BRB Nos. 98-1417 BLA
and 98-1417 BLA-A

FELIX H. COLEMAN	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
HARMAN MINING CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	
	)	
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 Edith Barnett, Administrative Law Judge, United States Department of Labor, and of the Decision and Order Denying Motion for Reconsideration of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Daniel Sachs, Springfield, Virginia, for claimant.

Mark E. Solomons (Arter & Hadden), Washington, D.C., for employer.

Rita Roppolo (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order Awarding Benefits (96-BLA-0071) of Administrative Law Judge Edith Barnett and the Decision and Order Denying Motion for Reconsideration of Administrative Law Judge Thomas M. Burke awarding benefits 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). This case is before the Board for the second time.[1] In a Decision and Order issued on September 17, 1996, Judge Barnett initially found that employer was barred pursuant to the doctrine of collateral estoppel from challenging her prior finding in claimant's original claim that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4) by means of new evidence in claimant's duplicate claim. Judge Barnett further found the newly submitted evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) and, therefore, a material change in conditions pursuant to 20 C.F.R. §725.309(d), in accordance with the standard enunciated by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Lisa Lee Mines*

[1] Claimant originally filed a claim on October 18, 1984, which was ultimately referred to the Office of Administrative Law Judges, Director's Exhibit 45. In a Decision and Order issued on April 7, 1988, Administrative Law Judge Ben L. O'Brien found thirty-eight and one-half years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. Part 718. Judge O'Brien found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1), (4), pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §718.203(b) and total disability due to pneumoconiosis established pursuant to 20 C.F.R. §718.204. Accordingly, benefits were awarded. Employer appealed and the Board affirmed Judge O'Brien's finding pursuant to Section 718.203(b), but vacated his findings pursuant to Sections 718.202(a)(1), (4) and 718.204(c) and remanded the case for reconsideration. *Coleman v. Harman Mining Corp.*, BRB No. 88-1518 BLA (Jan. 23, 1991)(unpub.).

In a Supplemental Decision and Order On Remand, Administrative Law Judge Edith Barnett found the existence of pneumoconiosis established by the medical opinion evidence pursuant to Section 718.202(a)(4), but further found that total disability was not established pursuant to Section 718.204(c)(1)-(4). Accordingly, benefits were denied. Claimant appealed, but subsequently withdrew his appeal and, therefore, the Board dismissed claimant's appeal. Claimant subsequently filed a second, duplicate claim on April 6, 1994, Director's Exhibit 1, at issue herein.

v. Director, OWCP [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g,* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied,* 519 U.S. 1090 (1997). Judge Barnett further found that total disability due to pneumoconiosis was established, *see* 20 C.F.R. §718.204(b). Finally, Judge Barnett noted that even if the issue of the existence of pneumoconiosis were relitigated, there was no reason to modify her prior determination that the existence of pneumoconiosis was established by the medical opinion evidence submitted with claimant's original claim pursuant to Section 718.202(a)(4) and found the newly submitted medical opinion evidence confirmed her original finding. Accordingly, benefits were awarded.

Employer filed a motion for reconsideration which was ultimately considered by Administrative Law Judge Thomas M. Burke.[2] Judge Burke noted that because Judge

[2] Employer initially appealed Judge Barnett's Decision and Order on October 7, 1996, but subsequently filed a motion for reconsideration with the Office of Administrative Law Judges on October 25, 1996, which was served on claimant's counsel. Thus, the Board issued an Order on November 26, 1996, dismissing employer's appeal as premature pursuant to 20 C.F.R. §802.206(f). Employer filed a brief in support of its motion for reconsideration with the Office of Administrative Law Judges on January 6, 1997, which was served on claimant's counsel. After claimant's counsel inquired to the Office of Administrative Law Judges as to the status of employer's pending motion for reconsideration and claimant's counsel's pending petition for attorney fees, Judge Barnett issued an Order on October 21, 1997, awarding claimant's counsel attorney fees and stating that she had not received employer's motion for reconsideration. Thus, Judge Barnett gave employer an opportunity to refile its motion within fifteen days of the order. On October 28, 1997, employer refiled copies of its original motion for reconsideration and supporting brief, and indicated that claimant's counsel had been sent certified copies of its filing.

Barnett had died on December 11, 1997, she was no longer available to reconsider her previous decision. Judge Burke found that reconsideration by an administrative law judge other than Judge Barnett would be inconsistent with the regulatory scheme that designates the Board as the appropriate body to review the Decision and Order of an administrative law judge pursuant to 20 C.F.R. §§725.479(b) and 725.481. Thus, employer's motion for reconsideration was denied.

On appeal, employer initially contends that Judge Burke erred in failing to consider employer's motion for reconsideration on its merits. Next, employer contends that it should be allowed the opportunity to submit evidence addressing the standard for establishing a material change in conditions enunciated by the Fourth Circuit Court in *Rutter*, *supra*. Employer also contends that Judge Barnett erred in invoking the doctrine of collateral estoppel to hold that employer was precluded from challenging her prior finding in claimant's original claim that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4) and, alternatively, in finding that, even if relitigated, the existence of pneumoconiosis was established pursuant to subsection (a)(4). Finally, employer contends that the administrative law judge erred in finding total disability due to pneumoconiosis established pursuant to Section 718.204(b). Claimant responds, urging that the award of benefits be affirmed. Claimant also cross-appeals, contending that Judge Burke did not have jurisdiction to consider employer's motion for reconsideration of Judge Barnett's Decision and Order awarding benefits or, alternatively, contending that employer's motion for reconsideration was untimely or, alternatively, contending that he was not served employer's motion for reconsideration and supporting brief and, therefore, was unjustly prevented from participating in the reconsideration process. Finally, claimant contends that employer's appeal before the Board, at issue herein, was untimely. Employer filed a reply brief, reiterating its contentions. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, responds, also contending that Judge Burke erred in failing to consider employer's motion for reconsideration on its merits and that Judge Barnett erred in invoking the doctrine of collateral estoppel to hold that employer was precluded from challenging her prior finding in claimant's original claim that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4).

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in order to establish a material change in conditions in a duplicate claim pursuant to Section 725.309(d), a claimant must prove "under all of the

probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him," *see Rutter, supra*. In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement, *id*. Moreover, pursuant to Section 718.204(b), claimant must prove by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment, *see Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Initially, we address claimant's contentions in his cross-appeal. Claimant contends that because employer filed an appeal of Judge Barnett's September, 1996, Decision and Order before filing its motion for reconsideration, jurisdiction for this case was before the Board and, therefore, employer no longer had the right to request reconsideration. Alternatively, claimant contends that employer's motion for reconsideration was not received by the Office of Administrative Law Judges until after the thirty day deadline and, therefore, was untimely. Finally, in light of claimant's contentions that employer's motion for reconsideration was either moot or untimely, claimant contends that employer's appeal subsequent to the issuance of Judge Burke's Decision and Order On Reconsideration was untimely.

We reject claimant's contentions. Section 802.206(f) states, as referred to in the Board's November 26, 1996, Order dismissing employer's prior appeal as premature, that "[i]f a timely motion for reconsideration of a decision or order of an administrative law judge... is filed, any appeal to the Board, *whether filed prior to or subsequent to the filing of the timely motion for reconsideration*, shall be dismissed as premature," *see* 20 C.F.R. §802.206(f)(emphasis added). Moreover, Section 802.206(c) states that "[i]f the motion for reconsideration is sent by mail and the fixing of the date of delivery as the date of filing would result in a loss or impairment of reconsideration rights, it will be considered to have been filed as of the date of mailing," *see* 20 C.F.R. §802.206(c). Thus, employer's motion for reconsideration of Judge Barnett's Decision and Order of September 17, 1996, which was mailed on October 17, 1996, was timely filed *see* 20 C.F.R. §802.206(c). Moreover, employer's appeal of Judge Barnett's September, 1996, Decision and Order, filed "prior to" the timely filing of its motion for reconsideration, was premature and, therefore, did not preclude consideration of employer's motion for reconsideration *see* 20 C.F.R. §802.206(f). Consequently, employer's July 30, 1998, appeal of Judge Burke's Decision and Order On Reconsideration issued on June 30, 1998, and filed with the district director on July 8, 1998, was timely filed, *see* 20 C.F.R. §802.205(a); *Mecca v. Kemmerer Coal Co.*, 14 BLR 1-101 (1990); *Harris v. Nacco Mining Co.*, 12 BLR 1-115 (1989).

We also reject claimant's alternative contention that he was not served with employer's October, 1997, refiling of its original motion for reconsideration and supporting brief and, therefore, was prevented from participating in the reconsideration process, resulting in a manifest injustice to claimant. A review of employer's original motion for reconsideration and supporting brief indicate that they were served on claimant's counsel. In addition, employer's October, 1997, refiling of its original motion for reconsideration and supporting brief indicates that claimant's counsel was sent certified copies of employer's filing. In any event, inasmuch as Judge Burke denied employer's motion for reconsideration because he found that reconsideration by another administrative law judge would be inconsistent with the regulatory scheme, any potential injustice to claimant in not being able to participate in the reconsideration process is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Next, both employer and the Director contend that Judge Burke erred in denying employer's motion for reconsideration because he found that reconsideration by an administrative law judge other than Judge Barnett was inconsistent with the regulatory scheme at Sections 725.479(b) and 725.481. Judge Burke found that these regulations only designated the Board as the appropriate body to review an individual administrative law judge's Decision and Order on reconsideration. We agree with employer and the Director. Section 725.479(b) does not specifically require that the same administrative law judge consider a motion for reconsideration as the administrative law judge who issued the original decision and/or order, *see* 20 C.F.R. §725.479(b). Consequently, we vacate the Decision and Order Denying Motion for Reconsideration issued by Judge Burke and remand the case for consideration of employer's motion for reconsideration on its merits.

Regarding Judge Barnett's Decision and Order, both employer and the Director challenge Judge Barnett's [hereinafter, the administrative law judge] invocation of the doctrine of collateral estoppel to hold that employer was precluded from challenging her prior finding of the existence of pneumoconiosis in the duplicate claim, Decision and Order at 6-11.[3] The administrative law judge distinguished the Board's holding in *Sellards v.*

[3] Inasmuch as employer does not challenge the administrative law judge's findings that the newly submitted evidence is sufficient to establish total disability pursuant to Section 718.204(c) and, therefore, a material change in conditions pursuant to Section 725.309(d) in accordance with the standard enunciated by the Fourth Circuit Court in *Rutter, supra*, the administrative law judge's findings are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Moreover, we reject employer's contention that because the standard for establishing a material change in conditions pursuant to Section 725.309(d) enunciated by the Fourth

Director, OWCP, 17 BLR 1-77 (1993), that the doctrine of *res judicata* "generally" is not applicable in a duplicate claim under Section 725.309(d) because it was promulgated to provide relief from the principles of *res judicata* to miners whose physical condition has worsened over time. The administrative law judge found that while such reasoning applies to miners, it does not apply to permit an employer, who was not adversely affected by the denial of benefits in the prior claim, to challenge by means of new evidence the administrative law judge's finding in the prior claim that the existence of pneumoconiosis was established merely in light of the opportunity presented by the claimant/miner's filing of a duplicate claim in order to establish total disability. Moreover, the administrative law judge noted that, while the Board has held that the principle of collateral estoppel does not preclude relitigation of an issue already determined in a prior claim where the regulations applicable to the prior claim are distinct from the regulation applicable to the subsequent claim, *see Alexander v. Island Creek Coal Co.*, 12 BLR 1-44 (1988), *aff'd sub nom. Island Creek Coal Co.*, No. 88-3863 (6th Cir. Aug. 29, 1989)(unpub.), the Part 718 regulations were applicable to both claimant's original claim and his subsequent, duplicate claim in the instant case, which the administrative law judge also noted was the case in *Sellards*.

Circuit Court in *Rutter*, *supra*, was not issued until after employer had submitted evidence relying on the previous standard and its closing argument, it should be allowed the opportunity to present evidence addressing the new, current standard. Employer had notice of the type of newly submitted evidence that would be relevant to consideration of each of the elements of entitlement which previoulsy defeated the claim, and thus to the issue of a material change in conditions, and had the opportunity to submit such evidence at trial. Thus, as the standard enunciated by the Fourth Circuit Court in *Rutter* did not change employer's evidentiary burden or the type of evidence relevant to meeting the burden of proof for establishing a material change in conditions pursuant to Section 725.309(d), *Rutter* does not compel the reopening of the record, *see Troup v. Reading Anthracite Co.*, BLR , BRB No. 98-0143 BLA (Nov. 15, 1999)(*en banc*).

In addition, the administrative law judge noted that employer did not seek timely review, either through filing a motion for reconsideration or modification or an appeal, of her prior Decision and Order finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4) and, therefore, found that her prior Decision and Order was final. The administrative law judge also found that employer's choice not to appeal her original Decision and Order was not the same as a lack of standing to appeal and/or the ability to litigate, or seek modification of, the issue of the existence of pneumoconiosis. Finally, the administrative law judge found that since the presence of pneumoconiosis is an essential element of entitlement to benefits, it was "necessary" to the judgment that claimant was not sufficiently disabled to be entitled to benefits and is prejudicial to employer as it "exposes an employer to later liability" either on modification, with a duplicate claim or with a reversal of a finding of no total disability on appeal, *id*.

Collateral estoppel forecloses "the relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate." *Ramsay v. INS*, 14 F.3d 206 (4th Cir. 1994); *see Virginia Hosp. Ass'n v. Baliles*, 830 F.2d 1308 (4th Cir. 1987)*; Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*). For collateral estoppel to apply in the present case, which arises within the jurisdiction of the Fourth Circuit Court, claimant must establish that:

(1) the issue sought to be precluded is identical to one previously litigated;
(2) the issue was actually determined in the prior proceeding;
(3) the issue was a critical and necessary part of the judgment in the prior proceeding;
(4) the prior judgment is final and valid; and
(5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum.

See Sedlack v. Braswell Services Group, Inc., 134 F.3d 219 (4th Cir. 1998); *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir. 1992); *Ramsey*, *supra*; *Hughes*, *supra*. Inasmuch as benefits were ultimately denied in claimant's original claim because total disability was not established pursuant to Section 718.204(c) and claimant did not pursue an appeal of the denial, the third and fifth element have not been satisfied. While the existence of pneumoconiosis is an essential element of entitlement, the establishment of that element does not support, and thus is not "essential" to, a judgment denying benefits. *See Hughes*, *supra*. Moreover, because a party who is satisfied with a judgement below need not appeal from it, *see generally Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987), employer did not have a full and fair opportunity to litigate the issue of the existence of pneumoconiosis in claimant's original claim. Consequently, under the facts of this case,

we reverse the administrative law judge's finding that employer is collaterally estopped from relitigating the issue of the existence of pneumoconiosis.

However, the administrative law judge also found that, even if the issue of the existence of pneumoconiosis were relitigated, there was no reason to modify her prior determination that the existence of pneumoconiosis was established by the medical opinion evidence submitted with claimant's original claim pursuant to Section 718.202(a)(4), since pneumoconiosis is a progressive disease and once present, does not go away, and the newly submitted medical opinion evidence confirmed her original finding. Decision and Order at 13-14. The administrative law judge considered the newly submitted medical opinion evidence, including the opinions of Dr. Wallace, who treated claimant during a one week hospitalization and diagnosed coal workers' pneumoconiosis, Director's Exhibit 29, and subsequently opined that claimant was totally disabled from his respiratory condition, Director's Exhibit 30, and Dr. Robinette, who also treated claimant during his hospitalization and diagnosed simple coal workers' pneumoconiosis and severe airflow obstruction, Director's Exhibit 29. The administrative law judge also considered contrary opinions from Drs. Forehand, Sargent, Castle and Fino.[4] The administrative law judge, within her discretion, found that Dr. Forehand failed to adequately explain why claimant's coal mine employment did not contribute to claimant's respiratory condition, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see also Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), and gave greater weight to the opinions of Drs. Wallace and Robinette as they were claimant's treating physicians. Although employer contends that the

[4] Dr. Forehand examined claimant and diagnosed emphysema with chronic obstructive pulmonary disease due to smoking, along with a mild to moderate impairment which "may" be disabling, Director's Exhibit 7. Dr. Sargent examined claimant and found he was not suffering from coal workers' pneumoconiosis, but a disabling respiratory impairment due to smoking, not coal dust exposure, as it was a purely obstructive impairment without restriction, Director's Exhibit Director's Exhibit 35. Dr. Castle reviewed the evidence and found that claimant does not suffer from coal workers' pneumoconiosis, but a disabling pulmonary obstructive disease due to smoking and not coal dust exposure, which causes a mixed obstructive and restrictive defect, and that even assuming that claimant had coal workers' pneumoconiosis, he would not be disabled by it, Director's Exhibit 45; Employer's Exhibits 3, 6. Finally, Dr. Fino reviewed the evidence and also found that claimant does not suffer from coal workers' pneumoconiosis or coal mine dust related pulmonary impairment, but a disabling, purely obstructive abnormality due to smoking and asthma, without restrictive defect, and that even assuming that claimant had pneumoconiosis, he would not be disabled by it, Employer's Exhibit 4.

administrative law judge failed to consider the evidence as a whole, including the originally submitted medical opinion evidence, employer does not challenge the administrative law judge's finding that there was no reason to modify her prior determination that the existence of pneumoconiosis was established by the originally submitted medical opinion evidence or the administrative law judge's specific weighing of the originally submitted medical opinion evidence under Section 718.202(a)(4) in her prior Decision and Order, *see Skrack, supra*.

However, as employer properly notes, the Fourth Circuit Court has held that an administrative law judge should not "mechanistically" credit, "to the exclusion of all other testimony," the testimony of a treating physician solely because the physician treated the claimant, but has a "statutory obligation to consider all of the relevant evidence bearing upon the existence of pneumoconiosis and its contribution to the claimant's disability, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). Thus, the administrative law judge did not adequately explain why the opinions of Drs. Wallace and Robinette, as claimant's treating physicians, were entitled to more weight under Section 718.202(a)(4) than the contrary opinions of Drs. Sargent, Castle and Fino, whose opinions the administrative law judge did not specifically consider under Section 718.202(a)(4). Consequently, we vacate the administrative law judge's finding that the existence of pneumoconiosis was established under Section 718.202(a)(4) and remand the case for reconsideration of all relevant evidence.

Finally, the administrative law judge considered the newly submitted medical opinion evidence pursuant to Section 718.204(b) and found the opinions of Drs. Wallace and Robinette were also sufficient to establish that claimant's coal dust exposure is at least a contributing factor to his respiratory disability, Decision and Order at 13. The administrative law judge gave no weight to the contrary opinions of Drs. Sargent, Fino, Castle and Forehand because he found their opinions that claimant did not have pneumoconiosis were "an impermissible collateral attack" on the administrative law judge's earlier determination that the existence of pneumoconiosis was established by the originally submitted medical opinion evidence and the administrative law judge's finding that the newly submitted evidence confirmed her original finding, *id*.

However, the Fourth Circuit Court held in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), that where, as in this case pursuant to Section 718.204(b), a claimant bears the burden of establishing that pneumoconiosis caused his total disability, as opposed to enjoying a presumption of total disability due to pneumoconiosis, once the administrative law judge has found that the claimant suffers from some form of pneumoconiosis, a physician's opinion premised on an understanding that the miner does not suffer from coal workers' pneumoconiosis may hold probative value, *see also Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *cf. Grigg v. Director*,

OWCP, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). The Fourth Circuit Court held in *Ballard, supra*, that such an opinion is not necessarily inconsistent with the administrative law judge's decision that the miner suffers from pneumoconiosis as defined in 20 C.F.R. §718.201, inasmuch as the legal definition of pneumoconiosis is broader than the medical definition of coal workers' pneumoconiosis. Moreover, the Fourth Circuit Court held that a medical opinion that acknowledges the miner's respiratory or pulmonary impairment, but nevertheless concludes that an ailment other than pneumoconiosis caused the miner's total disability, is relevant because it directly rebuts the miner's evidence that pneumoconiosis contributed to his disability, *id*. Drs. Sargent, Castle, Fino and Forehand all acknowledge that claimant suffers from a respiratory or pulmonary impairment and/or disability and Drs. Fino and Castle both opined that even assuming claimant had coal workers' pneumoconiosis, he would not be disabled by it. Consequently, we vacate the administrative law judge's findings that the opinions failing to diagnose pneumoconiosis should be discredited under Section 718.204(b) and, inasmuch as we vacate the administrative law judge's findings under Section 718.202(a), we vacate the administrative law judge's finding that total disability due to pneumoconiosis was established pursuant to Section 718.204(b) and remand the case for reconsideration.

Accordingly, the Decision and Order Denying Motion for Reconsideration of Judge Burke is vacated and the Decision and Order Awarding Benefits of Judge Barnett is affirmed in part and vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting

Administrative Appeals Judge