BRB No. 09-0769 BLA

HAROLD LAWSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SILVER EAGLE MINING COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 08/24/2010
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
	)	DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits (2007-BLA-05972) of Administrative Law Judge Edward Terhune Miller, rendered on a subsequent claim

filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] In a Decision and Order dated July 10, 2009, the administrative law judge credited claimant with at least twenty-four years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that the evidence established that the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, and that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in failing to address, pursuant to 20 C.F.R. §725.309, whether there has been a material change in claimant's condition since the denial of his prior claim. Employer generally asserts that claimant's subsequent claim must be barred under the principles of res judicata. Employer challenges the administrative law judge's finding that the evidence is sufficient to establish the existence of clinical and legal pneumoconiosis. Employer further asserts that the administrative law judge erred in finding that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant has not filed a response

[1] Claimant first filed a claim for benefits on August 25, 1992, which was denied by Administrative Law Judge Sheldon R. Lipson on September 23, 1994, because claimant failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant appealed, and the Board affirmed the denial of benefits. *See Lawson v. Silver Eagle Mining Co.*, BRB No. 95-0410 BLA (Sept. 28, 1995) (unpub.). Claimant subsequently filed three requests for modification, on May 31, 1996, October 15, 1998 and November 7, 2000, each of which was denied. *Id.* Claimant's last request for modification was denied by Administrative Law Judge Stuart A. Levin on April 24, 2002, because he found that while the evidence was sufficient to establish that claimant was totally disabled, it did not establish the existence of pneumoconiosis. *Id*. Claimant appealed and the Board vacated the denial of benefits and remanded the case for further consideration. *Id*. In a Decision and Order on Remand dated January 11, 2005, Judge Levin again denied claimant's request for modification, finding that claimant failed to establish the existence of pneumoconiosis. *Id*. Claimant took no further action with respect to that denial until he filed the current subsequent claim on February 21, 2006. Director's Exhibit 3.

brief.[2] The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response, unless specifically requested to do so by the Board, but does note that employer misstates the legal standard applicable to subsequent claims pursuant to 20 C.F.R. §725.309.[3]

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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the

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[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings of at least twenty-four years of coal mine employment and that the evidence was sufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(i), (iv). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] By Order dated May 10, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. *Lawson v. Silver Eagle Mining Co.*, BRB No. 09-0769 BLA (May 10, 2010) (unpub. Order). Employer and the Director, Office of Workers' Compensation Programs (the Director), have responded and assert that, while Section 1556 is applicable to this claim because it was filed after January 1, 2005, the case need not be remanded to the administrative law judge for further consideration, unless the Board vacates the administrative law judge's award of benefits.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4.

date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, claimant's prior claim was denied because the evidence did not establish the existence of pneumoconiosis or disability causation. Director's Exhibit 1. Therefore, claimant had to submit new evidence establishing at least one of these elements of entitlement in order to have the administrative law judge review the subsequent claim on the merits. *See White*, 23 BLR at 1-3.

Based on his review of the newly submitted evidence, the administrative law judge found that claimant established the existence of pneumoconiosis and a change in an applicable condition of entitlement. Employer argues, however, that the administrative law judge erred in failing to consider whether claimant demonstrated a material change in conditions, prior to finding that claimant satisfied his burden of proof at 20 C.F.R. §725.309. Employer asserts that because claimant was determined to be totally disabled by a respiratory impairment in the prior claim, and "none of the medical experts in this case opined that [his] condition somehow worsened since the adjudication of his last claim," there is no evidence to support a finding of a material change in conditions. Petition for Review and Supporting Brief at 12. Employer also asserts that because claimant did not establish disability causation in the prior claim, common law principles of res judicata preclude reconsideration of whether claimant's disability is due to pneumoconiosis in this subsequent claim, as the etiology of claimant's respiratory condition is not subject to change. Employer maintains that the "[administrative law judge's] decision, coupled with the [Department of Labor's] interpretation of [20 C.F.R.]§725.309, erects an irrebuttable presumption that a person who can prove entitlement after his claim has been denied has experienced a material change in condition and be able to relitigate. The fact irrebuttably presumed is that his condition changed due to black lung whether or not that is a medical possibility in a given case." *Id*. at 15. Employer contends that it "is manifestly unfair to impose a perpetual litigation regime on mine operators where, as here, there is no valid justification for doing so." *Id*. Thus, employer urges the Board to vacate the administrative law judge's findings pursuant to 20 C.F.R. §725.309. Employer's arguments are rejected as they are without merit.

We agree with the Director that employer has misstated the legal standard applicable to subsequent claims. In referencing a "material change in conditions," employer relies on the prior regulation at 20 C.F.R. §725.309 (2000),[5] which is not

[5] The Department of Labor revised the regulations implementing the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). These regulations apply to all claims filed after January 19, 2001, and are found at 20 C.F.R. Parts 718, 722,

applicable to this claim, based on the filing date. In revising 20 C.F.R. §725.309, the Department of Labor adopted the test set forth in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc*). Pursuant to 20 C.F.R. §725.309, claimant must submit new evidence, developed in connection with the current claim, that establishes one of the elements upon which the prior denial was based. *See White*, 23 BLR at 1-3; s*ee also* 65 Fed. Reg. 79968 (Dec. 20, 2000).

There is no merit to employer's assertion that the regulation at 20 C.F.R. §725.309, as interpreted, is invalid because it permits a claimant to relitigate the denial of an earlier claim in contravention of the principles of res judicata. As noted by the Director, in determining whether a claimant has satisfied his burden of proof under 20 C.F.R. §725.309, the adjudicator is bound by the final denial of the prior claim, but "compares the new medical evidence with the legal conclusions reached in the prior claim," to determine whether claimant has established a change in one of the applicable conditions of entitlement. Director's Brief at 1 n.1. We agree that, by requiring a miner to prove a change in conditions with new evidence, the regulation ensures that the miner is not simply seeking reconsideration of his prior, finally denied claim. *Id*., citing *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006).

Additionally, contrary to employer's assertion, because claimant is required to establish a change in an applicable condition of entitlement by a preponderance of the relevant evidence, and employer also has the right to submit evidence to defeat claimant's proffer, there is no "irrebuttable presumption" implicated by 20 C.F.R. §725.309. *See* Director's Brief at 2. We therefore reject employer's arguments regarding the validity of 20 C.F.R. §725.309. *See Rutter*, 86 F.3d at 1362, 20 BLR at 2-235; *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 450, 21 BLR 2-50, 2-60 (8th Cir. 1997); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 314, 20 BLR 2-76, 2-87 (3d Cir. 1995); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-79 (1993).

Turning to the administrative law judge's weighing of the evidence, employer argues that the administrative law judge erred in finding that the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis. We disagree. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered ten readings of four films dated November 22, 2004, April 4, 2006, July 21, 2006, and October 9, 2007, of which there was one reading for quality only, five positive and four negative readings for pneumoconiosis. Decision and Order at 6, 12. The administrative law judge explained the weight accorded the conflicting readings as follows.

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725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the revised regulations.

The administrative law judge found that the November 22, 2004 x-ray was read by Dr. Alexander, a Board-certified radiologist and B reader, as positive for pneumoconiosis, and by Dr. Wheeler, a Board-certified radiologist and B reader, as negative. Director's Exhibits 14, 31. He concluded that the "readings of this film are in equipoise as both physicians have the same credentials but came to inconsistent conclusions." Decision and Order at 12. The administrative law judge found that the April 4, 2006 x-ray was read by Dr. Baker, a B reader, as positive for pneumoconiosis, by Dr. Miller, a Board-certified radiologist and B reader, as positive, by Dr. Scatarige, a Board-certified radiologist and B reader, as negative, and by Dr. Barrett for the purposes of assessing quality only. Director's Exhibits 11, 30, 34. Based on the majority of the positive readings, the administrative law judge concluded that the April 4, 2006 x-ray was positive for pneumoconiosis. Decision and Order at 12. The administrative law judge found that the July 21, 2006 x-ray was read by Dr. Alexander, a Board-certified radiologist and B reader, as positive and by Dr. Dahhan, a B reader, as negative. Director's Exhibits 13, 32. Because the administrative law judge considered Dr. Alexander to be more qualified, he determined that the July 21, 2006 x-ray was positive. Decision and Order at 12. Similarly, the administrative law judge found that the October 9, 2007 x-ray was positive for pneumoconiosis, as it had one positive reading by Dr. Ahmed, a Board-certified radiologist and B reader, and one negative reading by Dr. Castle, a B reader. *Id.*; Claimant's Exhibit 1; Employer's Exhibit 1. Based on his consideration of all of the newly submitted x-ray readings, the administrative law judge concluded, "[a]s the weight of the most qualified physicians, and the weight of the readings of each film considered individually, are positive for pneumoconiosis, the weight of the x-ray evidence as a whole establishes pneumoconiosis by x-ray." Decision and Order at 12.

Contrary to employer's contention, the administrative law judge did not engage in a "mere headcount" of the x-ray evidence. Petition for Review and Supporting Brief at 16. The administrative law judge properly performed both a qualitative and quantitative review of the x-ray evidence, taking into consideration the radiological qualifications of the physicians, and found that the majority of the readings by the more qualified radiologists establish that claimant has pneumoconiosis.[6] We, therefore, reject employer's assertion of error and affirm the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis by a preponderance of the

[6] Contrary to employer's contention, the administrative law judge was not required to give Dr. Wheeler's readings greater weight than those of other dually qualified physicians based on Dr. Wheeler's academic and teaching credentials. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993).

newly submitted x-ray evidence at 20 C.F.R. §718.202(a)(1).[7] *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *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); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003).

We also reject employer's contention that the administrative law judge failed to explain his findings with regard to the CT scan evidence. The administrative law judge noted that the record contained readings of two CT scans dated January 5, 2005 and February 4, 2006, both of which were read by Dr. Wheeler, a Board-certified radiologist and B reader, as negative for pneumoconiosis. Decision and Order at 10. Citing *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002), the administrative law judge noted that while there were negative CT scan readings by Dr. Wheeler, the CT scan evidence did not detract from his finding that claimant established the existence of clinical pneumoconiosis, based on the x-ray evidence and credible medical opinions. Contrary to employer's assertion, as noted by the administrative law judge, CT scan evidence is not *per se* more reliable than x-ray evidence for diagnosing pneumoconiosis. As the administrative law judge permissibly explained, in accordance with the Administrative Procedure Act,[8] that the CT scans in this case "have not been shown to outweigh the positive x-ray interpretations" we affirm his finding. Decision and Order at 14-15; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335.

[7] The administrative law judge noted that when all of the x-ray evidence was assessed, "several readers who determined that x-rays were negative, 0/1, in effect indicated that a positive reading was also considered, but did not prevail." Decision and Order at 16. According to employer, the administrative law judge's statement indicates that he did not properly weigh Dr. Dahhan's 0/1 reading of the July 21, 2006 x-ray as a negative reading. We disagree. As discussed *supra*, the administrative law judge specifically found that while Dr. Dahhan read the July 21, 2006 x-ray as negative for pneumoconiosis, his reading was outweighed by a positive reading of that same x-ray by a more qualified radiologist.

[8] The Administrative Procedure (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a).

Employer next contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis, based on the newly submitted medical opinion evidence. Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the newly submitted medical opinions of Drs. Baker, Dahhan and Castle. Dr. Baker examined claimant on April 4, 2006, at the request of the Department of Labor. Director's Exhibit 11. He diagnosed coal workers' pneumoconiosis by x-ray and chronic obstructive pulmonary disease (COPD) with moderate to borderline severe obstructive defect, based on the results of the pulmonary function testing. *Id*. He opined that claimant suffers from clinical pneumoconiosis, citing claimant's thirty-two years of underground coal dust exposure, x-ray changes consistent with coal workers' pneumoconiosis, and the fact that there was no other condition to account for the x-ray changes. *Id*. With respect to the etiology of claimant's COPD, Dr. Baker stated:

> This can be caused either by coal dust exposure or by cigarette smoking. He does have less than a [twenty]-pack year history of smoking and has not smoked any for approximately [eighteen] years. He also alleges [thirty-two] years of underground coal dust exposure, which can cause similar problems, and, in fact the cigarette smoking and coal dust exposure may be synergistic in the production of obstructive airway disease. Therefore, I feel his impairment is significantly related to and substantially aggravated by dust exposure from his coal mine employment and represents legal pneumoconiosis. There has been some contribution from his less than [twenty]-pack year history of smoking as well[,] and it may be nearly equal in the production of his symptoms, but it is difficult to partition the exact effects of each.

Id. He concluded that coal workers' pneumoconiosis and COPD contributed to claimant's "class 3 respiratory impairment" and that claimant is totally disabled due to these conditions. *Id*.

Dr. Dahhan examined claimant on July 21, 2006, and also reviewed Dr. Baker's report. Director's Exhibit 13. Dr. Dahhan reported that claimant's x-ray was negative for pneumoconiosis, while his pulmonary function study revealed a moderate obstructive ventilatory impairment with no evidence of restrictive abnormalities. *Id*. Dr. Dahhan stated that, based on the negative chest x-ray, claimant had "insufficient objective findings to justify the diagnosis of clinical pneumoconiosis." *Id*. He also opined that claimant did not have legal pneumoconiosis, attributing claimant's obstructive impairment to smoking. *Id*. In support of his opinion that claimant's respiratory condition was unrelated to coal dust exposure, Dr. Dahhan noted that claimant was last exposed to coal mine dust in 1992, "a duration of absence sufficient to cause cessation of any industrial bronchitis . . . ." *Id*. Dr. Dahhan also explained that claimant "has lost over 2000 cc of his FEV1, an amount that cannot be accounted for by the obstructive

defect secondary to the inhalation of coal dust." *Id*. Finally, Dr. Dahhan noted that claimant has been treated with bronchodilators and "his condition is responsive to such measures, a finding that is inconsistent with the permanent adverse [e]ffects of coal dust on the respiratory system." *Id*.

Dr. Castle examined claimant on October 9, 2007, and also reviewed the medical reports of Drs. Dahhan and Baker. Employer's Exhibit 1. Dr. Castle indicated that claimant did not have radiographic evidence for pneumoconiosis, but did have some increased interstitial infiltrates in the middle lobe and lower lung zones, consistent with usual interstitial pneumonitis. *Id*. He reported that a pulmonary function study showed evidence of moderate airway obstruction with some reversibility after a bronchodilator, but no restriction. *Id*. He also reported that a blood gas study was normal, but indicated that claimant had evidence of gas trapping. *Id*. Dr. Castle concluded that claimant's moderate obstruction is due to his smoking history because "[w]hen coal workers' pneumoconiosis causes [an] impairment, it generally does so by causing a mixed, irreversible obstructive and restrictive ventilatory defect. That was not the finding in this case." *Id*. Dr. Castle concluded that claimant is totally disabled from a respiratory standpoint due to smoking.

The administrative law judge also considered medical records pertaining to claimant's treatment by Drs. Robinette and Shamiyeh. On May 31, 2007, claimant was seen by Dr. Robinette for follow-up of his underlying black lung disease with associated emphysema and chronic airflow obstruction. Claimant's Exhibit 3. A pulmonary function test showed a moderate obstructive respiratory impairment, and a blood gas study showed significant oxygen desaturation at eighty-five percent. *Id*. Dr. Robinette stated that, "clearly [claimant] has evidence of moderate obstructive ventilatory defect associated with his occupational pneumoconiosis." *Id*. Claimant was prescribed oxygen and advised to continue his medication. *Id*. In subsequent treatment notes dated August 31, 2007, Dr. Robinette indicated that claimant had profound oxygen desaturation with exercise. In a letter dated November 1, 2007, addressed to the Department of Labor, Dr. Robinette advised that claimant had severe lung disease as a consequence of occupational pneumoconiosis. *Id*. Dr. Robinette later examined claimant on December 14, 2007, and reiterated that claimant has "severe lung disease occurring as a consequence of [claimant's] occupational pneumoconiosis" with evidence of oxygen desaturation, a reduction in diffusion capacity and exercise induced hypoxemia. *Id*.

In a letter dated January 18, 2008, addressed "To Whom It May Concern," Dr. Shamiyeh indicated that he had treated claimant since June 7, 2005. Claimant's Exhibit 4. Dr. Shamiyeh noted that claimant has a history of COPD and pneumoconiosis and stated, "[w]ith the [claimant's] medical problems, the findings on his CT scan, [arterial blood gas tests] and [pulmonary function tests] as well as clinical findings, [claimant] has evidence for COPD and pneumoconiosis." *Id*. Dr. Shamiyeh indicated that he was in

agreement with Dr. Robinette that claimant's "problems of COPD and pneumoconiosis are significant enough that he deserves to obtain Black Lung benefits." *Id*.

In weighing the conflicting evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge found that the weight of the medical opinions established the existence of clinical pneumoconiosis, and that, with respect to the issue of legal pneumoconiosis, "the opinions of Drs. Dahhan and Castle are not as persuasive as the opinions of Drs. Baker, Robinette, and Shamiyeh considered as a whole." Decision and Order at 14. Based on his weighing of all of the newly submitted evidence at 20 C.F.R. §718.202(a), the administrative law judge found that claimant satisfied his burden to establish the existence of clinical and legal pneumoconiosis, and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. In considering the entirety of the record as to the merits of claimant's entitlement, the administrative law judge noted that there was no basis to take exception with the prior denial of benefits based on the evidence in that record. However, "because of the latent and progressive nature of pneumoconiosis," the administrative law judge indicated that he would give controlling weight to the more recent evidence "since the older evidence tends toward equipoise in many respects and is not compellingly negative." Decision and Order at 15. The administrative law judge concluded that the more recent positive x-ray evidence and the opinions of Drs. Baker and Robinette, "with some corroboration by Dr. Shamiyeh," establish that claimant has pneumoconiosis. *Id*. Thus, the administrative law judge found that claimant established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Contrary to employer's assertion, the administrative law judge gave permissible reasons for according the opinions of Drs. Dahhan and Castle less weight, and the opinion of Dr. Baker controlling weight, as to the issue of the existence of pneumoconiosis. We consider employer's assertions of error with regard to these physicians to be little more than a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

The administrative law judge permissibly gave Dr. Dahhan's opinion, that claimant does not have clinical pneumoconiosis, less weight as it was based on a negative x-ray reading, which was contrary to the administrative law judge's overall finding that "the x-ray evidence as a whole has been determined to be positive." Decision and Order at 13; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson*, 12 BLR at 1-113. Moreover, the administrative law judge reasonably assigned Dr. Dahhan's opinion, that claimant does not have legal pneumoconiosis, less weight because Dr. Dahhan did not address, to the satisfaction of the administrative law judge, "whether both cigarette smoking and coal dust exposure could have had a concurrent effect in causing COPD, particularly where the facts of this case disclose exposure histories that were similar."

Decision and Order at 13; *see Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227 (4th Cir. May 11, 2004) (unpub.);[9] *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007);[10] *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). In addition, the administrative law judge correctly noted that Dr. Dahhan's opinion "depended substantially upon . . . the lapse of time between [c]laimant's departure from coal mine work and the deterioration of his lung condition" and that Dr. Dahhan "did not concern himself with the facts [sic] that coal workers' pneumoconiosis . . . can be latent until after coal work has stopped, and that [c]laimant stopped smoking approximately four years before he left the mines." Decision and Order at 14; *see* 20 C.F.R. §718.201; *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998).

The administrative law judge also reasonably assigned Dr. Castle's opinion, that claimant did not have clinical pneumoconiosis, less weight because, like Dr. Dahhan, Dr. Castle's opinion "is based on a finding that the x-ray evidence is negative for pneumoconiosis, and the x-ray evidence as a whole has been determined to be

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[9] Employer asserts that the administrative law judge's reliance on *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227, 237 (4th Cir. May 11, 2004) (unpub.) is *prohibited* by Local Rule 32.1 of the Rules of the Fourth Circuit, as the court has indicated only that "reliance on unpublished decisions is generally disfavored," in briefs and oral arguments filed before it or the district courts. The rule, however, does not prohibit an administrative law judge from citing an unpublished decision in reaching his decision. Furthermore, while unpublished decisions are not considered binding precedent in the Fourth Circuit, our holding is not based exclusively upon the Fourth Circuit's holding in *Swiger*, but is based upon a review of the administrative law judge's specific findings in this case.

[10] Employer asserts that the administrative law judge's "decision to discredit Dr. Dahhan's opinion on the strength of the court's decision in [*Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007)]" was in error. Petition for Review and Supporting Brief at 25. We disagree. In *Barrett*, the United States Court of Appeals for the Sixth Circuit similarly affirmed the administrative law judge's decision to accord less weight to Dr. Dahhan's opinion on the issue of legal pneumoconiosis because he did not adequately explain "why he believes that coal dust exposure did not exacerbate [the miner's] smoking-related impairments." *Barrett*, 478 F.3d at 356, 23 BLR at 2-483. The administrative law judge in this case found similar deficiencies in Dr. Dahhan's rationale for excluding coal dust exposure as a contributing factor in claimant's respiratory condition.

positive."[11] Decision and Order at 13; *see Worhach*, 17 BLR at 1-110; *Anderson*, 12 BLR at 1-111. Furthermore, the administrative law judge acted within his discretion in finding that Dr. Castle's opinion, that claimant does not have legal pneumoconiosis, was entitled to less weight because Dr. Castle also failed "to address whether [claimant's] smoking and coal mine employment could have had a concurrent effect on [claimant's] respiratory condition . . . ." Decision and Order at 13; *see Swiger*, 98 Fed. Appx. at 237; *Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Clark*, 12 BLR at 1-155.

We also conclude, contrary to employer's argument, that the administrative law judge acted within his discretion in finding that Dr. Baker's opinion was sufficient to satisfy claimant's burden of proving that he has both clinical and legal pneumoconiosis. The administrative law judge permissibly found that Dr. Baker's opinion was sufficient to establish the existence of clinical pneumoconiosis because it was "based on the miner's x-ray, his exposure history and the lack of other conditions to account for the x-ray changes." Decision and Order at 13; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark*, 12 BLR at 1-149. Furthermore, the administrative law judge permissibly found that Dr. Baker's diagnosis of legal pneumoconiosis was reasoned and documented because Dr. Baker explained that both smoking and coal dust were risk factors for claimant's disabling respiratory condition, that they can have a synergistic effect in the production of airways disease, that the miner had not smoked for eight years and had had thirty-two years of underground dust exposure, and specifically opined that claimant's impairment was significantly related to and substantially aggravated by coal dust exposure, sufficient to establish legal pneumoconiosis. Decision and Order at 13; *see Hicks*, 138 F.3d at 524, 21 BLR at 2-323; *Underwood*, 105 F.3d at 946, 21 BLR at 2-23; *Grizzle*, 994 F.2d at 1093, 17 BLR at 2-123; *Clark*, 12 BLR at 1-155.

In considering the weight to accord claimant's treating physicians, the administrative law judge also properly discussed the factors at 20 C.F.R. §718.104(d) and found that the opinions of Drs. Robinette and Shamiyeh were "somewhat persuasive" based on "the continuity and documentation of the records underlying their assessments. Decision and Order at 14. He reasonably concluded that they corroborate the findings of Dr. Baker. *Id*. Therefore, because substantial evidence supports the administrative law judge's credibility determinations, we affirm his findings that claimant established the existence of clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a) and a change in

[11] Dr. Castle noted that it was his opinion "and the opinion of the majority of radiologists and B readers that [claimant] did not have radiographic evidence of coal workers' pneumoconiosis." Employer's Exhibit 1. However, the administrative law judge concluded that a majority of the x-ray evidence was positive for pneumoconiosis, contrary to Dr. Castle's summation.

an applicable condition of entitlement pursuant to 20 C.F.R §725.309. We further affirm, as supported by substantial evidence, the administrative law judge's findings on the merits that the more recent evidence is sufficient to establish that claimant has clinical and legal pneumoconiosis.

Finally, we reject employer's assertion that the administrative law judge erred in finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Petition for Review and Supporting Brief at 26-27. To the extent that Drs. Dahhan and Castle did not diagnose pneumoconiosis, the administrative law judge properly found that their opinions were entitled to little weight on the issue of the cause of claimant's total disability. *See Toler v. Eastern Associated Coal Co.*, 43 F.2d 109, 19 BLR 2-70 (4th Cir. 1995). In contrast, the administrative law judge permissibly found that Dr. Baker provided a reasoned and documented opinion that claimant's respiratory disability was due, at least in part, to coal dust exposure. We specifically reject employer's assertion that claimant benefited from an improper presumption that "*every* ex-miner with disabling COPD is entitled to black lung benefits" and that the administrative law judge erred in failing to consider whether Dr. Baker explained why coal dust exposure caused claimant's disabling obstructive lung disease. Petition for Review and Supporting Brief at 27 (emphasis in original). Contrary to employer's contention, a physician is not required to specifically apportion the extent to which various causal factors contribute to a totally disabling respiratory or pulmonary impairment in order to provide a credible opinion regarding disability causation. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-10 (2003); *Clark*, 12 BLR at 1-155. The administrative law judge had discretion to find Dr. Baker's opinion "persuasive because his reasoning accounts for [c]laimant's significant coal dust exposure, while recognizing the possible effects of his smoking history" on his disability. Decision and Order at 17. Thus, we affirm the administrative law judge's finding that claimant established total disability due to clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[12]

[12] Based on our affirmance the administrative law judge's award of benefits, we hold that application of the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, would not alter the outcome of this case. *See* 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge