BRB No. 06-0715 BLA

WILLIAM T. KILLMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SAHARA COAL COMPANY	)	
	)	DATE ISSUED: 07/30/2007
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision on Remand-Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Claimant appeals the Decision on Remand-Denying Benefits (99-BLA-0760) of Administrative Law Judge Joseph E. Kane rendered on a duplicate 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). The relevant procedural history of the case is as follows. Claimant filed a duplicate claim on October 20, 1997.[1] Director's Exhibit 55.

[1] Claimant filed a claim for benefits on February 20, 1985, which was denied by Administrative Law Judge Robert M. Glennon on December 21, 1993. Director's

In a Decision and Order dated October 24, 2000, Administrative Law Judge Robert L. Hillyard credited claimant with twenty-three years of coal mine employment, and found that claimant's application for benefits, filed on October 20, 1997, constituted a duplicate claim and not a request for modification. *See* 20 C.F.R. §§725.309, 725.310 (2000). Judge Hillyard determined that the newly submitted evidence was insufficient to establish that claimant had become totally disabled by a respiratory or pulmonary impairment since the denial of his prior claim, and thus found, that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, benefits were denied.

Claimant filed an appeal with the Board, asserting that the administrative law judge erred in treating his October 20, 1997 application for benefits as a duplicate claim. The Board rejected this argument and determined that claimant's October 20, 1997 application did not constitute a timely request for modification and was properly adjudicated by Judge Hillyard under the duplicate claims provision of 20 C.F.R. §725.309 (2000). *Killman v. Sahara Coal Co.*, BRB No. 01-0288 BLA, slip op. at 4-7 (Dec. 26, 2001) (unpub.). The Board, however, held that Judge Hillyard erred in finding that claimant was not totally disabled because Judge Hillyard failed to consider whether Drs. Renn, Dahhan, and Tuteur understood the exertional requirements of claimant's job, in comparison to Dr. Cohen, when they considered whether claimant's was totally disabled for work by his obstructive pulmonary impairment.[2] *Killman*, BRB No. 01-0288 BLA,

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Exhibit 36. Although Judge Glennon found that claimant established the existence of pneumoconiosis arising out of coal mine employment, he determined that the evidence was insufficient to establish that claimant was totally disabled by a respiratory or pulmonary impairment. Claimant appealed this decision, but the Board affirmed the denial of benefits. *Killman v. Sahara Coal Co.*, BRB No. 94-0660 BLA (June 23, 1994) (unpub.). Claimant filed a duplicate claim on October 20, 1997, which is the subject of the instant appeal.

[2] Dr. Cohen diagnosed that claimant suffered from a mild to moderate respiratory impairment that prevented claimant from performing his usual coal mine work as a foreman. Director's Exhibit 44. Dr. Baker opined that claimant was permitted to engage in "mild to moderate exertion at most." *Id.* Drs. Tuteur, Renn and Dahhan diagnosed that claimant had a mild obstructive impairment, each opining that that claimant retained the respiratory capacity to work in his usual coal mine job as a foreman. Because the administrative law judge had not assessed the physician's findings of respiratory impairment in light of the exertional requirements of claimant's work as a foreman, the Board determined that the administrative law judge had failed to properly consider whether claimant had established his total respiratory or pulmonary disability. *Killman v. Sahara Coal Co.*, BRB No. 01-0288 BLA, slip op. at 9. (Dec. 26, 2001) (unpub.).

slip op. at 8. On remand, the Board directed Judge Hillyard first to determine the nature of claimant's usual coal mine work, and then compare the medical opinions diagnosing a respiratory impairment, in conjunction with claimant's work requirements and his physical capabilities, to determine whether claimant was totally disabled. *Killman*, BRB No. 01-0288 BLA, slip op. at 9. If the administrative law judge found that claimant had established a totally disabling respiratory or pulmonary impairment, and was able to establish a material change in conditions, the Board directed Judge Hillyard to further consider the merits of the claim under 20 C.F.R. Part 718. *Id*.

On remand, Judge Hillyard recited the physicians' opinions that described claimant's job duties, indicated that he would not substitute his opinion for those of the medical experts, and then found based on the opinions of employer's experts, that claimant was not totally disabled by a respiratory or pulmonary impairment. Judge Hillyard further determined that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), and denied benefits. Claimant appealed and the Board affirmed Judge Hillyard's Decision and Order on Remand denying benefits. *Killman v. Sahara Coal Co.*, BRB No. 02-0880 BLA (Sept. 30, 2003) (unpub.) (McGranery, J., dissenting), *aff'd Killman v. Sahara Coal Co.*, BRB No. 02-0889 BLA (Order on Reconsideration *En Banc*) (Apr. 22, 2004) (unpub.) (McGranery and Hall, J.J., dissenting). Claimant next filed an appeal with the United States Court of Appeals for the Seventh Circuit, wherein jurisdiction for this case arises, asserting that the administrative law judge failed to properly evaluate the medical opinion evidence in light of the exertional requirements of claimant's usual coal mine work.[3] The court agreed that the administrative law judge erred by failing to specifically confirm that employer's experts had an accurate understanding of the specific job requirements of claimant's usual work as a foreman, prior to relying on those opinions to support a finding that claimant was not totally disabled. *Killman v. Director, OWCP*, 415 F.3d 716, 722, 23 BLR 2-250, 2-259 (7th Cir. 2005). Therefore, the court vacated the Board's decision and remanded the case for further consideration by the administrative law judge as to whether claimant was totally disabled. *Id.*

On remand, the case was reassigned to Judge Kane (the administrative law judge), whose Decision on Remand – Denying Benefits is the subject of the instant appeal. Because the administrative law judge credited Dr. Cohen's opinion that claimant was totally disabled by a respiratory impairment from performing his usual coal mine work as a foreman, the administrative law judge found that claimant had satisfied his burden to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). The

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as claimant was last employed in the coal mine industry in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 2.

administrative law judge, however, denied benefits because he found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

On appeal, claimant argues that the administrative law judge erred in finding that he did not suffer from pneumoconiosis. Claimant maintains that the administrative law judge erred in weighing the x-ray evidence under 20 C.F.R. §718.202(a)(1) because he ignored relevant x-rays and improperly relied on the numerical superiority of the negative x-ray evidence. Claimant contends that the administrative law judge erred by failing to making a specific finding as to the quantity and length of claimant's smoking history. Claimant also contends that the administrative law judge erred in weighing the conflicting medical opinions as to the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). Employer responds, urging affirmance of the denial of benefits. Employer contends that the administrative law judge erred in finding that claimant was totally disabled, and thereby proceeding to the merits of the claim. Employer's Response Brief at 27. Employer, however, maintains that the administrative law judge's error in finding that claimant was totally disabled, and thereby entitled to a finding of a material change in conditions, may be deemed harmless by the Board only if the Board affirms the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis. Employer's Response Brief at 29. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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. 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In the instant case, the administrative law judge determined that the x-ray evidence was insufficient to establish the existence of pneumoconiosis. We note that the record contains ten chest x-rays dated February 20, 1998, April 22, 1997, April 24, 1996, April 26, 1996, September 8, 1993, September 28, 1993, September 15, 1987, October 24, 1985, July 15, 1985, and March 21, 1985. The administrative law judge discussed nine of the x-rays and found that eight of those films were negative for pneumoconiosis, based on the preponderance of negative readings by dually qualified Board-certified

radiologists and B readers, and that one x-ray was inconclusive because there was one negative and one positive reading for pneumoconiosis. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v.Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); Decision on Remand at 8-11.

Under Section 718.202(a)(1), claimant alleges that, because the administrative law judge adopted the summary of the medical evidence, as set forth by Judge Hillyard in a prior decision, and did not provide his own detailed summary of the conflicting x-ray evidence in his Decision on Remand - Denying Benefits, then it is impossible to assess the propriety of his finding that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(1). Claimant's argument is without merit as the administrative law judge specifically stated that he "incorporated by reference…the description of the medical evidence as contained in the October 24, 2000 Decision and Order." Decision on Remand – Denying Benefits at 3. Because Judge Hillyard's October 24, 2000 Decision and Order contains a complete description of the x-ray evidence of record, there was no prejudice to claimant in the administrative law judge's adoption of that summary. *Id.*

Claimant also contends that the administrative law judge overlooked relevant evidence. Claimant notes that while there were nineteen readings of an x-ray dated February 20, 1998, the administrative law judge considered only twelve readings of that film, and found that a preponderance of the readings was negative for pneumoconiosis. Claimant's assertion of error is misleading. First, the administrative law judge found that there were nineteen readings of the February 20, 1998 x-ray with five positive readings by physicians who were dually qualified as Board-certified radiologists and B readers, six negative readings by dually-qualified physicians, one positive reading by a B-reader, and one negative reading by a B reader. Decision on Remand at 9. There were also six additional negative readings for pneumoconiosis by dually qualified physicians, but the administrative law judge did not weigh those readings because the doctors listed the quality of the film as "poor." Decision on Remand – Denying Benefits at 9 n.8. Based on our review of the record and medical summary, the administrative law judge overlooked only one reading of the February 20, 1998 x-ray, which was a negative reading for pneumoconiosis. Employer's Exhibit 6. Because the administrative law judge properly weighed all of the positive readings for pneumoconiosis of the February 20, 1998 x-ray, and found that the five positive readings for pneumoconiosis were outweighed by the seven negative readings for pneumoconiosis, the administrative law judge's failure to consider one additional negative reading was, at best, harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant next asserts that the administrative law judge ignored an April 24, 1996 x-ray in his analysis of the evidence at 20 C.F.R. §718.202(a)(1). We disagree. The

record discloses that three dually qualified Board-certified radiologists and B readers read the April 26, 1996 x-ray as negative for pneumoconiosis. Based on our review of the evidence summary, it is apparent that when the administrative law judge stated that there were "nineteen" readings of an April 26, 1996 x-ray, he mistakenly combined the three positive readings of the April 26, 1996 x-ray with sixteen readings of the April 24, 1996 x-ray, and then weighed them together as readings of only the April 26, 1996 x-ray. The administrative law judge found that the April 26, 1996 x-ray was negative for pneumoconiosis, crediting eleven negative readings rendered by dually qualified B readers and Board-certified radiologists over four positive readings for pneumoconiosis rendered by dually qualified physicians. Decision on Remand – Denying Benefits at 9; Director's Exhibits 46, 44, 53, 54, 64, 66, 75, 78, 89; Employer's Exhibits 4-7, 12. However, contrary to claimant's contention, we do not consider the administrative law judge's mistake in commingling the nineteen readings together to constitute more than harmless error. *Larioni*, 6 BLR at 1276. When the three negative readings of the April 26 1996 x-ray are excluded from the mix, there are sixteen readings of the April 24, 1996-x-ray, of which there were four positive readings and seven negative readings for pneumoconiosis by dually-qualified Board-certified radiologists and B readers.[4] Because substantial evidence supports the administrative law judge's determination that the preponderance of the readings of the April 24, 1996 x-ray was negative for pneumoconiosis, and since the April 26, 1996 film was unanimously read as negative for pneumoconiosis, there was no prejudicial error to claimant in the administrative law judge's treatment of either film. *Id*.

Claimant also contends that the administrative law judge erred in considering the September 28, 1993 x-ray. Claimant faults the administrative law judge for stating that there were nine readings of this film, but then considering only six of the readings in his analysis of whether that film was positive or negative for pneumoconiosis. However, as claimant points out on appeal, while the summary of evidence includes nine readings of the September 28, 1993 x-ray, claimant specifically informed the administrative law judge that the three readings of Drs. Binns, Abramowitz and Gogineni of that x-ray should not be considered because the readings had been previously excluded from the record while the case was pending with Judge Hillyard. Thus, the administrative law judge appears to have only followed claimant's instruction that he not consider three of the nine readings of the September 28, 1993 x-ray. Moreover, because the three readings that claimant alleges that the administrative law judge failed to consider are negative for

[4] The administrative law judge gave no probative weight to one reading of the April 24, 1996 x-ray by a physician whose qualifications were not indicated and who failed to identify the quality of the film. Decision on Remand – Denying Benefits at 9 n.8.

pneumoconiosis, any error committed by the administrative law judge was harmless. *Larioni*, 6 BLR at 1276.

We also reject claimant's assertion that the administrative law judge erred by failing to explain how he resolved the conflict in the six readings he considered of the September 28, 1993 x-ray. The administrative law judge permissibly found that there was only one positive reading of the September 28, 1993 x-ray by Dr. Sanjabi, a physician who held no radiological qualifications, and that his positive reading was outweighed by a preponderance of negative readings of the film by better qualified Board-certified radiologists and B readers. Decision on Remand – Denying Benefits at 9 n.8. Thus, we affirm the administrative law judge's finding that the September 28, 1993 x-ray was negative for pneumoconiosis.[5]

Lastly, claimant asserts that the administrative law judge erred in concluding that the September 8, 1993 x-ray was negative for pneumoconiosis. We disagree. The administrative law judge properly found that there were two readings of the September 8, 1993 x-ray. The film had been read as negative by a dually qualified physician and as positive by a B reader. The administrative law judge permissibly determined that the September 8, 1993 x-ray was negative, based on the negative reading of the dually qualified physician. Decision on Remand – Denying Benefits at 9; Director's Exhibits 33, 35.

Despite claimant's assertion that the administrative law judge erred in relying on the numerical superiority of the negative x-ray evidence, we find that he performed a qualitative and quantitative analysis of the evidence, and permissibly determined that the weight of the x-ray evidence was negative for pneumoconiosis, taking into consideration the qualifications of the physicians who interpreted claimant's x-rays. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Consequently, because substantial evidence supports the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the x-ray evidence of record, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1). *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*).

[5] Although we agree with claimant that the administrative law judge improperly considered three negative readings of the September 28, 1993 x-ray that had been previously excluded from the record, that error was harmless in view of his permissible rejection of the only positive reading of that film. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision on Remand – Denying Benefits at 9.

Pursuant to 20 C.F.R. §718.202(a)(4), claimant contends that the administrative law judge erred in finding that the opinions of Drs. Wells, Clarke and Baker were insufficient to establish that claimant suffered from pneumoconiosis. We disagree. The administrative law judge properly found that, while Dr. Wells diagnosed that claimant suffered from coal workers' pneumoconiosis and "chronic pulmonary disease" related to coal dust exposure, he failed to explain specifically how the results of any of the objective tests, other than a positive x-ray, supported his diagnosis of clinical pneumoconiosis. *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Decision on Remand - Denying Benefits at 11.

Similarly, the administrative law judge permissibly assigned less weight to Dr. Clarke's diagnosis of pneumoconiosis and chronic pulmonary disease related to coal dust exposure, because the administrative law judge noted that Dr. Clarke diagnosed pneumoconiosis based solely on a positive chest x-ray and claimant's history of dust exposure. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-265 (6th Cir. 2003); *Worhach*, 17 BLR at 1-110; Decision on Remand – Denying Benefits at 12. The administrative law judge properly noted that while Dr. Clarke referenced claimant's pulmonary function study results in support of his opinion, he failed to explain how those tests were used to diagnose either clinical or legal pneumoconiosis. *See Worhach*, 17 BLR at 1-110; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-1-149 (1989) (*en banc*). Moreover, the administrative law judge permissibly found that Dr. Clarke's pulmonary function studies had been invalidated by seven other physicians, who as Board-certified internists and pulmonary disease specialists, were better qualified than Dr. Clarke. *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J. concurring) (*aff'd on recon*.); Decision on Remand – Denying Benefits at 12 n.11. Additionally, the administrative law judge permissibly found Dr. Clarke's opinion to be less persuasive based on his understanding of claimant's smoking history. Decision on Remand – Denying Benefits at 12. As noted by the administrative law judge, although Dr. Clarke opined that there was no explanation for claimant's respiratory condition, other than coal dust exposure, he only reported that claimant had smoked one half pack of cigarettes per day for twelve years in reaching that diagnosis. Director's Exhibit 25. Because the administrative law judge determined that the record supported a finding that claimant smoked one half pack per day for thirty years,[6] which is a longer period of smoking than

[6] Claimant asserts that the administrative law judge erred by failing to make a specific finding as to the length of his smoking history. Claimant's assertion of error is without merit as the administrative law judge adopted the smoking history determination rendered by Judge Hillyard in his October 24, 2000 Decision and Order, that claimant smoked thirty-years at the rate of one-half packs per day. Decision on Remand – Denying Benefits at 13 n.12. The administrative law judge specifically noted that Judge

reported by Dr. Clarke, the administrative law judge had discretion to assign his opinion less weight on the issue of disease causation at 20 C.F.R. §718.202(a)(4). *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

We also reject claimant's assertion that the administrative law judge erred in his treatment of Dr. Baker's opinion. The administrative law judge properly noted that Dr. Baker prepared three examination reports dated March 12, 1985, September 8, 1993, and April 24, 1996, which diagnosed coal worker's pneumoconiosis, chronic bronchitis and chronic obstructive pulmonary disease (COPD) related to coal dust exposure. Decision on Remand - Denying Benefits at 13; Director's Exhibits 8, 33, 44. The administrative law judge permissibly found that Dr. Baker's diagnosis of coal workers' pneumoconiosis [clinical pneumoconiosis] was not sufficiently reasoned since Dr. Baker did not fully explain the basis for his opinion, citing only to a positive x-ray reading and claimant's subjective symptoms. *See Worhach*, 17 BLR at 1-104. The administrative law judge also assigned less weight to Dr. Baker's opinion relevant to the existence of legal pneumoconiosis because he found that Dr. Baker reported inconsistent smoking histories for claimant, with the most recent smoking history reported as only a ten-year smoking habit. Since the administrative law judge was unable to discern whether Dr. Baker based his disease causation opinion on an accurate smoking history, the administrative law judge had discretion to assign Dr. Baker's opinion, regarding the etiology of claimant's chronic bronchitis and COPD, less weight. *See Worhach*, 17 BLR at 1-110; *Clark*, 12 BLR 1-1-149; *Trumbo*, 17 BLR 1-85; Decision on Remand - Denying Benefits at 9, 13, 14.

Moreover, we reject claimant's contention that the administrative law judge improperly determined at 20 C.F.R. §718.202(a)(4) that claimant failed to establish the existence of pneumoconiosis based on a mere head count of witnesses.[7] Contrary to claimant's argument, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis because he credited what he determined to be

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Hillyard's finding as to the quantity and length of claimant's smoking history was supported by the record. *Id.*

[7] Claimant also contends that the administrative law judge erred by not separately considering whether claimant established either the existence of clinical or legal pneumoconiosis. However, because the administrative law judge gave proper consideration to all of the evidence relevant to both the existence of clinical and legal pneumoconiosis, any error committed by the administrative law judge in failing to separate his analysis of these issues is harmless error. *See Larioni*, 6 BLR at 1-1276.

the more complete, comprehensive and better reasoned opinions of Drs. Tuteur,[8] Dahhan, and Renn, that claimant did not suffer from coal workers' pneumoconiosis or any respiratory condition due to coal dust exposure.[9] Decision on Remand – Denying Benefits at 19. As discussed previously, the administrative law judge gave permissible reasons for assigning less probative weight to the opinions of Drs. Wells, Clarke and Baker. Furthermore, although the administrative law judge acknowledged that Dr. Cohen provided a reasoned and documented opinion that claimant suffered from both clinical and legal pneumoconiosis, the administrative law judge permissibly determined that Dr. Cohen's opinion, diagnosing pneumoconiosis and a chronic obstructive respiratory impairment due to coal dust exposure, was outweighed by the credible opinions of Drs. Tuteur, Renn, and Dahhan, each of whom provided a reasoned and documented opinion attributing claimant's respiratory disease to smoking and not coal dust exposure. Furthermore, the administrative law judge properly determined that the probative value of Dr. Cohen's opinion, as to the presence of clinical pneumoconiosis, was diminished in light of the preponderance of the reasoned medical opinions stating that claimant did not suffer from the disease. *Clark*, 12 BLR 1-149; Decision on Remand - Denying Benefits at 19. Consequently, as substantial evidence supports the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), that finding is affirmed. Because claimant failed to establish the

[8] Contrary to claimant's assertion, the administrative law judge did not err by failing to find Dr. Tuteur's opinion to be hostile to the Act, as the doctor did not foreclose all possibility that coal dust exposure can produce chronic airways obstruction. Rather, as noted by the administrative law judge, Dr. Tuteur stated that coal dust exposure can produce chronic airway obstruction typically associated with progressive fibrosis, but that claimant had no evidence of progressive fibrosis or obstruction consistent with coal dust exposure based on the results of the objective testing. *See Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987); *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Butela v. United States Steel Corp.* 8 BLR 1-48 (1985); Decision on Remand – Denying Benefits at 15; Employer's Exhibit 1.

[9] Claimant asserts that the administrative law judge mistakenly grouped the testimony of Dr. Wiot in with the medical opinion evidence, and confused the issues of clinical versus legal pneumoconiosis. We disagree. The administrative law judge properly weighed Dr. Wiot's opinion at Section 718.202(a)(4) based on his interpretation of a CT scan. Contrary to claimant's assertion, CT scan evidence must be considered as "other medical evidence" under 20 C.F.R. §718.202(a)(4). *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002). The administrative law judge permissibly credited Dr. Wiot's opinion that claimant's CT scan was negative for pneumoconiosis. Decision on Remand – Denying Benefits at 18-19.

existence of pneumoconiosis, a requisite element of entitlement, the administrative law judge's denial of benefits is affirmed.[10]

Accordingly, the administrative law judge's Decision on Remand – Denying Benefits is affirmed.

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

[10] Because we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis, we decline to address employer's contention that the administrative law judge erred in finding that claimant was totally disabled, and thus, that he erred in finding that claimant established a material change in conditions. *See Larioni,* 6 BLR at 1-1276.