BRB No. 07-0484 BLA

J.B.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CAMPBRANCH COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 03/31/2008
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2004-BLA-06558) of Administrative Law Judge Alice M. Craft issued on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Claimant filed his claim for benefits on May 23, 2003. Director's Exhibit 2. The administrative law judge found that the claim was timely filed pursuant to 20 C.F.R. §725.308, and that claimant worked fifteen years in coal mine employment. The administrative law judge determined that the medical evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that claimant was totally disabled due to pneumoconiosis

pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, asserting that the administrative law judge erred in finding that the claim was timely filed, and asks the Board to reverse the award of benefits and dismiss the claim as a matter of law. Employer challenges the administrative law judge's determination that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Employer specifically contends that the administrative law judge failed to provide valid reasons for crediting the opinions of Drs. Caudill and Rasmussen over the opinions of Drs. Westerfield and Broudy, as to the etiology of claimant's respiratory condition. Employer asks the Board to reverse the administrative law judge's finding at Section 718.202(a)(4), or in the alternative, to remand the case for further consideration. With respect to the issue of total disability, employer contends that the administrative law judge erred in finding that claimant was totally disabled, without first ascertaining the exertional requirements of claimant's usual coal mine work. Employer also contends that the administrative law judge erred in characterizing Dr. Broudy's opinion at Section 718.204(b)(2)(iv) as supporting a finding that claimant was totally disabled. Lastly, employer contends that the administrative law judge erred in combining his discussion of the issues of total disability and causation, and by failing to address whether the opinions of Drs. Rasmussen and Caudill were sufficiently reasoned to support claimant's burden of proving that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(c). Claimant responds to employer's appeal, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief. Employer has also filed a reply brief.

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).

Timeliness of the Claim:

Initially, we address employer's contention that the administrative law judge erred in finding this claim timely filed. Employer's Brief at 11-14. Section 422(f) of the Act, 30 U.S.C. §932(f), and its implementing regulation at Section 725.308(a), provide that a claim for benefits must be filed within three years of a medical determination of total disability due to pneumoconiosis which has been communicated to the miner. The regulation at Section 725.308(c) provides a rebuttable presumption that every claim for benefits filed under the Act is timely filed. 20 C.F.R. §725.308(c). In *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), the United States Court of

Appeals for the Sixth Circuit, within whose jurisdiction this cases arises, stated that it is "employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [the claimant]" more than three years prior to the filing of his/her claim. *Kirk*, 264 F.3d at 607, 22 BLR at 2-296.

Employer asserts that the administrative law judge failed to offer valid reasons for finding that employer failed to rebut the presumption of timeliness, since the combined hearing testimony of claimant and the deposition testimony of Dr. Caudill, claimant's treating physician, prove that claimant was told by Dr. Caudill that he was totally disabled due to pneumoconiosis more than three years prior to the filing of his claim.[1] We disagree.

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[1] Employer cross-examined claimant at the hearing and relies on the following testimony to support its position:

> Q. Has Dr. Caudill told you that black lung disease has made you totally disabled? That you can't go back to work on account of your black lung disease, that you're not able to work on account of black lung?
>
> A. Yeah, he's told me that.
>
> Q. Can you tell when you believe Dr. Caudill first told you that?
>
> A. I'd say two years after I started seeing him.

Employer's Brief at 12, citing Hearing Transcript (HT) at 24-25. Employer also cites to Dr. Caudill's testimony:

> Q. I would assume that you've diagnosed him as having black lung, and told him that he was disabled, totally disabled as a result of that disease, that you would have communicated that to him probably orally in your office?
>
> A. That's correct.

Employer's Brief at 13, citing Claimant's Exhibit 5 at.14.

The administrative law judge properly addressed whether claimant had timely filed his claim, taking into consideration the testimony of claimant and Dr. Caudill. The administrative law judge provided a valid explanation as to why he found that employer failed to rebut the presumption of timeliness based on that testimony. The administrative law judge specifically stated:

> At the hearing, the Claimant testified that Dr. Caudill had been treating him for lung and other problems for 10 to 11 years and, variously, that he was not sure whether Dr. Caudill ever told him that he had black lung (Tr. 23), and that Dr. Caudill told him that he was totally disabled by black lung disease two years after he started being treated (Tr. 25). Dr. Caudill's testimony at his deposition was equivocal and similarly inconclusive. He did not recall telling the Claimant that he was disabled due to pneumoconiosis, but said it would be consistent with his records. However, Dr. Caudill's testimony and treatment records suggest that he believed the Claimant to be disabled based on multiple impairments due to multiple causes, and involving multiple body organs; it appears that he did not single out the pulmonary or respiratory impairments in and of themselves as a cause of disability when treating the Claimant *(see* CX 3 and CX 4 at 8). He was not asked to give an opinion in connection with the Claimant's black lung claims when he first started treating the Claimant, because the Claimant was already receiving state benefits, and had not yet filed his federal claim. I conclude that the evidence as to when the Claimant was told he was disabled due to pneumoconiosis is insufficient to overcome the presumption that the claim was timely filed.

Decision and Order at 4.

An administrative law judge is charged with determining the credibility of all witnesses and their respective testimony, *see Harris v. Director, OWCP*, 3 F.3d 103, 106, 18 BLR 2-1, 2-5 (4th Cir. 1993); *Miller v. Director, OWCP*, 7 BLR 1-693, 1-694 (1985). In this case, the administrative law judge permissibly found claimant's testimony to be equivocal as to whether he received a medical determination of total disability due to pneumoconiosis more than three years prior to filing his claim. Decision and Order at 4. Since Dr. Caudill could not specifically recall telling claimant that he was totally disabled as a result of his pneumoconiosis, the administrative law judge properly turned to Dr. Caudill's treatment records. *Id*. Because she found that those records showed that Dr. Caudill treated claimant for multiple impairments due to multiple causes, and involving

multiple body organs, the administrative law judge reasonably concluded that this claim was not time barred, as there was no evidence that Dr. Caudill diagnosed that claimant was totally disabled due to a respiratory or pulmonary impairment, and communicated such a diagnosis to claimant.[2] 20 C.F.R. §718.204(a); Decision and Order at 4. Consequently, we affirm the administrative law judge's finding that employer failed to rebut the presumption of timeliness afforded claimant pursuant to Section 725.308(c), and we affirm her finding that claimant timely filed his claim. *Kirk*, 264 F.3d at 607, 22 BLR at 2-298.

Merits of Entitlement:

Employer challenges the administrative law judge's finding that claimant established the existence of legal pneumoconiosis, arguing that she failed to offer a valid reason for crediting the opinions of Drs. Caudill and Rasmussen, that claimant suffers a chronic respiratory condition due, in part, to coal dust exposure, over the contrary opinions of Drs. Broudy and Westerfield, that claimant's respiratory condition is due entirely to smoking.[3] Employer contends that the administrative law judge erred in automatically deferring to Dr. Caudill's opinion because he is a treating physician, and that she failed to consider that "nothing in [Dr. Caudill's] actual treatment records reflect [sic] a diagnosis of pneumoconiosis," only a reference to a history of "black lung." Employer's Brief at 19. Employer also argues that the administrative law judge erred in concluding that Dr. Rasmussen's opinion was reasoned and documented, when his diagnosis of pneumoconiosis was based on a discredited positive x-ray reading. We reject employer's arguments as they are without merit.[4]

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[2] Section 718.204(a), specifically provides that a "nonpulmonary or nonrespiratory condition or disease, which causes an independent disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a).

[3] We affirm the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), and that he was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) as they are unchallenged on appeal. *See Skrack v. Island Creek Coal, Co.*, 6 BLR 1-710 (1983); Decision and Order at 12-13.

[4] Employer asserts that:

> The approach Judge Craft has taken suggests that every cigarette smoker who works in a mine will have 'legal' pneumoconiosis. The judge's selective citation to 65 Fed. Reg. at 79940 suggests that she believes the regulations provided for such an absurd result

Under Section 718.202(a)(4), the administrative law judge properly noted that the record physicians each diagnosed that claimant suffers from chronic obstructive pulmonary disease (COPD), although they disagree as to the etiology of that condition. The administrative law judge first discussed Dr. Caudill's opinion, noting that he was a family practitioner who had treated claimant for thirteen years for COPD with bronchitis and multiple non-respiratory conditions. Decision and Order at 9-10, 15; Claimant's Exhibit 3. Contrary to employer's assertion, the administrative law judge did not "automatically" defer to Dr. Caudill's opinion based on his status as a treating physician. See *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Rather, she properly considered whether Dr. Caudill's opinion was documented and reasoned, taking into consideration the factors set forth at 20 C.F.R. §718.104,[5] and concluded that Dr. Caudill had a "firm ongoing understanding of the [c]laimant's physical condition" based on the doctor's "extensive experience in treating the [c]laimant." Decision and Order at 15. Although employer is correct that Dr. Caudill did not specifically diagnose clinical pneumoconiosis during his treatment of claimant, and that he reported only a "history of black lung disease" in his treatment notes, the administrative law judge properly determined that Dr. Caudill had specifically diagnosed and treated claimant for COPD. The administrative law judge properly determined that

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Employer's Brief at 16-17. Employer's assertion has no merit. The administrative law judge properly acknowledged at the outset of her analysis at Section 718.202(a)(4), that it is the position of the Department of Labor that "[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis" and that medical literature "support[s] the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms." Decision and Order at 14, citing 65 Fed. Reg. 79940, 79943 (Dec. 20, 2000).

[5] Section 718.104(d) requires an administrative law judge to take into consideration the nature of the relationship between the miner and the treating physician, the duration of the relationship, the frequency of treatment, and the extent of the treatment. 20 C.F.R. §718.104(d)(1)-(4). The regulation also provides that the treatment relationship may constitute substantial evidence in support of an administrative law judge's decision to give that physician's opinion controlling weight in appropriate cases, but the weight accorded must also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5); *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002) (the opinions of treating physicians get the deference they deserve based on their power to persuade).

Dr. Caudill based his diagnosis of COPD on the results of claimant's pulmonary function studies, his history of smoking and coal dust exposure, and his description of experiencing "smothering spells." Decision and Order at 15, citing Claimant's Exhibit 3. Because the administrative law judge found Dr. Caudill's explanation as to why he attributed claimant's COPD to both smoking and coal dust exposure to be reasoned and documented, based on the objective testing and his "13 years of extensive treatment," we reject employer's assertion that the administrative law judge erred in assigning Dr. Caudill's opinion "great weight towards a finding of legal pneumoconiosis." Decision and Order at 4.

Turning to Dr. Rasmussen's opinion, employer argues that because Dr. Rasmussen based his diagnosis of coal workers' pneumoconiosis on a positive x-ray reading by Dr. Patel, which was "discredited" by the administrative law judge at Section 718.202(a)(1), the administrative law judge erred in assigning Dr. Rasmussen's opinion any weight at Section 718.202(a)(4).[6] Employer's Brief at 23. We disagree. Dr. Rasmussen's diagnosis of coal workers' pneumoconiosis was based, in part, on Dr. Patel's positive reading of the July 17, 2003 x-ray. Director's Exhibit 12. The administrative law judge properly found that Dr. Rasmussen diagnosed COPD based on the results of claimant's pulmonary function studies, which showed a moderate obstructive respiratory impairment. Decision and Order at 10. Because Dr. Rasmussen explained, to the satisfaction of the administrative law judge, that it was impossible to distinguish between the effects of smoking-induced airways obstruction and coal dust-induced airways obstruction, the administrative law judge permissibly found that Dr. Rasmussen provided a reasoned and documented opinion that claimant's COPD was due both to claimant's lengthy, forty-year smoking history and his fifteen years of coal mine employment.[7] *See*

[6] Contrary to employer's assertion, the administrative law judge did not "discredit" Dr. Patel's x-ray reading and, in fact, concluded that the July 17, 2003 x-ray was positive for pneumoconiosis. Decision and Order at 13. The administrative law judge ultimately determined that the x-ray evidence was equally divided between positive and negative readings, and that claimant failed to carry his burden of proof to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence at Section 718.202(a)(1). Decision and Order at 14.

[7] In his July 17, 2003 report, Dr. Rasmussen noted that claimant suffered from clinical pneumoconiosis based on the positive x-ray reading by Dr. Patel, a Board-certified radiologist and B reader, of the July 17, 2003 x-ray taken in conjunction with Dr. Rasmussen's DOL examination. However, during his deposition, Dr. Rasmussen indicated that he had also read claimant's x-ray as showing a lesser profusion of 0/1, which is a negative reading under the regulations. 20 C.F.R. §718.202(a). Employer contends that "to the extent that Dr. Rasmussen's opinion is based on evidence not in the record, it must be excluded from consideration." Employer's Brief at 23 n. 2. Although

Martin v. Ligon Preparation Co., 400 F.3d 302, 23 BLR 2- 261 (6th Cir. 2005); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc);* Decision and Order at 15-16.[8]

Additionally, we reject employer's contention that the administrative law judge erred in concluding that Dr. Westerfield's opinion as to the etiology of claimant's respiratory condition was not well-reasoned. Dr. Westerfield diagnosed that claimant's COPD was due entirely to smoking and asthma, unrelated to coal dust exposure. In weighing Dr. Westerfield's opinion at Section 718.202(a)(4), the administrative law judge reasonably found that while Dr. Westerfield opined that the pulmonary function tests showed obstructive lung disease due to asthma, and opined that the reversible portion of the disease was caused by asthma, Dr. Westerfield "did not explain why cigarette smoking caused the [remaining non-reversible] impairment seen and did not explain why coal dust exposure did or did not contribute to the obstructive defect seen." Decision and Order at 16; *see Crockett Collieries, Inc. v. Director, OWCP [Barrett]*, 478 F.3d 350 (6th Cir. 2007) (J. Rogers, concurring), Because an administrative law judge may assign less weight to a doctor's opinion where he or she finds that the doctor fails to explain the bases for his medical conclusions, we affirm the administrative law judge's

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employer is correct that Dr. Rasmussen's reading of the July 17, 2003 x-ray is not part of the record, employer has not shown how it has been prejudiced by Dr. Rasmussen's reference to the negative reading in his deposition and, thus, we conclude that the administrative law judge's failure to address this evidentiary issue is, at best, harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[8] We reject employer's assertion that because Dr. Rasmussen opined that he was unable to distinguish between the effects of smoking versus coal dust exposure, the administrative law judge erred by failing to find that his opinion was equivocal as to whether claimant's chronic obstructive pulmonary disease was due to coal dust exposure. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-351, 2-372, 2-373 (4th Cir. 2006) (a physician is not required to specify relative degrees of causal contribution to a lung impairment); *Gross v. Dominion Coal Corp.*, 23 BLR. 1-8 (2004) (a medical opinion that pneumoconiosis "was one of two causes" of the miner's total disability met the "substantially contributing cause" standard at 20 C.F.R. §718.204(c); Employer's Brief at 25-26.

determination to assign less weight to Dr. Westerfield's opinion at Section 718.202(a)(4). *See Clark*, 12 BLR at 1-151.

Furthermore, we reject employer's contention that the administrative law judge erred in her treatment of Dr. Broudy at Section 718.202(a)(4), by suggesting that his opinion supported a finding of simple coal workers' pneumoconiosis. Employer's Brief at 35. Employer asserts that the administrative law judge selectively analyzed Dr. Broudy's opinion, and twisted his words out of context in finding that his opinion was not well-reasoned. We disagree. The administrative law judge properly noted that while Dr. Broudy opined in his first two reports dated January 17, 2006 and April 11, 2006, Employer's Exhibits 1, 3, that claimant did not have pneumoconiosis, Dr. Broudy also stated in his most recent report dated May 22, 2006, after review of additional x-rays and CT scans, that claimant suffered from "no more than very early simple pneumoconiosis." Employer's Exhibit 4, *see* Decision and Order at 11 n.6. Contrary to employer's contention, based on Dr. Broudy's statement, we see no error in the administrative law judge finding that Dr. Broudy "hedge[d]" his opinion as to the existence of pneumoconiosis. Decision and Order at 16. We note, however, that Dr. Broudy's diagnosis of simple pneumoconiosis pertains to clinical pneumoconiosis, and the administrative law judge did not find that claimant established clinical pneumoconiosis at Section 718.202(a)(4). On the issue of legal pneumoconiosis, the administrative law judge specifically found that Dr. Broudy's diagnosis of COPD due to smoking, and not coal dust exposure, was not well-explained, since Dr. Broudy referred to the generally irreversible nature of pneumoconiosis, but failed to explain, with references to the objective evidence in this case, "why this obstructive defect was not caused, at least in part, by coal dust exposure." Decision and Order at 16. Because the administrative law judge provided a proper rationale for assigning less weight to Dr. Broudy's opinion at Section 718.202(a)(4), we affirm her finding.

The administrative law judge has discretion to resolve the conflicting evidence and is given deference by the Sixth Circuit with regard to credibility determinations. S*ee Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 512 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 103 (6th Cir. 1983). The administrative law judge has examined each medical opinion as to the existence of legal pneumoconiosis "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained her rationale for according greater weight to the opinions of Drs. Caudill and Rasmussen, that claimant's COPD was due in part, to coal dust exposure. Decision and Order at 15-17. Consequently, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at Section 718.202(a)(4), as it is supported by substantial evidence. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Notwithstanding our holding at Section 718.202(a)(4), we agree with employer that the administrative law judge erred in finding that claimant was totally disabled without having first "engaged in a rational discussion of the miner's exertional requirements in his usual coal mine employment" or without having made any specific findings as to the nature of claimant's last coal mine job. Employer's Brief at 32. Under Section 718.204(b)(2)(iv), the administrative law judge assigned controlling weight to Dr. Rasmussen's opinion that claimant was totally disabled by a moderate obstructive respiratory impairment from performing his last coal mine job, which the doctor described as requiring "some *very heavy* manual labor" in his work as an underground mine foreman. Director's Exhibit 12 (emphasis added). The administrative law judge also gave weight to Dr. Caudill's opinion that claimant was totally disabled from resuming his usual coal mine job. Decision and Order at 20; Claimant's Exhibit 1; Claimant's Exhibit 5 at 7. Dr. Caudill, however, did not identify claimant's last coal mine job as having been a foreman, and specifically testified that claimant described working underground as a roof bolter and cutter machine operating, having to perform "pretty heavy manual labor." Claimant's Exhibit 5 at.4.

Although the opinions of Drs. Rasmussen and Cadle may be supportive of a finding of total disability, the administrative law judge is required to compare a physician's opinion on the degree of respiratory impairment diagnosed, with the exertional requirements of claimant's usual coal mine work. *Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986) (*en banc*). In order to do so, the administrative law judge must make a specific finding as to nature of claimant's usual coal mine work and the physical requirements associated with that job. It is claimant's burden to establish the exertional requirements of his usual coal mine employment to provide a basis of comparison for the administrative law judge to evaluate a medical assessment of disability and reach a conclusion regarding total disability. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Because the administrative law judge has made no finding as to the exertional requirements of claimant's usual coal mine work, we vacate her finding that claimant is totally disabled, and remand the case for further consideration pursuant to Section 718.204(b)(2). On remand, the administrative law judge should render a specific finding as to claimant's usual coal mine employment, and reconsider whether the medical opinion evidence is sufficient to establish that claimant is totally disabled from his usual coal mine employment by a respiratory or pulmonary impairment. [9]

[9] We agree with employer that the administrative law judge erred in rejecting Dr. Westerfield's opinion on the ground that Dr. Westerfield did not consider the exertional requirements of claimant's usual coal mine work. Decision and Order at 20. As employer correctly points out, Dr. Westerfield reviewed Dr. Rasmussen's report, which described what Dr. Rasmussen believed to be the exertional requirements of claimant's

Furthermore, because we vacate the administrative law judge's finding that claimant is totally disabled, we also vacate her finding that claimant established total disability due to pneumoconiosis at Section 718.204(c), and remand the case for further consideration. On remand, the administrative law judge must evaluate the evidence and render a finding as to whether claimant is totally disabled by a respiratory or pulmonary impairment pursuant to Section 718.204(b). Thereafter, if necessary, she must also weigh the evidence and determine whether claimant has satisfied his burden of establishing that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(c).[10] 20 C.F.R. §718.204(c); s*ee also Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Abshire v. D & L Coal Co., 22* BLR 1-202, 214 (2002) (*en banc*).

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usual coal mine job. Employer's Brief at 37; Employer's Exhibit 2. If Dr. Rasmussen's description is correct, the administrative law judge must weigh Dr. Westerfield's opinion that claimant is not totally disabled based on his review of the medical record. *Id*.

We also agree with employer that the administrative law judge should reconsider the totality of Dr. Broudy's opinion on the issue of total disability. Employer's Brief at 35-36. In his reports dated January 26, 2006 and April 11, 2006, Dr. Broudy opined that clamant was not totally disabled. Employer's Exhibits 1, 3. In his third report dated May 22, 2006, Dr. Broudy acknowledged that new medical testing showed "significant impairment" which "meets the Federal criteria for disability in coal workers." Employer's Exhibit 4. Although the administrative law judge credits Dr. Broudy's opinion as supportive of a finding of total disability, her analysis does not address that claimant's objective studies were found by the administrative law judge to be non-qualifying for total disability. Decision and Order at 20. Thus, the administrative law judge should reconsider what probative weight, if any, to accord Dr. Broudy's May 22, 2006 disability opinion.

[10] The regulation at 20 C.F.R. §718.204(c) requires that a miner establish that his pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

> (i). Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii). Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed in part, and vacated in part, and the case is remanded for further consideration 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