

BRB No. 09-0727 BLA

BOBBY SAYLOR )  
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 Claimant-Respondent )  
 )  
 v. )  
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 MULLINS & SONS COAL COMPANY )  
 )  
 and )  
 )  
 KENTUCKY COAL PRODUCERS SELF- ) DATE ISSUED: 06/30/2010  
 INSURANCE FUND )  
 )  
 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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens Law Center), Whitesburg, Kentucky, for claimant.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer.

Barry H. Joyner (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (05-BLA-5999) of Administrative Law Judge Edward Terhune Miller granting claimant’s request for modification of the denial of a subsequent claim 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).<sup>1</sup> Claimant’s prior claim for benefits, filed on September 11, 1991, was finally denied on May 31, 1996, because claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director’s Exhibit 1. On May 13, 2002, claimant filed his current claim, which is considered a “subsequent claim for benefits” because it was filed more than one year after the final denial of his previous claim. 20 C.F.R. §725.309(d); Director’s Exhibit 3. The district director denied this claim on October 29, 2003. Director’s Exhibit 26. Claimant requested modification, pursuant to 20 C.F.R. §725.310, which was denied by the district director on February 13, 2004. Director’s Exhibits 27, 36. Claimant again requested modification, and on February 28, 2005, the district director granted claimant’s request, and awarded benefits. Director’s Exhibit 47. Employer requested a hearing, and the case was forwarded to the Office of Administrative Law Judges.

In a decision dated June 18, 2009, the administrative law judge credited claimant with 16.01 years of coal mine employment,<sup>2</sup> and found that the medical evidence developed since the prior denial of benefits established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).<sup>3</sup> The administrative law judge

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<sup>1</sup> Employer and the Director, Office of Workers’ Compensation Programs, have submitted supplemental briefs correctly stating that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as it involves a miner’s claim filed before January 1, 2005.

<sup>2</sup> The record indicates that claimant’s coal mine employment was in Kentucky. Director’s Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

<sup>3</sup> A finding of either clinical pneumoconiosis or legal pneumoconiosis is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Clinical pneumoconiosis is defined as “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). Legal pneumoconiosis is defined as “any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition

therefore found that claimant demonstrated a change in conditions under 20 C.F.R. §725.310, and a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Reviewing the merits of entitlement, the administrative law judge relied on the medical evidence developed since the 1996 denial of claimant's prior claim, as more probative of claimant's current condition. The administrative law judge found that the evidence established the existence of clinical and legal pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203(b). The administrative law judge further found that claimant is totally disabled and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in considering x-rays and pulmonary function studies not specifically designated by claimant on his evidence summary form, and erred in crediting the opinions of those physicians who relied, in part, on that evidence. Employer also argues that the administrative law judge erred in excluding the deposition testimony of Dr. Westerfield, submitted by employer post-hearing. Employer argues, therefore, that the administrative law judge erred in finding that the evidence established the existence of pneumoconiosis and a change in an applicable condition of entitlement since the prior denial of benefits, pursuant to 20 C.F.R. §§718.202, 725.309(d), 725.310. Employer further challenges the administrative law judge's findings, on the merits, that claimant established that he is totally disabled due to pneumoconiosis, and is entitled to benefits beginning May 1, 2002. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, agreeing with employer that the administrative law judge erred in determining the date for the commencement of benefits. Employer has filed a reply brief reiterating its contentions.<sup>4</sup>

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359

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includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

<sup>4</sup> The administrative law judge's finding of 16.01 years of coal mine employment is affirmed as unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

(1965). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

We first address employer's arguments regarding the evidentiary record. Employer initially asserts that the administrative law judge violated the evidentiary limitations set forth at 20 C.F.R. §725.414<sup>5</sup> when he considered x-ray readings and pulmonary function studies that were not designated on the evidence summary form submitted by claimant in connection with the most recent modification proceeding.<sup>6</sup> Employer's Brief at 22; Employer's Reply Brief at 3. Employer contends that, pursuant to *Collins v. Whitaker Coal Corporation*, BRB No. 05-0397 BLA (Jan. 27, 2006)(unpub.), the parties are bound by their evidentiary designations. Employer's Brief at 23; Employer's Reply Brief at 4. Employer further contends that, because Drs. Forehand and Hussain considered these "undesigned" x-rays and pulmonary function studies, their medical reports are tainted by inadmissible evidence. Employer's Brief at 24; Employer's Reply Brief at 5-7. Employer's contentions lack merit.

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<sup>5</sup> Section 725.414 provides, in pertinent part, that each party may submit two x-ray readings, one autopsy report, one biopsy report, two pulmonary function studies, two blood gas studies, and two medical reports as its affirmative case evidence. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Each party may then submit, in rebuttal, one physician's interpretation of each x-ray reading, autopsy report, biopsy report, pulmonary function study, and blood gas study submitted as the opposing party's affirmative case. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, the party that originally proffered the evidence may submit certain rehabilitative evidence. *Id.* Further, 20 C.F.R. §725.310(b) provides that in a modification proceeding, each party shall be entitled to submit one additional x-ray interpretation, pulmonary function study, blood gas study, and medical report as affirmative case evidence, "along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of §725.414." 20 C.F.R. §725.310(b). "Good cause" is required to exceed the numerical limits. 20 C.F.R. §725.456(b)(1).

<sup>6</sup> On the evidence summary forms submitted in connection with the most recent request for modification, claimant designated, as his affirmative evidence, Dr. Forehand's readings of x-rays dated May 9, 2003 and August 23, 2004, Dr. Forehand's August 23, 2004 blood gas study, Dr. Forehand's medical reports dated September 20, 2004 and October 13, 2007, and Dr. Hussain's medical report dated October 2, 2007. As rebuttal evidence, claimant submitted Dr. Ahmed's re-reading of an x-ray dated April 7, 2005. Employer identified, as its affirmative evidence, Dr. Fino's reading of an x-ray dated April 7, 2005, together with Dr. Fino's April 7, 2005 pulmonary function study, blood gas study, and medical report. As rebuttal evidence, employer designated Dr. Halbert's re-reading of the August 23, 2004 x-ray.

Sections 20 C.F.R. §§725.414 and 725.310(b) “should be read together to establish combined evidentiary limits on modification, to allow a party to submit for the first time in a modification proceeding all of the evidence permitted by each regulation.” *Rose v. Buffalo Mining Co.*, 23 BLR 1-221, 1-227 (2007). Therefore:

[W]here a petition for modification is filed on a claim arising under the amended regulations, each party may submit its full complement of medical evidence allowed by 20 C.F.R. §725.414, *i.e.*, additional evidence to the extent the evidence already submitted in the claim proceedings is less than the full complement allowed, plus the party may also submit the additional medical evidence allowed by 20 C.F.R. §725.310(b).

*Rose*, 23 BLR at 1-228.

In considering this request for modification of the denial of a subsequent claim (which was denied based upon a failure to establish a change in an applicable condition of entitlement), the administrative law judge was required to consider whether the evidence developed in the subsequent claim, including any new evidence submitted with claimant’s two requests for modification, established a change in an applicable condition of entitlement. *See* 20 C.F.R. §§725.309(d); 725.310(b); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998).

Contrary to employer’s assertion, therefore, in determining whether claimant established a change in an applicable condition of entitlement, the administrative law judge was not required to limit his consideration to evidence designated by claimant on his most recent evidence summary form only. Rather, the proper inquiry is whether the evidence considered by the administrative law judge falls within claimant’s allowable evidence pursuant to the combined evidentiary limits of 20 C.F.R. §725.414 and 20 C.F.R. §725.310(b).<sup>7</sup> A review of the record reveals that each item of evidence considered by the administrative law judge was previously designated by the parties and admitted into the record either in connection with the initial proceedings on claimant’s 2002 subsequent claim, or in connection with the December 10, 2003 or October 14, 2004 modification requests, and that each item was within the evidentiary limitations associated with those proceedings. Thus, there is no merit to employer’s contention that

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<sup>7</sup> Employer’s reliance on *Collins v. Whitaker Coal Corporation*, BRB No. 05-0397 BLA (Jan. 27, 2006)(unpub.), is misplaced. The Board held in *Collins* that an administrative law judge was not required to consider a physician’s opinion for a purpose beyond that for which the employer designated it. Thus, *Collins* is distinguishable from the present case, which involves the submission and designation of evidence at different stages of combined, initial and modification proceedings on a claim.

the administrative law judge reviewed evidence that was not properly of record. *See Rose*, 23 BLR at 1-228. Moreover, the reports of Drs. Forehand and Hussain do not contain any x-ray interpretations, “pulmonary function test results,” blood gas studies, or medical reports that are not admissible under either the 20 C.F.R. §725.414(a) limits, or under 20 C.F.R. §725.414(a)(4) as hospitalization or treatment records, or under 20 C.F.R. §725.310(b) in support of modification.<sup>8</sup> Therefore, we reject employer’s contention that the administrative law judge erred in evaluating their opinions.

We further reject employer’s assertion that the administrative law judge abused his discretion in excluding Dr. Westerfield’s medical reports and deposition testimony from the record. Employer’s Brief at 26. At the November 14, 2007 hearing, the parties disagreed as to the evidentiary limitations applicable to claims on modification, and the applicability of *Rose*. Hearing Tr. at 20-25. Employer asserted, incorrectly, that *Rose* does not apply to this case, which involves a subsequent claim followed by two requests for modification. Hearing Tr. at 20-23. Employer asserted that the parties were entitled to submit no more than one exhibit under each category of evidence enumerated under 20 C.F.R. §725.310(b). *Id.* Thus, employer objected to the admission of certain evidence by claimant, and employer submitted the October 19, 2006 report of Dr. Fino as its sole affirmative case medical report. Employer’s Exhibit 1.

Post-hearing, on November 16, 2007, employer moved to submit the March 25, 2005 deposition testimony of Dr. Westerfield. Employer asserted that, based on its interpretation of *Rose* and 20 C.F.R. §725.310(b), it refrained from submitting Dr. Westerfield’s deposition at the hearing, on the ground that it would exceed the evidentiary limitations. Employer stated that, having heard the arguments of claimant’s counsel pertaining to the application of *Rose*, “[i]f claimant’s counsel is correct in his argument concerning the limitations on evidence, and the undersigned counsel respectfully submits that he is not, then the undersigned counsel desires to submit the deposition of Dr. Westerfield as . . . an initial medical report . . . .” Employer’s

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<sup>8</sup> Employer contends that, because Dr. Hussain did not identify the date of the pulmonary function study he referenced, he relied on evidence that is not contained in the record. Employer’s Brief at 24. It is employer’s burden to establish that the administrative law judge erred in evaluating Dr. Hussain’s opinion. As Dr. Hussain merely referred to “PFT,” not to the results of a specific pulmonary function test, employer has failed to establish that the study is not of record. Moreover, since it is undisputed on this record that the pulmonary function studies show an obstructive impairment, employer has not established how it was prejudiced by Dr. Hussain’s observation that claimant has “evidence of airway obstruction on [pulmonary function testing].” Claimant’s Exhibit 1; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

November 16, 2007 Motion (Motion) at 2. In support of its motion, employer argued that it previously attempted to submit “evidence from Dr. Westerfield” to the district director, but the district director excluded it as in excess of the limitations. Motion at 2-3. Employer also asserted that the “information contained in Dr. Westerfield’s deposition was previously submitted . . . to claimant’s prior representatives as was Dr. Westerfield’s narrative report dated November 19, 2002.” Motion at 3. Employer noted that the record was kept open for claimant’s counsel to submit additional evidence, and asked that Dr. Westerfield’s deposition also be admitted “in the interest of equity and fairness.” *Id.*

By Order dated January 30, 2008, the administrative law judge excluded Dr. Westerfield’s deposition, on the grounds that it was not in compliance with 20 C.F.R. §725.456(b)(2), and that employer did not show good cause for its untimely submission.<sup>9</sup> The administrative law judge found that, while employer had room for additional medical reports under *Rose* and the combined evidentiary limitations, and claimant had not opposed employer’s motion,<sup>10</sup> the admission of Dr. Westerfield’s deposition out of time was not justified. January 30, 2008 Order (Order) at 2-3. The administrative law judge found that although employer asserted that “the information contained in Dr. Westerfield’s deposition was previously submitted” to claimant’s prior representative while this case was pending before the district director, “[c]laimant is now represented by different counsel,” “no representative of the [c]laimant participated in the deposition,” and the deposition itself was never “submitted to, or timely exchanged with,” claimant’s representatives. Order at 3. The administrative law judge found that employer’s attempted submission of Dr. Westerfield’s written reports to the district director “was the

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<sup>9</sup> Section 725.456(b)(2) provides, in relevant part, that “any . . . documentary material, including medical reports, which was not submitted to the district director, may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least 20 days before a hearing is held in connection with the claim.” Section 725.456(b)(3) provides, in turn: “If documentary evidence is not exchanged in accordance with paragraph (b)(2) of this section and the parties do not waive the 20-day requirement or good cause is not shown, the administrative law judge shall either exclude the late evidence from the record or remand the claim to the district director for consideration of such evidence.” 20 C.F.R. §725.456(b)(2), (3).

<sup>10</sup> Claimant later indicated that he opposed the admission of Dr. Westerfield’s deposition, but had not responded immediately to employer’s motion due to claimant’s understanding that evidentiary issues were to be addressed in the parties’ post-hearing briefs. Claimant’s Brief at 5 n.1; Hearing Tr. at 13, 20-26, 52. However, the administrative law judge issued his ruling excluding Dr. Westerfield’s medical evidence on January 30, 2008, before claimant could raise his objection. Claimant’s Post-Hearing Brief at 3 n.2.

only instance in which medical evidence from Dr. Westerfield was submitted by [employer] . . . and it did not include Dr. Westerfield's deposition which is now offered in evidence for the first time, post hearing." Order at 3. The administrative law judge correctly noted that although the district director advised employer that it could offer the evidence again at the formal hearing, employer did not do so. Thus, the administrative law judge concluded that although the district director's exclusion of Dr. Westerfield's reports may have been erroneous, employer's "failure to reoffer all or any part of Dr. Westerfield's medical evidence at or prior to the hearing, does not justify its offer or the acceptance of Dr. Westerfield's deposition into evidence out of time, even in the absence of objection from the claimant." Order at 3-4.

Employer argues that the administrative law judge's exclusion of Dr. Westerfield's deposition testimony and written reports constituted an abuse of discretion.<sup>11</sup> Employer's Brief at 26; Employer's Reply Brief at 10-11. Employer contends that the exclusion denied employer the right to fully respond to claimant's evidence. Employer's Brief at 26-28. Employer also asserts that the administrative law judge's exclusion of its evidence was inconsistent with the administrative law judge's acceptance of post-hearing evidence from claimant. Employer's Brief at 30; Employer's Reply Brief at 10. Employer further asserts that the submission of Dr. Westerfield's deposition and medical reports was timely under 20 C.F.R. §725.456(b)(2), because employer exchanged Dr. Westerfield's reports with claimant's prior representative and because, contrary to the administrative law judge's statement, claimant's prior representative received proper notice of Dr. Westerfield's deposition, as reflected by the deposition transcript.<sup>12</sup> Employer's Brief at 31; Employer's Reply Brief at 10. Lastly, employer asserts that good cause existed for the post-hearing submission of this evidence because of the general confusion among the parties as to the application of *Rose* and the evidentiary limitations applicable to claims on modification. Employer's Brief at 33-34; Employer's Reply Brief at 11.

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<sup>11</sup> Employer's motion did not specifically request admission of Dr. Westerfield's November 19, 2002 and November 10, 2005 reports, although they were attached to the physician's deposition. However, on appeal, employer asserts that the administrative law judge erred in excluding both Dr. Westerfield's deposition and his reports. Employer's Brief at 34.

<sup>12</sup> The cover sheet of Dr. Westerfield's deposition transcript states that, "Said deposition was taken by notice to be used as evidence on behalf of the defendant-employer in the above-styled action now pending for compensation under Federal black Lung Benefits Reform Act of 1977 (30 U.S.C., 901, et. seq.)." Dr. Westerfield's Deposition (excluded) at 1.

Employer's allegations of error are without merit. First, employer's contention that the administrative law judge acted inconsistently in "accepting claimant's late evidence," but not employer's evidence, is not supported by the record. Employer's Brief at 30. Contrary to employer's contention, at the hearing, claimant requested the opportunity to have Dr. Fino's April 7, 2005 x-ray re-read, and to submit that re-reading post-hearing, as Claimant's Exhibit 4. Hearing Tr. at 31. Claimant's counsel explained that he previously requested Dr. Fino's x-ray from employer, but received no response, and was simply reiterating his earlier request. Hearing Tr. at 32. When asked if employer objected, employer's counsel acknowledged that the request to re-read the x-ray had been "timely." *Id.* Moreover, contrary to employer's contention, in agreeing to hold the record open to allow claimant to submit a re-reading of Dr. Fino's x-ray, the administrative law judge specifically found that claimant's counsel was "duly diligent" in attempting to obtain Dr. Fino's x-ray, and that "simply, through a failure [in communication] beyond his control" was unable to have the x-ray re-read in compliance with the twenty-day rule. Hearing Tr. at 32, 52. In addition, employer's assertion that Dr. Westerfield's medical reports and deposition testimony were timely submitted, because his reports were exchanged with claimant's prior representative in 2005, who also received notice of the deposition, is unavailing. The fact that claimant's prior representative may have had copies of Dr. Westerfield's reports before the district director excluded them in 2005 does not excuse employer's failure to notify claimant's current representative at least twenty days before the hearing, in the current proceeding, that employer intended to submit them in support of its affirmative case. In addition, the absence of the element of surprise does not render the twenty-day rule or the good cause requirement irrelevant, as the exclusion of evidence that is untimely submitted is also designed to promote the orderly and efficient adjudication of a claim. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-236 (1987), *aff'g on recon. en banc*, 9 BLR 1-195 (1986); *White v. Douglas Van Dyke Coal Co.*, 6 BLR 1-905 (1984).

We hold, therefore, that based upon the facts of this case, the administrative law judge rationally determined that employer's submission of Dr. Westerfield's deposition testimony and medical reports post-hearing was in violation of the twenty-day rule set forth in Section 725.456(b)(2). 20 C.F.R. §725.456(b)(2); *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1985); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984); Order at 2; Decision and Order at 3. The administrative law judge also acted within his discretion in finding that employer did not establish good cause for failure to timely submit this evidence pursuant to Section 725.456(b)(3), on the ground that employer had the opportunity to submit the evidence in a timely fashion, and did not do so. *See Clark*, 12 BLR at 1-153; *Morgan v. Director, OWCP*, 8 BLR 1-491, 1-493 (1986); January 30, 2008 Order at 3. Accordingly, employer has not established that the administrative law judge abused his discretion in excluding Dr. Westerfield's reports and deposition testimony. *Id.*

We next address employer's contention that, in finding a change in an applicable condition of entitlement, the administrative law judge erred in his evaluation of the medical opinion evidence relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer's Brief at 34; Employer's Reply Brief at 11. The administrative law judge considered the medical opinions of Drs. Forehand,<sup>13</sup> Hussain,<sup>14</sup> Walker,<sup>15</sup> and Fino.<sup>16</sup> The administrative law judge found the opinions of Drs. Forehand and Hussain to be "well documented and reasoned" because they were based on the results of physical examinations, objective test results, and occupational and medical histories. Decision and Order at 15-16. The administrative law judge found that Dr. Walker's opinion was unexplained and thus not entitled to substantial weight, but that it nonetheless lent support to the opinions of Drs. Forehand and Hussain. Decision and Order at 15-16.

By contrast, the administrative law judge found the opinion of Dr. Fino to be less persuasive than, and outweighed by, the well-documented and reasoned opinions of Drs. Forehand and Hussain. Decision and Order at 16. Specifically, the administrative law judge found that Dr. Fino did not adequately explain his opinion that coal dust was not a factor in claimant's respiratory impairment, and failed to address the significance of the lack of bronchodilator response seen on pulmonary function testing. Based on the opinions of Drs. Forehand and Hussain, as supported by the opinion of Dr. Walker, the administrative law judge concluded that claimant established legal pneumoconiosis by the medical opinion evidence. Decision and Order at 21.

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<sup>13</sup> Dr. Forehand diagnosed chronic obstructive pulmonary disease (COPD), exercise-induced arterial hypoxemia, and pneumoconiosis, and stated that claimant's COPD and hypoxemia are due to smoking and coal dust exposure. Claimant's Exhibit 3.

<sup>14</sup> Dr. Hussain diagnosed airway obstruction, as demonstrated by pulmonary function studies, causally related to both coal mine dust and tobacco smoking. Claimant's Exhibit 1.

<sup>15</sup> Dr. Walker examined claimant on behalf of the Department of Labor and diagnosed emphysema and chronic bronchitis with bronchospasms, due to occupational dust and tobacco abuse. Dr. Walker opined that claimant had a moderate obstructive ventilatory defect, as demonstrated by his pulmonary function study. Director's Exhibit 10.

<sup>16</sup> Dr. Fino opined that there is no evidence of clinical or legal pneumoconiosis, but that claimant has COPD with chronic bronchitis and emphysema due to cigarette smoking. Employer's Exhibit 1.

Employer asserts that the administrative law judge erred in crediting the opinions of Drs. Forehand, Hussain, and Walker, and in discrediting the opinion of Dr. Fino. Specifically, employer asserts that the opinions of Drs. Forehand and Hussain are unreasoned and conclusory, and that Dr. Walker did not diagnose legal pneumoconiosis. Employer's Brief at 40-50; Employer's Reply Brief at 14-17. We disagree.

Initially, we reject employer's assertion that Dr. Forehand's diagnosis of legal pneumoconiosis is unreasoned because it relies in part on a positive x-ray, which is contrary to the administrative law judge's finding that the weight of the x-ray evidence does not establish the existence of pneumoconiosis. Employer's Brief at 45; Employer's Reply Brief at 15-16. Dr. Forehand examined claimant on October 15, 2003 and August 23, 2004, and stated in his most recent report, dated October 13, 2007, that he based his conclusion, that claimant's COPD is due partly to coal dust exposure, on claimant's seventeen years of coal mine employment, complaints of shortness of breath for twenty years, inspiratory crackles on chest examination, positive chest x-ray (s/t, 1/0), and abnormal exercise blood gas studies. Claimant's Exhibit 3. Dr. Forehand explained how the objective testing supported his conclusions:

The disabling effects of cigarette smoking can be measured with the FEV1 and DLCO. [Claimant's] FEV1 was 75% of normal and his DLCO was completely normal. I have no basis for attributing [Claimant's] respiratory impairment solely to cigarette smoking if his FEV1 and DLCO are clearly well above published standards for establishing total and permanent disability.<sup>17</sup> The scarring in [Claimant's] lungs caused by inhaling coal dust blocks the normal oxygenation of his lungs and this can be demonstrated through his abnormal arterial blood gas study (resting pO<sub>2</sub> 72, exercise pO<sub>2</sub> 59).

Claimant's Exhibit 3. Contrary to employer's assertion, while Dr. Forehand referenced his positive x-ray reading, Dr. Forehand's consideration of other evidence, including his physical examinations, pulmonary function study, arterial blood gas study, and claimant's smoking and employment histories, renders his opinion sufficient to support a finding of legal pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005). Further, Dr. Forehand's consideration of this evidence

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<sup>17</sup> In an earlier opinion dated September 20, 2004, Dr. Forehand explained that the effects of cigarette smoking on lung function can be measured as a significant reduction of FEV1 and DLCO. Dr. Forehand stated that, because claimant had a minor reduction in FEV1 of only five percentage points below normal, and his DLCO was normal, Dr. Forehand was able to rule out cigarette smoking as a major cause of claimant's shortness of breath on exertion. Director's Exhibit 36.

refutes employer's contention that Dr. Forehand merely assumed that coal dust contributed to claimant's pulmonary condition. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003); Decision and Order at 15; Claimant's Exhibit 3; Employer's Brief at 43. Moreover, the administrative law judge found that Dr. Forehand considered all possible causes of claimant's obstructive impairment, including smoking and coronary artery disease, and provided "cogent reasons" for his opinion that coal dust exposure had contributed to claimant's COPD. Decision and Order at 47. Finally, contrary to employer's assertion, the administrative law judge fully considered Dr. Forehand's qualifications, noting that while the physician's Board-certifications are in Pediatrics and Allergy and Immunology, he "regularly practices as a 'chest physician' and is an examining physician for the U.S. Department of Labor, demonstrating expertise by practice if not by certification." Decision and Order at 15; Employer's Brief at 41; Employer's Reply Brief at 14-15. Thus, the administrative law judge acted within his discretion in concluding that Dr. Forehand's opinion was well-reasoned and well-documented, and supported a finding that claimant suffers from legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Gross*, 23 BLR at 1-19-20; *Clark*, 12 BLR at 1-155; Decision and Order at 15; Claimant's Exhibit 3.

We further reject employer's contention that Dr. Hussain's opinion, that both smoking and coal dust contributed to claimant's pulmonary impairment, is inadequately reasoned and documented to support claimant's burden of proof. Employer's Brief at 15-17; Employer's Reply Brief at 17. The determination of whether a physician's opinion is reasoned and documented is committed to the discretion of the administrative law judge. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-155. In evaluating Dr. Hussain's opinion, the administrative law judge correctly noted that Dr. Hussain treated the miner frequently for respiratory conditions since 2004; that he considered x-rays, pulmonary function studies, and arterial blood gas studies as part of his treatment; and that he based his diagnosis of legal pneumoconiosis on claimant's history of dyspnea, cough, wheeze, and bilateral rhonchi on examination, and evidence of airway obstruction on pulmonary function study. Decision and Order at 15. Moreover, the administrative law judge noted that Dr. Hussain did not dismiss the miner's smoking as a cause of claimant's chronic lung disease, but attributed 70% of his disease to coal dust exposure, and 30% to smoking. Decision and Order at 15. We therefore affirm the administrative law judge's determination that Dr. Hussain's opinion was "persuasive" and "consistent with Dr. Forehand's opinion" as to the existence of legal pneumoconiosis, as it is supported by substantial evidence. *See* 20 C.F.R. §718.104(d)(5); *Rowe*, 710 F.2d at 254, 5 BLR at 2-102; Decision and Order at 16. The administrative law judge, therefore, permissibly found that the opinions of Drs. Forehand and Hussain are well-reasoned and documented, and entitled to probative weight. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155.

Regarding Dr. Walker's opinion, contrary to employer's assertion, the administrative law judge accurately observed that, in affirmatively attributing claimant's emphysema and chronic bronchitis to both smoking and occupational dust exposure, Dr. Walker diagnosed legal pneumoconiosis. See 20 C.F.R. §718.201(a)(2); Decision and Order at 9-10, 15; Employer's Brief at 40-41; Employer's Reply Brief at 14; Director's Exhibit 10. Moreover, although the administrative law judge found that Dr. Walker's opinion lacked sufficient explanation to be entitled to substantial weight, the administrative law judge permissibly found that Dr. Walker's opinion "lends support" to the opinions of Drs. Forehand and Hussain. See *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155 at 15-16.

We also reject employer's assertion that the administrative law judge failed to state a valid reason for discounting Dr. Fino's opinion, that claimant's obstructive lung disease is due entirely to smoking. Employer's Brief at 51-53. In explaining the basis for his opinion, Dr. Fino stated: "[Claimant] stopped work in 1984, but did not stop smoking until about 2004. Based on the information I have reviewed, the obstruction in this case is clearly related to cigarette smoking." Employer's Exhibit 1 at 6. Substantial evidence supports the administrative law judge's finding that Dr. Fino's opinion is inconsistent with the amended regulations, which recognize that pneumoconiosis may be latent and progressive, and "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); see *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); Decision and Order at 16. The administrative law judge, therefore, permissibly accorded less weight to Dr. Fino's opinion.

Because the administrative law judge provided valid reasons for finding that the opinions of Drs. Forehand and Hussain, as supported by the opinion of Dr. Walker, outweigh the opinion of Dr. Fino, we affirm his finding that claimant established legal pneumoconiosis under 20 C.F.R. §718.202(a)(4),<sup>18</sup> and, therefore established a change in

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<sup>18</sup> Although employer challenges the administrative law judge's additional finding of clinical pneumoconiosis, the Board has long held that 20 C.F.R. §718.202 provides four alternative methods for establishing the existence of pneumoconiosis, *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985), and has declined to extend the holdings in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), and *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), outside the jurisdictions of the United States Courts of Appeals for the Third and Fourth Circuits, respectively. See *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-227 (2002)(*en banc*). Thus, our affirmance of the administrative law judge's finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) obviates the need to address employer's challenges to the administrative law judge's evaluation of the x-ray evidence at 20 C.F.R.

an applicable condition of entitlement pursuant to 20 C.F.R. §§718.202(a)(4), 725.309(d), 725.310. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 16.

Turning to the merits of entitlement, we first address employer's contention that, in finding that claimant established all elements of entitlement, the administrative law judge erred by failing to consider all of the relevant evidence of record, including that submitted with the prior claims. Employer's Brief at 15, 35-39, 54. Employer's contention lacks merit.

In considering the evidence at 20 C.F.R. §718.202(a), the administrative law judge summarized the prior x-ray and medical opinion evidence, but permissibly concluded that the more recent medical evidence was of greater probative value than that submitted with the prior claim because of the progressive nature of pneumoconiosis. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004)(*en banc*)(McGranery, J., concurring and dissenting); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004)(*en banc*); Decision and Order at 17. Thus, the administrative law judge reiterated his conclusion that the recent medical opinion evidence establishes the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further correctly found that he need not separately determine whether claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), because that finding was subsumed in his finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Kiser v. L & J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); Decision and Order at 17.

We next address employer's contention that the administrative law judge erred in finding that the medical opinion evidence established the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer asserts that the administrative law judge failed to consider the opinion of Dr. Westerfield, that claimant is not disabled. Employer's Brief at 53-54; Employer's Reply Brief at 18. However, as we have affirmed the administrative law judge's determination to exclude Dr. Westerfield's opinion from the record, employer's contention is moot. As employer raises no other arguments with respect to the administrative law judge's finding that claimant established total disability under 20 C.F.R. §718.204(b)(2), it is affirmed.

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§718.202(a)(1), including the administrative law judge's failure to consider Dr. Halbert's rebuttal reading of the May 9, 2003 x-ray, or employer's challenges to the administrative law judge's finding of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(4). *See Dixon*, 8 BLR at 1-345; *Larioni*, 6 BLR at 1-1278; n.3, *supra*; Employer's Brief at 36-39.

Employer also challenges the administrative law judge's finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer's Brief at 54; Employer's Reply Brief at 18-19. Permissibly relying on the evidence developed since the prior claim, *see Cooley*, 845 F.2d at 624, 11 BLR at 2-149; *Parsons*, 23 BLR at 1-35; *Workman*, 23 BLR at 1-27, the administrative law judge correctly noted that Drs. Forehand and Hussain opined that claimant's total disability is due in part to coal dust exposure, Dr. Fino attributed claimant's total disability solely to his smoking history, and Dr. Walker did not offer an opinion as to the cause of claimant's respiratory disability. Decision and Order at 19; Director's Exhibit 10; Claimant's Exhibits 1-3, Employer's Exhibit 1. The administrative law judge discounted the opinion of Dr. Fino because he did not diagnose legal pneumoconiosis, and relied on the opinions of Drs. Forehand and Hussain. Decision and Order at 20.

Contrary to employer's contention, the administrative law judge rationally discounted the opinion of Dr. Fino because he did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); Decision and Order at 18-20; Employer's Brief at 54-58; Employer's Reply Brief at 18-19. The fact that Dr. Fino stated that his opinion would remain the same "[e]ven if [he] were to assume that [claimant] has coal workers' pneumoconiosis," does not compensate for Dr. Fino's opinion that claimant does not have legal pneumoconiosis as found by the administrative law judge, namely, COPD and disabling hypoxemia due in part to coal dust exposure. *See Skukan*, 993 F.2d at 1233, 17 BLR at 2-104; Employer's Brief at 55-56; Employer's Reply Brief at 19. Moreover, as the administrative law judge rationally relied on the reasoned and documented opinions of Drs. Forehand and Hussain to find that claimant established the existence of legal pneumoconiosis, the administrative law judge rationally relied on their opinions to find that claimant is totally disabled due to legal pneumoconiosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003); *Smith*, 127 F.3d at 507, 21 BLR at 2-185-86. Consequently, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c).

Lastly, employer challenges the administrative law judge's determination of the date for commencement of benefits. Employer's Brief at 58-60; Employer's Reply Brief at 19-20. Having found claimant entitled to benefits, the administrative law judge, without further discussion, awarded benefits beginning May 1, 2002, the month in which claimant filed his subsequent claim. Decision and Order at 20. Employer argues that since benefits were awarded pursuant to a modification request, under 20 C.F.R.

§725.503(d)(2), the earliest date of onset must be October 2004, the month in which claimant filed his current request for modification.<sup>19</sup> Employer's Brief at 58-59; Employer's Reply Brief at 19-20. Employer asserts that if the Board affirms the award of benefits, the Board should vacate and modify the administrative law judge's onset date determination to reflect entitlement to benefits beginning October 2004. Claimant contends that the administrative law judge's award of benefits beginning May 1, 2002, reflects the administrative law judge's application of 20 C.F.R. §725.503(d)(1), and a finding that the month of onset of total disability cannot be determined from the medical evidence.<sup>20</sup> Claimant's Brief at 12. The Director responds, asserting that a remand is

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<sup>19</sup> Employer relies on 20 C.F.R. §725.503(d)(2), which states:

*Change in conditions.* Benefits are payable to a miner beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, provided that no benefits shall be payable for any month prior to the effective date of the most recent denial of the claim by a district director or administrative law judge. Where the evidence does not establish the month of onset, benefits shall be payable to such miner from the month in which the claimant requested modification.

20 C.F.R. §725.503(d)(2); Employer's Brief at 58-59.

<sup>20</sup> Claimant relies on 20 C.F.R. §725.503(d)(1), which states:

*Mistake in fact.* The provisions of paragraphs (b) or (c) of this section, as applicable, govern the determination of the date from which benefits are payable.

20 C.F.R. §725.503(d)(1).

Paragraph (b) is applicable to the instant case, involving a miner's claim, and provides, in pertinent part:

Benefits are payable to a miner who is entitled beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment. Where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed.

20 C.F.R. §725.503(b).

required because the administrative law judge failed to specify whether claimant is entitled to modification because of a mistake in fact or a change in conditions, and failed to make a finding on whether the evidence establishes a date of onset of total disability. Director's Brief at 3. We agree with the Director, in part.

Contrary to the Director's contention, the administrative law judge specifically found that claimant was entitled to modification because of a change in conditions. Decision and Order at 16. Thus, in this living miner's claim where entitlement to benefits is based on a change in conditions established through modification, claimant may not receive benefits "for any month prior to the effective date of" the district director's February 13, 2004 decision denying the claim. 20 C.F.R. §725.503(d)(2). We, therefore, vacate the administrative law judge's determination that claimant is entitled to benefits beginning May 1, 2002. In addition, if the evidence does not establish the date of onset of total disability due to pneumoconiosis, then benefits are payable beginning from the month in which the claimant requested modification. 20 C.F.R. §725.503(d)(2). However, as the Director and employer further assert, the administrative law judge did not address whether the medical evidence of record establishes when claimant became totally disabled due to pneumoconiosis. Because the administrative law judge did not make this necessary finding, we must remand this case to the administrative law judge to reconsider the date from which benefits are payable, consistent with 20 C.F.R. §725.503(d)(2). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge