BRB Nos. 98-0397 BLA
and 98-0397 BLA-A

GLORIA MARIE HOUGH (Widow of CHARLES MELVIN HOUGH)	)	
Claimant-Respondent/ Cross-Petitioner	)	
v.	)	
VALLEY CAMP COAL COMPANY	)	DATE ISSUED:
Employer-Petitioner/ Cross-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order of George P. Morin, Administrative Law Judge, United States Department of Labor.

Barbara E. Holmes (Blaufeld, Wood & Schiller), Pittsburgh, Pennsylvania, for claimant.

Ronald B. Johnson (McDermott & Bonenberger, P.L.L.C.), Wheeling, West Virginia, for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals and claimant[1] cross-appeals the Decision and Order of

[1]Claimant, Gloria M. Hough, is the surviving widow of the miner, Charles M. Hough, who died on November 1, 1995. The death certificate lists the cause of death as pneumonia with no other factors or causes listed. Director's Exhibit 6

Administrative Law Judge George P. Morin awarding benefits on the miner's claim (97-BLA-0119) and denying benefits on the survivor's claim (97-BLA-0120) which were filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge found that the evidence established a coal mine employment history of approximately forty years, Decision and Order at 3. The administrative law judge further found, with regard to the miner's claim, that the newly submitted x-ray evidence, *i.e.*, that evidence submitted since the previous denial, established a material change in conditions pursuant to 20 C.F.R. §725.309, under the holding of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, *rev'g en banc* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Decision and Order at 6-8. The administrative law judge also found that the newly submitted evidence established the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c) and that, based on Dr. Reedy's opinion, the evidence established that the totally disabling respiratory impairment was due to

---

(Widow's Claim). The miner initially filed a claim on January 17, 1980 which was ultimately denied in a Decision and Order issued by Administrative Law Judge Ralph Musgrove on June 26, 1990. Director's Exhibit 28. Judge Musgrove found that claimant was unable to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a). The miner took no further action until the filing of a second claim on June 6, 1995. The district director made an initial finding of entitlement on the miner's claim. Director's Exhibit 18 (Widow's Claim). After the miner's death on November 1, 1995, claimant, on December 13, 1995, filed a survivor's claim. On November 19, 1997, the administrative law judge issued the Decision and Order which is the subject of these appeals.

pneumoconiosis. Decision and Order at 9-10. Accordingly, benefits were awarded on the miner's claim.

With regard to the survivor's claim, the administrative law judge found that while claimant had established the existence of pneumoconiosis, the evidence of record failed to establish that the miner's death was due to that pneumoconiosis. Decision and Order at 10-12. Accordingly, the administrative law judge denied benefits on the survivor's claim.[2]

[2]We note that claimant is not eligible for benefits on a derivative basis. *See* 30 U.S.C. §901(a); 20 C.F.R. §725.212; *Smith v. Camco Mining Inc.*, 13 BLR 1-17, 1-18-22 (1989); *cf. Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

On appeal, employer contends that, pursuant to the miner's claim, the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(1). Employer further contends that the administrative law judge erred in finding total disability established pursuant to Section 718.204(c). Claimant, in response, urges affirmance of the award of benefits on the miner's claim. On cross-appeal, claimant contends that the administrative law judge erred in denying survivor's benefits as the administrative law judge erred in according less weight to the opinion of Dr. Gaziano than to the opinion of Dr. Altmeyer. Employer responds to claimant's appeal and urges affirmance of the administrative law judge's denial of survivor's benefits.[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in finding that the newly submitted x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Specifically, employer contends that the adminsitrative law judge erroneously discredited the negative x-ray interpretations of Drs. Orr and DeMarino, Director's Exhibits 11, 12, (Widow's Claim) merely based on the fact that these physicians were retained by employer. Employer further contends that the administrative law judge erred in failing to consider Dr. Caruso's interpretation of an October 24, 1995 x-ray. Director's Exhibit 6 (Widow's Claim), as a negative interpretation.

[3]We affirm, as unchallenged, the administrative law judge's length of coal mine employment determination, his finding that total disability was not demonstrated pursuant to Section 718.204(c)(2) and (3), and his finding that claimant carried his burden at Section 718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In finding that the newly submitted evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge considered seven interpretations of two x-rays, Director's Exhibits 9-12 (Widow's Claim); Director's Exhibits 12-14 (Miner's Claim), and, in a permissible exercise of his discretion, accorded greatest weight to the interpretations of those physicians with the dual qualification of B-readers and board-certified radiologists.[4] The administrative law judge, however, accorded less weight to the negative interpretations of Drs. Orr and DeMarino, who possessed the same dual qualifications, based on the fact that these physicians were hired by employer. Contrary to the administrative law judge's determination, unless the physicians retained by the parties are properly held to be biased, the interpretations of these physicians may not be discounted on this basis. *See Underwood v. Elkay Mining*, 105 F.3d 946 (4th Cir. 1997); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *see generally Cochran v. Consolidated Coal Co.*, 16 BLR 1-101 (1992); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1992). Inasmuch as the administrative law judge has not considered any specific evidence of bias, we vacate the administrative law judge's findings discrediting these physicians and remand the case to the administrative law judge for further consideration of their x-ray interpretations.

Contrary to employer's assertion, however, the x-ray interpretation of Dr. Caruso does not specifically address the existence of pneumoconiosis and as such does not constitute probative evidence at Section 718.202(a)(1). *See* 20 C.F.R. §718.202(a)(1). We, therefore, vacate the administrative law judge's determination that the newly submitted x-ray evidence established a material change in conditions by demonstrating the existence of pneumoconiosis and remand the claim for further consideration of that evidence. We further hold that, if the administrative law judge again determines that the newly submitted x-ray evidence establishes a material change in conditions at 718.202(a)(1), then he must consider the entirety of x-ray evidence of record in order to determine whether such evidence establishes the

[4]A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16 , 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Rutter, supra*; *see Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Finally, with regard to existence of pneumoconiosis, if, on remand, the administrative law judge determines that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), then consideration must be given to the entirety of medical opinion evidence of record in order to determine whether such evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4).[5]

Employer further contends that the administrative law judge erred in finding that the evidence established a totally disabling respiratory impairment pursuant to Section 718.204(c). Employer asserts that the administrative law judge erred in discrediting the May 26, 1995 pulmonary function study of Dr. Altmeyer, which produced non-qualifying[6] values, Director's Exhibit 14 (Miner's Claim). In addition to the non-qualifying May 26, 1995 study of Dr. Altmeyer, the administrative law judge found that the newly submitted evidence consisted of a qualifying pulmonary function study dated April 5, 1995, Director's Exhibit 7 (Miner's Claim). The administrative law judge, after noting Dr. Altmeyer's statement that the May 26, 1995 pulmonary function study "failed to yield technically acceptable results," the administrative law judge concluded that the pulmonary function evidence demonstrated total disability at Section 718.204(c)(1). Decision and Order at 9. The record, however, contains testimony by Dr. Altmeyer which calls into question the validity of the qualifying study of April 5, 1995, and other statements by Dr. Altmeyer indicating why the non-qualifying May 26, 1995 pulmonary function study he conducted reflected an accurate assessment of claimant's respiratory capacity. Employer's Exhibit 1 (Miner's Claim). Accordingly, we vacate the administrative law judge's

[5]Inasmuch as there is no autopsy or biopsy evidence and no evidence of complicated pneumoconiosis in these claims filed subsequent to January 1, 1982, and the miner died subsequent to March 1, 1978, claimant is not eligible for any of the presumptions found at 20 C.F.R. §718.304-306, and thus is precluded from establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(2), (3). Director's Exhibit 1 (Widow's Claim); Director's Exhibit 1 (Miner's Claim); 20 C.F.R. §§718.202(a)(2), (3), 718.304, 718.305, 718.306.

[6]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. §718.204, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

determination that total disability was demonstrated pursuant to Section 718.204(c)(1) and remand the claim for consideration of all the relevant evidence at Section 718.204(c)(1). *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979); *see also Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986).

In finding that total disability was demonstrated pursuant to Section 718.204(c)(4), the administrative law judge accorded greatest weight to the newly submitted opinion of Dr. Reedy, who found that the miner's respiratory impairment rendered him unable to return to his previous coal mine employment, Director's Exhibit 6 (Widow's Claim). Decision and Order at 10. The administrative law judge further accorded little weight to the opinion of Dr. Altmeyer, that claimant was not totally disabled, Director's Exhibit 28 (Miner's Claim); Employer's Exhibit 1 (Miner's Claim), as the administrative law judge determined that the physician based his conclusion on an invalid pulmonary function study. Contrary to the administrative law judge's determination, however, Dr. Altmeyer conducted a thorough medical examination and demonstrated a familiarity with the requirements of claimant's most recent coal mine employment. Moreover, Dr. Altmeyer explained in his testimony the rationale for his determination that the study is an accurate reflection of claimant's respiratory capacity. *See* discussion*, supra*; *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989) (*en banc*)*; Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *see also Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989). Accordingly, we vacate the administrative law judge's determination that total disability was demonstrated pursuant to Section 718.204(c)(4) and remand for further consideration of Dr. Altmeyer's opinion. We further hold that, if reached on remand, the administrative law judge must weigh all the probative evidence, like and unlike, together in order to determine whether such a evidence supports a finding of total disability pursuant to Section 718.204(c). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*. 9 BLR 1-195 (1986). Previously, the administrative law judge failed to weigh all the evidence together, instead he based his finding of total disability on the affirmative evidence at Section 718.204(c)(1) and (4), without any consideration of the contrary probative evidence. Such a finding violates the Administrative Procedure Act (the APA), which 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). Accordingly, we vacate the administrative law judge's

determination that total disability was established pursuant to Section 718.204(c), and remand the claim for further consideration on this issue, if reached.

Turning to the survivor's claim, on cross-appeal, claimant contends that the administrative law judge erred in finding no entitlement to benefits, asserting, specifically, that the opinion of Dr. Gaziano, that the miner's death was due to pneumoconiosis, Director's Exhibit 6 (Widow's Claim), supports a finding of entitlement on the survivor's claim and that the administrative law judge erred in disregarding the opinion in favor of Dr. Altmeyer's opinion that the miner's death was due to pneumonia and that pneumoconiosis in no way hastened his death, Employer's Exhibit 1 (Widow's Claim).

In order to establish entitlement to benefits on a survivor's claim pursuant to Section 718.205, a claimant must establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2). *See Neeley v. Director, OWCP,* 11 BLR 1-85 (1988); *Foreman v. Peabody Coal Co.*, 8 BLR 1-371 (1985). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held that a substantially contributing factor is any condition which hastens the miner's death. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *see Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 20 BLR 2-335 (10th Cir. 1996); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993*)*; *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

In considering entitlement on the survivor's claim, the administrative law judge found that only the opinion of Dr. Gaziano attributed the death of the miner to pneumoconiosis, but permissibly concluded that the opinion did not constitute a well-reasoned opinion as the physician did not explain his conclusion. *See Clark, supra; Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp*. 8 BLR 1-46 (1985). As the record is devoid of any further evidence supporting a finding that the miner's death was due to pneumoconiosis, *see Shuff*, *supra,* we must affirm the administrative law judge's determination that claimant was not entitled to survivor's benefits.[7] *See* 20 C.F.R. §718.205(c).

[7]In view of the fact that the record contains no credible medical opinion

supporting claimant's burden of demonstrating that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), we need not address claimant's contentions regarding Dr. Altmeyer's opinion. *See generally Coen v. Director, OWCP*, 7 BLR 1-30 (1984).

Accordingly, the Decision and Order of the administrative law judge awarding benefits on a miner's claim and denying benefits on a survivor's claim is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge