

BRB No. 13-0117 BLA

WILLIAM O. DEMPSEY (Deceased) )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 SEWELL COAL COMPANY ) DATE ISSUED: 02/28/2014  
 )  
 Employer-Petitioner )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order on Third Remand – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Daniel K. Evans and Timothy C. MacDonnell (Washington and Lee University School of Law, Legal Practice Clinic), Lexington, Virginia, for claimant.

Kathy L. Snyder and Jeffrey R. Soukup (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Third Remand – Awarding Benefits (2002-BLA-5357) of Administrative Law Judge Michael P. Lesniak, rendered on a subsequent claim filed on February 8, 2001,<sup>1</sup> pursuant to the provisions of the Black

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<sup>1</sup> The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this claim because it was filed before January 1, 2005.

Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).<sup>2</sup> This case is before the Board for a fourth time.<sup>3</sup> The Board previously affirmed the Second Decision and Order on Remand awarding benefits, issued by Administrative Law Judge Daniel L. Leland on October 23, 2008.<sup>4</sup> *See Dempsey v. Sewell Coal Co.*, BRB No. 09-0151 BLA, slip op. at 1 (Nov. 25, 2009) (unpub.) (Boggs, J., concurring in part and dissenting in part). However, in consideration of employer's appeal, the United States Court of Appeals for the Fourth Circuit<sup>5</sup> subsequently vacated the award, holding that Judge Leland failed to rationally explain how he resolved the conflict in the x-ray evidence and the medical opinions of Drs. Cohen and Renn, as to whether claimant had pneumoconiosis and was totally disabled. *Sewell Coal Co. v. Director, OWCP [Dempsey]*, 429 F. App'x. 311, 314-17 (4th Cir. 2011) (unpub). Specifically, the court held that Judge Leland did not adequately address how each physician's review of inadmissible evidence impacted their respective opinions. Therefore, the case was remanded for further consideration. *Id.* at 317.

On remand, because Judge Leland had retired, the case was reassigned to Judge Lesniak (the administrative law judge). By Order dated January 31, 2012, the

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<sup>2</sup> Claimant's counsel has informed the Board that claimant died in March of 2013. Claimant's Response Brief at 14 n. 5.

<sup>3</sup> We incorporate the procedural history of the case as set forth in the Board's prior decisions. *See Dempsey v. Sewell Coal Co.*, BRB No. 09-0151 BLA, slip op. at 1 (Nov. 25, 2009) (unpub.) (Boggs, J., concurring in part and dissenting in part); *Dempsey v. Sewell Coal Co.*, BRB No. 05-0614 BLA, slip op. at 2-5 (Mar. 31, 2006) (unpub.) (Boggs, J., concurring in part and dissenting in part); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-54-55 (2004) (en banc).

<sup>4</sup> The Board affirmed the evidentiary rulings of Administrative Law Judge Daniel L. Leland, along with his finding that the claim was timely filed pursuant to 20 C.F.R. §725.308. *See Dempsey*, BRB No. 09-0151 BLA, slip op. at 3-5. The Board also affirmed Judge Leland's findings that claimant established the existence of pneumoconiosis, total disability and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *Id.* at 5; *see also Dempsey*, BRB No. 05-0614 BLA, slip op. at 6-10. The Board further affirmed Judge Leland's finding that claimant was totally disabled due to pneumoconiosis and that benefits should commence as of the date of the filing of the claim. *See Dempsey*, BRB No. 09-0151 BLA, slip op. at 5-6.

<sup>5</sup> As claimant's coal mine employment was in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

administrative law judge permitted the parties to submit supplemental reports from Drs. Cohen and Renn. Thereafter, the administrative law judge issued his November 28, 2012 Decision and Order on Third Remand, which is the subject of this appeal. The administrative law judge initially found that the opinions of Drs. Cohen and Renn were not impacted by their review of inadmissible evidence. In his consideration of the evidence, the administrative law judge determined that it was sufficient to establish that claimant was totally disabled due to clinical pneumoconiosis and he awarded benefits accordingly.

On appeal, employer challenges the administrative law judge's determination that claimant established the existence of clinical pneumoconiosis. Claimant's counsel responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board. Employer also filed a reply brief, reiterating its arguments.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>6</sup> 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).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge discussed eleven ILO-classified readings of six x-rays dated February 10, 1989, May 22, 1989, July 19, 2001, August 13, 2001, October 1, 2002 and October 25, 2002.<sup>7</sup> The February 10,

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<sup>6</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Because claimant established total disability, an element he failed to prove in the prior claim, claimant also demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See* 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013) (to be codified at 20 C.F.R. §725.309); *White v. New White Coal Co.*, 23 BLR 1-1 (2004).

<sup>7</sup> The administrative law judge also considered narrative readings by Dr. Goerlich of x-rays taken on November 20, 1976, August 8, 1978 and January 5, 1983. Dr. Goerlich read the November 20, 1976 and January 5, 1983 x-rays as positive for pneumoconiosis, and read the August 8, 1978 x-ray as revealing pneumothorax over the left lung. Director's Exhibit 1. The administrative law judge assigned little weight to Dr. Goerlich's readings because his qualifications were not in the record. Decision and Order on Third Remand at 7.

1989 x-ray had one reading by Dr. Gaziano, a B reader, which was positive for pneumoconiosis. Director's Exhibit 1. The May 22, 1989 x-ray was read as positive by Dr. Gaziano and by Dr. Shah, a Board-certified radiologist. *Id.* The July 19, 2001 x-ray was read as negative for pneumoconiosis by Dr. Wiot, dually qualified as a Board-certified radiologist and B reader. Director's Exhibit 35. The August 13, 2001 x-ray was read as positive for pneumoconiosis by Drs. Patel and Alexander, dually qualified radiologists, and as negative by Dr. Wheeler. Director's Exhibit 19; Claimant's Exhibit 3. The administrative law judge found that Dr. Wheeler was a Board-certified radiologist, but not a B reader, insofar as Dr. Wheeler's curriculum vitae indicated that his B reader certification had lapsed as of the date that he read the August 13, 2001 x-ray. Decision and Order on Third Remand at 8; Employer's Exhibit 2. The October 1, 2002 x-ray had only one reading, by Dr. Wiot, which was negative for pneumoconiosis. Employer's Exhibit 12. The October 25, 2002 x-ray was read as positive for pneumoconiosis by Dr. Alexander and by Dr. Cohen, a B reader, but as negative for pneumoconiosis by Dr. Wiot. Claimant's Exhibits 2, 6; Employer's Exhibit 12.

In resolving the conflict in the x-ray evidence, the administrative law judge indicated that he gave controlling weight to the readings by the dually qualified radiologists. Decision and Order on Third Remand at 7-8. The administrative law judge found that the February 10, 1989 and May 22, 1989 x-rays were positive for pneumoconiosis, based on the uncontradicted readings of those x-rays by Drs. Gaziano and Shah. *Id.* He also concluded that the October 25, 2002 x-ray was positive for pneumoconiosis, based on the weight of the positive readings by Drs. Alexander and Cohen. *Id.* at 8. Considering the August 13, 2001 x-ray, the administrative law judge found that Drs. Patel and Alexander were more qualified than Dr. Wheeler and, therefore, found that it was positive for pneumoconiosis. *Id.* at 8.

With regard to the x-rays dated July 19, 2001 and October 1, 2002, the administrative law judge noted that the only readings of those films were negative for pneumoconiosis by Dr. Wiot. Decision and Order on Third Remand at 7-8. However, the administrative law judge assigned less weight to Dr. Wiot's readings overall, based on the explanation Dr. Wiot provided for why the x-rays were negative for pneumoconiosis. *Id.* at 8. Based on the weight of the positive x-ray evidence, the administrative law judge concluded that claimant established the existence of pneumoconiosis. *Id.*

Employer asserts that the administrative law judge arbitrarily dismissed the significance of the credentials of Drs. Wiot and Wheeler, and erred by not crediting their opinions that claimant did not have coal workers' pneumoconiosis. Employer notes that Dr. Wheeler is a professor of radiology and that Dr. Wiot has considerable experience and expertise in classifying x-rays, since Dr. Wiot is a C reader. Employer maintains that the administrative law judge's explanations for according less weight to the negative

readings by Drs. Wheeler and Wiot do not satisfy the Administrative Procedure Act (APA).<sup>8</sup> We disagree.

The administrative law judge considered employer's arguments that Drs. Wheeler and Wiot were the most qualified to interpret claimant's x-rays. The administrative law judge permissibly concluded, however, that the readings by Drs. Wheeler and Wiot should not be given additional weight above that of any other dually qualified physician. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); Decision and Order on Third Remand at 7, 8 n.7. Contrary to employer's contention, although an administrative law judge *may* give greater weight to the interpretations of a physician, based upon his or her academic qualifications as a professor of radiology, he or she is not required to do so. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *citing Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

We also affirm the administrative law judge's assignment of less weight to Dr. Wheeler's readings in comparison to those made by the dually qualified radiologists. In considering the qualifications of the radiologists, the administrative law judge rationally found that Dr. Wheeler was not a certified B reader, as of March 20, 2002, the date on which Dr. Wheeler read the August 13, 2001 x-ray. Employer's Exhibits 2, 6. Dr. Wheeler's curriculum vitae indicated that Dr. Wheeler was a B reader, but it also specifically stated that "This Certification Will Remain In Effect From 5/01/1997 Until 04/30/01." Employer's Exhibit 6. Based on this evidence,<sup>9</sup> we see no error in the

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<sup>8</sup> The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, 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 30 U.S.C. §932(a).

<sup>9</sup> Employer asserts that the administrative law judge erred in not referencing the Department of Labor's "Comprehensive B reader List, which indicates Dr. Wheeler has been continuously certified as a B reader since 1973." Employer's Brief in Support of Petition for Review at 14. Employer also notes that the ILO form completed by Dr. Wheeler is titled as a "Pneumoconiosis classification/B-reading." Employer's Exhibit 2. The administrative law judge, however, was under no obligation to refer to sources

administrative law judge's rational finding that Dr. Wheeler's certification as a B reader had lapsed at the time of his reading of the August 13, 2001 x-ray, and we affirm the administrative law judge's determination to give Dr. Wheeler's negative reading less weight. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Consequently, because we affirm the administrative law judge's findings with respect to Dr. Wheeler's credentials, we also affirm his assignment of greater weight to the positive readings by Drs. Alexander and Patel, based on their superior qualifications, and we further affirm his finding that the August 13, 2001 x-ray is positive for pneumoconiosis. Decision and Order on Third Remand at 8; *see Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993).

Additionally, we reject employer's argument that the administrative law judge substituted his opinion for that of a medical expert in assigning Dr. Wiot's negative readings less weight. Dr. Wiot completed ILO forms for his readings of the July 19, 2001, October 1, 2002 and October 25, 2002 x-rays, wherein he indicated that there were no abnormalities consistent with pneumoconiosis. Director's Exhibit 35; Employer's Exhibit 12. In the narrative report attached to the July 19, 2001 ILO form, Dr. Wiot identified the opacities as, "basilar interstitial change of irregular type." Director's Exhibit 35. Dr. Wiot explained that he read the x-ray as negative for coal workers' pneumoconiosis, because coal workers' pneumoconiosis "*invariably begins* in the upper lung fields and most often is of a rounded opacity." *Id.* Dr. Wiot stated that claimant's "upper lung fields are perfectly clear." *Id.* (emphasis added).

In a December 9, 2002 narrative report, Dr. Wiot wrote:

There is no evidence of coal worker[s'] pneumoconiosis. This patient has an abnormal chest x[-]ray, but the findings are not those of coal dust exposure. There is bibasilar interstitial fibrosis extending into the mid zones, but the upper lung fields are totally clear. Coal worker[s'] pneumoconiosis *invariably begins* in the upper lung fields, and it is only when the disease process progresses that it moves to the mid and lower lung fields. In this patient, *the lower lung zones are the most severely involved, and the upper zones are completely clear.*

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outside the record to ascertain Dr. Wheeler's radiological credentials. Rather, the administrative law judge rationally considered Dr. Wheeler's interpretation in light of the qualifications reflected on the curriculum vitae employer submitted. *See* 20 C.F.R. §§725.455(c), 725.456; *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (en banc).

Employer's Exhibit 12 (emphasis added).

In determining the weight to accord Dr. Wiot's negative readings, the administrative law judge observed correctly that the Department of Labor does "not require a finding of primarily rounded opacities in the upper lung zones to support a finding of pneumoconiosis." Decision and Order on Third Remand at 7, citing 20 C.F.R. §§718.102; 718.202(a)(1). We conclude that the administrative law judge acted within his discretion, as the trier-of-fact, in finding that Dr. Wiot's comments "undercut the probative value of his ILO interpretations," and in rejecting Dr. Wiot's explanation as to why claimant did not have coal workers' pneumoconiosis. See *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; see also *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). We therefore affirm the administrative law judge's decision to assign less weight to Dr. Wiot's negative readings overall.

We also reject employer's assertion that the administrative law judge erred in relying on the positive x-ray readings by Drs. Alexander and Patel because, unlike Drs. Wheeler and Wiot, they did not explain their rationale for diagnosing clinical pneumoconiosis on the ILO form. The regulation at 20 C.F.R. §718.202(a)(1) states that "[a] chest X-ray conducted and classified in accordance with [20 C.F.R. §] 718.102 may form the basis for a finding of the existence of pneumoconiosis." The regulation at 20 C.F.R. §718.102 provides that: "[a] chest X-ray to establish the existence of pneumoconiosis shall be classified as Category 1, 2, 3, A, B, or C." 20 C.F.R. §718.102(b) There is no requirement under the regulations that an interpreting physician provide a "rationale" for his or her reading. *Id.* However, in cases, such as this one, where a physician provides a rationale for his opinion, the administrative law judge may consider that explanation. Thus, the administrative law judge permissibly considered the comments by Dr. Wiot in determining the weight to accord his opinion and we reject employer's assertion that the administrative law judge did not hold claimant's evidence to the same standard as employer's evidence. See *Dempsey*, 23 BLR at 1-65; *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (en banc on recon.). Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge adopted the prior credibility findings of Judge Leland, that the opinions of Drs. Rasmussen and Gaziano, that claimant had clinical pneumoconiosis, were reasoned and documented opinions, while the contrary opinion of Dr. Bellotte, that claimant did not suffer from pneumoconiosis, was not credible because it was inextricably linked to his review of

evidence deemed inadmissible. Decision and Order on Third Remand at 9, 11-12. In accordance with the Fourth Circuit's instructions, the administrative law judge also reweighed the opinions of Drs. Wantz, Renn and Cohen. *Id.* at 9-11. The administrative law judge assigned little weight to Dr. Wantz's opinion, that claimant had pneumoconiosis, because he "reviewed a limited amount of data." *Id.* at 9. He also assigned little weight to Dr. Renn's opinion, that claimant did not have pneumoconiosis, because he found that it was insufficiently explained. *Id.* In contrast, the administrative law judge credited Dr. Cohen's opinion, that claimant had pneumoconiosis, based on his qualifications and because his opinion was supported by the x-ray evidence, along with the credible opinions of Drs. Rasmussen and Gaziano that claimant suffered from pneumoconiosis.<sup>10</sup> *Id.* at 11-12.

Contrary to employer's assertion, we see no error in the administrative law judge decision to incorporate Judge Leland's credibility findings with regard to Drs. Rasmussen, Gaziano, and Bellotte, as the weight accorded those opinions by Judge Leland was affirmed on appeal. *See Dempsey*, 429 F. App'x. at 315; *Dempsey*, BRB No. 05-0614 BLA, slip op. at 8-9; *Dempsey*, 23 BLR at 1-67; *see generally Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236, 1-246 (2003); Decision and Order on Third Remand at 10 n. 12. We also reject employer's contention that the administrative law judge erred in his treatment of Dr. Renn's opinion. Dr. Renn opined that claimant suffered from idiopathic pulmonary interstitial fibrosis (IPF), and did not suffer from pneumoconiosis. Employer's Exhibit 9. He concluded that claimant's IPF caused a gas exchange impairment, but resulted in no other ventilatory impairment. *Id.* His opinion was based on the objective testing he reviewed, including radiographic evidence, along with claimant's clinical presentation. *Id.*; Employer's Exhibit 32 at 28, 41. In his deposition, Dr. Renn acknowledged the presence of small irregular opacities on claimant's x-rays, but explained why this was not coal workers' pneumoconiosis, as follows:

[F]irst of all, they were irregular opacities. I know that there is some literature that says that you can have irregular opacities as a result of coal mine dust. However, if you do have small irregular opacities, it should at least involve the upper lung zones. In [claimant's] case, the radiographs revealed that he had no involvement of small irregular opacities and he certainly had no rounded opacities in the upper lung zones.

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<sup>10</sup> The administrative law judge also noted that the record contains diagnoses of pneumoconiosis from Dr. Brown and physicians with the West Virginia Occupational Pneumoconiosis Board, but he assigned these opinions little weight because they were not well reasoned. Decision and Order on Third Remand at 9.

Employer's Exhibit 32 at 27.

As discussed *supra*, the administrative law judge permissibly assigned little weight to Dr. Renn's opinion excluding pneumoconiosis because "the [r]egulations do not require a finding of primarily rounded opacities in the upper lung zones to support a finding of pneumoconiosis." Decision and Order on Third Remand at 10; *see* 20 C.F.R. §§718.102; 718.202(a)(1); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-155. Moreover, the administrative law judge referenced "Dr. Renn's observation that [claimant's] symptoms were incompatible with [coal workers' pneumoconiosis] 'because you don't see interference with gas exchange this early in a coal mine induced disease unless you have a diffusing capacity that is much more severely impaired.'" Decision and Order on Third Remand at 11 n. 15. The administrative law judge rationally determined that Dr. Renn's opinion was entitled to less weight because "it is unclear how Dr. Renn could categorize [the claimant's] lung disease as being in an early stage where [the claimant's] x-rays showed some kind of abnormality as far back as 1979." *Id.*; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; *Clark*, 12 BLR at 1-155.

Furthermore, the administrative law judge permissibly found that Dr. Renn did not persuasively explain why claimant had IPF, as opposed to coal workers' pneumoconiosis or a combination of both conditions. *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. As noted by the administrative law judge, Dr. Renn acknowledged in his deposition conducted on January 24, 2003, that an increased FEV1/FVC ratio and a reduced diffusion capacity are hallmark indicators of IPF, but that claimant did not exhibit these indicators. Employer's Exhibit 32 at 63. Dr. Renn also conceded that the mean survival rate for patients with IPF is somewhere between four and six years, while claimant had survived at least fourteen years, as of 2003, with his respiratory disease. *Id.* at 65. Although Dr. Renn tried to distinguish claimant's longer survival rate, based on the fact that claimant did not have a reduction in his diffusion capacity,<sup>11</sup> the administrative law judge permissibly concluded that Dr. Renn relied on circular reasoning to support his opinion:

Specifically, Dr. Renn is using [claimant's] lack of one symptom of IPF (the decreased pulmonary function ratio) to prove his lack of another

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<sup>11</sup> Dr. Renn cited a study titled "Determinants of Survival in Idiopathic Pulmonary Fibrosis" for the proposition that "an increased FEV1/FVC ratio and decreased lung diffusion were all significantly associated with reduced survival." Employer's Exhibit 36 at 6. Dr. Renn opined that, because claimant did not exhibit a reduced diffusion capacity, he was "not an individual who would succumb rapidly to IPF." *Id.*

symptom of IPF (the decreased survival rate) whereas the absence of both symptoms of [IPF] *leads more directly to the conclusion that miner does not have [IPF]*.

Decision and Order on Third Remand at 11 (internal citations and quotations omitted) (emphasis added); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-155. Moreover, the administrative law judge rationally credited Dr. Cohen's explanation that "the radiographic evidence lacked the classic features of IPF, and that it was non-sensical to attribute [claimant's] lung condition to a disease of *unknown origin* when [claimant] had a lengthy exposure to coal dust." Decision and Order on Third Remand at 11; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Thus, we affirm the administrative law judge's decision to accord Dr. Renn's opinion little weight.<sup>12</sup>

In addition, the administrative law judge permissibly found that Dr. Cohen provided a reasoned and documented opinion, which was "consistent with [the administrative law judge's] determination that the weight of the x-ray evidence supports a finding of clinical pneumoconiosis." Decision and Order on Third Remand at 11; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-155. Because the administrative law judge acted within his discretion in determining the weight to accord the medical opinion evidence, we affirm his finding that it is sufficient to establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

Lastly, we reject employer's assertion that the administrative law judge failed to give proper consideration to the CT scan evidence, as it "reinforced conclusions that [claimant] ha[d] IPF and no coal workers' pneumoconiosis." Employer's Brief in Support of Petition for Review at 17. The administrative law judge was not required, as employer's suggests, to find that the negative CT scan evidence was more probative than the positive x-ray evidence and the credible medical opinions diagnosing clinical pneumoconiosis. The administrative law judge permissibly determined that claimant established the existence of pneumoconiosis, based on the preponderance of positive ILO classified x-rays for the disease and the weight of Dr. Cohen's opinion, whom he considered to be the most qualified physician of record. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Clark*, 12 BLR at 1-155. We

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<sup>12</sup> Because the administrative law judge provided valid reasons for rejecting Dr. Renn's opinion, it is not necessary that we address employer's argument that Dr. Renn is more qualified than claimant's experts. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

therefore affirm the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis by a preponderance of the evidence. *Id.*; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions and to assign them appropriate weight. *See Looney* 678 F.3d at 314, 25 BLR at 2-130; *Clark*, 12 BLR at 1-155; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a), based on his consideration of all relevant evidence.

The administrative law judge determined that claimant's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Because employer does not identify any specific error with regard to the administrative law judge's findings pursuant to 20 C.F.R. §§718.203(b) and 718.204(c), they are affirmed. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Accordingly, the administrative law judge's Decision and Order on Third Remand – Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL  
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from the majority's decision to reject employer's arguments that the administrative law judge did not give proper consideration to the totality of Dr. Wiot's opinion, regarding whether claimant had radiographic evidence of coal workers' pneumoconiosis, as opposed to idiopathic pulmonary fibrosis (IPF), by rejecting his x-ray readings at 20 C.F.R. §718.202(a)(1) and then failing to give his opinion any consideration thereafter. Similarly, I disagree with the majority's decision to affirm the administrative law judge's credibility determination with regard to the medical opinion provided by Dr. Renn.

In rejecting Dr. Wiot's negative x-ray interpretation for pneumoconiosis, the administrative law judge noted the physician's deposition testimony, that coal workers' pneumoconiosis primarily occurs as rounded opacities originating in the upper lung zones. The administrative law judge considered Dr. Wiot's testimony to be contrary to the regulations, because the administrative law judge interpreted the regulations as not requiring that opacities seen on x-ray appear either as rounded, rather than irregular,<sup>13</sup> or begin in the upper lobes of the lungs. Although the administrative law judge correctly recites one portion of the regulations, there is merit to employer's argument that: "While the regulating criteria allow that certain changes could be deemed pneumoconiosis, when an expert explains changes are not pneumoconiosis or coal mine dust-induced, the fact-finder cannot suggest the general, permissive, regulation trumps the specific expert opinion." Employer's Brief in Support of Petition for Review at 13.

Crucially, the administrative law judge failed to recognize that he was considering the x-ray interpretation and physician's opinions under 20 C.F.R. §718.202 for the purpose of determining whether claimant has "clinical pneumoconiosis" as defined under 20 C.F.R. §718.201(a)(1).<sup>14</sup> The language of that provision makes *clinical*

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<sup>13</sup> Although the administrative law judge acknowledged that both Drs. Wiot and Renn stated that coal dust exposure may cause irregular opacities, he nonetheless also used this aspect of their opinions to discredit them, stating that "the Regulations do not require a finding of primarily rounded opacities in the upper lung zones to support a finding of pneumoconiosis." Decision and Order on Third Remand at 10.

<sup>14</sup> The regulation at 20 C.F.R. §718.202(a)(1) states: "A chest X-ray conducted and classified in accordance with §718.102 may form the basis for a finding of the existence of pneumoconiosis...." 20 C.F.R. §718.202(a)(1).

The regulation at 20 C.F.R. §718.202(a)(4) states: "A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in §718.201...." 20 C.F.R. §718.202(a)(4).

The definition of "pneumoconiosis" for purposes of both subsections is found in 20 C.F.R. §718.201, which sets forth two categories of pneumoconiosis. The first category is described as "*medical*, or 'clinical', pneumoconiosis." 20 C.F.R. §718.201(a) (emphasis added). The terms "medical" and "clinical" are used here interchangeably to mean the same thing. *Id.* The second category is described as "statutory, or 'legal', pneumoconiosis." *Id.*

*pneumoconiosis* a medical matter.<sup>15</sup> The regulation at 20 C.F.R. §718.201(a)(1) defines clinical pneumoconiosis as follows:

“Clinical pneumoconiosis” consists of 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) (emphasis added).<sup>16</sup> The regulation goes on to elaborate that the definition “includes, but is not limited to, coal workers’ pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.” *Id.*

Based on the plain language of the regulation, resolution of the issue of whether claimant had clinical pneumoconiosis depends on whether he had a disease recognized by the *medical community* as pneumoconiosis. The regulations list “coal workers’ pneumoconiosis,” as one disease fitting the definition, *i.e.*, recognized by the medical community as pneumoconiosis. The contours of what constitutes “coal workers’ pneumoconiosis,” consequently, is defined medically. Thus, when addressing whether

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<sup>15</sup> After analyzing the x-ray and other medical evidence, the administrative law judge found that claimant had *clinical* pneumoconiosis. He made no findings with respect to legal pneumoconiosis. Consequently, only the clinical pneumoconiosis definition is germane to a determination as to whether his decision may be affirmed. Decision and Order on Third Remand at 8, 12, 13.

<sup>16</sup> The regulatory definition of clinical pneumoconiosis limits pneumoconiosis to diseases which are characterized by deposition of particulate matter caused by dust exposure in coal mine employment. In this regard it is more restrictive than the definition of pneumoconiosis for purposes of the ILO classification system (ILO Classification of Radiographs of the Pneumoconioses) (use of the ILO system is required by 20 C.F.R. §718.102). The ILO system is designed “for describing and recording systematically the radiographic abnormalities in the chest provoked by the inhalation of dusts” and is “used internationally for epidemiological research, for screening and surveillance of those in dusty occupations, and for clinical purposes.” *Guidelines For The Use Of The ILO International Classification of Radiographs Of Pneumoconioses*, Revised edition 2011, Introduction, p. 1. Consequently, it includes pneumoconiosis provoked by inhalation of dusts other than those encountered in coal mine employment (such as talc). See *Dorland’s Illustrated Medical Dictionary*, 32d Edition 2012.

a claimant has coal workers' pneumoconiosis,<sup>17</sup> a physician is not precluded from using the medically accepted presentation and progression of that disease to diagnose its presence, or to indicate its absence.

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<sup>17</sup> In this case, Dr. Alexander interpreted claimant's x-rays as displaying "Coal Workers' Pneumoconiosis." Claimant's Exhibits 2, 3. Dr. Wiot interpreted the x-rays as "more likely [interstitial pulmonary fibrosis]" and "not [coal workers' pneumoconiosis]." Director's Exhibit 35; Employer's Exhibit 12. Each doctor reported different findings as to the location, as well as the shape, of what they saw. The administrative law judge did not consider the variations in the observations as to the shape and location of the opacities in making his findings or conclusions. Rather, the administrative law judge simply accepted Dr. Alexander's positive reading and did not attempt to resolve the conflict in the x-ray evidence by specifically weighing Dr. Wiot's contrary opinion, even though the physicians were addressing the same issue — the presence or absence of coal workers' pneumoconiosis, as seen on x-ray. This was error.

In weighing the medical opinion evidence, the administrative law judge gave no further consideration to Dr. Wiot's interpretation. The physicians who offered medical opinions, based on testing and examinations, with the exception of Drs. Wantz and Brown, diagnosed claimant either as specifically suffering from coal workers' pneumoconiosis or not suffering from that disease. Dr. Wantz diagnosed clinical pneumoconiosis due to coal dust exposure. Director's Exhibit 1. Dr. Brown diagnosed chronic obstructive pulmonary disease. Claimant's Exhibit 1. Dr. Rasmussen diagnosed coal workers' pneumoconiosis. Director's Exhibits 1, 15. Dr. Gaziano diagnosed coal workers' pneumoconiosis. Claimant's Exhibit 1. Dr. Cohen diagnosed coal workers' pneumoconiosis and an obstructive lung impairment due to coal dust exposure. Claimant's Exhibit 6. Dr. Renn opined that claimant suffers from idiopathic pulmonary fibrosis (IPF) and not coal workers' pneumoconiosis. Employer's Exhibits 32, 26.

Dr. Rasmussen confirmed that coal workers pneumoconiosis generally occurs in the upper lung zones, as Drs. Wiot and Renn contended; however, he stated that a minority of miners demonstrate lower zone opacities first, for example, and that when an individual has emphysema, the opacities may not be seen in the upper lobes. Claimant's Exhibit 8 at 19-20, 33, 36-37. Dr. Cohen also offered evidence as to the presentation of coal workers' pneumoconiosis, particularly as to the presence of irregular opacities. Claimant's Exhibit 6. He did not specifically dispute the contention that that disease begins in the upper lobes; however, he indicated that there is some data suggesting that coal silica exposure may contribute to the development of IPF. *Id.*

Dr. Wiot's x-ray interpretation and his explanation as to why claimant did not have coal workers' pneumoconiosis were relevant to the credibility of the medical opinion evidence at 20 C.F.R. §718.202(a)(4), and his opinion should have been weighed

In this case, Dr. Alexander interpreted claimant's x-rays as displaying "Coal Workers' Pneumoconiosis." Claimant's Exhibits 2, 3. Dr. Wiot interpreted the x-rays as "more likely [interstitial pulmonary fibrosis]" and "not [coal workers' pneumoconiosis]." Director's Exhibit 35; Employer's Exhibit 12. Therefore, contrary to the administrative law judge's determination, Dr. Wiot's opinion setting forth evidence as to the presentation and progression of coal worker's pneumoconiosis is not contrary to the regulations, but is pertinent to determining whether claimant had clinical pneumoconiosis. For the same reason, the opinion of Dr. Renn,<sup>18</sup> is not contrary to the regulations, but is pertinent to determining whether claimant had clinical pneumoconiosis.<sup>19</sup>

There also is merit in employer's contention that the administrative law judge erred in rejecting Dr. Renn's opinion on the grounds that he engaged in circular reasoning

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by the administrative law judge in determining whether the evidence, as a whole, established the existence of clinical pneumoconiosis, consistent with the Fourth Circuit's directive in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000), that all of the evidence on the issue be weighed together.

<sup>18</sup> All of the physicians whose medical opinions the administrative law judge credited, in finding that claimant suffers from clinical pneumoconiosis, diagnosed claimant as having coal worker's pneumoconiosis. Decision and Order on Third Remand at 9-12; *see* summary of medical opinions *supra* n.17. The administrative law judge discredited Dr. Renn's opinion because he discussed the presentation and progression of that disease. Decision and Order on Third Remand at 10. Thus, he discredited Dr. Renn for addressing the specific disease found by the doctors he credited.

In order to constitute the basis for a determination of the existence of pneumoconiosis, the regulations specifically require that the physician find that the miner "suffers or suffered from pneumoconiosis as defined in 20 C.F.R §718.201." 20 C.F.R. §718.202(a)(4). As discussed *supra* n.15, the administrative law judge found only clinical pneumoconiosis, therefore it is clinical pneumoconiosis, and its definition in 20 C.F.R. §718.201(a)(1), which is pertinent here.

<sup>19</sup> This is not a case in which the physicians have taken a medical position contrary to the regulations. For example, the regulations specifically provide that pneumoconiosis can be latent and progressive, and that legal pneumoconiosis can include obstructive impairments. 20 C.F.R. §718.201. Therefore, an opinion that rejects those principles may be discredited on that basis. *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998).

and did not adequately explain why claimant “has survived IPF for 30+ years, considering its short life expectancy.” Decision and Order on Third Remand at 10. Contrary to the administrative law judge’s finding, Dr. Renn referenced the absence of both a reduced diffusion capacity and an increased FEV1/FVC ratio in claimant to explain why claimant was not among those IPF patients with reduced survival, citing to a study for the proposition that a reduced survival was associated with these characteristics in patients diagnosed with IPF.<sup>20</sup> Employer’s Exhibit 36 at 6. However, he did not use the fact that claimant was still alive to then explain the absence of these characteristics. *Id.* Rather, as employer suggests, using the study as support, Dr. Renn contended that claimant’s survival was consistent with claimant’s having IPF and not having either a reduced diffusion capacity or an elevated FEV1/FVC ratio. Employer’s Exhibits 32 at 62-63; 36 at 6; Employer’s Brief in Support of Petition for Review at 23. Dr. Renn acknowledged that, later in the course of the disease, claimant should have a restrictive ventilatory defect and interference with diffusion capacity, but suggested that claimant was in the early stages of IPF. *Id.* at 39-40, 62. In rejecting Dr. Renn’s opinion, the administrative law judge assumed that all persons with IPF have a short life expectancy and decreased pulmonary function values.<sup>21</sup> The administrative law judge made this

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<sup>20</sup> The study cited by Dr. Renn followed seventy-four subjects with IPF. The subjects were followed from 1.4 to 118.8 months after the onset of pulmonary symptoms. During the period of observation, forty-one subjects died (median survival=28.2 months) and thirty-three continued to survive (median follow-up period=60.9 months). Thus, the median for the surviving subjects during the period of observation was over five years, and some subjects with IPF were living almost ten years after the onset of pulmonary symptoms. “A univariate analysis demonstrated that diminished survival was significantly associated with male gender (hazard ratio=1.98; 95% confidence interval [CI]=1.01-3.85), a higher FEV1/FVC ratio (hazard ratio=1.82 [per 10% increase in the FEV1/FVC ratio]; 95% CI=1.21-2.73), a lower percent predicted FVC (hazard ratio=0.74; 95% CI=0.60-0.91), a lower percent predicted total lung capacity (TLC) (hazard ratio= 0.75; 95% CI=0.60-0.94), a lower percent predicted diffusing capacity of carbon monoxide (DLCO) (hazard ratio=0.69; 95% CI=0.53-0.89), a higher ILO profusion category on chest radiograph (hazard ratio=3.52; 95% CI=1.58-7.87) and an enhanced release of prostaglandin E2 (PGE2) by cultured alveolar macrophages (hazard ratio=1.32 [per 10 pm/ml of PGE2]; 95% CI=1.07-1.62).” American Journal of Respiratory and Critical Care Medicine, Volume 49, Issue 2 (February, 1994), “Determinants of survival in idiopathic pulmonary fibrosis,” D.A. Schwartz, R.A. Helmers, J.R. Galvin, D.S. Van Fossen, K.L. Frees, C.S. Dayton, L.F. Burmeister, and G.W. Hunninghake (Abstract Truncated at 250 Words, available at [www.atsjournals.org/doi/abs/10.1164ajrccm.149.2.8306044](http://www.atsjournals.org/doi/abs/10.1164ajrccm.149.2.8306044)).

<sup>21</sup> Moreover, the administrative law judge did not consider all of the evidence on this issue. Like Dr. Renn, Dr. Wiot testified during a deposition that IPF may develop

assumption without analyzing the credibility of Dr. Renn's contention, supported by the study, that this is not the case. Dr. Renn also cited other positive indicators for IPF that the administrative law judge ignored, namely a nagging, predominantly non-productive, persistent cough, interference with gas exchange during exercise, and the specific radiographic pattern seen on claimant's x-rays. Employer's Exhibit 32 at 16, 28-29, 56, 59-60, 64-65.

The resolution of a dispute between physicians as to whether the evidence establishes the existence of clinical pneumoconiosis must be resolved by comparing the opinions and the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their respective diagnoses.<sup>22</sup> See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Because the administrative law judge did not conduct the proper analysis of all relevant evidence as to whether claimant established the existence of clinical pneumoconiosis, this case must be remanded.

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quickly or slowly. Employer's Exhibit 31 at 19. In contrast, Dr. Gaziano contended that if claimant had IPF, he "would likely have been dead or at least be severely impaired by this time[.]" Claimant's Exhibit 4. The administrative law judge did not resolve this conflict in the physicians' views by considering their explanations and the documentation underlying them, as is required. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

<sup>22</sup> The administrative law judge also discredited Dr. Renn for stating that IPF "is a presumptive diagnosis, based upon probabilities, but it is not proven until a lung biopsy is obtained[.]" Employer's Exhibit 9 at 6. The administrative law judge concluded that Dr. Renn failed to explain how he made the diagnosis of IPF with no biopsy to review. Decision and Order on Third Remand at 10. There is merit to employer's argument that the administrative law judge mischaracterized Dr. Renn's reasoning, as the physician opined that he could not identify which of the four types of IPF was present absent a biopsy. Employer's Exhibit 9 at 6. This did not necessarily detract from his conclusion that claimant had IPF. Moreover, although the majority also cites to the administrative law judge's reference to "Dr. Renn's observation that [claimant's] symptoms were incompatible with [coal workers' pneumoconiosis] 'because you don't see interference with gas exchange this early in a coal mine induced disease unless you have a diffusing capacity that is much more severely *impaired*,'" Decision and Order on Third Remand at 11 n.15, it is unclear if the administrative law judge discredited Dr. Renn's opinion on this basis, as this discussion was in a footnote.

In addition, the administrative law judge rendered inconsistent findings when considering the qualifications of the physicians. As noted by the majority, the administrative law judge declined, without explanation, to assign greater weight to the x-ray interpretations of Drs. Wiot and Wheeler.<sup>23</sup> Decision and Order on Third Remand at 7. However, when considering the medical opinion evidence, the administrative law judge specifically assigned greater weight to the opinion of Dr. Cohen, based on his research and publications.<sup>24</sup> *Id.* at 10. Employer argues that the administrative law judge erred by not considering the superior radiological qualifications of Drs. Wiot and Wheeler, and failing to explain his reasoning for not giving their opinions greater weight, as well as finding Dr. Cohen's credentials superior to those of other physicians.

Employer's contentions have some merit. Although the administrative law judge is given broad discretion when weighing the qualifications of the physicians, *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting), the administrative law judge has valued research and publications inconsistently by choosing to recognize them with regard to Dr. Cohen, but not with regard to Drs. Wiot and Wheeler. Consequently, I also would remand this case for the administrative law judge to explain why it is rational to accord greater weight

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<sup>23</sup> The administrative law judge declined to give greater weight to Dr. Wiot's reading, stating "[h]owever, I decline to give his [Dr. Wiot's] interpretation additional weight above that of any other dually-qualified physician, as is my prerogative." Decision and Order on Third Remand at 7. Dr. Wiot authored or co-authored approximately fifty articles dealing with various aspects of radiology, in addition to co-authoring a text and chapters of various texts on radiology, and serving as an editor and consultant for various professional journals and standards-setting committees. He was one of five from the United States, and seventeen in the world, who participated in the international meetings convened by the ILO which led to the most recent revised edition (2000) of the ILO Classification of Radiographs of Pneumoconioses. See Director's Exhibit 31 at 7-12; Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses, Revised edition 2000, Occupational Safety and Health Series No. 22 (Rev.2000), pp. 40-42. Dr. Wheeler authored or co-authored over forty peer reviewed articles and textbook chapters. Employer's Exhibit 6. Dr. Alexander's curriculum vitae lists six publications. Claimant's Exhibit 2.

<sup>24</sup> The administrative law judge found that Dr. Cohen was more qualified than Dr. Renn, the other Board-certified pulmonologist who saw black lung patients, as well as the other physicians qualified in the area of pulmonology/occupational diseases, because "he also has researched and published extensively in the area of occupational disease." Decision and Order on Third Remand at 10.

based on a physician's publications in the case of Dr. Cohen, but not as to Drs. Wiot and Wheeler, or to, alternatively, give additional weight to the opinions of all of the physicians who have authored extensive numbers of publications. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Accordingly, I would vacate the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202. Moreover, because I would vacate the finding of the existence of pneumoconiosis, I would also vacate the administrative law judge's findings that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant was totally disabled due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

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JUDITH S. BOGGS  
Administrative Appeals Judge