BRB No. 10-0275 BLA

MIKEL C. TRADER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
McELROY COAL COMPANY	)	
	)	
and	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 01/31/2011
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Ashley M. Harmon (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (08-BLA-5981) of Administrative Law Judge Michael P. Lesniak on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge accepted the parties' stipulation that claimant worked in qualifying coal mine employment for thirty-one years and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the new evidence was sufficient to establish the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, the administrative law judge found that claimant established the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's finding that the evidence was sufficient to establish the existence of clinical and legal pneumoconiosis at Section 718.202(a)(1), (4), total respiratory disability at Section 718.204(b)(2)(i), (iv), and total disability due to pneumoconiosis at Section 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response brief in this appeal.

By Order dated April 29, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148. *Trader v. McElroy Coal Co.*, BRB No. 10-0275 BLA (Apr. 29, 2010) (unpub. Order). This provision amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and were pending on or after March 23, 2010, the effective date of the amendments. In particular, Section 1556 reinstated the "15-year presumption" of total disability due to pneumoconiosis set forth in Section

[1] Claimant filed his first claim on March 14, 2001. Director's Exhibit 1. On June 29, 2005, Administrative Law Judge Gerald M. Tierney issued a Decision and Order denying benefits. *Id*. Judge Tierney's denial was based on claimant's failure to establish the existence of pneumoconiosis. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed this claim on December 5, 2007. Director's Exhibit 3.

411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] All parties have responded. Claimant asserts that the amended Section 411(c)(4) may be applicable to the instant claim. Nevertheless, claimant argues that he "met his burden of proof with regard to all the elements of entitlement *without invoking the new presumption.*" Claimant's Brief at 26 [emphasis in original]. Claimant therefore urges the Board to affirm the administrative law judge's decision awarding benefits. Employer avers that the amendments may apply to this case because claimant filed his claim after January 1, 2005, and because the administrative law judge credited him with thirty-one years of qualifying coal mine employment and found a totally disabling respiratory impairment. Employer therefore asserts that, if the Board remands the case, due process requires that it be permitted to develop whatever new medical evidence is necessary to respond to the change in the law.[3] The Director asserts that the amended Section 411(c)(4) applies to this claim because claimant filed his claim on December 5, 2007 and "established thirty-one years of coal mine employment, 'the majority of which were underground.' (ALJ at 3)." Director's Letter at 1. Nevertheless, the Director contends that the amended Section 411(c)(4) has no bearing on this case, if the Board affirms the administrative law judge's award of benefits. However, the Director contends that, if the Board vacates the administrative law judge's award of benefits and remands the case for further consideration of the evidence, the administrative law judge should consider whether claimant is entitled to invocation of the amended Section 411(c)(4) presumption, 30

[2] Section 411(c)(4) provides that if a miner establishes at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis or, relevant to a survivor's claim, death due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 199 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[3] Employer also challenges the constitutionality of the amendments to Section 411(c)(4), 30 U.S.C. §921(c)(4), arguing that retroactive application of these provisions denies its right to due process and constitutes an unconstitutional taking of private property. The Board recently addressed the constitutionality of the amendments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193 (2010)(motion for recon. pending), and held that retroactive application of amended Section 921(c)(4) does not constitute an unlawful taking of an employer's property under the Fifth Amendment because the employer failed to demonstrate that the amended Section 411(c)(4) imposed a severe economic impact on it, disproportionately interfered with its distinct investment-backed expectations, or constituted an inappropriate governmental action. Thus, we reject employer's assertion that retroactive application of the provisions of the amendments to Section 411(c)(4), 30 U.S.C. §921(c)(4), denies employer its right to due process and constitutes an unconstitutional taking of private property.

U.S.C. §921(c)(4), unless he again finds that claimant is entitled to benefits under 20 C.F.R. Part 718. Further, the Director asserts that the administrative law judge must allow the parties to proffer additional evidence on remand, consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414, or upon a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1), if the evidence exceeds the limitations.

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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially contends that the administrative law judge erred in finding that the x-ray evidence was sufficient to establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). The administrative law judge considered eight interpretations of the five new x-ray films dated December 26, 2007, January 10, 2008, April 22, 2008, October 22, 2008, and November 7, 2008. Based on his assessment of the conflicting x-ray interpretations, the administrative law judge found that the x-ray films dated January 10, 2008, April 22, 2008, and October 22, 2008 were positive for pneumoconiosis, while the x-ray film dated December 26, 2007 was inconclusive for pneumoconiosis.[5] Decision and Order at 9-10. Hence, the administrative law judge found that the new x-ray evidence was positive for pneumoconiosis. *Id*. at 10.

Employer argues that the administrative law judge erred by merely "counting heads" without analyzing the x-ray evidence in its entirety. Employer's Brief at 8. Contrary to employer's argument, the administrative law judge did not rely solely on the numerical superiority of the positive x-ray readings. Rather, the administrative law judge determined that "[t]he x-ray interpretations of physicians who are [B]oard[-]certified radiologists and B readers are entitled to the greatest weight." Decision and Order at 9. Thus, the administrative law judge properly considered the qualifications of the

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. Director's Exhibit 5; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[5] Dr. Ahmed read the December 26, 2007 x-ray film as positive for pneumoconiosis, Director's Exhibit 15, while Dr. Meyer read this film as negative, Employer's Exhibit 4. The administrative law judge concluded that the conflicting interpretations of the December 26, 2007 x-ray film by Drs. Ahmed and Meyer, who are both dually-qualified as Board-certified radiologists and B readers, were in equipoise. The administrative law judge therefore found that the December 26, 2007 x-ray film was "inconclusive as to the presence of pneumoconiosis." Decision and Order at 10.

radiologists in evaluating the x-ray evidence. *See* 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Consequently, we reject employer's assertion that the administrative law judge erred by merely "counting heads" without analyzing the x-ray evidence in its entirety.

Employer also argues that the administrative law judge erred by failing to discuss "the quality of the interpretations, the findings of the specific interpretations, or the overall picture presented by the entirety of the interpretations, including those made by B-readers who are not [B]oard-certified radiologists." Employer's Brief at 7. Specifically, employer asserts that the administrative law judge should have considered the quality of the x-ray films. Contrary to employer's assertion, the record does not indicate that any of the x-ray films were of unacceptable quality. Rather, the physicians who read the x-ray films noted that they were either quality 1 films or quality 2 films. Director's Exhibits 15, 21, 27, 28; Claimant's Exhibits 1, 5; Employer's Exhibits 2, 4. Employer does not point to any specific flaw in the quality of the x-ray films. Thus, we reject employer's assertion that the administrative law judge erred by failing to discuss the quality of the x-ray films. *See generally Lambert v. Itmann Coal Co.*, 6 BLR 1-256, 1-258 (1983) (recognizing that an x-ray film is assumed to be of acceptable quality, absent contrary proof, where its quality is not noted on the report).

Employer further argues that the administrative law judge erred by discrediting the negative x-ray readings by Drs. Fino and Repsher, both of whom are B readers and Board-certified pulmonologists, given that their x-ray interpretations were based on a greater amount of information concerning claimant's pulmonary health. Contrary to employer's assertion, the administrative law judge properly considered the radiological expertise of the physicians in assessing the probative value of the conflicting interpretations of the x-ray films. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon*, 8 BLR at 1-346. Section 718.202(a)(1) provides that an administrative law judge must consider the *radiological* qualifications of the readers of x-rays that are in conflict. 20 C.F.R. §718.202(a)(1). The fact that Drs. Repsher and Fino are Board-certified *pulmonologists* "is not relevant to the weighing of the evidence pursuant to Section 718.202(a)(1)." *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991) (*en banc*). Thus, the administrative law judge properly found that the x-rays dated April 22, 2008 and October 22, 2008 were positive for pneumoconiosis because Dr. Ahmed, who is a Board-certified radiologist and B reader, read these films as positive for pneumoconiosis, whereas Drs. Repsher and Fino, who are B readers, read these films as negative. *See Trent*, 11 BLR at 1-27-28; *Dixon*, 8 BLR at 1-346; Decision and Order at 10; Director's Exhibit 27; Employer's Exhibits 1, 2, 4. Consequently, we reject employer's assertion that the x-ray readings of Drs. Repsher and Fino were entitled to enhanced weight because they were rendered by Board-certified *pulmonologists*.

Employer additionally argues that the administrative law judge erred by concluding that the January 10, 2008 x-ray film was positive for pneumoconiosis, given that a physician with superior radiological expertise interpreted this film as negative. The administrative law judge noted that Dr. Schaaf, a B reader, interpreted the January 10, 2008 x-ray film as positive for pneumoconiosis. The administrative law judge also noted that Dr. Meyer, a Board-certified radiologist and B reader, interpreted this x-ray as negative for pneumoconiosis. Based on his assessment of the readings of the January 10, 2008 x-ray film by Drs. Schaaf and Meyer, the administrative law judge concluded that this x-ray was "positive for pneumoconiosis." Decision and Order at 9-10. However, as discussed *supra*, the administrative law judge reasonably determined that the x-ray readings by physicians who are dually-qualified as Board-certified radiologists and B readers are entitled to the greatest weight. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Because the administrative law judge gave greatest weight to the positive reading of the January 10, 2008 x-ray by a B reader, instead of the negative reading of the same x-ray by a dually-qualified radiologist, we vacate the administrative law judge's finding that the new x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) and remand the case for reconsideration of the new x-ray evidence and, if reached, all the x-ray evidence of record.[6]

Employer next contends that the administrative law judge erred in finding that the medical opinion evidence was sufficient to establish the existence of clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the new opinions of Drs. Martin, Begley, Schaaf, Fino, and Repsher. Dr. Martin opined that claimant has coal workers' pneumoconiosis, industrial bronchitis related to coal dust exposure, and chronic obstructive pulmonary disease (COPD) related to coal dust exposure and cigarette smoking. Director's Exhibit 15. Similarly, Drs. Begley and Schaaf opined that claimant has coal workers' pneumoconiosis and chronic bronchitis related to his coal dust exposure and his history of tobacco use. Director's Exhibit 21; Claimant's Exhibit 2. By contrast, Dr. Fino opined that the objective medical evidence was insufficient to justify a diagnosis of clinical or legal coal workers' pneumoconiosis. Employer's Exhibit 2. Likewise, Dr. Repsher opined that "[claimant] is not now and never has suffered from either medical or legal coal workers['] pneumoconiosis or any

[6] In his summary of the x-ray evidence, the administrative law judge noted that Dr. Ahmed, who is dually-qualified as a Board-certified radiologist and B reader, interpreted an x-ray film dated November 7, 2008 as positive for pneumoconiosis. Decision and Order at 4; Claimant's Exhibit 5. However, the administrative law judge did not mention this reading in his analysis of the x-ray evidence. On remand, the administrative law judge must consider Dr. Ahmed's reading of the November 7, 2008 x-ray film in his weighing of the x-ray evidence at 20 C.F.R. §718.202(a)(1). *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

other pulmonary or respiratory disease or condition, either caused by or aggravated by…the inhalation of coal mine dust." Director's Exhibit 28.

The administrative law judge gave less weight to Dr. Martin's opinion because Dr. Martin is not a pulmonologist. After considering the opinions of Drs. Begley and Schaaf, the administrative law judge stated that "[w]hile both doctors had incorrect smoking histories for [c]laimant, both testified that if [c]laimant had 26 pack years, then they would still report that his coal dust exposure significantly contributed to his COPD." Decision and Order at 10. The administrative law judge then considered the opinions of Drs. Fino and Repsher. Specifically, the administrative law judge stated:

> Drs. Fino and Repsher read and based their determination on several x-rays that are not in evidence and disregarded Dr. Begley's and Dr. Schaaf's pre-bronchodilator pulmonary function tests as invalid. However, I determined Dr. Begley's and Dr. Schaaf's pre-bronchodilator tests were valid. I must give both doctors' opinions less weight, because they did not rely on the valid pulmonary function tests and did rely on x-rays not in evidence. I must also give Dr. Repsher's opinion less weight because he was of the belief that [c]laimant was still smoking and I find that he no longer smokes. Similarly, I must also give Dr. Fino's opinion less weight because he does not correctly report [c]laimant's symptomology of daily cough and mucus production.

Id. at 11. Based on the opinions of Drs. Martin, Begley, and Schaaf, the administrative law judge found that the new medical opinion evidence established the existence of clinical and legal pneumoconiosis at Section 718.202(a)(4).

Employer argues that the administrative law judge selectively analyzed the medical opinion evidence, provided insufficient reasoning to support his findings, and substituted his opinion for that of the physicians. Specifically, employer asserts that the administrative law judge erred in discounting the opinions of Drs. Fino and Repsher because they relied on x-ray interpretations that were not contained in the record. Contrary to the administrative law judge's finding, a review of the reports by Drs. Fino and Repsher belies the administrative law judge's determination. All of the x-rays that Drs. Fino and Repsher relied on are contained in the record. Dr. Fino based his opinion on his interpretation of the November 4, 2008 x-ray associated with his examination of claimant, and his review of additional x-rays dated July 13, 2001, August 30, 2001, January 14, 2003, December 26, 2007, January 10, 2008, April 22, 2008, and October 22, 2008. Director's Exhibits 1, 15, 21, 27, 28; Claimant's Exhibit 1; Employer's Exhibit 2. Similarly, Dr. Repsher relied on his interpretation of the April 22, 2008 x-ray associated with his examination of claimant, in addition to his review of x-rays dated July 13, 2001, August 30, 2001, and January 10, 2008. Director's Exhibits 1, 21, 27, 28. Thus, the

administrative law judge erred in giving less weight to the opinions of Drs. Fino and Repsher because they relied on x-ray evidence that was not in the record. *Cf. Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-109 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting).

Employer also asserts that the administrative law judge erred in discounting the opinions of Drs. Fino and Repsher because they "disregarded pulmonary function studies administered by Drs. Begley and Schaaf as invalid." Employer's Brief at 9, *citing* Decision and Order at 11. In their respective reports, Drs. Fino and Repsher examined the tracings associated with pulmonary function studies administered by Dr. Schaaf on January 10, 2008 and by Dr. Begley on November 7, 2008. Director's Exhibit 28; Employer's Exhibit 2. Drs. Fino and Repsher concluded that these tests were invalid due to irregular and irreproducible flow volume loops. *Id*. In his Decision and Order, as noted above, the administrative law judge determined that the pre-bronchodilator pulmonary function studies of Drs. Begley and Schaaf were valid. Although it is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw his own conclusions and inferences from it, *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), the interpretation of medical data is for the medical experts, *Marcum v. Director,* OWCP, 11 BLR 1-23 (1987). Thus, in discounting the opinions of Drs. Fino and Repsher because they disregarded the pre-bronchodilator pulmonary function tests administered by Drs. Begley and Schaaf as invalid, based on his finding that these tests were valid, the administrative law judge erroneously substituted his opinion for that of the physicians. *Marcum*, 11 BLR at 1-24.

Employer further asserts that the administrative law judge erred in discounting Dr. Fino's opinion because Dr. Fino incorrectly reported claimant's symptomology. In his report, Dr. Fino noted that "[*claimant*] *does not admit* to daily cough and mucous production, and he does not wheeze." Employer's Exhibit 2 [emphasis added]. During his deposition, Dr. Fino addressed potential symptoms of cough and mucous production. Employer's Exhibit 8 at 20. However, Dr. Fino did not indicate that the symptoms that claimant had previously reported to him were inaccurate. In considering Dr. Fino's report at Section 718.202(a)(4), the administrative law judge gave less weight to Dr. Fino's opinion because he found that the doctor did not correctly report claimant's symptomology of a daily cough and mucus production. Decision and Order at 11. The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v.*

Duquesne Light Co., 12 BLR 1-162 (1989). In this case, the administrative law judge noted that claimant testified that he has a productive cough in the mornings. Decision and Order at 3. However, the administrative law judge did not render a credibility determination regarding claimant's testimony about his symptomology at the hearing and Dr. Fino's reporting of the symptomology that claimant gave to him during an examination. *Mabe*, 9 BLR at 1-68; *Sisak*, 7 BLR at 1-181. Thus, because the administrative law judge merely stated that Dr. Fino incorrectly reported claimant's symptomology, *Wojtowicz*, 12 BLR at 1-165, we hold that the administrative law judge erred in discounting Dr. Fino's opinion on this basis.

Employer additionally asserts that the administrative law judge erred in discounting Dr. Repsher's opinion because Dr. Repsher mistakenly believed that claimant was still smoking. The administrative law judge noted that Dr. Repsher opined that claimant was still smoking at the time of his examination. However, the administrative law judge stated, "I find that [c]laimant was no longer smoking at the time of his exams."[7] Decision and Order at 10-11. The administrative law judge gave less weight to Dr. Repsher's opinion for this reason. In his report, Dr. Repsher noted a severe cigarette addiction. Director's Exhibit 28. However, as employer asserts, Dr. Repsher did not opine that claimant has a chronic lung disease, or a pulmonary or respiratory impairment, related to cigarette smoking. Thus, the administrative law judge erred in failing to explain why he discounted Dr. Repsher's opinion because Dr. Repsher incorrectly determined that claimant was still smoking at the time of his examination. *Wojtowicz*, 12 BLR at 1-165. Moreover, the administrative law judge's characterization of Dr.

[7] The administrative law judge stated: "Dr. Repsher was of the opinion that [c]laimant was still smoking at the time of his exam based on [c]laimant's raised carboxyhemoglobin, serum nicotine, and continine levels. He claims that [c]laimant would have to be smoking a pack and a half a day to have those levels. (DX-27). Dr. Repsher indicates that these raised levels could be caused by exposure to carbon dioxide. (EX-9 at 49). In addition, when asked, Dr. Repsher could not recall whether [c]laimant smelled of cigarette smoke. *Id*. at 51." Decision and Order at 10-11.

The administrative law judge further stated: "Dr. Schaaf specifically indicated that [c]laimant did not smell of smoke and that he would have noted such a smell because he is 'incredibly sensitive to [the smell of cigarette smoke].' CX-6 at 39. In light of [c]laimant's testimony, both Dr. Repsher and Dr. Schaaf's testimony that [c]laimant did not smell of smoke, and Dr. Repsher's testimony that the blood levels could have been caused by something as simple as a leaky exhaust, I find that [c]laimant was no longer smoking at the time of his exams." *Id*. at 11.

Repsher's testimony regarding whether Dr. Repsher found that claimant smelled of smoke was contradictory.[8] *Tackett v. D*irector, OWCP, 7 BLR 1-703 (1985).

In view of the foregoing, we vacate the administrative law judge's finding that the new medical opinion evidence established the existence of clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for reconsideration of the new medical opinion evidence and, if reached, all the medical opinion evidence in accordance with the APA.

Furthermore, because we herein vacate the administrative law judge's findings that the new evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4) and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also vacate his finding that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Allen v. Mead Corp.*, 22 BLR 1-63, 1-66 (2000) (*en banc*).

Nevertheless, in the interest of judicial economy, we will also address employer's contentions of error on the merits by the administrative law judge at 20 C.F.R. §718.204(b)(2)(i), (iv), and (c). Specifically, employer contends that the administrative law judge erred in finding that the pulmonary function study evidence was sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i). Employer argues that the administrative law judge's analysis of the pulmonary function study evidence is flawed because he substituted his opinion for that of the physicians concerning the validity of the studies. We agree. A review of the administrative law judge's Decision and Order reveals that the administrative law judge failed to assess the conflicting pulmonary function studies of record and render a specific determination pursuant to Section 718.204(b)(2)(i).[9] While the administrative law judge summarized the new

[8] As previously noted, the administrative law judge stated that Dr. Repsher could not recall whether claimant smelled of cigarette smoke. Decision and Order at 11. However, the administrative law judge also stated that Dr. Repsher's testimony was that claimant did not smell of smoke. *Id*. The administrative law judge indicated that his finding that claimant was no longer smoking at the time of his examination was based, in part, on Dr. Repsher's testimony. *Id*.

[9] The new pulmonary function study evidence consists of one non-qualifying test and four qualifying tests. Three of the four qualifying tests were invalidated by the administering physicians. Director's Exhibits 21, 27; Employer's Exhibit 2. Dr. Vuskovich invalidated two qualifying tests dated April 22, 2008 and October 22, 2008. Employer's Exhibit 5. Dr. Renn opined that the pre-bronchodilator results of the January 10, 2008 test were valid, while the post-bronchodilator results were invalid. Director's

pulmonary function studies, he failed to address and weigh these studies. The administrative law judge's only statement with respect to the pulmonary function study evidence was that "[c]laimant has two qualifying pulmonary function tests, [and] one non-qualifying pulmonary function test." Decision and Order at 12. Further, although the administrative law judge acknowledged the opinions of physicians who either validated or invalidated certain studies in addressing his summary of the pulmonary function study evidence, he did not qualitatively assess the reliability of the various tests or the probative value of the consulting physicians' opinions. *Id*. at 4, n.5-10. Moreover, the administrative law judge did not discuss the previously submitted pulmonary function study evidence. Director's Exhibit 1. Thus, we hold that the administrative law judge erred in failing to provide a valid basis for finding that the pulmonary function study evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(i). *Wojtowicz*, 12 BLR at 1-165.

Furthermore, because the administrative law judge erred in his consideration of the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i), and inasmuch as that finding influenced his determinations regarding the credibility of the medical opinion evidence, Decision and Order at 13, we hold that the administrative law judge erred in weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). Moreover, in view of our holdings at 20 C.F.R. §§718.202(a) and 718.204(b), we also hold that the administrative law judge failed to provide a valid basis for finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

At the outset, on remand, the administrative law judge must consider whether claimant has established invocation of the Section 411(c)(4) presumption. As discussed *supra*, Section 1556 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a claimant establishes at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, there is a rebuttable presumption that claimant was totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). In this case, claimant filed his claim after January 1, 2005, Director's Exhibit 3, and the administrative law judge credited him with thirty-one years of coal mine employment, Decision and Order at 2, 12.

On remand, the administrative law judge must determine whether at least fifteen of the thirty-one years of coal mine employment that the administrative law judge credited claimant with working occurred in an underground coal mine or in a surface coal mine in conditions substantially similar to those in an underground mine. *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988). The

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Exhibit 23. The previously submitted pulmonary function study evidence consists of three non-qualifying tests and one qualifying test. Director's Exhibit 1.

administrative law judge must then determine whether claimant has established invocation of the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

If the administrative law judge finds that claimant is entitled to the presumption at Section 411(c)(4), then the administrative law judge must determine whether the medical evidence rebuts the presumption. 30 U.S.C. §921(c)(4).

Further, on remand, the administrative law judge must allow for the submission of evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lamar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge