosis" was not sufficiently reasoned, the Director will have failed to fulfill his duty to provide claimant with a complete pulmonary evaluation. In a reply brief, employer reiterates its previous contentions of error.

[4] Because no party challenges the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(2), and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] "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).

Clinical Pneumoconiosis

The administrative law judge initially considered whether the new medical opinion evidence established the existence of clinical pneumoconiosis. While Drs. Brown and Baker opined that claimant suffered from clinical pneumoconiosis, Director's Exhibits 10, 14, 15, 33; Claimant's Exhibit 1, Drs. Westerfield and Broudy opined that claimant did not suffer from the disease. Director's Exhibits 13, 16; Employer's Exhibit 2. The administrative law judge found that:

> Turning first to the issue of clinical pneumoconiosis, I find that Claimant has . . . failed to meet his burden on that issue. Dr. Brown, Claimant's treating physician, mentions "Black Lung [D]isease" and silicosis, but she has failed to state a basis for those diagnoses apart from "history." The only chest x-ray findings that she mentioned related to emphysema and, as noted above, I have already found the x-ray evidence to not support of [sic] finding of clinical pneumoconiosis. Dr. Baker's diagnosis of coal worker's pneumoconiosis was based upon his own interpretation of the chest x-ray (which was interpreted as negative by a more qualified reader) and a history of coal mine dust exposure. In contrast, Drs. Westerfield and Broudy found insufficient evidence to support a diagnosis of coal worker's pneumoconiosis, or clinical pneumoconiosis. I agree.

Decision and Order at 19.

Claimant argues that the administrative law judge erred in finding that Dr. Brown's opinion did not establish the existence of clinical pneumoconiosis. We disagree. The administrative law judge reasonably found that, although Dr. Brown was claimant's treating physician, she offered no explanation for her diagnoses of black lung disease and silicosis.[6] Decision and Order at 19; *see* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Substantial evidence supports this permissible finding. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

We further reject claimant's contention that the administrative law judge erred in discrediting Dr. Baker's diagnosis of clinical pneumoconiosis. In an October 30, 2002 report, Dr. Baker diagnosed coal workers' pneumoconiosis, based in part upon his positive interpretation of claimant's October 30, 2002 x-ray. Director's Exhibit 10. The

[6] Although Dr. Brown mentioned chest x-ray findings, the administrative law judge noted that the physician related the findings to emphysema, not coal workers' pneumoconiosis. Decision and Order at 19; Director's Exhibits 14, 15; Claimant's Exhibit 1.

administrative law judge permissibly found that the October 30, 2002 x-ray that Dr. Baker interpreted as positive for pneumoconiosis was interpreted as negative for pneumoconiosis by Dr. Halbert, who possesses superior radiological qualifications, thus calling into question the reliability of Dr. Baker's opinion.[7] *See Williams*, 338 F.3d at 514, 22 BLR at 2-649; *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 17, 19; Director's Exhibit 10; Employer's Exhibit 1.

The administrative law judge accurately noted that Drs. Westerfield and Broudy, the remaining two physicians to submit medical opinions in connection with claimant's 2002 claim, opined that claimant did not suffer from clinical pneumoconiosis. Decision and Order at 19; Director's Exhibits 13, 16; Employer's Exhibit 2. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Legal Pneumoconiosis

In her consideration of whether the new medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Brown, Baker, Westerfield, and Broudy. While Drs. Brown and Baker opined that claimant suffered from pulmonary diseases arising out of his coal mine employment, Drs. Westerfield and Broudy opined that claimant did not suffer from any pulmonary disease arising out of his coal mine employment. Because the administrative law judge found that none of these opinions adequately addressed the role that cigarette smoking and/or coal dust exposure played in causing claimant's pulmonary disease, the administrative law judge found that claimant failed to satisfy his burden of establishing the existence of legal pneumoconiosis based on the medical opinion evidence. Decision and Order at 20-21.

Claimant argues that the administrative law judge erred in her consideration of Dr. Brown's opinion. Dr. Brown completed a questionnaire on April 12, 2003, wherein she opined that claimant suffered from chronic pulmonary disease related to his eighteen years of coal mine employment. Claimant's Exhibit 1. Dr. Brown based her opinion upon an abnormal chest x-ray that revealed "emphysematous lungs" and claimant's prolonged, eighteen year exposure to coal dust. *Id.* The administrative law judge permissibly accorded less weight to Dr. Brown's opinion because her conclusion was based upon an erroneous assumption regarding the length of claimant's coal mine

[7] While Dr. Baker is a B reader, Dr. Halbert is a B reader and a Board-certified radiologist. Director's Exhibit 10; Employer's Exhibit 1.

employment.[8] *Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86, 2-91 (6th Cir. 1988) (holding that an administrative law judge permissibly found physician's opinion "unreasoned" because it was based on an erroneous coal mine employment history); *Crosson v. Director, OWCP*, 6 BLR 1-809, 1-812 (1984) (recognizing that an administrative law judge may properly discount a physician's opinion that is based on an erroneous assumption regarding the miner's years of coal mine employment); Decision and Order at 19. The administrative law judge also permissibly discredited Dr. Brown's opinion because she failed to account for the effect of claimant's significant smoking history in causing claimant's pulmonary conditions.[9] *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984) (holding that an administrative law judge may properly discredit the opinion of a physician that is based upon an inaccurate or incomplete picture of the miner's health); Decision and Order at 19-20.

[8] While Dr. Brown relied upon a coal mine employment history of eighteen years, the administrative law judge credited claimant with eleven years of coal mine employment. Decision and Order at 13-14.

[9] In calculating the length of claimant's smoking history, the administrative law judge stated:

> Claimant admitted that he had been a smoker for most of his adult life, but he had recently (December 2005) given up the habit. (Tr. 33, 37). Before he quit, he was down to two to three cigarettes daily. (Tr. 33-34). Although at one time he smoked one and one-half packs per day, he stopped doing so in 1973 or 1974, when regulations prevented cigarettes or lighters to be taken underground. (Tr. 37). In the 2002 to 2004 period, he was not smoking more than one pack per day. (Tr. 38). Assuming that Claimant began smoking at age 21, in 1963, as he told Dr. Baker in 1997 (DX 1), his smoking history may be estimated as 45-pack years (based upon one and one[-]half pack[s] daily from 1963 to 1973 and one pack daily from 1973 to 2003.)

Decision and Order at 11.

Because no party challenges the administrative law judge's finding that claimant has a smoking history of forty-five pack years, this finding is affirmed. *Skrack*, 6 BLR at 1-711.

Claimant also argues that the administrative law judge erred in her consideration of Dr. Baker's opinion. In his October 30, 2002 report, Dr. Baker opined that claimant suffered from chronic obstructive pulmonary disease, chronic bronchitis, and hypoxemia, each of which he attributed to claimant's coal dust exposure and cigarette smoking. Director's Exhibit 10. In a report dated August 17, 2004, Dr. Baker opined that claimant's chronic obstructive airway disease, chronic bronchitis and hypoxemia "all could be contributed to by coal dust . . . ."[10] Director's Exhibit 33. The administrative law judge reasonably discredited Dr. Baker's opinion regarding the cause of claimant's chronic obstructive pulmonary disease, chronic bronchitis, and arterial hypoxemia because the doctor did not have an accurate understanding of claimant's smoking history.[11] *See Bobick*, 13 BLR at 1-54; *Rickey*, 7 BLR at 1-108.

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[10] Dr. Baker stated that:

> [Claimant] does have COPD, chronic bronchitis and arterial hypoxemia, which can be contributed to, to some extent by his coal dust exposure. If he only had 9 years of coal dust exposure and smoked 25 years, the coal dust exposure would be a minimal, and perhaps, not a significant contribution to his conditions. If he indeed had 16 years, then it would probably be significant and therefore be a cause of the miner's condition. He does have a mild impairment. It is related primary [sic] to the obstructive airway disease and chronic bronchitis, as well as his resting arterial hypoxemia. These in turn can be related to pneumoconiosis as his coal dust exposure may have contributed to some extent in the causation of these problems.

Director's Exhibit 33.

[11] In his 2002 medical report, Dr. Baker relied upon a twenty-five year smoking history of one-half pack a day (twelve and one-half pack years). Director's Exhibit 10. The administrative law judge found that claimant had a forty-five pack year smoking history. Decision and Order at 11.

Because the administrative law judge provided a proper basis for discrediting Dr. Baker's opinion, *i.e.*, that his opinion was based upon an inaccurate understanding of claimant's smoking history, the administrative law judge's error, if any, in discrediting Dr. Baker's opinion for other reasons, constitutes harmless error. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). We, therefore, need not address claimant's remaining arguments regarding the weight accorded to Dr. Baker's opinion.

Because there is no other new medical opinion evidence supportive of a finding of legal pneumoconiosis,[12] we affirm the administrative law judge's finding that the new evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant does not challenge the administrative law judge's finding that the previously submitted medical opinion evidence did not establish the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See* Decision and Order at 24. Consequently, we affirm the administrative law judge's finding, on the merits, that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).

In light of our decision to affirm the administrative law judge's findings that the evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Trent*, 11 BLR at 1-27.

Complete Pulmonary Evaluation

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994). 30 U.S.C. §923(b); 20 C.F.R. §725.406. In this case, the Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, wherein he argued that, if the Board affirms the administrative law judge's finding that Dr. Baker's diagnosis of legal pneumoconiosis is

[12] In a report dated November 5, 2002, Dr. Westerfield diagnosed chronic obstructive pulmonary disease due to cigarette smoking. Director's Exhibit 13. During an April 18, 2003 deposition, Dr. Westerfield reiterated his opinion that claimant suffered from chronic obstructive pulmonary disease due to smoking. Director's Exhibit 16 at 21. Dr. Westerfield also opined that claimant suffered from chronic bronchitis due to cigarette smoking. *Id.* at 22. Dr. Westerfield opined that claimant did not suffer from any medical condition that was caused, contributed to, or aggravated by, his coal dust exposure. *Id.*

In a report dated November 4, 2005, Dr. Broudy opined that claimant did not suffer from any pulmonary disease that was caused, contributed to, or aggravated by, coal dust exposure. Employer's Exhibit 2. Dr. Broudy opined that claimant suffered from chronic obstructive airways disease due to cigarette smoking. *Id.*

unreasoned, the Director will have failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation.[13]

However, at Oral Argument, the Director clarified his position, noting that, if the Department of Labor-sponsored pulmonary evaluation is deficient solely because of a miner's failure to provide the physician with accurate and complete information, this would not necessitate a remand of the case to the district director. *See* Oral Argument Transcript at 83. We agree with the Director's position. In this case, claimant selected Dr. Baker to perform his Department of Labor sponsored pulmonary evaluation. *See* Director's Exhibit 9. The record reflects that Dr. Baker examined claimant on October 30, 2002, conducted the full range of testing required by the regulations, and addressed each element of entitlement. Director's Exhibits 10, 33. Dr. Baker's pulmonary evaluation was complete and documented, and Dr. Baker addressed all elements of entitlement. The administrative law judge discredited Dr. Baker's opinion, that claimant's chronic obstructive pulmonary disease, chronic bronchitis, and hypoxemia were attributable to coal dust exposure and cigarette smoking, *see* Director's Exhibits 10, 33, because she found that Dr. Baker had relied upon an inaccurate smoking history. Decision and Order at 14. Thus, Dr. Baker's opinion was deficient, not because of any failure on behalf of the Director, but because claimant provided Dr. Baker with a smoking history considerably shorter in duration than that found by the administrative law judge. Consequently, under the facts of this case,[14] we hold that a remand is not

[13] We reject employer's contention that the Director did not timely raise the issue of a complete and credible pulmonary evaluation. The Director has standing, as a party-in-interest, to raise the issue of a complete pulmonary examination in cases in which a responsible operator is a party. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84, 1-87-88 (1994). Moreover, the Director's failure to raise the issue at the earliest opportunity does not preclude the Board from considering the issue for the first time on appeal. *Hodges*, 18 BLR at 1-89-90.

[14] In *Smith v. Martin County Coal Corp.*, Nos. 06-3808, 06-3907 (6th Cir. May 25, 2007) (unpub.), the Sixth Circuit held that, in order for the Director to satisfy his obligation to provide a claimant with a complete pulmonary evaluation, the Director must provide a medical opinion that addresses all the elements of entitlement. Moreover, the Sixth Circuit has not always accepted the Director's position that he has failed to provide a claimant with a complete pulmonary evaluation. For example, in *Keith v. Director, OWCP*, No. 92-3433 (6th Cir. Nov. 25, 1992) (unpub.), the Director argued for a remand on the basis that the physician providing the Department of Labor (DOL)-sponsored evaluation had failed to address whether the claimant was totally disabled. The Sixth Circuit disagreed, holding that while the physician could have provided more detail, the "lack of [a] more detailed explanation [did] not render [his] report inadequate in fulfilling the DOL's obligation to provide [the claimant] with a full pulmonary evaluation and

necessary as the the Director provided claimant with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §725.406; *Hodges*, 18 BLR at 1-93.

In light of our affirmance of the administrative law judge's denial of benefits, we need not address employer's contentions raised in its cross-appeal. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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report." *Id.*

We further note that the Director, in cases before the Board, has taken a variety of positions in regard to what constitutes a complete pulmonary evaluation. For example, the Director has taken the position that the fact that a physician has adequately addressed the issue of clinical pneumoconiosis is sufficient to satisfy his obligation to provide claimant with a complete pulmonary evaluation. In *Young v. Island Fork Constr., Ltd.*, BRB No. 05-0708 (Apr. 27, 2006) (unpub.), the Director acknowledged that the physician performing the DOL-sponsored pulmonary evaluation did not render an opinion sufficient to establish legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). However, because the physician's diagnosis of clinical pneumoconiosis was neither unreasoned nor undocumented, the Director asserted that the opinion was sufficient to satisfy his obligation to provide the claimant with a complete pulmonary evaluation.

In another case, the claimant argued that, because the physician who performed the DOL-sponsored evaluation did not specifically state whether or not claimant was totally disabled, the Director had failed to provide him with a complete pulmonary evaluation. *W.C. v. Whitaker Coal Corp.*, BRB No. 07-0649 BLA (Apr. 30, 2008) (unpub.). Although the Director acknowledged that the doctor's opinion was not complete on the issue of total disability, the Director nevertheless maintained that a remand for further development of the medical evidence was not warranted. *Id.* Although the physician performing the DOL-sponsored evaluation diagnosed a severe respiratory impairment, the administrative law judge accorded his opinion less weight because he determined that the opinions of two other physicians, that the claimant had no respiratory impairment, were better explained and more consistent with the objective evidence. Consequently, the Board noted that, even if the physician who performed the DOL-sponsored evaluation were to provide an additional statement that the claimant was totally disabled from returning to work, the underlying basis for his disability opinion, a finding of a severe respiratory impairment, had already been rejected by the administrative law judge. *Id.* Thus, the Board agreed with the Director that a remand for further medical development was not required under the circumstances of the case. *Id.*

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

We concur.

_____
ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from the majority's determination to hold that the Director, Office of Workers' Compensation Programs (the Director), provided claimant with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §725.406; *Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994). Review of the record does not support the majority's assertion that the administrative law judge discredited Dr. Baker's opinion because claimant provided the doctor with an inaccurate smoking history. Although that was a factor in finding the opinion unreliable, the administrative law judge discredited the opinion, as the Director acknowledged, for failing to explain how claimant's symptomatology and test results support the doctor's conclusion that claimant's respiratory impairment is caused, in part, by coal mine employment. Decision and Order

at 21; Director's Response Brief at 5. Given the Director's acknowledgement that the administrative law judge properly discredited Dr. Baker's opinion for failing to explain, by reference to the underlying documentation, the basis for his conclusion that claimant's respiratory condition was related to his coal mine work, and given the Director's concession that, if the Board affirmed that finding, he has failed to provide claimant with a complete, credible pulmonary evaluation, I would vacate the administrative law judge's Decision and Order and remand the case to the district director to provide a complete pulmonary evaluation.

In light of my determination to remand the case, I would also address, in the interest of judicial economy, employer's contentions of error raised in its cross-appeal.

Length of Coal Mine Employment Finding

Employer argues that the administrative law judge erred in crediting claimant with eleven years of coal mine employment. Employer initially argues that the district director's finding of nine years and ten months of coal mine employment is "*res judicata* and collateral estoppel." Employer's Brief at 6 n.5. Employer argues that, because the district director found in the prior claim that the record established only nine years and ten months of coal mine employment and claimant did not appeal that determination, claimant is now bound by the district director's finding of nine years and ten months of coal mine employment. I disagree. Assuming *arguendo* that collateral estoppel is applicable here,[15] it is noted that for a prior finding to have preclusive effect in subsequent litigation, the issue determined must have been a critical and necessary part of the judgment in the prior proceeding.[16] *Smith v. S.E.C.*, 129 F.3d 356, 362 (6th Cir.

[15] Collateral estoppel is arguably "not a good fit where, as here, all previous decisions have been informal denials by the district director." *See Meadows v. Sea "B" Mining Co.*, BRB No. 99-0211 BLA (Nov. 9, 1999) (unpub.). Where a formal hearing is requested after a district director's decision, the administrative law judge proceeds *de novo* and is not bound by the district director's findings. *See* 20 C.F.R. §725.455(a). Additionally, in the context of this subsequent claim, the administrative law judge found a change in an applicable condition of entitlement, thus requiring her to consider *de novo* whether the entire record supported a finding of entitlement. 20 C.F.R. §725.309(d)(4).

[16] The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has adopted a four-part test to determine whether collateral estoppel bars relitigation of an issue: (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) judicial determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the

1997). In the prior claim, the district director determined that the evidence did not establish pneumoconiosis arising out of coal mine employment or that claimant was totally disabled by pneumoconiosis. Director's Exhibit 1. The district director's additional determination that claimant had only nine years and ten months of coal mine employment was not essential to support the district director's decision denying benefits for failure to establish any of the elements of entitlement. Therefore, claimant is not collaterally estopped from relitigating the issue of length of coal mine employment.

Moreover, contrary to employer's argument, there is no evidence that employer raised any collateral estoppel issue while this claim was pending before the administrative law judge. Employer, having failed to raise the argument while the case was pending before the administrative law judge, cannot raise it now before the Board. *See generally Armco, Inc. v. Martin*, 277 F.3d 468, 22 BLR 2-334 (4th Cir. 2002); *Dankle v. Duquesne Light Co*., 20 BLR 1-1, 1-6 (1995); *Taylor v. 3D Coal Co.*, 3 BLR 1-350 (1981).

Employer also contends that the administrative law judge erred in crediting claimant with one year and three months of coal mine employment during the period from March 1960 until September of 1962. In this case, the administrative law judge noted that claimant indicated, on an Employment History form, that he was engaged in coal mine employment from 1960 to 1963.[17] Director's Exhibit 4. Claimant also testified that he was engaged in coal mine employment from 1960 to 1963.[18] Hearing Transcript at 19. The administrative law judge found that claimant's testimony was "credible to a point" and accepted "the fact that [c]laimant worked in coal mine employment in the early 1960's." Decision and Order at 14. However, in light of

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issue in the prior proceeding. *Smith v. S.E.C.*, 129 F.3d 356, 362 (6th Cir. 1997).

[17] Claimant indicated that he worked for "Sims Creek Coal Co." from March 1, 1960 to May 15, 1961 and for "Greene Bro. Coal Co." from July 10, 1961 to September of 1963. Director's Exhibit 4.

[18] Claimant testified that he first worked as a coal miner for Birchfield and Greene Coal Company in 1960. Hearing Transcript at 19. After that time, he worked for "Simms Creek" and "Greene Brothers," companies that were owned by his father and uncle. *Id.* Claimant explained that he worked off and on during this period. *Id.* However, claimant estimated that he worked in coal mine employment "roughly seven to eight months" a year during the period from 1960 to 1963. *Id.* at 20. Claimant testified that he worked loading coal, blasting, and running a three-wheel tractor. *Id.* at 21. Claimant testified that, during this period, he was paid in cash or by personal check. *Id.*

claimant's Social Security records, the administrative law judge did not credit claimant with all the coal mine employment that he claimed during the early 1960's.

The administrative law judge noted that claimant's Social Security records showed that claimant was continuously employed by Anchor Metal Finishing beginning in the third quarter of 1962 and extending into 1964. Decision and Order at 14; Director's Exhibit 6. The administrative law judge further noted that claimant's Social Security records revealed "sporadic employment with other entities" from 1960 to 1962. Consequently, the administrative law judge credited claimant with only six months of coal mine employment a year from March 1960 to September 1962, not the seven to eight months a year claimed by claimant. Although employer states that claimant's Social Security records reveal non-coal mine employment from 1960 to 1962, the Director responds that such sporadic employment is not inconsistent with the administrative law judge crediting claimant with six months of coal mine employment a year from 1960 to 1962.[19] Because the administrative law judge's finding is based on a reasonable method and is supported by substantial evidence,[20] I would affirm the administrative law judge's decision to credit claimant with one year and three months of coal mine employment from March 1960 to September 1962.

Employer also argues that the administrative law judge erred in not rendering a *de novo* finding regarding claimant's periods of coal mine employment after 1963. Employer's Reply Brief at 7. In considering claimant's 2002 claim, the administrative law judge stated that:

> At the informal conference for the first claim, the district director found that . . . Claimant had established nine years and ten months of coal mine employment based on the earnings reflected in the Social Security records and, at the hearing, both the Employer and the Director agreed to that

[19] Claimant's Social Security records reveal no employment during the first six months of 1960. Director's Exhibit 6. During 1961, claimant's Social Security records indicate that claimant earned only $32.00 in the third quarter and only $6.25 in the fourth quarter for non-coal mine employment. *Id.* During 1962, claimant's Social Security records indicate that claimant earned only a total of $178.25 in the first quarter and only $55.63 in the second quarter for non-coal mine employment. *Id.*

[20] The Board has held that, where an administrative law judge's computation of time is based on a reasonable method and is supported by substantial evidence, it will be upheld. *See* 20 C.F.R. §725.101(a)(32); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988)(*en banc*); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

> amount. (DX 1; Tr. 9-10). Although in connection with this claim, the district director only found nine years of coal mine employment during the period from January 1, 1971 to February 1, 1985, the district director has stated no rationale for the changed calculation (DX 23) and I accept the calculations from the informal conference.

Decision and Order at 13-14.

Contrary to the administrative law judge's characterization, employer did not agree with the district director's decision to credit claimant with nine years and ten months of coal mine employment from 1971 through 1984 based upon claimant's Social Security records. Although employer and the Director stated at the hearing that they were willing to stipulate to a total of nine years and ten months of coal mine employment, *see* Hearing Transcript at 9, neither employer nor the Director specifically conceded that claimant's Social Security records revealed nine years and ten months of coal mine employment from 1971 to 1984. Consequently, if the administrative law judge were to credit claimant with more than the nine years and ten months of coal mine employment stipulated to by employer, she would be required to render a *de novo* finding regarding the length of claimant's coal mine employment from 1971 to 1984.

Dr. Westerfield's Opinion

Employer next argues that the administrative law judge erred in discrediting Dr. Westerfield's opinion because it was hostile to the Act. Dr. Westerfield opined that claimant suffered from chronic obstructive pulmonary disease due entirely to his cigarette smoking. Director's Exhibits 13, 16. The administrative law judge found that Dr. Westerfield reached his conclusion "based upon questionable generalizations as to the comparative effects of cigarette smoking and coal mine dust, which generalizations are unsupported, *even if not hostile to the Act*." Decision and Order at 20 (emphasis added). Thus, contrary to employer's contention, the administrative law judge did not accord less weight to Dr. Westerfield's opinion because she found it hostile to the Act.

In this case, the administrative law judge discredited Dr. Westerfield's opinion because she found that the doctor "relied upon particular generalized assumptions without citing support for those assumptions." Decision and Order at 20. I would hold that the administrative law judge, as the fact-finder, acted within her discretion, in discrediting Dr. Westerfield's opinion because it was based on generalities, rather than upon information particular to claimant. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, BLR (7th Cir. 2008) (affirming an administrative law judge's discrediting of a medical opinion that was based upon information not particular to the miner); *Knizer v. Bethlehem Mining Corp*., 8 BLR, 1-5, 1-7 (1985).

Employer also argues that the administrative law judge erred in finding that Dr. Westerfield relied upon evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414.[21] The administrative law judge found that:

> The evidence in the instant claim is in compliance with the evidentiary limitations, except for the fact that some of the medical opinions, particularly that of Dr. Westerfield as expressed at his deposition, discuss inadmissible evidence. In reviewing the medical evidence in this case, I will strike the inadmissible references and will consider the remainder of the opinions to the extent not inextricably intertwined with the inadmissible evidence.

Decision and Order at 13 (footnote omitted).

The Director agrees with employer that the administrative law judge "did not properly identify the alleged fault in the doctor's opinion." Director's Brief at 7. However, the Director accurately notes that the administrative law judge never specifically struck any portion of Dr. Westerfield's opinion. Consequently, although the administrative law judge erred in not identifying the inadmissible evidence upon which Dr. Westerfield allegedly relied, the administrative law judge's error was harmless since there is no indication that the administrative law judge struck any portion of Dr. Westerfield's opinion from the record or accorded the opinion less weight because it was based upon evidence in excess of the evidentiary limitations. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). However, the administrative law judge should have identified the inadmissible evidence, if any, that Dr. Westerfield relied upon, and should have addressed the implications of that reliance upon her weighing of the medical opinion evidence.

[21] In *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting), the Board held that an administrative law judge should not automatically exclude medical opinions without first ascertaining what portions of the opinions are tainted by review of inadmissible evidence. If the administrative law judge finds that the opinion is tainted, he is not required to exclude the report or testimony in its entirety. *Harris*, 23 BLR at 1-108. Rather, he may redact the objectionable content; ask the physician to submit a new report; or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which the physician's opinion is entitled. *Harris*, 23 BLR at 1-108; *see Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-66-67 (2004) (*en banc*). Exclusion of evidence, however, is not the favored option, as it would result in the loss of probative evidence developed in compliance with the evidentiary limitations. *Id.*

Exertional Requirements of Claimant's Coal Mine Employment

Employer argues that the administrative law judge, in assessing the exertional requirements of claimant's usual coal mine employment, erred in finding that claimant's work involved lifting seventy-five pounds. Because claimant indicated in his prior claim that his work involved lifting a lesser amount, namely fifty pounds, employer contends that claimant should have been judicially estopped from arguing that he was required to lift the greater weight. In connection with his 1997 claim, claimant completed a "Description of Coal Mine Work" form wherein he indicated that his last coal mine job as a mine foreman required him to, *inter alia*, carry fifty pounds a distance of fifty feet, ten times per day. Director's Exhibit 1. In connection with his current claim, claimant completed an identical form. However, this time, in describing his duties as a mine foreman, claimant indicated that the amount of weight that he was required to carry on a daily basis "varied from time to time," ranging from ten to two hundred pounds. Director's Exhibit 5. During the hearing on February 2, 2006, claimant testified that the amount of weight that he was required to lift on a average day "would depend if [he] was loading coal or moving a rock fall." Hearing Transcript at 28. In that case, claimant testified that he would have to lift seventy-five pounds. *Id.* Claimant testified that he was sometimes required to lift less than that and sometimes more than that, depending upon what he was required to do.[22] *Id.*

I would reject employer's argument that the administrative law judge was collaterally estopped from finding that claimant was required to lift more than fifty pounds as part of his coal mine employment duties. The Director notes that the district director, in denying claimant's 1997 claim, did not render a finding regarding the exertional requirements of claimant's usual coal mine employment. Because there was no finding, the doctrine of collateral estoppel is not applicable. *Smith*, 129 F.3d at 362.

However, the Director agrees with employer that the administrative law judge erred in not addressing the apparent inconsistency between claimant's description of the exertional requirements of his usual coal mine employment in his 1997 and 2002 claims. If the administrative law judge had rendered a finding, on the merits, regarding whether the evidence established total disability pursuant to 20 C.F.R. §718.204(b), she would have had to address all the evidence of record, including claimant's earlier characterization of the exertional requirements of his usual coal mine employment. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

[22] For example, claimant testified that he was sometimes required, with the assistance of another worker, to change three hundred pound mine batteries in the tractors. Hearing Transcript at 28. However, claimant acknowledged that this task was only undertaken about "every three or four or five months." *Id.*

In summary, I would vacate the administrative law judge's Decision and Order denying benefits and remand the case to the district director to allow for a complete pulmonary evaluation and for reconsideration of the merits of this claim in light of all of the evidence of record.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge