

BRB No. 03-0303 BLA

EARL EVANS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIXIE PINE COAL COMPANY)	DATE
02/25/2004)	ISSUED:
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits of Administrative Law Judge Daniel F. Solomon on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

amended, 30 U.S.C. §901 *et seq.* (the Act).¹ The administrative law judge credited claimant with nineteen years of coal mine employment and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718.² The administrative law judge found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).³ On the merits, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge further found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).⁴ In addition, the administrative law judge found the evidence

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

²Claimant's first claim was filed with the Social Security Administration on July 24, 1970. Director's Exhibit 31. After several administrative denials by the Social Security Administration and the Department of Labor, this claim was dismissed with prejudice by Administrative Law Judge Giles J. McCarthy on September 28, 1987. *Id.* Claimant's second claim was filed on October 26, 1992. Director's Exhibit 32. This claim was denied by the Department of Labor on May 7, 1993. *Id.* On February 28, 1994, claimant filed a third claim, which the Department of Labor construed as a request for modification. *Id.* However, the Department of Labor denied claimant's request for modification on April 28, 1994. *Id.* On April 16, 1996, claimant filed another request for modification, which the Department of Labor denied as untimely filed. *Id.* Claimant's fourth claim was filed on November 24, 1997. Director's Exhibit 33. This claim was denied by the Department of Labor on February 11, 1998. *Id.* In a letter dated March 24, 1999, claimant advised the Department of Labor that he was submitting a medical report. Although the Department of Labor construed claimant's March 24, 1999 letter as a request for modification, it denied this request as untimely filed. *Id.* Claimant's most recent claim was filed on May 17, 1999. Director's Exhibit 1.

³The revisions to the regulation at 20 C.F.R. §725.309 apply only to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2.

⁴Although the administrative law judge cited 20 C.F.R. §718.204(c)(2) (2000), the revised regulation at 20 C.F.R. §718.204(b)(2)(ii) applies to this claim, which was pending on January 19, 2001.

sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge's adjudication of claimant's duplicate claim violates the doctrine of *res judicata*. Employer also contends that claimant's duplicate claim was untimely filed. Further, employer contends that the administrative law judge erred in finding the evidence sufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000). In addition, employer challenges the administrative law judge's findings at 20 C.F.R. §§718.202(a), 718.204(b)(2)(ii), 718.204(b)(2) overall and 718.204(c). Lastly, employer challenges the administrative law judge's award of augmented benefits payable to claimant on behalf of his grandchild. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), also responds, urging the Board to reject employer's contention that the administrative law judge's adjudication of claimant's duplicate claim violates the doctrine of *res judicata*. The Director further urges the Board to reject employer's contention that claimant's duplicate claim was untimely filed. The Director additionally urges the Board to reject employer's contention that claimant failed to prove that his pneumoconiosis is latent and progressive before the administrative law judge found that the newly submitted evidence established the existence of pneumoconiosis.⁵

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).

Initially, employer contends that the administrative law judge's adjudication of claimant's duplicate claim violates the doctrine of *res judicata*. In *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him to assess whether the evidence is sufficient to establish a material

⁵Employer filed a brief in reply to the response briefs of claimant and the Director, Office of Workers' Compensation Programs, reiterating its prior contentions.

change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). The court also held that the doctrine of *res judicata* does not apply to the material change in conditions standard it adopted. *Ross*, 42 F.3d at 998, 19 BLR at 2-20. With regard to the material change in conditions standard in *Ross*, the court stated:

It affords a miner a second chance to show entitlement to benefits under the Act. The interpretation implicitly recognizes that the doctrine of *res judicata* is not implicated by the claimant's physical condition or extent of his disability at two different times.

Id. In view of the Sixth Circuit's holding in *Ross* that the doctrine of *res judicata* does not apply to a determination of whether a material change in conditions is established at 20 C.F.R. §725.309 (2000), we reject employer's contention that the administrative law judge's adjudication of claimant's duplicate claim violates the doctrine of *res judicata*. *Id.*; see also *Sellards v. Director, OWCP*, 17 BLR 1-77 (1993).

Next, citing *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BRB 2-288 (6th Cir. 2001), employer contends that claimant's duplicate claim was untimely filed. Employer's contention is based on the premise that the instant claim is barred by 20 C.F.R. §725.308 because it was not filed within three years after the communication to claimant of a medical determination that he is totally disabled due to pneumoconiosis. The Director responds, contending that employer has waived its right to raise the issue of timeliness of the claim.

First, we will address the Director's contention that employer has waived its right to raise the issue of timeliness of the claim. Section 422(f) of the Act, 30 U.S.C. §932(f), as implemented by Section 725.308, requires that a claim be filed within three years of a medical determination of total disability due to pneumoconiosis that is communicated to the miner or claimant. The Board has held that this time limitation does not bar the filing of a duplicate claim, as Section 725.308 applies only to the filing of claimant's initial Part C claim and that the filing of any subsequent claims need not comply with the statute of limitations. *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990); *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990). In *Kirk*, however, the Sixth Circuit held:

The three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to [Ross], the clock may only be turned back if the miner returns to the mines after a

denial of benefits. There is thus a distinction between premature claims that are unsupported by a medical determination...and those claims that come with or acquire such support. Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course he may continue to pursue pending claims.

Kirk, 244 F.3d at 608, 22 BLR at 2-298-299. Subsequently, in *Furgerson v. Jericor Mining*, 22 BLR 1-216 (2002)(*en banc*), the Board held that the statute of limitations language in *Kirk* was not dicta. Employer did not contest the timeliness of the instant claim prior to this appeal before the Board. Director's Exhibit 34. While an appellate court generally will not address an issue that was not presented below, an exception is made when raising the issue would have been futile. *Youakim v. Miller*, 425 U.S. 231 (1976); *Peabody Coal Co. v. Greer*, 62 F.3d 801, 19 BLR 2-235 (6th Cir. 1995); *The Youghiogheny and Ohio Coal Co. v. Warren*, 841 F.2d 134, 11 BLR 2-73 (6th Cir. 1987); *Kyle v. Director, OWCP*, 819 F.2d 139, 10 BLR 2-112 (6th Cir. 1987), *cert. denied*, 488 U.S. 997 (1988). The Sixth Circuit issued its decision in *Kirk* on September 6, 2001, almost a year before the August 20, 2002 hearing in this case. However, the Board did not issue its decision in *Furgerson* until September 30, 2002, a month after the hearing. Since the Board, in *Furgerson*, clarified its position that the statute of limitations language in *Kirk* was not dicta only after the hearing was held in the instant case, it would have been futile for employer to raise this issue before the district director or the administrative law judge. *Youakim*, 425 U.S. at 234-235; *Greer*, 62 F.3d at 806, 19 BLR at 2-242; *Warren*, 841 F.2d at 138, 11 BLR at 2-79; *Kyle*, 819 F.2d at 142, 10 BLR at 2-115. Consequently, we hold that employer did not waive the issue of timeliness, and thus, we will consider employer's arguments regarding this issue. *Furgerson*, 22 BLR at 1-222; *Abshire v. D & L Coal Co.*, 22 BLR 1-202 (2002).

Employer contends that the medical evidence submitted in the 1992 claim rebuts the presumption of timeliness in Section 725.308 in light of *Kirk*, as employer need only show that a medical determination of total disability due to pneumoconiosis was communicated to the claimant more than three years prior to the duplicate claim filing. Employer relies upon Dr. Hudson's February 19, 1993 report wherein he diagnosed chronic obstructive bronchitis related to smoking and coal dust exposure and opined that claimant is disabled for mining. Director's

Exhibit 32. In assessing the extent to which the diagnosed condition contributes to the impairment, Dr. Hudson stated, “[c]an’t partition amount from smoking [and] mining.” *Id.* Employer asserts that because Dr. Hudson’s opinion satisfies the statutory requirements for a diagnosis of total disability due to pneumoconiosis that was communicated to claimant, claimant’s 1999 claim is untimely. Employer further maintains that rebuttal of the presumption of timeliness is accomplished despite the fact that the prior evidence favorable to claimant was not credited. Employer contends that under Section 725.308, the clock begins to run the first time that a miner is told that he is totally disabled by pneumoconiosis, even if the diagnosis is found not to be supported by the weight of the medical evidence.

Section 725.308 includes a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(c). Whether the evidence in a particular case is sufficient to establish rebuttal of this presumption involves substantial *factual* findings that are appropriately made by the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989)(*en banc*) (emphasis added). Moreover, the Sixth Circuit has held that “[w]hen the administrative law judge fails to make important and necessary factual findings, the proper course for the Board is to remand the case. . . .” *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *see Peabody Coal Co. v. Greer*, 62 F.3d 801, 19 BLR 2-233 (6th Cir. 1995); *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990). The administrative law judge did not make a factual determination with respect to whether the evidence is sufficient to establish rebuttal of the presumption that the instant claim was timely filed. Since it is the administrative law judge’s duty to make factual determinations, we vacate the administrative law judge’s award of benefits and remand this case to the administrative law judge to address whether claimant’s 1999 duplicate claim was timely filed. *Kirk*, 244 F.3d at 608, 22 BLR at 2-298-299; *Adkins v. Donaldson Coal Co.*, 19 BLR 1-34 (1993); *Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-95 (1994); *Clark*, 12 BLR at 1-151-152. If, on remand, the administrative law judge finds the evidence of record sufficient to establish rebuttal of the presumption that this claim was timely filed, he must provide claimant with an opportunity to show whether any extraordinary circumstances exist that should avoid dismissal of his claim. 20 C.F.R. §725.308(c).

In the interest of completeness, we will discuss employer’s other contentions of error. Employer contends that the administrative law judge erred in finding the evidence sufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000). Specifically, employer asserts that the administrative law judge’s material change in conditions analysis does not comply with *Ross*. The administrative law judge stated that “[p]rior to the submission of Dr. Rasmussen’s report, the evidence clearly showed that the [c]laimant either did not suffer from pneumoconiosis, and even if he had, any respiratory problems were produced by

tobacco usage.” Decision and Order at 12-13. Citing *Ross*, the administrative law judge stated that “Dr. Rasmussen’s report provides new and material evidence, and combined with new evidence from Dr. Kabir, it is reasonable that the new evidence differs ‘qualitatively’ from evidence submitted with the prior claim and therefore[] a material change in conditions is established.” *Id.* at 13.

As previously noted, the Sixth Circuit in *Ross* held that an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him to assess whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). *Ross*, 42 F.3d at 997, 19 BLR at 2-18. The administrative law judge did not consider all of the newly submitted evidence in determining whether the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000). Rather, the administrative law judge only weighed the favorable newly submitted opinions of Drs. Rasmussen and Kabir. Thus, we vacate the administrative law judge’s finding that the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000) and remand the case for further consideration thereunder in accordance with *Ross*, if reached.⁶

Next, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). In addressing the issue of pneumoconiosis, the administrative law judge stated:

In *Island Creek Coal Co. v. Compton*, 211 F.3d 203 [, 22 BLR 2-162] (4th Cir. 2000), the Fourth Circuit held that an administrative law judge must weigh all evidence together under 20 C.F.R. §718.202(a) to determine whether the miner suffered from the disease. This is contrary to the Board’s view that an administrative law judge may weigh the evidence under each subsection separately, i.e. x-ray evidence at §718.202(a)(1) is weighed apart from the medical opinion evidence at §718.202(a)(4). In [Furgerson v. Jericol Mining, 22 BLR 1-216 (2002)(*en banc*)], a case arising in the

⁶If reached on remand, the administrative law judge should reconsider the medical opinion evidence at 20 C.F.R. §725.309 (2000) in light of the District of Columbia Circuit’s decision 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)(interpreting 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). See also 68 FR at 69931-69932 (Dec. 15, 2003).

Sixth Circuit, the Board declined to apply the Fourth Circuit's holding in [*Compton*], which required that a determination of the presence of pneumoconiosis be based on weighing all types of evidence under 20 C.F.R. §718.202 together. Rather, the Board noted that "the Sixth Circuit has often approved the independent application of the subsections of Section 718.202(a) to determine whether claimant has established the existence of pneumoconiosis."

In an abundance of caution, I will do both.

Decision and Order at 16-17 (footnote omitted). The Sixth Circuit has not adopted the Fourth Circuit's decision in *Compton* that requires an administrative law judge to weigh all evidence together at 20 C.F.R. §718.202(a). Thus, since *Compton* does not apply to the instant case, and since Section 718.202(a) provides alternative methods by which a claimant may establish the existence of pneumoconiosis, 20 C.F.R. §718.202(a); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985), we hold that the administrative law judge erred by weighing the x-ray evidence and the medical opinion evidence together in finding the existence of pneumoconiosis established. If reached on remand, the administrative law judge must provide separate and distinct findings on the merits with respect to the x-ray evidence at 20 C.F.R. §718.202(a)(1) and the medical opinion evidence at 20 C.F.R. §718.202(a)(4).

With regard to the x-ray evidence at 20 C.F.R. §718.202(a)(1), employer asserts that the administrative law judge mischaracterized the x-ray readings of Drs. Rodgers and Pendergrass as inconclusive. Decision and Order at 17-18. Dr. Rodgers classified a February 21, 1980 x-ray as 0/1, Director's Exhibit 31, and Dr. Pendergrass classified a February 19, 1993 x-ray as 0/1, Director's Exhibit 32. An x-ray classified as 0/1 constitutes a negative reading because it does not constitute evidence of pneumoconiosis under the ILO-U/C Classification. 20 C.F.R. §718.102(b). Thus, since Drs. Rodgers and Pendergrass provided negative x-ray readings, we hold that the administrative law judge erred in characterizing their x-ray readings as not conclusive. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Employer also asserts that the administrative law judge erred in ignoring the relevant qualifications of the physicians who read the x-rays. Specifically, employer asserts that the administrative law judge should have accorded greater weight to the physicians who are dually qualified as B readers and Board-certified radiologists. Contrary to employer's assertion, the administrative law judge considered the relative qualifications of the physicians. The administrative law judge noted which physicians are B-readers and/or Board-certified radiologists and which physicians did not possess either of these qualifications. Decision and Order at 14-15. While an administrative law judge may accord greater weight to the physicians who are dually qualified as B readers and Board-certified

radiologists, he is not required to do so. *Scheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); *see also McMath v. Director*, OWCP, 12 BLR 1-6 (1988). Thus, we reject employer's assertion that the administrative law judge erred in ignoring the relevant qualifications of the physicians who read the x-rays.

Employer further asserts that the administrative law judge erred in according greater weight to the positive reading of the February 14, 2001 x-ray by Dr. Patel than to the negative readings of the same x-ray by Drs. Wiot and Perme. In weighing the conflicting interpretations of the February 14, 2001 x-ray, the administrative law judge stated:

I also must discount the opinions of Dr. Wiot and Dr. Perme as to their opinions concerning the February 14, 2002 (sic) x-ray as their diagnoses are not accurate when the other evidence is considered. The full weight of evidence, from well qualified internists and pulmonologists shows that the [c]laimant has chronic obstructive pulmonary disease.

Decision and Order at 19. In contrast, the administrative law judge accorded greater weight to Dr. Patel's positive reading of the February 14, 2001 x-ray because Dr. Patel indicated that claimant suffers from chronic obstructive pulmonary disease. The administrative law judge stated, "I give greater weight to the reading of Dr. Patel, although he is not qualified, because his opinions are closer to the full weight of all the evidence, in that chronic obstructive pulmonary disease is documented." *Id.* at 20. As employer asserts, although "clinical" pneumoconiosis and/or "legal" pneumoconiosis may be demonstrated by medical opinion evidence, only "clinical" pneumoconiosis can be demonstrated by x-ray evidence. Consequently, a diagnosis of chronic obstructive pulmonary disease is not relevant to the consideration of x-ray evidence at 20 C.F.R. §718.202(a)(1). Thus, since the administrative law judge failed to provide a valid basis for according greater weight to Dr. Patel's positive reading than to the negative readings of Drs. Wiot and Perme, we hold that the administrative law judge erred in failing to weigh the conflicting interpretations of the February 14, 2001 x-ray.

Citing *Adkins v. Director*, OWCP, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), employer additionally asserts that the administrative law judge ignored the relevant x-ray evidence. Employer's assertion is based on the premise that the administrative law judge erred by discounting all of the x-rays taken prior to the

most recent x-ray, which was taken on February 14, 2001.⁷ The record consists of x-rays dated from February 10, 1969 to February 14, 2001. The administrative law judge stated, “[w]ith respect to the x-ray readings, Dr. Patel rendered the most recent x-ray.” Decision and Order at 18. Although Drs. Wiot and Perme read the February 14, 2001 x-ray as negative for pneumoconiosis, Dr. Patel read the same x-ray as positive for pneumoconiosis. Based on his determination that Dr. Patel’s reading of the February 14, 2001 x-ray outweighed the contrary readings of the same x-ray by Drs. Wiot and Perme, the administrative law judge found that the most recent x-ray is positive for pneumoconiosis.

In *Adkins*, the United States Court of Appeals for the Fourth Circuit noted that the logic of the “later is better” theory with respect to x-ray evidence only holds where the evidence is consistent with the premise that the miner’s condition has worsened.⁸ The Fourth Circuit also noted that if the evidence, taken at face value, shows that the miner’s condition has improved, the reasoning of the “later is better” theory cannot apply. The Fourth Circuit stated, “[i]t is impossible to reconcile the evidence.” *Adkins*, 958 F.2d at 51, 16 BLR at 2-65 (emphasis in original). Hence, the Fourth Circuit concluded that the reliability of irreconcilable items of evidence must be evaluated without reference to their chronological relationship.

The Sixth Circuit discussed the Fourth Circuit’s decision in *Adkins* when it addressed the “later is better” theory. *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). In *Woodward*, the court noted that the administrative law judge did not weigh the earlier x-ray readings against the later x-ray readings, but limited his consideration of the x-ray evidence to the later five x-rays. *Woodward*, 991 F.2d at 319, 320, 17 BLR at 2-83, 2-85. The court also noted that the administrative law judge’s finding that the x-ray interpretations were overwhelmingly negative was based on his weighing of those x-ray readings. *Woodward*, 991 F.2d at 320, 17 BLR at 2-85. However, the court determined that “the positive results from the first three x-rays were not reconciled with the

⁷We reject employer’s assertion that the later evidence rule does not apply because the 1999 x-rays were contemporaneous with the February 14, 2001 x-ray. The February 14, 2001 x-ray was taken more than a year after the December 3, 1999 x-ray. *Pate v. Alabama By-Products Corp.*, 6 BLR 1-636, 1-639 (1983).

⁸The United States Court of Appeals for the Fourth Circuit stated, “[i]n a nutshell, the [later is better] theory is: (1) pneumoconiosis is a progressive disease; (2) therefore, claimants cannot get better; (3) therefore, a later test or exam is a more reliable indicator of the miner’s condition than an earlier one.” *Adkins v. Director, OWCP*, 958 F.2d 49, 51, 16 BLR 2-61, 2-65 (4th Cir. 1992).

negative interpretations of the last five x-rays.”⁹ *Id.* The court stated that “[p]neumoconiosis is a progressive and degenerative disease.” *Id.* Consequently, the court reasoned that “[t]he subsequent negative x-ray readings do not illustrate the expected deterioration in the miner’s condition, but rather an improvement in his physical condition, which is inconsistent with the normal course of the disease.”¹⁰ *Id.* Therefore, the court held that the administrative law judge misapplied the later evidence rule. *Woodward*, 991 F.2d at 320, 17 BLR at 2-85-86.

In the instant case, the administrative law judge found that Dr. Patel’s positive reading of the February 14, 2001 x-ray outweighs the negative readings of the same x-ray by Drs. Wiot and Perme. Based on his reliance on Dr. Patel’s positive reading of the February 14, 2001 x-ray, the administrative law judge found that the most recent x-ray indicates a deterioration in claimant’s condition, and not an improvement in his condition. However, as previously mentioned, the administrative law judge failed to provide a valid basis for according greater weight to Dr. Patel’s positive reading than to the negative readings of Drs. Wiot and Perme. Thus, if reached on remand, the administrative law judge must reconsider all of the x-ray evidence at 20 C.F.R. §718.202(a)(1).

With regard to the medical opinion evidence at 20 C.F.R. §718.202(a)(4), employer asserts that the administrative law judge erred in failing to weigh all of the medical opinion evidence of record, both old and new. In addressing the medical opinion evidence on the merits, the administrative law judge determined that the evidence submitted in the prior claims is insufficient to establish the existence of pneumoconiosis. The administrative law judge also determined that the evidence submitted since the denial of the prior claims demonstrates that claimant’s condition has progressed. Hence, the administrative law judge concluded that he did not need to consider the evidence submitted in the prior claims. Rather, the administrative law judge considered the February 25, 1999

⁹The Sixth Circuit stated that “[t]he Administrative Law Judge’s analysis clearly runs counter to our decision in [*Conn v. White Deer Coal Co.*, 862 F.2d 591, 12 BLR 2-75 (6th Cir. 1988),] and the Fourth Circuit’s rationale in *Adkins*.¹⁰ *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-85 (6th Cir. 1993).

¹⁰The Sixth Circuit stated that “[t]his case stands in contrast to the actual facts of *Adkins*.¹⁰ *Woodward*, 991 F.2d at 320, 17 BLR at 2-86. The court noted that while the administrative law judge in *Adkins* was called upon to determine the severity of the pneumoconiosis, the administrative law judge in *Woodward* was called upon to determine whether the miner suffered from pneumoconiosis at all. *Id.*

report of Dr. Robinette, the June 1, 1999 report of Dr. Seargent, the December 7, 1999 report of Dr. Dahhan, the February 14, 2001 report of Dr. Rasmussen, the March 16, 2001 report of Dr. Branscomb, the March 22, 2001 report of Dr. Fino, and the June 19, 2002 report of Dr. Kabir.¹¹ Decision and Order at 17-20; Director's Exhibits 9, 23, 33; Claimant's Exhibits 1, 2; Employer's Exhibit 8. The administrative law judge specifically stated:

The record shows that the [c]laimant's condition has gotten progressively worse with time (See Dr. Kabir note of June 19, 2002, CX 2, also see DX 33-5; DX 9). As set forth above, I accept that evidence prior to the filing of this claim showed that the [c]laimant had failed to prove that he has pneumoconiosis. I note the near unanimity on this issue.

Decision and Order at 17. The administrative law judge further stated:

By the time that the [c]laimant was examined by Dr. Robinette in early 1999, the condition had progressed significantly. After an examination of all that evidence, I do not accept that the evidence prior to that date is relevant or helpful in determining whether the [c]laimant has pneumoconiosis since the filing of the current application. However, as of that date, the x-ray evidence and pulmonary function studies and other evidence were insufficient to prove that the [c]laimant has pneumoconiosis.

Id. An administrative law judge must address and discuss all relevant evidence of record. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984). Although the administrative law judge referred to the previously submitted evidence, he did not specifically address it in his weighing of the conflicting medical opinion evidence. Thus, we hold that the administrative law judge erred in failing to weigh all of the relevant medical opinions in his consideration of the merits of claimant's 1999 claim.

Employer also asserts that the administrative law judge erred in failing to weigh the reports of Drs. Seargent and Dahhan against Dr. Rasmussen's report. Dr. Robinette diagnosed obstructive lung disease, Director's Exhibit 33, and Drs. Branscomb, Dahhan, Kabir and Seargent diagnosed chronic obstructive pulmonary disease, Claimant's Exhibit 2; Director's Exhibits 9, 23; Employer's Exhibit 8.

¹¹Although Dr. Robinette's report was filed in support of claimant's request for modification of a denial of the November 24, 1997 claim, the report was never considered because the Department of Labor denied claimant's request for modification as untimely filed. Director's Exhibit 33.

Dr. Rasmussen diagnosed coal workers' pneumoconiosis related to coal dust exposure. Claimant's Exhibit 2. In contrast, Dr. Fino opined that claimant does not suffer from coal workers' pneumoconiosis or an occupationally acquired pulmonary condition. Employer's Exhibit 8. The administrative law judge stated, "I accept the proposition found in Dr. Kabi[r]'s reports, that [claimant] has a progressive disease that has gotten progressively worse." Decision and Order at 20. Based on his finding that Dr. Kabir's opinion supports Dr. Rasmussen's opinion, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis.¹² The administrative law judge stated:

I credit the majority opinion that there is evidence of a respiratory condition, notably chronic obstructive pulmonary disease. I note that this opinion is also consistent with Dr. Robinette's opinion, and in pertinent part, that of Dr. Dahhan, who also had the opportunity to examine the [c]laimant, and found chronic obstructive pulmonary disease (DX 23).

Decision and Order at 19. Although Drs. Seargent and Dahhan diagnosed chronic obstructive pulmonary impairment, Dr. Seargent did not render an opinion with regard to the cause of this condition and Dr. Dahhan opined that this condition was not related to coal dust exposure. The administrative law judge discredited Dr. Seargent's opinion because it is based in part on invalid pulmonary function studies. *Id.* at 18. However, the administrative law judge did not weigh Dr. Dahhan's opinion that chronic obstructive pulmonary disease was not caused by coal dust exposure against Dr. Rasmussen's opinion that claimant suffers from coal workers' pneumoconiosis related to coal dust exposure. Rather, the administrative law judge merely indicated that Dr. Dahhan's diagnosis of chronic obstructive pulmonary disease supports the diagnosis of chronic obstructive pulmonary disease by the majority of physicians. The Administrative Procedure Act (APA), 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 30 U.S.C. §932(a), 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); see also *Hall v. Director, OWCP*, 12

¹²The administrative law judge stated, "[a]fter a review of the entire record, I accept, that based on the recent treatment records [of Dr. Kabir] and the examination of Dr. Rasmussen and his report, although not perfect, that his diagnosis is more rational and is more cogent than the report of Dr. Fino, and his opinions are more persuasive than the reports of Dr[s]. Wiot and Perme." Decision and Order at 20. The administrative law judge further stated, "I find that it is irrational that all of them fail to diagnose chronic obstructive pulmonary disease." *Id.*

BLR 1-80 (1988); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). Since the administrative law judge did not weigh Dr. Dahhan's opinion that chronic obstructive pulmonary disease was not caused by coal dust exposure against Dr. Rasmussen's contrary opinion, we hold that the administrative law judge erred in according dispositive weight to Dr. Rasmussen's opinion.

Employer next asserts that the administrative law judge arbitrarily found that Dr. Rasmussen's opinion outweighs the contrary opinions of Drs. Fino and Branscomb. Specifically, employer asserts that the administrative law judge held the opinions of Drs. Fino and Branscomb to a higher standard than Dr. Rasmussen's opinion. Although the opinions of Drs. Rasmussen, Fino and Branscomb were rendered contemporaneously, the administrative law judge indicated that Drs. Fino and Branscomb should have considered Dr. Rasmussen's opinion. However, the administrative law judge did not indicate that Dr. Rasmussen should have considered the opinions of other physicians. In considering Dr. Fino's opinion, the administrative law judge noted that "Dr. Fino did not provide a contrary opinion to the diagnosis rendered by Dr. Rasmussen." Decision and Order at 19. The administrative law judge therefore concluded, "I find that by failing to comment on the whole of Dr. Rasmussen's report, Dr. Fino has discounted his prior report." *Id.* at 20. With respect to Dr. Branscomb's opinion, the administrative law judge stated, "I must also discount the opinion of Dr. Branscomb, who did not have the recent treatment records before him, did not review the results of the February 2001 pulmonary function studies, x-ray, and Dr. Rasmussen's report before him, and because he inferred that tobacco and pneumoconiosis are mutually exclusive."¹³ *Id.* The administrative law judge found that "none of the other physicians fully commented or even took into consideration Dr. Rasmussen's examination." *Id.* However, as employer asserts, the administrative law judge did not indicate that Dr. Rasmussen should have considered the opinions of other physicians. Thus, since the administrative law judge failed to apply the same degree of scrutiny to the opinion rendered by Dr. Rasmussen that he applied to the opinions rendered by Drs. Fino and Branscomb,

¹³Employer asserts that the administrative law judge mischaracterized Dr. Branscomb's opinion. The administrative law judge found that Dr. Branscomb inferred that tobacco and pneumoconiosis are mutually exclusive. Contrary to the administrative law judge's finding, Dr. Branscomb merely opined that claimant probably suffers from mild chronic obstructive pulmonary disease related to smoking. Claimant's Exhibit 1. Dr. Branscomb stated that there was no medical basis to diagnose coal workers' pneumoconiosis or any other condition or impairment related to coal dust exposure. *Id.* Thus, we hold that the administrative law judge erred in characterizing Dr. Branscomb opinion as indicating that tobacco and pneumoconiosis are mutually exclusive. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

we hold that the administrative law judge erred in selectively analyzing the opinions of Drs. Fino and Branscomb. *Wright v. Director, OWCP*, 7 BLR 1-475 (1984); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984).

Employer also asserts that the administrative law judge erred in discrediting the opinions of Drs. Fino and Branscomb because they did not examine claimant. The administrative law judge stated, “I also note that both Dr. Branscomb and Dr. Fino never met the [c]laimant and I accord significance to the fact that Dr. Rasmussen personally examined the [c]laimant.” Decision and Order at 20. The administrative law judge did not explain why he accorded greater weight to Dr. Rasmussen’s opinion on the basis of his examination of claimant. Rather, the administrative law judge mechanistically accorded greater weight to Dr. Rasmussen’s opinion than to the contrary opinions of Drs. Fino and Branscomb because he examined claimant. Since the administrative law judge did not indicate that Dr. Rasmussen’s examination of claimant gave him a more thorough understanding of claimant’s condition, we hold that the administrative law judge erred in according greater weight to Dr. Rasmussen’s opinion than to the contrary opinions of Drs. Fino and Branscomb simply because Dr. Rasmussen examined claimant. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-548-549 (6th Cir. 2002).¹⁴

In addition, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii). The record consists of seven arterial blood gas studies. The studies dated August 1, 1979, February 19, 1993, January 21, 1998, February 25, 1999, May 26, 1999 and December 3, 1999 yielded non-qualifying values. Although the study dated February 14, 2001 yielding non-qualifying values at rest, it yielded qualifying values during exercise. In his analysis of the arterial blood gas study evidence, the administrative law judge only considered the February 14, 2001 study. The administrative law judge stated:

The [e]mployer was given an opportunity post hearing to contest the results and the validity [of] the testing but did not do so. In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and, therefore, rendered it unreliable.

¹⁴As previously noted, see p.7 n.6, *supra*, the administrative law judge should reconsider the medical opinion evidence at 20 C.F.R. §718.202(a)(4) in light of the District of Columbia Circuit’s decision in *Nat’l Mining Ass’n*.

Decision and Order at 22. The administrative law judge also stated that “[t]he [e]mployer has failed to raise any of those concerns and I find that the arterial blood gas studies are conforming to 20 C.F.R. §718.204(c)(2) and that total disability has been presumptively established.” *Id.* However, claimant has the burden of proving total disability. *White v. Director, OWCP*, 6 BLR 1-368 (1983). Thus, we hold that the administrative law judge erred in failing to weighing all of the arterial blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii). Moreover, we hold that employer correctly contends that the administrative law judge erred in failing to weigh together all of the contrary probative evidence of disability, like and unlike, to determine whether the evidence is sufficient to establish total disability. *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), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Further, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Specifically, employer asserts that Dr. Rasmussen's opinion is not reliable, probative or substantial evidence of total disability due to pneumoconiosis because it is speculative. Dr. Rasmussen stated:

There are [three] apparent risk factors for [claimant's] disabling respiratory insufficiency. He does have a cigarette smoking history and a history suggestive of hyperactive airways disease or asthma. The bulk of his impairment, however, is secondary to his occupational dust exposure with resultant pneumoconiosis. Any component of asthma would not produce a marked reduction in single breath carbon monoxide diffusing capacity and would not be expected to produce marked remodeling of the airways. Both cigarette smoking and coal mine dust exposure could produce ventilatory impairment and impairment in oxygen transfer.

Claimant's Exhibit 1. Dr. Rasmussen therefore opined that claimant's coal dust exposure must be considered a major contributing factor to his disabling respiratory insufficiency. *Id.* Contrary to employer's assertion that Dr. Rasmussen's opinion is based on pure speculation, Dr. Rasmussen explained the bases for his opinion. The administrative law judge exercises broad discretion in assessing the persuasiveness and reasoning of a medical opinion. *Fife v. Director, OWCP*, 888 F.2d 365, 13 BLR 2-109 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Since the administrative law judge reasonably found that Dr. Rasmussen's disability causation opinion is sufficiently documented and reasoned, we reject employer's assertion that Dr. Rasmussen's opinion is not substantial evidence of total disability due to pneumoconiosis.

Employer also asserts that the administrative law judge erred in discrediting Dr. Fino's causation opinion. The administrative law judge stated that "[t]he reports of Dr. Fino, Dr. Wiot and Dr. Perme are poorly documented and are not rational based on the current record."¹⁵ Decision and Order at 24. However, the administrative law judge did not explain why he found that Dr. Fino's opinion is not documented and reasoned. *Wojtowicz*, 12 BLR at 1-165. Thus, we hold that the administrative law judge erred in discrediting Dr. Fino's causation opinion.

Finally, employer contends that the administrative law judge erred in awarding augmented benefits payable to claimant on behalf of his grandchild. The administrative law judge stated:

[Claimant's] wife is Martha Evans; and he testified that he has no other dependents (TR 14). However, his application lists a grandchild, Thomas Christian Evans, born December 18, 1987, as a dependent (DX 1).

Decision and Order at 3. After finding that claimant is entitled to benefits, the administrative law judge ordered employer to pay augmented benefits to claimant on behalf of his dependent minor grandchild. As previously noted, however, the APA requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. 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 30 U.S.C. §932(a). The administrative law judge did not indicate that he considered the pertinent regulatory criteria for establishing entitlement to augmented benefits on behalf of a child. 20 C.F.R. §§725.208, 725.209. Rather, the administrative law judge merely ordered employer to pay augmented benefits to claimant on behalf of his grandchild. Since the administrative law judge did not provide an explanation for determining that claimant is entitled to the payment of augmented benefits on behalf of his grandchild, we hold that the administrative law judge erred in ordering employer to pay augmented benefits to claimant on behalf of his minor grandchild. *Wojtowicz*, 12 BLR at 1-165. If reached on remand, the administrative law judge must consider claimant's entitlement to the payment of augmented benefits on behalf of his grandchild in accordance with the APA.

¹⁵The x-ray readings of Drs. Wiot and Perme are not diagnostic of the extent of a disability. *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983). Therefore, we hold that the administrative law judge erred in considering the x-ray readings of Drs. Wiot and Perme at 20 C.F.R. §718.204(c).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully dissent from the majority's decision to hold that the administrative law judge erred in failing to weigh all of the relevant medical opinions in his consideration of the merits of claimant's 1999 claim. Although the administrative law judge did not rely on the previously submitted medical opinion evidence, he nonetheless indicated that he considered all of the relevant medical opinion evidence of record. The administrative law judge specifically stated, "[a]fter an examination of all of that evidence, I do not accept that the evidence prior to [Dr. Robinette's examination of claimant in early 1999] is relevant or is helpful in determining whether the [c]laimant has pneumoconiosis since the filing of the current application." Decision and Order at 17. Thus, I would reject employer's assertion that the administrative law judge erred in failing to weigh all of the medical opinion evidence of record, both old and new.

I concur in all other respects in the majority's opinion.

BETTY JEAN HALL
Administrative Appeals Judge