

BRB Nos. 10-0209 BLA
and 10-0209 BLA-A

RONALD L. LYNCH)
)
Claimant-Petitioner)
)
v.)
)
OLD BEN COAL COMPANY)
)
and) DATE ISSUED: 12/08/2010
)
THE TRAVELERS COMPANIES,)
INCORPORATED)
)
Employer/Carrier-)
Respondents)
Cross-Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Cross-Petitioner) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck,
Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

Ann Marie Scarpino (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals the Decision and Order Denying Benefits (07-BLA-5426) of Administrative Law Judge Jeffrey Tureck rendered on a claim filed pursuant to the provisions of 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). In a Decision and Order dated November 5, 2009, the administrative law judge credited claimant with sixteen years of coal mine employment,¹ and found that the evidence did not establish the existence of either clinical² or legal³ pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits. The administrative law judge further found, assuming *arguendo* that claimant is entitled to benefits, that employer is not the responsible operator and that liability for the payment of any benefits must be transferred to the Black Lung Disability Trust Fund (the Trust Fund).

On appeal, claimant argues that the administrative law judge erred in permitting employer to submit two rebuttal readings of a June 26, 2006 x-ray, and in admitting certain reports by Drs. Tuteur and Rosenberg as rehabilitative evidence. Claimant further contends that the administrative law judge erred in weighing the x-ray, computed

¹ The Board will apply the law of the United States Court of Appeals for the Seventh Circuit, as claimant was last employed in the coal mining industry in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 5, 7.

² "Clinical pneumoconiosis" is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

³ "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive disease arising out of coal mine employment." A disease "arising out of coal mine employment" includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b).

tomography (CT) scan, and medical opinion evidence in finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). The Director has filed a response brief, urging the Board to vacate the administrative law judge's denial of benefits and remand this case for further consideration. The Director agrees with claimant that the administrative law judge erroneously admitted two rebuttal readings of the June 26, 2006 x-ray, and erred in weighing the x-ray and medical opinions pursuant to 20 C.F.R. §718.202(a)(1), (4). The Director has also filed a cross-appeal, contending that the administrative law judge erred in transferring liability to the Trust Fund. Employer has submitted a combined response brief, arguing in support of both the administrative law judge's denial of benefits and transfer of liability to the Trust Fund.⁴ The Director has filed a reply brief reiterating his contention, on cross-appeal, that the administrative law judge erred in transferring liability to the Trust Fund.

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

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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, 1-112 (1989).

After the issuance of the administrative law judge's Decision and Order Denying Benefits, amendments to the Act, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010, were enacted. The amendments, *inter alia*, revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption of total disability due to pneumoconiosis in cases where the miner has established fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4).

By Order dated May 28, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of the amendments made to the Act by Section 1556 of Public Law No. 111-148. The Director and claimant have responded, asserting that, because claimant was credited with sixteen years of coal mine employment, and

⁴ Because no party challenges the administrative law judge's finding of sixteen years of coal mine employment, or his finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

because his claim was filed after January 5, 2005, and was pending on March 23, 2010, the recent amendments affect this case. Director's Supplemental Brief at 4; Claimant's Supplemental Brief at 2.

We agree that Section 1556 affects this case. Because the administrative law judge credited claimant with sixteen years of coal mine employment, and employer conceded before the administrative law judge that claimant suffers from a totally disabling respiratory impairment, Employer's Closing Brief at 12, we must vacate the administrative law judge's denial of benefits, and remand this case for consideration of this claim pursuant to Section 411(c)(4). If the administrative law judge finds that claimant is entitled to the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether the medical evidence rebuts the presumption by showing that claimant does not have pneumoconiosis or that his total disability "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). The administrative law judge, on remand, must allow for the submission of evidence by the parties to address the change in law, consistent with the evidentiary limitations. *See* 20 C.F.R. §§725.414, 725.456.

Although we have vacated the denial of benefits, in the interest of judicial economy, we will address the parties' arguments regarding the administrative law judge's evidentiary rulings, his findings regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and his transfer of liability to the Trust Fund for the payment of any benefits.

Evidentiary Limitations

X-ray Rebuttal Evidence

Claimant contends, and the Director agrees, that the administrative law judge erred in admitting into evidence Dr. Scott's negative reading of the x-ray dated June 26, 2006. Claimant's contention has merit.

The June 26, 2006 x-ray was procured as part of the examination of claimant performed at the request of the Department of Labor (DOL). Dr. Whitehead, a dually qualified B reader and Board-certified radiologist, interpreted the x-ray on behalf of DOL and read it as positive for pneumoconiosis. Director's Exhibit 9. Claimant designated a positive reading by Dr. Alexander, a dually qualified physician, as rebuttal evidence. Claimant's Exhibit 3. Employer designated two negative readings by Drs. Wheeler and Scott, both of whom are dually qualified physicians, in rebuttal of the positive readings by Drs. Whitehead and Alexander. Employer's Exhibits 10, 15. At the hearing, the administrative law judge admitted, over claimant's objection, both of employer's x-ray interpretations on the ground that employer was entitled to rebut each positive reading of the June 26, 2006 x-ray. Hearing Transcript at 26. On reconsideration, the

administrative law judge again overruled claimant's objections. Order Denying Reconsideration of Evidentiary Ruling and Closing Record (Order) at 2.

Pursuant to 20 C.F.R. §725.414(a)(2)(ii), claimant was entitled to submit, in rebuttal of employer's case, one physician's interpretation of the x-ray submitted by the Director pursuant to 20 C.F.R. §725.406. 20 C.F.R. §725.414(a)(2)(ii). Claimant permissibly submitted the positive interpretation by Dr. Alexander as rebuttal evidence in response to the interpretation submitted by the Director. *See J.V.S. [Stowers] v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-83 (2008). Similarly, under 20 C.F.R. §725.414(a)(3)(ii), employer was entitled to submit, in rebuttal of claimant's case, one physician's interpretation of the x-ray submitted by the Director under 20 C.F.R. §725.406. 20 C.F.R. §725.414(a)(3)(ii). Employer permissibly submitted the negative interpretation by Dr. Wheeler as rebuttal to the interpretation submitted by the Director. Contrary to the administrative law judge's analysis, however, the regulation did not entitle employer to submit a second reading to rebut claimant's rebuttal reading. The regulations permit each party to submit one physician's interpretation of each x-ray interpretation that the opposing party submits in its affirmative case. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). The x-ray reading submitted by claimant was not an affirmative-case x-ray reading; it was a reading in rebuttal to the x-ray reading submitted by the Director. Thus, Dr. Scott's negative x-ray reading was not admissible as rebuttal evidence to claimant's x-ray reading.⁵

The administrative law judge alternatively found that, assuming an "employer generally cannot rebut so-called rebuttal evidence submitted by a claimant," employer established good cause for the submission of an additional x-ray reading in response to Dr. Alexander's rebuttal interpretation, pursuant to 20 C.F.R. §725.456. Order at 2. In finding good cause established, the administrative law judge stated:

[H]ad claimant's reading of [Dr. Whitehead's June 26, 2006 x-ray] been proffered as affirmative evidence rather than as rebuttal evidence, there is no doubt that employer would be entitled to rebut it; and since claimant did

⁵ The administrative law judge relied on *Elm Grove Coal Co. v. Director, OWCP [Blake]*, 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007), *J.V.S. [Stowers] v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78 (2008) and *Ward v. Consolidation Coal Co.*, 23 BLR 1-151 (2006), to find the employer should be permitted to submit two negative readings, by Drs. Wheeler and Scott, in rebuttal of the positive readings by Drs. Whitehead and Alexander. Employer's Exhibits 10, 15. These cases are distinguishable, as they addressed the rebuttal of x-ray readings submitted in each party's affirmative case, not x-ray readings offered in rebuttal. *See Blake*, 480 F.3d at 278, 23 BLR at 2-430; *Stowers*, 24 BLR at 1-84; *Ward*, 23 BLR at 1-155.

not designate any affirmative x-ray readings, he could have offered Dr. Alexander's reading as an affirmative reading. Employer should not be denied the opportunity to rebut claimant's evidence due to this ploy.

Order at 2.

While an administrative law judge has the discretion to permit the development of additional evidence pursuant to the "good cause" provision of 20 C.F.R. §725.456, under the facts presented here, the administrative law judge has failed to adequately explain his determination that claimant's adherence to the categories set forth in the regulations on evidentiary limitations justified the admission of employer's additional evidence.⁶ Thus, we vacate the administrative law judge's decision to admit the x-ray interpretation of Dr. Scott, and consequently, we must vacate the administrative law judge's finding that the x-ray evidence is negative for the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1).

Medical Reports

Claimant next contends that the administrative law judge erred in admitting into the record the December 18, 2008 medical report of Dr. Tuteur, and December 31, 2008 medical report from Dr. Rosenberg, contained at Employer's Exhibits 16 and 17, which were designated by employer as rehabilitative evidence under 20 C.F.R. §725.414. Because employer had submitted medical reports from Drs. Tuteur and Rosenberg just prior to the twenty-day deadline for the submission of evidence, in which the doctors reviewed and commented on Dr. Cohen's medical report, the administrative law judge granted claimant's request to submit an additional report from Dr. Cohen. After claimant submitted a December 2, 2008 supplemental medical report from Dr. Cohen, employer sought to submit the December 18, 2008 medical report of Dr. Tuteur, and December 31, 2008 medical report of Dr. Rosenberg, as rehabilitative evidence pursuant to 20 C.F.R. §725.414(a)(3)(ii), in response to Dr. Cohen's report. Employer's January 8, 2009 letter. Claimant objected to employer's additional medical opinions, asserting that, because Dr. Cohen's December 2, 2008 report did not directly criticize the opinions of Drs. Tuteur

⁶ In opposition to claimant's motion for reconsideration, employer urged the administrative law judge to find good cause for the submission of its additional x-ray interpretation. Employer asserted that to allow a claimant to submit a positive reading in rebuttal to the Department of Labor (DOL) physician's positive reading, without allowing employer to rebut both readings unfairly "stack[ed] the deck" in favor of claimant. Employer's Opposition to Claimant's Motion for Reconsideration at 5. The Board, however, has rejected the argument that it is unfair to allow the submission of a rebuttal reading that does not contradict the DOL reading. *Stowers*, 24 BLR at 1-83 n.5.

and Rosenberg, employer was not entitled to rehabilitate their opinions. Claimant's January 14, 2009 letter. Claimant asked that the reports be excluded, or that claimant be permitted to rehabilitate Dr. Cohen's opinion. Claimant's January 14, 2009 letter.

In his January 21, 2009 Order, the administrative law judge admitted the December 18, 2008 medical report of Dr. Tuteur, and December 31, 2008 medical report of Dr. Rosenberg, finding that their reports "clearly meet the definition of rehabilitative evidence," pursuant to 20 C.F.R. §725.414(a)(3)(ii). Order at 2. The administrative law judge did not address claimant's January 14, 2009 objection to employer's evidence, or his request to obtain a rehabilitative report from Dr. Cohen.

On appeal, claimant argues that the administrative law judge erred in admitting the December 18, 2008 medical report of Dr. Tuteur, and the December 31, 2008 medical report of Dr. Rosenberg, without first determining whether these reports meet the definition of rehabilitative evidence under 20 C.F.R. §725.414. Claimant's Brief at 10-12. Claimant maintains that, because Dr. Cohen did not criticize the opinions of Drs. Tuteur or Rosenberg, but simply buttressed his earlier opinion in response to their comments, employer was not entitled to rehabilitate their opinions. Claimant's Brief at 11.

Claimant, employer, and the administrative law judge have focused too narrowly on those parts of the evidentiary rules that provide for the rebuttal of specific objective tests underlying a medical report, such as x-ray readings, pulmonary function studies, and blood gas studies, and that provide for the submission of rehabilitative evidence following such rebuttal. As claimant asserts, under those rules, following rebuttal of an objective test, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (a)(3)(iii). These rules, however, do not provide for the rebuttal of medical reports themselves. Instead, a separate provision allows a party to respond to the other party's medical opinion evidence by having one or both of the doctors who prepared its affirmative medical reports review and address the opinion evidence. Specifically, Section 725.414(a) provides that "[a] medical report may be prepared by a physician who examined the miner and/or reviewed the available admissible evidence." 20 C.F.R. §725.414(a) (emphasis added); *see also* 64 Fed.Reg. 54995, (f) (October 8, 1999)(recognizing that a physician who prepares a medical report may address medical reports prepared by other physicians that are in the record and in conformance with the limitations). Thus, the salient question presented in this case is whether employer and claimant could submit a "supplemental report" in response to each other's affirmative medical reports. Since a medical report may be submitted by a physician who has examined the miner "and/or" reviewed admissible evidence, and the evidentiary limitations do not require that a "medical report" be contained in a single document, 20 C.F.R. §725.414(a)(1), employer's request that it be

allowed to submit responses to Dr. Cohen's report was consistent with the evidentiary limitations. *See generally Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-146-47 (2006); *C.L.H. [Hill] v. Arch on the Green, Inc.*, BRB No. 07-0133 BLA, slip op. at 4 (Oct. 31, 2007)(unpub.)(deferring to the Director's position that supplemental reports based on review of admissible evidence do not exceed the two-report limitation). Therefore, any error by the administrative law judge in failing to explain his determination that the supplemental reports submitted by employer constituted rehabilitative evidence, is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). However, it is not apparent that the administrative law judge considered claimant's request to submit a supplemental report from Dr. Cohen in response to employer's submissions. Thus, on remand, the administrative law judge should consider claimant's request, and determine, as is within his discretion, whether the admission of a supplemental report from Dr. Cohen is warranted.

Having addressed the parties' arguments regarding the application of the evidentiary limitations, we will now address the parties' contentions regarding the merits of the case.

Existence of Pneumoconiosis

X-ray Evidence

Claimant contends that the administrative law judge erred in his consideration of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). Specifically, claimant argues that, in addition to considering excess x-ray evidence, the administrative law judge improperly relied on the qualifications of Drs. Wheeler and Scott, and erred in resolving the conflicting x-ray evidence. Because we have vacated the administrative law judge's ruling admitting Dr. Scott's x-ray reading, we vacate the administrative law judge's finding that the x-ray evidence did not establish pneumoconiosis. Contrary to claimant's contention, however, in analyzing the negative x-ray interpretations of Drs. Scott and Wheeler, the administrative law judge did not err in considering their qualifications and other factors relevant to the level of radiological competence, such as a prestigious position teaching radiology. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-266, 2-280, 2-281 (7th Cir. 2001); *Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1983); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir). As claimant contends, however, both Drs. Whitehead and Alexander, who read claimant's x-rays as positive for pneumoconiosis, also held teaching positions in radiology, and we cannot discern from the administrative law judge's decision whether he considered this factor.⁷ *See Worhach*, 17 BLR at 1-108. Thus, on remand, the administrative law judge

⁷ Dr. Whitehead's curriculum vitae indicates that he has served as a lecturer at Indiana University Medical Center's Department of Radiology. Claimant's Exhibit 2.

should consider the radiological qualifications of all the physicians and provide a sufficient statement of findings and adequate rationale for his conclusions as required under the Administrative Procedure Act, 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). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Computed Tomography Scans

Claimant next asserts that, pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge erred in crediting the negative CT scan reading of record. Claimant's Brief at 16. Claimant contends that the CT scan was taken during claimant's hospitalization for heart surgery, and, therefore, is not probative as to the existence of pneumoconiosis. Claimant's Brief at 16.

Contrary to claimant's contention, the administrative law judge, in considering the CT scan evidence, permissibly concluded that it did not establish the existence of pneumoconiosis because the CT scan was specifically interpreted for the presence of lung disease, but did not mention the existence of pneumoconiosis.⁸ *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-9, 22 BLR 2-311, 2-318 (7th Cir. 2001); Decision and Order at 4; Employer's Exhibit 13 at 247-48.

Medical Opinion Evidence

Claimant also challenges the administrative law judge's finding that pneumoconiosis was not established by the medical opinion evidence at 20 C.F.R. §718.202(a)(4). Claimant asserts, and the Director agrees, that the administrative law judge improperly accorded less weight to the opinions of Drs. Houser and Cohen, that claimant has pneumoconiosis, than to the contrary opinions of Drs. Tuteur and Rosenberg. Claimant's Brief at 17-20.

In evaluating the medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge properly found

Dr. Alexander's curriculum vitae indicates that he has served as an Assistant Professor of Radiology and Nuclear Medicine at the University of Maryland Medical System, Department of Diagnostic Radiology. Claimant's Exhibit 3.

⁸ The administrative law judge noted that Dr. Ailjig interpreted the July 8, 2008 computed tomography scan as showing centrilobular emphysema, bilateral pleural effusions and old granulomatous disease, and added that "the remaining lungs appear unremarkable." Decision and Order at 4; Employer's Exhibit 13 at 247-48.

that Dr. Houser diagnosed both clinical coal workers' pneumoconiosis, based in part on a positive x-ray reading, and legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) and chronic bronchitis due to both cigarette smoking and coal dust exposure. Decision and Order at 4. The administrative law judge initially discredited Dr. Houser's diagnosis of clinical pneumoconiosis, because the June 26, 2006 x-ray upon which Dr. Houser relied was re-read as negative by more highly qualified readers. In light of our decision to vacate the administrative law judge's evaluation of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), we also vacate the administrative law judge's determination to discredit Dr. Houser's diagnosis of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge also discredited, as inconsistent, Dr. Houser's opinion as to the existence of legal pneumoconiosis, finding that, while Dr. Houser stated on his examination report that claimant's respiratory impairment is due to both coal workers' pneumoconiosis and smoking, he stated on an attached summary form that claimant's impairment is due solely to pneumoconiosis. Decision and Order at 4. We agree with claimant and the Director that the administrative law judge mischaracterized Dr. Houser's opinion as inconsistent.

In his narrative report dated August 1, 2006, Dr. Houser diagnosed coal workers' pneumoconiosis, "secondary to inhalation of coal dust and rock dust arising from [claimant's] 15 year employment [as a] coal miner," and COPD and chronic bronchitis "secondary to cigarette smoking and exposure to coal and rock dust." Director's Exhibit 9. Dr. Houser also diagnosed a respiratory impairment, and stated that "Coal Workers' Pneumoconiosis is a contributing factor, COPD is a significant contributing factor. The chronic bronchitis can be included with the COPD." Director's Exhibit 9. On the summary form, attached to his report, in response to the question of whether claimant has an occupational lung disease caused by his coal mine employment, Dr. Houser checked "yes," and stated that the basis for his diagnosis was "History of coal mine employment for 15 years, chest roentgenographic findings indicating 1/0 pneumoconiosis. He also has COPD- moderately severe." Director's Exhibit 9. In response to the question of whether the miner's pulmonary impairment is related to pneumoconiosis, or has another etiology, Dr. Houser responded, "The impairment is related to Coal Workers' Pneumoconiosis." *Id.* Contrary to the administrative law judge's characterization, Dr. Houser did not state that claimant's impairment is due "solely" to pneumoconiosis. Moreover, as claimant and the Director contend, by acknowledging that claimant's impairment "is related to" coal workers' pneumoconiosis, Dr. Houser has not precluded contribution by other causes as well. Thus, the administrative law judge erred in concluding that the diagnosis on Dr. Houser's narrative report is inconsistent with the diagnosis he provided on the attached summary form. *See Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 24 BLR 2-33 (7th Cir. 2007).

We further agree with claimant and the Director that the administrative law judge erred in his evaluation of Dr. Cohen's opinion. In his initial report dated September 5, 2008, Dr. Cohen diagnosed coal workers' pneumoconiosis, based a sixteen-year history of coal mine employment with significant coal mine dust exposure, symptoms consistent with chronic lung disease and chronic bronchitis, including cough, sputum production, dyspnea, and wheezing, and physical signs of chronic lung disease, including prolonged expiration. Dr. Cohen also opined that pulmonary function studies revealed moderately severe obstructive lung disease with moderate diffusion impairment, consistent with claimant's sixteen years of coal mine dust exposure and forty-three pack years of tobacco exposure. Claimant's Exhibit 1 at 6. Dr. Cohen noted that the record contained one positive x-ray reading for pneumoconiosis, and several negative readings, but concluded that, even "if the sum of the x-ray evidence were judged as negative, it would not change [his] opinion that [claimant] has clinical, physical exam, and physiological evidence of coal workers' pneumoconiosis related to coal dust exposure." Claimant's Exhibit 1 at 6. Dr. Cohen explained that there is no history of any other occupational exposure that could cause coal workers' pneumoconiosis or obstructive lung disease, that claimant's only other significant exposure was his forty-three pack years of cigarette smoking, and that "it is well known that coal mine dust like tobacco smoke can cause or contribute to [an] obstructive impairment like that in [claimant]." Claimant's Exhibit 1 at 6-7. Dr. Cohen further explained that objective tests alone do not reveal the cause of an obstructive impairment:

Pulmonary function studies do not distinguish between obstructive lung disease caused by coal mine dust and that caused by smoking. There is no specific physiologic pattern that will allow you to determine the toxic exposure which caused COPD, whether it is grain dust, coal mine dust, tobacco smoke, or some other occupational or environmental exposure. What lab testing does reveal is the presence, nature and extent of lung disease. Etiology, on the other hand, is determined primarily from patient history and what medical and scientific authority has established.

Claimant's Exhibit 1 at 9.

Considering Dr. Cohen's opinion, together with his additional statement that "it cannot be said with medical certainty that [claimant] would have the same obstructive lung impairment had he never been a coal miner," Claimant's Exhibit 5 at 4, the administrative law judge concluded that, "by Dr. Cohen's own admission he has no way of knowing whether claimant's obstructive lung disease resulted from his coal mining alone, his smoking, or a combination of both. Therefore, his diagnosis of coal workers' pneumoconiosis, be it clinical or legal, is not credible." Decision and Order at 5.

Contrary to the administrative law judge's conclusion, Dr. Cohen did not opine that he has "no way of knowing" whether coal dust contributed to claimant's obstructive lung disease. Rather, Dr. Cohen explicitly stated that claimant's obstructive impairment is due to both smoking and coal mine dust exposure. Claimant's Exhibit 1 at 10. Moreover, Dr. Cohen explained that, while objective testing cannot differentiate causes of obstructive lung disease, the medical studies showing that smoking and coal mine dust cause similar obstructive impairments, together with claimant's history of developing a significant impairment after his exposure to coal mine dust, support the conclusion that both smoking and coal mine dust contributed to the development of claimant's obstructive lung disease. Claimant's Exhibits 1, 5. Thus, substantial evidence does not support the administrative law judge's conclusion that Dr. Cohen did not explain the basis for his diagnosis. See *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 890-91, 22 BLR 2-514, 2-528-29 (7th Cir. 2002); *Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 670-71, 22 BLR 2-483, 2-490-91 (7th Cir. 2002). In light of the above-referenced errors, we also vacate the administrative law judge's finding that the evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). On remand, when reconsidering whether the medical opinion evidence establishes the existence of legal pneumoconiosis, the administrative law judge should address the comparative credentials of all of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. See *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988).

Responsible Operator

On cross-appeal, the Director argues that the administrative law judge erred in dismissing Old Ben Coal Company (Old Ben or employer) as the responsible operator on the ground that employer is not capable of assuming liability for payment of benefits, and in determining that the Trust Fund is liable for payment of any benefits ultimately awarded.

Claimant last worked as a miner for Old Ben, ending in May or June of 1990. It is undisputed that at that time, employer was self-insured under the Act through an indemnity bond issued by Aetna Casualty and Surety Company, under bond number 2S100302631 (the Aetna bond). Decision and Order at 7; Director's Exhibit 11. Subsequently, Old Ben was acquired by Zeigler Coal Company, and ultimately, became a

subsidiary of Horizon Natural Resources.⁹ Director's Exhibit 13 at 2. Horizon, and Old Ben, were later liquidated in bankruptcy.

Claimant filed his claim for benefits on February 14, 2006. Director's Exhibit 2. In the Notice of Claim issued on March 22, 2006, the district director named employer as the potentially liable operator, noting that Old Ben was self-insured. Because Horizon, Old Ben's parent company, was being liquidated in bankruptcy, the district director also notified The Travelers Companies (Travelers), as Aetna's successor. Director's Exhibit 11. Employer contested Old Ben's designation as the responsible operator, asserting that the district director did not establish that the Aetna bond continued to guarantee Old Ben's liabilities on the claim following Old Ben's dissolution in bankruptcy. Director's Exhibit 12. The district director issued a Proposed Decision and Order on December 15, 2006, finding claimant entitled to benefits and naming Old Ben as the operator responsible for payment of those benefits. Director's Exhibit 18. Travelers contested the award on Old Ben's behalf and requested a hearing, and the case was transferred to the Office of Administrative Law Judges.

By motion dated August 7, 2007, Old Ben requested that it and Travelers be dismissed from the case, asserting that its dissolution in bankruptcy absolved Old Ben and Travelers from any financial liability resulting from the claim. The Director opposed the motion, asserting that Old Ben was properly named as the responsible operator. By Order dated October 3, 2007, the administrative law judge granted Travelers intervenor status, but declined to rule on its motion as premature, stating that the issue would be addressed at the hearing. At the hearing, the Director asserted that Old Ben's capability to assume liability was established by the regulatory presumption at 20 C.F.R. §725.495(b),¹⁰ and that employer had not rebutted the presumption, as required by 20 C.F.R. §725.495(c). Hearing Tr. at 16-18. Travelers argued that the Section 725.495(b) presumption was rebutted by Old Ben's liquidation in bankruptcy. Hearing Tr. at 16-18; Old Ben's Closing Brief at 9.

In his Decision and Order Denying Benefits, the administrative law judge determined that employer was not the responsible operator, finding that the Director did

⁹ In turn, Old Ben's liabilities were subsequently secured by a second Aetna bond, and later, through a bond issued by Frontier Insurance Company (the Frontier Bond). Director's Exhibit 14.

¹⁰ Section 725.495(b) provides that "[i]t shall be presumed, in the absence of evidence to the contrary, that the designated responsible operator is capable of assuming liability for the payment of benefits in accordance with §725.494(e)." 20 C.F.R. §725.495(b).

not meet his burden of proving that Old Ben is financially capable of assuming its liability for the payment of benefits. Decision and Order at 6-8. Specifically, the administrative law judge found that, while employer met the criteria set forth at 20 C.F.R. §725.494(a)-(d),¹¹ it was not financially capable of assuming liability, and thus, did not meet the criteria of Section 725.494(e). Decision and Order at 7.

The regulation at 20 C.F.R. §725.494(e) provides that an operator will be deemed capable of assuming liability for benefits if one of three conditions is met: 1) the operator is covered by a policy or contract of insurance in an amount sufficient to secure its liability; 2) the operator was self-insured, during the period in which the miner was last employed by the operator, and there was a security given by the operator pursuant to 20 C.F.R. §726.104(b), that is sufficient to secure the payment of benefits; or 3) the operator possesses sufficient assets to secure the payment of benefits as awarded under the Act. 20 C.F.R. §725.494(e)(1)-(3). In order to qualify as a self-insured operator, the regulations permit the operator to give a security “[i]n the form of an indemnity bond with sureties [in an amount] that is satisfactory to the [Office of Workers’ Compensation Programs].” 20 C.F.R. §726.104(b).

The administrative law judge found that, although “Old Ben once qualified as a self-insurer,” because it had “since been liquidated and can no longer pay benefits,” the question became whether the security given by Old Ben to secure its liability, pursuant to 20 C.F.R. §726.104(b), was sufficient to secure the payment of benefits in the event the claim is awarded. Decision and Order at 7. Thus, the administrative law judge found that the issue turned on whether the Director met his burden to establish that there is a valid surety bond sufficient to pay the claim. The administrative law judge concluded that, although the Director asserted that a surety bond, number 2S100302631 held by Aetna Casualty & Surety, exists, the Director failed to produce the bond and, therefore, failed to prove either its existence or its validity. Therefore, the administrative law judge concluded that the Director failed to establish that Old Ben’s liability for this claim is covered by a surety bond. The administrative law judge therefore ruled that Old Ben could not be the responsible operator, and that the Trust Fund would be liable for the payment of any benefits.

¹¹ In order to qualify as a “potentially liable operator,” the miner’s disability or death must have arisen out of employment with the operator or its successor, the operator or successor must have been in business after June 30, 1973, the operator or successor must have employed the miner for a cumulative period of not less than one year, the employment must have occurred after December 31, 1969, and the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

We agree with the Director that the administrative law judge erred in placing the burden of proof on the Director to establish Old Ben's financial capability to pay benefits through the existence of a valid surety bond. As the administrative law judge found, it is undisputed that Old Ben met the first four criteria of a potentially liable operator set forth at 20 C.F.R. §725.494(a)-(d).¹² Decision and Order at 6-7. The administrative law judge also found, correctly, that Old Ben was an authorized self-insurer. Decision and Order at 7. Thus, contrary to the administrative law judge's finding, Old Ben met all of the criteria of a potentially liable operator, including the requirement of Section 725.494(e), that it be financially capable of assuming payment for its liabilities under the Act. The posting of a surety bond pursuant to 20 C.F.R. §726.104(b), fulfilled that requirement. Therefore, Old Ben was properly named as a potentially liable responsible operator by the Director, pursuant to Section 725.494. 20 C.F.R. §725.494(e)(2); Decision and Order at 7; Director's Brief at 8.

Contrary to the administrative law judge's finding, once the Director has properly named a potentially liable operator, the Director no longer bears the burden of establishing that the named operator continues to be capable of paying benefits. Rather, the regulation specifically provides that "[i]t shall be presumed, in the absence of evidence to the contrary, that the designated responsible operator is capable of assuming liability for the payment of benefits in accordance with §725.494(e)." 20 C.F.R. §725.495(b). The named operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability or that another operator that more recently employed the miner is financially capable of doing so. 20 C.F.R. §725.495(c).

The Director has established that there was a surety bond posted by Old Ben when it was authorized to self-insure, pursuant to 20 C.F.R. §726.104(b). Employer concedes that Old Ben secured its liabilities through a bond issued by Aetna Casualty and Surety Company, but argues that the original bond is no longer valid, or has been replaced by subsequent bonds, including the Frontier bond. Employer's Response Brief at 28 n.7; Employer's Closing Brief at 11; Director's Exhibits 13 at 2-3, 14 at 14. However, as the Director asserts, the administrative law judge has no jurisdiction to decide whether a surety bond is valid, as that is an issue to be decided in federal district court. *See* 28 U.S.C. §§1342, 1345; 30 U.S.C. §934. The Board also lacks jurisdiction to decide this issue; therefore, we decline to address employer's arguments with regard to this issue on

¹² As the administrative law judge found, Old Ben was claimant's last coal mine employer. Old Ben was also claimant's only coal mine employer, and, therefore, any coal mine related disability could only have arisen from claimant's employment with Old Ben. Further, Old Ben was an operator after June 30, 1973, claimant was employer by Old Ben for more than one year, and he worked after December 31, 1969. Decision and Order at 6-7.

appeal. The Trust Fund is currently paying benefits to claimant and, while the Trust Fund may be required to continue such payments in the future, the Director first must have an award of benefits issued against employer in order to enforce liability on the surety bond in federal district court. 30 U.S.C. §934(b)(4)(A); 20 C.F.R. §725.604. Thus, because employer is the responsible operator, we vacate the administrative law judge's determination that the Trust fund is liable for any benefits ultimately awarded on this claim.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge