BRB No. 09-0829 BLA

KENNETH WELLS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SPURLOCK MINING COMPANY, INCORPORATED	)	DATE ISSUED: 08/31/2010
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Barry H. Joyner (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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (07-BLA-5196) of Administrative Law Judge Larry S. Merck (the administrative law judge) awarding benefits on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Public 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). This case is before the Board for the second time. In a Decision and Order dated March 24, 2008, the administrative law judge credited claimant with at least 21 years of coal mine employment, based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the new evidence established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §§725.309 and 725.310, thereby granting claimant's request for modification of a subsequent claim. On the merits, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis[2] at 20 C.F.R. §718.202(a)(4).[3] The administrative law judge also found that the evidence established a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(b) and (c). Accordingly, the administrative law judge awarded benefits. In a subsequent Attorney Fee Order dated August 25, 2008, the administrative law judge awarded claimant's counsel a fee of $8,025.00 for 26.75 hours of legal services at an hourly rate of $300.00.

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[1] Claimant filed his first claim on July 11, 1989. Director's Exhibit 1. It was finally denied by a claims examiner on December 18, 1989 because claimant failed to establish any of the elements of entitlement. *Id.* Claimant filed his second claim (a subsequent claim) on August 12, 2002. Director's Exhibit 3. On June 30, 2005, Administrative Law Judge Joseph E. Kane issued a Decision and Order denying benefits because claimant failed to establish a change in an applicable condition of entitlement. Director's Exhibit 55. The Board affirmed Judge Kane's denial of benefits. *Wells v. Spurlock Mining Co.*, BRB No. 05-0814 BLA (Feb. 14, 2006)(unpub.). Claimant filed a request for modification on April 13, 2006. Director's Exhibit 61.

[2] Administrative Law Judge Larry S. Merck (the administrative law judge) found that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3). 2008 Decision and Order at 13, 27.

[3] The administrative law judge noted that a separate finding regarding disease causality under 20 C.F.R. §718.203 was unnecessary, given that he found that claimant has legal pneumoconiosis. 2008 Decision and Order at 27.

In response to employer's appeal, the Board affirmed the administrative law judge's length of coal mine employment finding and his determination to give greater weight to the evidence developed since the denial of the prior claim. *K.W.* [*Wells*] *v. Spurlock Mining Co.*, BRB Nos. 08-0506 BLA/S, slip op. at 3, n.3 (Apr. 16, 2009)(unpub.). The Board also affirmed the administrative law judge's finding that the new evidence established total disability at 20 C.F.R. §718.204(b) and, thus, it affirmed his finding that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §§725.309 and 725.310. *K.W.* [*Wells*], BRB Nos. 08-0506 BLA/S, slip op. at 5. Further, the Board affirmed the administrative law judge's finding that the evidence established total disability at 20 C.F.R. §718.204(b) on the merits. *K.W.* [*Wells*], BRB Nos. 08-0506 BLA/S, slip op. at 11. However, the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and remanded the case for further consideration and discussion of all the relevant medical opinion evidence.[4] *K.W.* [*Wells*], BRB Nos. 08-0506 BLA/S, slip op. at 8. In addition, the Board vacated the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) and instructed the administrative law judge to reconsider this issue on remand. *K.W.* [*Wells*], BRB Nos. 08-0506 BLA/S, slip op. at 11. Lastly, the Board declined to address the fee order because there had not been a successful prosecution of the claim at that time, given that it vacated the award of benefits. *K.W.* [*Wells*], BRB Nos. 08-0506 BLA/S, slip op. at 12.

On remand, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[5] The administrative law judge also found that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge again awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

[4] The Board rejected employer's contention that the administrative law judge could not rely on the opinions of Drs. Baker, Arnett, and Sikder as reasoned medical judgments. *K.W.* [*Wells*] *v. Spurlock Mining Co.*, BRB Nos. 08-0506 BLA/S, slip op. at 10 (Apr. 16, 2009)(unpub.).

[5] The administrative law judge noted that a separate disease causality finding under 20 C.F.R. §718.203 was unnecessary for claimant's legal pneumoconiosis, as that disease was based on claimant establishing that his chronic lung disease arose out of his coal mine employment. 2009 Decision and Order on Remand at 10.

Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, arguing that the Board should reject employer's assertion that a medical report opining that pneumoconiosis cannot be latent or progressive is credible.[6] The Director maintains that a medical opinion that pneumoconiosis can be neither progressive nor latent is contrary to the regulations, given that the regulations recognize that the disease may be both latent and progressive.[7]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[8] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

Employer initially contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the reports of Drs. Baker, Arnett, Sikder, Dahhan, and Fino. In a report dated October 15, 2002, Dr. Baker opined that claimant has chronic obstructive pulmonary disease (COPD) and chronic bronchitis related to coal dust exposure and cigarette smoking. Director's Exhibits 11.

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[6] Employer filed a brief in reply to the brief by the Director, Office of Workers' Compensation Programs (the Director), reiterating its prior contentions.

[7] Subsequent to the issuance of the administrative law judge's Decision and Order on Remand, amendments to the Act, which became effective on March 23, 2010, were enacted, affecting claims filed after January 1, 2005. Employer and the Director responded to the Board's June 8, 2010 Order, which permitted the parties to submit supplemental briefing in this claim to address the impact, if any, of the 2010 amendments in this case. Because all of claimant's claims were filed before January 1, 2005, the recent amendments to the Act do not apply in this case.

[8] The record indicates that claimant was employed in the coal mining industry in Kentucky. Director's Exhibits 1, 4, 6. Accordingly, the law of the United States Court of Appeals for the Sixth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Similarly, in reports dated June 3, 2003 and April 11, 2007, Dr. Arnett opined that claimant has COPD, emphysema and chronic bronchitis related to coal dust exposure. Director's Exhibit 45; Claimant's Exhibit 1. Additionally, in a report dated May 12, 2003, Dr. Sikder opined that claimant has moderate COPD related to coal dust exposure and tobacco abuse. Director's Exhibit 45. By contrast, in a report dated October 23, 2002 and a deposition dated October 25, 2004, Dr. Dahhan opined that claimant has no pulmonary or respiratory impairment caused by coal dust exposure. Director's Exhibits 39, 44, 49 (Dr. Dahhan's October 25, 2004 Deposition at 13, 15). In a subsequent report dated August 3, 2006, Dr. Dahhan opined that claimant has a moderate obstructive ventilatory impairment caused by his smoking habit, but not coal dust exposure. Employer's Exhibit 1. Similarly, in a report dated September 17, 2004, Dr. Fino opined that claimant has a moderate respiratory impairment caused by cigarette smoking, and not coal dust exposure. Director's Exhibits 47, 48. Further, in a deposition dated October 19, 2004, Dr. Fino opined that claimant has neither an occupational disease nor a pulmonary or a respiratory impairment that was caused by coal dust exposure. Director's Exhibit 48 (Dr. Fino's October 19, 2004 Deposition at 12, 15).

The administrative law judge gave little weight to Dr. Dahhan's opinion because he found that it was not well-reasoned, given that Dr. Dahhan's statement regarding the latency of pneumoconiosis was at odds with the Department of Labor's regulatory definition of pneumoconiosis and the preamble to the amended regulations. The administrative law judge also found that Dr. Dahhan's opinion was not well-reasoned, given that "treatment with bronchodilator agents is not sufficient evidence that [c]laimant's impairment is entirely reversible, and therefore, is not sufficient evidence to opine that coal dust played no contributing role in [c]laimant's obstructive lung impairment." 2009 Decision and Order on Remand at 7. The administrative law judge further found that Dr. Dahhan's opinion was not well-reasoned, given that the doctor did not explain why he determined that both coal dust exposure and cigarette smoking could not have contributed to claimant's pulmonary impairment. In addition, the administrative law judge gave less probative weight to Dr. Fino's opinion because he found that it was not adequately reasoned, given that "Dr. Fino's opinion on the etiology of [c]laimant's COPD is at odds with the definition of pneumoconiosis as a latent and progressive disease and the preamble to the revised regulations." *Id*. at 9. Further, after noting that the Board affirmed his prior finding that Dr. Baker's opinion was adequately reasoned and that the Board determined that he acted within his discretion in crediting the opinions of Drs. Arnett and Sikder, the administrative law judge stated, "I continue to find the opinions of these physicians adequately reasoned and documented and entitled to probative weight on the issue of legal pneumoconiosis." *Id*. (footnote omitted). Hence, based on his decision to give the most weight to Dr. Baker's opinion, as supported by the opinions of Drs. Arnett and Sikder, the administrative law judge found that claimant established the existence of legal pneumoconiosis at Section 718.202(a)(4).

Employer argues that the administrative law judge erred in discounting the opinions of Drs. Dahhan and Fino, that claimant does not have legal pneumoconiosis, because he found that their opinions were contrary to the regulations. Specifically, employer asserts that the administrative law judge violated the Administrative Procedure Act (APA) by considering "regulatory materials" as evidence in the case. Employer maintains that the administrative law judge could not take official notice of these "non-record materials" because they are not material facts that can be subject to such notice. Alternatively, employer asserts that the administrative law judge's reliance on the preamble to the amended regulations and the regulatory definition of pneumoconiosis violated its right to due process, given that the administrative law judge announced it in his decision, thereby notifying the parties of his reliance on "extra-record" evidence after the record was closed. Employer's Brief at 13.

Contrary to employer's assertion, the administrative law judge did not treat the regulatory definition of pneumoconiosis and the preamble to the amended regulations as evidence or take judicial notice of them. *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-139 (1990). Rather, the administrative law judge consulted the preamble as an authoritative statement of medical principles accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. The regulatory definition of pneumoconiosis and the preamble do not constitute evidence outside the record in which the administrative law judge must give notice and an opportunity to respond. The Department of Labor's comments to the amended regulations and the preamble are relevant to the appropriate interpretation of the amended regulations in that they set forth the legal and factual principles that the Department of Labor relied on in promulgating them. *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009). We, therefore, reject employer's assertion that the administrative law judge's review of the opinions of Drs. Dahhan and Fino in light of the principles set forth in the regulatory definition of pneumoconiosis and the preamble constituted the use of "extra-record" evidence, an untimely evidentiary ruling, or a denial of due process.

Employer also asserts that the administrative law judge erred in finding that the opinions of Drs. Dahhan and Fino are inconsistent with the regulations or the discussion in the preamble. Specifically, employer argues that neither Dr. Dahhan nor Dr. Fino opined that pneumoconiosis is never latent or progressive. Employer maintains that Drs. Dahhan and Fino explained why claimant's impairment was not caused by coal dust exposure. In the August 3, 2006 report, Dr. Dahhan opined that claimant's obstructive ventilatory impairment was related to his cigarette smoking. Employer's Exhibit 1. Dahhan concluded that claimant did not have a pulmonary impairment caused by, related to, contributed to, or aggravated by the inhalation of coal dust exposure based, in part, on the doctor's observation that "[claimant] has not had any exposure to coal dust for 25 years, a duration of absence sufficient to cause cessation of any industrial bronchitis that

he may have had." *Id*. In the September 17, 2004 report, Dr. Fino opined that claimant's pulmonary impairment was related to cigarette smoking. Director's Exhibit 48. In addressing the cause of claimant's impairment, Dr. Fino stated:

> According to the medical records that I have reviewed, [claimant's] FEV_1 was nearly normal in 2002. There is now a moderate reduction. He stopped working in 1987. However, he continued to smoke through 2004. It is my opinion that if he had an impairment due to coal mine dust, his lung function would not have been as well preserved in 2002. The progressive reduction in this man's lung function over two years is consistent with cigarette smoking.

Id. Further, in the October 19, 2004 deposition, Dr. Fino opined that claimant did not have a respiratory or pulmonary impairment related to coal dust exposure based, in part, on the doctor's observation that the spirometric and arterial blood gas studies showed that claimant's moderate obstruction worsened between 2002 and 2004, a period of time when claimant was no longer exposed to coal dust but continued to smoke cigarettes. *Id*. (Dr. Fino's Deposition at 13).

In his Decision and Order on Remand, the administrative law judge found that Dr. Dahhan's statement regarding the period of time since claimant's coal mine employment ceased was at odds with the Department of Labor's determination that coal dust exposure could cause a chronic pulmonary impairment after a latent period. 2009 Decision and Order on Remand at 6-7. The administrative law judge also found that Dr. Fino's opinion regarding the etiology of claimant's COPD was at odds with the regulatory definition of pneumoconiosis and the preamble to the amended regulations.[9] *Id*. at 9.

In comments regarding the decision of the United States Court of Appeals for the District of Columbia Circuit in *Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, BLR (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, BLR (D.D.C. 2001), the Department of Labor noted that the court interpreted the regulatory definition of pneumoconiosis at 20 C.F.R. §718.201(c) to mean that pneumoconiosis can be a latent and progressive disease, not that pneumoconiosis is always or typically a latent and progressive disease. 68 Fed. Reg. 69931 (Dec. 15, 2003). The Department of Labor also noted that there is no irrebuttable presumption that the miner's pneumoconiosis is latent or progressive. *Id*. Rather, the Department of Labor noted that the burden of proving the presence of pneumoconiosis is always on the miner.

[9] Specifically, the administrative law judge noted that "Dr. Fino's reasoning relates entirely to the latency of [c]laimant's lung impairment and the progression of his impairment between the years 2002 and 2004." 2009 Decision and Order on Remand at 9.

Id. Hence, the Department of Labor stated, "As the Department explained in the preamble to the final rule, 'the miner continues to bear the burden of establishing all of the statutory elements of entitlement.' 65 FR at 79972 (Dec. 20, 2000)." *Id*.

The APA, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge indicated that he discounted the opinions of Drs. Dahhan and Fino because they were based, in part, on views that were inconsistent with the regulatory definition of pneumoconiosis and the preamble to the amended regulations. However, the administrative law judge did not explain how the views of Drs. Dahhan and Fino conflict with the regulatory definition of pneumoconiosis and the preamble with regard to the Department of Labor's position that pneumoconiosis is a latent and progressive disease. Consequently, we hold that the administrative law judge did not comply with the requirements of the APA in setting forth his findings regarding the opinions of Drs. Dahhan and Fino. *Director, OWCP v. Rowe*, 710 F.2d 251, 254, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Wojtowicz*, 12 BLR at 1-165.

Employer further asserts that the administrative law judge erred in discounting Dr. Dahhan's opinion because the doctor did not explain why both coal mine dust exposure and cigarette smoking could not have contributed to claimant's pulmonary impairment. Employer maintains that "[t]he Board already rejected that [finding by the administrative law judge] as an invalid basis for discounting Dr. Dahhan's opinion." Employer's Brief at 16.

In his 2008 Decision and Order, the administrative law judge gave little weight to Dr. Dahhan's opinion because the doctor did not adequately explain why he believed that coal dust exposure did not contribute to claimant's impairment. 2008 Decision and Order at 25. The administrative law judge stated, "Instead he chose to rely solely on [claimant's] smoking history, apparently without considering whether both cigarette smoking and coal dust exposure had a concurrent effect in causing chronic obstructive lung disease." *Id*.

In its Decision and Order, the Board determined that the administrative law judge mischaracterized Dr. Dahhan's opinion, and thus, did not accurately explain why he found that Dr. Dahhan's reasoning was inadequate. The Board specifically stated:

> Thus, contrary to the administrative law judge's finding, Dr. Dahhan also did not "rely solely on [claimant's] smoking history, apparently without considering whether both cigarette smoking and coal dust exposure had a concurrent effect in causing chronic obstructive lung disease." Decision

> and Order at 25. Rather, Dr. Dahhan specifically considered whether coal dust had contributed to claimant's impairment, and determined that it did not, based on the length of time since claimant's last exposure to coal mine dust, the sudden drop in claimant's FEV_1 values since his prior examination in 2004, and the apparent reversibility of claimant's impairment. Employer's Exhibit 1.

K.W. [*Wells*], BRB No. 08-0506 BLA/S, slip op. at 8. The Board therefore vacated the administrative law judge's findings with respect to Dr. Dahhan's opinion.

In his Decision and Order on Remand, the administrative law judge again found that "Dr. Dahhan does not explain why both coal mine dust and cigarette smoking could not have contributed to [c]laimant's pulmonary impairment."[10] 2009 Decision and Order on Remand at 7.

We agree with employer that the administrative law judge erred in failing to follow the Board's instructions, on remand, to accurately characterize Dr. Dahhan's opinion and to fully set forth his reasons for crediting or discrediting the doctor's opinion as to the existence of legal pneumoconiosis. *Hall v. Director, OWCP*, 12 BLR 1-80 (1988). Thus, we again hold that the administrative law judge erred in discounting Dr. Dahhan's opinion on the erroneous basis that the doctor did not explain why both coal mine dust and cigarette smoking could not have contributed to claimant's pulmonary impairment.

Employer additionally asserts that the administrative law judge inaccurately characterized Dr. Dahhan's opinion with regard to the reversibility of claimant's respiratory impairment. Specifically, employer asserts that the administrative law judge substituted his opinion for that of the medical expert. In the August 3, 2006 report, Dr. Dahhan observed that "[claimant's] obstructive ventilatory defect is being treated with multiple bronchodilator agents indicating that his physician believes it is responsive to such measures, a finding that is inconsistent with the permanent adverse affects [sic] of coal dust on the respiratory system." Employer's Exhibit 1. At Section 718.202(a)(4), the administrative law judge found that Dr. Dahhan's opinion, that claimant's respiratory impairment is reversible, is contrary to the doctor's own objective medical testing, and thus, discounted it. Further, after noting that a finding of partial reversibility does not

[10] The administrative law judge stated that "[Dr. Dahhan's] opinion that coal dust, alone, could not have caused such a great decrease in pulmonary function does not speak to whether [c]laimant's impairment was 'significantly related to, or substantially aggravated by' his coal mine employment. §718.201(b)." 2009 Decision and Order on Remand at 7.

rule out the possibility that coal dust exposure contributed to claimant's respiratory impairment, the administrative law judge stated, "I find that treatment with bronchodilator agents is not sufficient evidence that [c]laimant's impairment is entirely reversible, and therefore, is not sufficient evidence to opine that coal dust played no contributing role in [c]laimant's obstructive lung impairment." 2009 Decision and Order on Remand at 7. To the extent that the administrative law judge discounted Dr. Dahhan's opinion because Dr. Dahhan relied on claimant's treatment with bronchodilator agents to find that his impairment is not caused by coal dust exposure, we hold that the administrative law judge impermissibly discounted Dr. Dahhan's opinion because it did not comply with his own medical conclusion that claimant's impairment is not entirely reversible because he was treated with bronchodilator agents. *Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984). Thus, we hold that the administrative law judge erred in mischaracterizing Dr. Dahhan's opinion and substituting his opinion for that of the medical expert.

In view of the foregoing, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and remand the case for further consideration of the medical opinion evidence in accordance with the APA.[11] *Wojtowicz*, 12 BLR at 1-165.

On remand, when considering the medical opinion evidence, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Because we herein vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) and remand the case for further consideration of all the evidence in accordance with the APA, if reached. On remand, the administrative law judge must consider the evidence in

[11] On remand, if the administrative law judge finds that the medical opinion evidence establishes the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), then he need not separately determine the etiology of the disease at 20 C.F.R. §718.203, as his findings at Section 718.202(a)(4) will necessarily subsume that inquiry. *Kiser v. L&J Equipment Co.*, 23 BLR 1-146, 1-159, n.18 (2006).

accordance with the disability causation standard set forth at 20 C.F.R. §718.204(c).[12] *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). The administrative law judge must specifically consider whether legal pneumoconiosis contributed to the miner's totally disabling respiratory impairment at 20 C.F.R. §718.204(c).

[12] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> > (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> >
> > (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge