BRB No. 00-1073 BLA

PERRY A. YOST	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
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 Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Perry A. Yost, Richlands, Virginia, *pro se*.

Douglas A. Smoot, Kathy L. Snyder, William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (98-BLA-

0684) of Administrative Law Judge Daniel F. Sutton 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).[1] This case is before the Board for the third time. Most recently, the Board, in *Yost v. Island Creek Coal Co.*, BRB No. 96-0354 BLA (Aug. 30, 1996)(unpublished), held that Administrative Law Judge Samuel J. Smith (Judge Smith) erred by failing to consider Dr. Fino's opinion in finding the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(4) (2000) and in finding that claimant is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000).[2] The Board thus remanded the case for redetermination of the issues of the existence of pneumoconiosis and the cause of claimant's disability. The Board further discussed the decision of the United States Court of Appeals for the Fourth Circuit in *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996)(a physician's opinion, that the lack of a restrictive component likely means that coal dust exposure is not a causative factor, may be probative of the issue of the existence of pneumoconiosis). In this regard, the Board noted that the court in *Stiltner* distinguished its decision in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19

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[1]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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

BLR 2-265 (4th Cir. 1995)(medical opinions based on the erroneous assumption that obstructive lung disorders could not be caused by coal mine employment or based on the erroneous premise that pneumoconiosis could not be diagnosed without a positive x-ray, are insufficient to establish the absence of pneumoconiosis as defined in the Act). Because *Stiltner* had issued subsequent to the issuance of Judge Smith's Decision and Order, the Board instructed Judge Smith to reconsider the opinions of Drs. Tuteur, Chillag and Stewart relevant to the cause of claimant's disability. The Board declined to direct Judge Smith to re-open the record on remand to permit the submission of additional evidence addressing the decisions in *Stiltner* and *Warth* inasmuch as the decision to re-open the record was within the discretion of the administrative law judge. Rather, the Board instructed Judge Smith, in considering employer's request on remand, to determine whether a refusal to re-open the record would result in "manifest injustice" to either party. Board's 1996 Decision and Order at 4. The Board also instructed Judge Smith to reconsider the credibility of Dr. Caday's opinion, addressing any discrepancy in the medical and smoking histories reported therein. The Board further instructed Judge Smith to determine, if reached, whether claimant established the requisite etiology at 20 C.F.R. §718.203(b) (2000). The Board thus remanded the case. Director's Exhibit 122.[3]

On remand, the case was reassigned to Administrative Law Judge Daniel F. Sutton (the administrative law judge), who found that claimant established the existence of pneumoconiosis which arose out of coal mine employment and that claimant was totally disabled by it. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge abused his discretion and violated employer's due process rights when he excluded all the evidence employer submitted while the claim was pending on remand before the Office of Administrative Law Judges, and when he upheld the district director's denial of employer's Motion to Compel Physical Examination. On the merits of the claim, employer alleges reversible error in the administrative law judge's findings that claimant established the existence of pneumoconiosis which arose from claimant's coal mine employment and that he is totally disabled due to the disease. Employer further challenges the administrative law judge's onset determination. Claimant, without the assistance of counsel, responds, and seeks affirmance of the decision below. The Director, Office of Workers' Compensation Programs (the Director), responds, and seeks a remand of the case based on his position that the administrative law judge abused his discretion in excluding from the record all of the

[3]By Order dated November 29, 1996, the Board denied claimant's motion for reconsideration. Director's Exhibit 124.

evidence submitted by employer while the case was pending on remand before the Office of Administrative Law Judges. The Director asserts, however, that the administrative law judge acted within his discretion in finding that claimant was not required to undergo a new physical examination at employer's behest.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

A brief summary of the procedural history subsequent to the Board's 1996 remand of the case to Judge Smith is as follows: On November 25, 1997, Judge Smith granted employer's motion to remand the case to the district director to allow the parties to submit evidence responsive to the Fourth Circuit's decision in *Stiltner* and *Warth.* Director's Exhibit 130.

By letter dated January 5, 1998, the district director allowed the parties 30 days within which to submit additional evidence. Director's Exhibit 132. By letter dated January 16, 1998, employer informed the district director that it had scheduled claimant for a physical examination with Dr. Castle on February 11, 1998. Because the examination was scheduled outside the 30-day time limit granted the parties for the submission of additional evidence, employer asked for an extension of time to submit additional evidence following the examination of claimant. Director's Exhibit 136. By letter dated January 29, 1998, the district director denied employer's request, indicating that Judge Smith's Order remanding the case only allowed for the submission of additional medical evidence addressing the issues raised by *Stiltner* and *Warth*, and did not authorize additional testing. Director's Exhibit 137. By motion dated January 30, 1998, employer moved to compel claimant to attend the scheduled examination. Director's Exhibit 138. By letter dated February 2, 1998, claimant submitted a January 30, 1998 letter from his treating physician, Dr. McVey, who stated that it would be "extremely detrimental" to claimant's well-being if he should undertake "pulmonary function testing or exercise to any degree. Again, I strongly advise that Mr. Yost not be subjected to this as he definitely is not able to do so." Director's Exhibit 139. On February 2, 1998, employer requested that the district director reconsider his ruling in light of the authorities cited by employer in its Motion to Compel Physical Examination. Director's Exhibit 140. By letter dated February 24, 1998, the district director denied employer's motion and its request for an extension of time in which to file medical evidence, reiterating his determination that Judge Smith's remand order did not authorized additional testing. The district director found that while the decisions in *Stiltner* and *Warth* may be relied upon to obtain additional medical opinions, they were not a basis for additional testing. The district director also noted Dr. McVey's opinion that any testing would be detrimental to claimant's

health. The district director determined that the period for the submission of evidence had closed and thus, he would forward the case to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 142. On March 13, 1998, employer submitted the reports of Drs. Stewart and Fino dated March 4, 1998 and their *curricula vitae*. Director's Exhibit 144. On April 3, 1998, the district director transferred the case to the Office of Administrative Law Judges. Director's Exhibit 145. Claimant objected to employer's submissions as untimely.

The case was assigned to Administrative Law Judge Pamela Lakes Wood, who issued a Notice of Hearing dated June 9, 1998. At claimant's request, Judge Wood reassigned the case to Judge Smith, cancelling the hearing scheduled for August 12, 1998. Due to Judge Smith's unavailability, the case was reassigned to the administrative law judge. On December 22, 1998, the administrative law judge issued a Notice of Hearing. On January 6, 1999, the administrative law judge issued an Order to Show Cause why the hearing should not be cancelled as unnecessary to the case's disposition on remand. Claimant and the employer agreed that a hearing was unnecessary. Employer additionally requested sixty days within which to inform the administrative law judge as to what medical evidence it had recently submitted and to file a closing brief. The administrative law judge cancelled the hearing by Order dated January 6, 1999, granting the parties until March 22, 1999 to file closing briefs.

In his Decision and Order on Remand Awarding Benefits, which is the subject of the instant appeal, the administrative law judge excluded from the record all the evidence employer submitted after the district director's transfer of the case to the Office of Administrative Law Judges, ruling that it was untimely. The administrative law judge also determined that the district director properly denied employer's Motion to Compel Physical Examination. On the merits of the claim, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of his coal mine employment and that claimant's coal workers' pneumoconiosis was a contributing cause of his total disability. Accordingly, benefits were awarded. The administrative law judge further found that since the onset of claimant's total disability could not be precisely ascertained from the relevant evidence, benefits were payable as of the first day of the month in which the claim was filed, January 1, 1990.

Employer contends that the administrative law judge abused his discretion and violated employer's right to due process by excluding all the evidence it submitted while the case was pending on remand before the Office of Administrative Law Judges. The administrative law judge found that the case was remanded to the district director for the specific purpose of providing the parties with an opportunity to submit evidence responsive to *Stiltner* and *Warth*, and found that the district director had provided the parties with a

reasonable opportunity to do so. The administrative law judge thus sustained claimant's objection to all the evidence submitted by employer after the close of the time allowed for the admission of evidence as set by the district director, with the exception of the supplemental reports of Drs. Fino and Stewart which the administrative law judge admitted as Director's Exhibit 144.[4] Employer argues that, contrary to the administrative law judge's finding, the excluded exhibits were timely submitted as employer had until 20 days before the hearing to submit evidence as provided by 20 C.F.R. §725.456(b) (2000)[5] and the administrative law judge established an alternative schedule. Employer states that it submitted all of the evidence excluded by the administrative law judge months before the hearing scheduled for March 4, 1999. Employer asserts that the administrative law judge's December 22, 1998 Notice of Hearing, in which he indicated that exhibits supplementing the record should be presented at the scheduled hearing for inclusion in the file, reflects the fact that the administrative law judge "anticipated that the parties would file new evidence." Employer's Brief at 8. Employer also notes that in his January 20, 1999 order cancelling the hearing, the administrative law judge specifically granted employer's request that it be allowed 6o days within which to identify all of its new evidentiary submissions. Employer also asserts that the administrative law judge's exclusion of evidence violates the requirement that the administrative law judge consider all the relevant evidence as mandated under 30 U.S.C. §932(b), and the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Employer argues that pursuant to 20 C.F.R. §725.461(a), where the parties waive their right to a

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[4]As to these two reports, the administrative law judge found:

> While these reports were submitted after the expiration of the 30-day period allowed by the claims examiner's January 5, 1998 letter, they were submitted shortly after [the] denial of the Employer's motion to compel and prior to the referral of the case back to the Office of Administrative Law Judges. In these circumstances, the Employer's failure to timely submit the supplemental reports amounts is [sic] excusable. Moreover, exclusion of this evidence would deprive the Employer of any opportunity to address the *Stiltner* standard through additional evidence and could be viewed as rising to the level of a manifest injustice.

Decision and Order on Remand Awarding Benefits at 9.

[5]The regulation at 20 C.F.R. §725.456(b) (2000) has been revised. *See* 20 C.F.R. §725.456(b). The revised regulation at 20 C.F.R. §725.456(b) does not apply to claims, such as the instant claim, which was pending on January 19, 2001. *See* 20 C.F.R. §725.2. Moreover, the revisions are not implicated in the instant case.

hearing, as in the instant case, the administrative law judge's decision should be based on the documentary evidence submitted by the parties.[6]

We reject employer's arguments alleging due process violations on the part of the administrative law judge in his exclusion of evidence from the record, as the facts do not support employer's position. It was pursuant to employer's own motion that Judge Smith remanded the case to the district director for the specific purpose of allowing the parties an opportunity to submit evidence responsive to the decisions in *Stiltner* and *Warth*. Director's Exhibits 130. The record supports the administrative law judge's finding that the district director provided the parties with a reasonable opportunity to submit additional evidence, Director's Exhibit 132, and, moreover, the administrative law judge permissibly overruled claimant's objection and admitted to the record the newly developed opinions of Drs. Fino and Stewart, as he found that employer's untimely submission of these reports to the district director was excusable. Decision and Order Awarding Benefits at 9; 20 C.F.R. §725.456 (2000); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989)(*en banc*)(McGranery, J., concurring). When the district director transferred the case to the Office of Administrative Law Judges on April 3, 1998, after the expiration of time allotted the parties to submit additional evidence, employer could have had no reasonable expectation that any evidence submitted thereafter would be admitted to the record. Further, employer's assertion that the administrative law judge "anticipated" that new evidence would be submitted by the parties, has no foundation in the record. A form, such as the Notice of Hearing sent by the administrative law judge to the parties of record in this case, does not reflect what an individual administrative law judge "anticipates" with regard to any party's evidentiary submissions in a particular case. We, therefore, affirm the administrative law judge's exclusion from the record of all evidence submitted by employer while the case was pending

[6]Employer asserts, in a footnote, that the administrative law judge acted on his own as no party objected to the submission of any evidence before the Office of Administrative Law Judges. Employer's Brief at 10-11 n.3. Employer's assertion is contrary to the record. In his March 19, 1999 closing brief before the administrative law judge, claimant objected to all evidence submitted by employer after the close of the period for the submission of evidence set by the district director. Claimant's *Pro Se* Closing Argument at 4-5.

on remand before the Office of Administrative Law Judges.

Further, we find no merit in the arguments advanced by the Director, agreeing with employer's contention that the administrative law judge erred in excluding from the record all evidence submitted by employer while the case was pending before the Office of Administrative Law Judges. The Director concedes that employer did not submit any evidence during the 30-day period set by the district director, but argues that, parties are routinely permitted to offer evidence while the case is pending before the Office of Administrative Law Judges. In his argument, the Director fails to recognize that employer had no right to disregard the evidentiary deadline set by the district director, and did so at its peril. Moreover, when employer submitted its evidence to the Office of Administrative Law Judges, it had not ensured the evidence would be admitted into the record; claimant objected to the admission of this evidence and the administrative law judge was under no obligation to admit it into the record. 20 C.F.R. §725.456(b).

The Director's additional assertion, that employer could reasonably rely upon the inference it drew from part of the hearing notice, must also be rejected in light of the explicit statement by the district director, that the parties would be allowed 30 days within which to submit additional evidence. Director's Exhibit 32. Neither employer nor the Director has shown that the administrative law judge erred in excluding employer's evidence and certainly has failed to show he abused his discretion.

We also reject employer's contention that administrative law judge violated employer's due process rights by upholding the district director's denial of its Motion to Compel Physical Examination. Employer does not have an absolute right to compel claimant to respond to discovery requests or other requests for medical evidence and the administrative law judge, in the instant case, acted within his discretion in finding that the new examination sought by employer was not necessary to provide an adequate record for the required reconsideration of the case on remand. *See generally Stiltner v. Wellmore Coal Corp.*, 22 BLR 1-37 (2000)(Decision and Order on Reconsideration *En Banc*); *Selak v. Wyoming Pocahontas Land Co.*, 21 BLR 1-173, 1-177, 178 (1999). Specifically, the administrative law judge noted that employer developed the medical reports of Drs. Fino and Stewart which address the issue of the cause of claimant's impairment and are thus responsive to the Fourth Circuit's decisions in *Stiltner* and *Warth* - the basis for Judge Smith's remand of the case. Thus, contrary to employer's assertion, employer has not been deprived of an opportunity to develop evidence in defense of its case. *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999). Further, the administrative law judge reasonably relied upon Dr. McVey's opinion, that further testing would be detrimental to claimant's health. Director's Exhibit 139.[7] For the foregoing reasons, we reject

[7]Contrary to employer's contention, Dr. McVey's opinion does not constitute evidence

employer's challenge to the administrative law judge's disposition on this issue.

Employer next contends that the medical opinions of Drs. McVey and Sutherland are unexplained and unreasoned and thus the administrative law judge erred in relying upon this evidence to find the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(4) and that claimant is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000).

We affirm the administrative law judge's determination that the medical opinion evidence establishes the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4). As an initial matter, consistent with the Board's remand order in its 1996 Decision and Order in *Yost*, the administrative law judge considered whether the medical opinions of Drs. Fino, Tuteur, Chillag and Stewart should be rejected as inconsistent with the Act because they rely on the premise discredited in *Warth* that exposure to coal mine dust cannot cause an obstructive impairment. Decision and Order on Remand Awarding Benefits at 10. The administrative law judge correctly found that none of these physicians "flatly stated" that they did not find the presence of pneumoconiosis because claimant's impairment was obstructive and pneumoconiosis never causes an obstructive impairment or chronic obstructive pulmonary disease. *Id.* Consistent with the Fourth Circuit's decision in *Stiltner*, the administrative law judge properly found that none of these medical opinions is "sufficiently tainted" to be rejected outright. *Id.* Further, the administrative law judge's findings are proper in light of the newly revised regulation at 20 C.F.R. §718.201(c)(2), which explicitly includes within the definition of "legal pneumoconiosis" any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(c)(2).

The administrative law judge then properly determined, after a thorough analysis of

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of a change in claimant's condition. Claimant previously established that he is totally disabled due to a respiratory or pulmonary impairment; the issue is the etiology of claimant's total disability. Dr. McVey made no findings pertinent to this issue in his January 30, 1998 report. Director's Exhibit 139. Further, we reject employer's assertion that the district director had a monetary interest in denying employer's Motion to Compel Physical Examination and should have granted the motion to maintain an appearance of neutrality. Employer's assertion is unfounded.

the record evidence, that the opinion of claimant's treating physician, Dr. McVey, was well reasoned and documented, and was corroborated by Dr. Sutherland's opinion, and thus outweighs the contrary opinions of Drs. Fino, Chillag, Tuteur and Stewart. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). The record refutes employer's assertion that Dr. McVey's opinion is cursory and lacks "any explanation or basis for his conclusions," Employer's Brief at 22. *See* Director's Exhibits 13-15, 64, 79, 89, 139. We also reject employer's assertion that Dr. Sutherland's diagnosis of pneumoconiosis was based solely on x-ray evidence and is not credible given that the weight of the x-ray evidence of record does not support a finding of pneumoconiosis. Dr. Sutherland explicitly stated that his diagnosis of coal miner's pneumoconiosis was based on claimant's history, physical examination, chest x-ray and exposure to coal mine dust over a period of 38 to 39 years. Director's Exhibit 18. Moreover, the administrative law judge, in finding that claimant established the existence of pneumoconiosis, properly considered all the types of relevant evidence together, including the negative weight of the x-ray evidence, as required by the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000). 20 C.F.R. §718.202(a).

Employer further argues that the administrative law judge's weighing of the opinions of physicians who found that claimant does not have pneumoconiosis and is not totally disabled due to pneumoconiosis is not supported by an adequate rationale as mandated by the APA. Employer also asserts that the administrative law judge erred in determining that Dr. Fino's assessment is contrary to the legal definition of pneumoconiosis.[8]

We affirm the administrative law judge's findings insofar as they support his determination that claimant established the existence of pneumoconiosis in the instant case. Contrary to employer's contention, the administrative law judge provided several valid reasons for according less weight to the consulting opinions of Drs. Fino, Chillag, Tuteur and Stewart. He did not summarily accord these opinions less weight on the basis that they did not examine claimant, but properly found that these physicians' opinions "are not only

[8]Employer preserves, for purposes of appeal, its challenge to the Board's affirmance of Judge Smith's crediting of Dr. McVey's report as supportive of a finding of the existence of pneumoconiosis, as well as his rejection of Dr. Endres-Bercher's opinion that claimant does not have pneumoconiosis. Employer's Brief at 20 n.6, 23 n.8.

We affirm the administrative law judge's finding that claimant established the requisite etiology at 20 C.F.R. §718.203(b) as that finding is unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Employer also does not challenge the administrative law judge's according of less weight to Dr. Caday's opinion.

undermined by the fact that they lack the perspective provided by an opportunity to examine the Claimant, there are serious flaws in their analyses and medical conclusions." Decision and Order on Remand Awarding Benefits at 11, 12; *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). The administrative law judge stated:

> In sum, I find that the non-examining medical opinions offered by the Employer narrowly focus on the existence of clinical pneumoconiosis and overlook the question of whether the claimant's respiratory conditions, which have been variously described as chronic obstructive pulmonary disease, industrial bronchitis or asthmatic bronchitis, are significantly related to or substantially aggravated by the Claimant's significant history of coal mine dust exposure. Therefore, giving greater weight to the opinion of Dr. McVey as the Claimant's treating physician for over one decade, whose opinion is corroborated by the report of the OWCP examining physician, I find that a preponderance of the medical opinion evidence establishes the existence of pneumoconiosis as defined by the Act and applicable regulations.

Decision and Order on Remand Awarding Benefits at 13. Thus, the administrative law judge properly determined that Dr. Fino's statements that (1) exposure to coal dust does not cause asthma or asthmatic bronchitis, and (2) that industrial bronchitis, seen in some coal miners while they are working, will go away after the miner leaves the coal mine, are, respectively, contrary to the broad definition of pneumoconiosis, *see* 20 C.F.R. §718.201; *Doris Coal Co. v. Director, OWCP*, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991), and contrary to the theory that pneumoconiosis is a progressive disease, a theory codified in the revised regulation at 20 C.F.R. §718.201(c).

The administrative law judge also permissibly accorded diminished weight to Dr. Chillag's opinion because he did not consider whether claimant's asthmatic bronchitis was related to his coal mine employment in finding that there was "not sufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis with respect to this man." Director's Exhibit 87.[9]

The administrative law judge next determined, within his discretion, that the opinions of Drs. Tuteur and Stewart lacked persuasive explanation, and were insufficient to outweigh the opinions rendered by Drs. McVey and Sutherland. *Oggero v. Director, OWCP*, 7 BLR 1-

[9]Employer's challenge to the administrative law judge's weighing of Dr. Chillag's report is based, in part, on evidence excluded from the record by the administrative law judge, which exclusion we have affirmed herein. Employer's Brief at 25.

860 (1985); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *see also Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995). The administrative law judge found:

> although their reports can not [sic] be rejected outright under *Warth* and *Stiltner*, their opinions that the Claimant does not have pneumoconiosis are not sufficient to outweigh the diagnoses from Drs. McVey and Sutherland because they did not provide any explanation that the Claimant's 35 years of coal mine employment and coal dust exposure played no role in the development of his totally disabling obstructive impairment.

Decision and Order on Remand Awarding Benefits at 12.

Substantial evidence thus supports the administrative law judge's findings that claimant established the existence of pneumoconiosis (1) based on the medical opinion evidence, including the medical opinions of Drs. McVey and Sutherland; and (2) on the relevant evidence as a whole, 20 C.F.R. §718.202(a), (a)(4); *Compton, supra.* We, therefore, affirm the administrative law judge's findings.

Employer has challenged the administrative law judge's decision to accord less weight to the medical opinions of Drs. Fino, Chillag, Tuteur, Stewart and Endres-Bercher, and to accord greater weight to the contrary opinions of Drs. McVey and Sutherland, in finding that claimant established that he is totally disabled due to pneumoconiosis. The administrative law judge considered whether the evidence satisfied the evidentiary standard set forth by the Fourth Circuit in *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990)[ALJ decision on remand rev'd No. 92-2106, 17 BLR 2-158 (4th Cir. June 21, 1993)(unpub.)], requiring that claimant establish that his pneumoconiosis is a contributing cause of his total disability. Decision and Order on Remand Awarding Benefits at 13. The disability causation standard established by the revised regulation at 20 C.F.R. §718.204(c) is as follows:

> 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). Because the administrative law judge has not addressed whether the evidence satisfies the disability causation standard set out at 20 C.F.R. §718.204(c)(1), we vacate the administrative law judge's determination that the evidence is sufficient to establish total disability due to pneumoconiosis in accordance with *Robinson*. We instruct the administrative law judge, on remand, to consider the evidence under the revised regulation at 20 C.F.R. §718.204(c).

Lastly, employer contends that the administrative law judge arbitrarily set the date of onset as the month in which the claim was filed. The record shows that employer did not challenge, in its 1995 appeal to the Board, Judge Smith's determination in his October 30, 1995 Decision and Order that claimant was entitled to benefits commencing January 1, 1990. Director's Exhibits 107, 108. Consequently, we hold that employer cannot now raise the issue of onset and we do not reach employer's arguments in this regard. *See Bernardo v. Director, OWCP*, 9 BLR 1-97 (1986).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge