BRB No. 08-0131 BLA

L.P.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 10/29/2008
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 Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Rita A. Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2004-BLA-05226) of Administrative Law Judge Pamela Lakes Wood rendered 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). The administrative law judge credited

claimant with thirty-two years of coal mine employment, based on the parties' stipulation, and adjudicated this claim, filed on July 8, 2002, pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of both clinical and legal pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b). The administrative law judge further found the evidence sufficient to establish that claimant has a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), (iv), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the x-ray evidence was sufficient to establish clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). Employer also argues that it was improper for the administrative law judge to reject one of the x-ray interpretations it proffered. Regarding 20 C.F.R. §718.202(a)(4), employer challenges the administrative law judge's exclusion of Dr. Fino's CT scan interpretations and her weighing of the medical opinions of Drs. Fino, Altmeyer, Lenkey and Saludes. With respect to 20 C.F.R. §718.204(c), employer challenges the administrative law judge's finding that the medical opinion evidence was sufficient to establish total disability due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not participate in the appeal before the Board, unless specifically requested to do so. In a footnote, however, the Director addresses employer's assertion that the administrative law judge erred in giving diminished weight to Dr. Fino's opinion because he relied on his own readings of two CT scans, which the administrative law judge determined were inadmissible. The Director notes that it is not clear why the administrative law judge concluded Dr. Fino's readings were inadmissible and avers that if the administrative law judge concluded that Dr. Fino's readings were prohibited by the evidentiary limitations, she erred.[1]

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

[1] Because the administrative law judge's length of coal mine employment determination and her findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3) and sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), (iv), are not challenged on appeal, we affirm those findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

may not be disturbed.[2] 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).

Pursuant to 20 C.F.R. §718.202(a)(1), employer argues that the administrative law judge erred in excluding Dr. Scott's negative reading of the film dated September 18, 2002. Employer further maintains that the administrative law judge impermissibly relied upon "numerical superiority" when she found that the September 18, 2002 x-ray was positive for pneumoconiosis, and that the other three x-rays were in equipoise. These contentions are without merit.

With respect to the administrative law judge's exclusion of Dr. Scott's negative interpretation of the September 18, 2002 film, we hold that the administrative law judge's action was within her discretion and supported by applicable law.[3] Pursuant to 20 C.F.R. §725.414(a)(2)(ii), claimant was entitled to submit, in rebuttal of employer's case, one physician's interpretation of the x-ray submitted by the Director pursuant to 20 C.F.R. §725.406. 20 C.F.R. §725.414(a)(2)(ii). In accordance with the Board's holding in *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, BLR , BRB Nos. 07-0812 BLA and 07-0812 BLA-A (July 30, 2008), the fact that the reading submitted by the Director in this case was positive did not preclude claimant from designating the positive interpretation by Dr. Ahmed as rebuttal evidence. Under the terms of 20 C.F.R. §725.414(a)(3)(ii), employer was entitled to submit, in rebuttal of claimant's case, one physician's interpretation of each x-ray submitted by claimant *in support of his*

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4; Hearing Transcript at 70.

[3] The September 18, 2002 x-ray was procured as part of the examination of claimant performed at the request of the Department of Labor (DOL). Dr. Noble, a dually qualified B reader and Board-certified radiologist, provided an interpretation of the film on behalf of DOL and read it as positive for pneumoconiosis. Director's Exhibit 20. Claimant designated a positive reading by Dr. Ahmed, a dually qualified physician, as rebuttal evidence. Claimant's Exhibit 1. Employer designated a negative reading by Dr. Wheeler, a dually qualified physician, as rebuttal evidence, and submitted negative readings by Drs. Scott and Scatarige, dually qualified physicians, under the good cause exception to the evidentiary limitations. Director's Exhibit 26. At the hearing, the administrative law judge admitted the interpretations of Drs. Noble, Ahmed, and Wheeler, but excluded the readings by Drs. Scott and Scatarige. Hearing Transcript at 51. Employer continued to maintain that it was entitled to submit at least one additional reading of the September 18, 2002 film.

affirmative case and the x-ray submitted by the Director under 20 C.F.R. §725.406. 20 C.F.R. §725.414(a)(3)(ii). Because claimant submitted Dr. Ahmed's reading as rebuttal evidence, rather than evidence in support of his affirmative case, the administrative law judge properly determined that 20 C.F.R. §725.414(a)(3)(ii) does not provide employer an opportunity to rebut Dr. Ahmed's reading.[4] *See Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007)(The terms of 20 C.F.R. §§725.414(a)(2)(ii) and (a)(3)(ii) authorize the submission of one piece of evidence on rebuttal *for each piece of affirmative evidence* submitted by the other party). We affirm, therefore, the administrative law judge's decision to exclude Dr. Scott's reading of the September 18, 2002 film.

With respect to the administrative law judge's weighing of the x-ray readings admitted into the record, the administrative law judge determined whether each of the four films was positive or negative by referring to the number of readings and the qualifications of the readers. Decision and Order at 26-27. In so doing, the administrative law judge acknowledged that all of the physicians who proffered interpretations are dually qualified as B readers and Board-certified radiologists. The administrative law judge found that the July 20, 2001 x-ray was in equipoise, as it was read as positive for pneumoconiosis by Dr. Noble, and as negative by Dr. Meyer. Decision and Order at 26; Director's Exhibit 22, Employer's Exhibit 2. Regarding the September 18, 2002 x-ray, the administrative law judge found that it was positive for pneumoconiosis, as it was read as positive by Drs. Noble and Ahmed, and interpreted as negative by Dr. Wheeler. Decision and Order at 26; Director's Exhibit 20; Claimant's Exhibit 2; Employer's Exhibit 2. The administrative law judge found that the September 24, 2002 x-ray was in equipoise, because it was read as positive for pneumoconiosis by Dr. Ahmed and as negative by Dr. Meyer. Decision and Order at 27; Claimant's Exhibit 3, Employer's Exhibit 2. Regarding the April 17, 2003 x-ray, the administrative law judge found that because it was read as positive for pneumoconiosis by Dr. Ahmed, but negative by Dr. Meyer, it was in equipoise. Decision and Order at 27; Claimant's Exhibit 2, Employer's Exhibit 2.

The administrative law judge indicated that the three films in equipoise neither supported nor undermined a finding of pneumoconiosis. Decision and Order at 27. With respect to the September 18, 2002 x-ray, which the administrative law judge determined

[4] Employer cites the Board's decision in *Ward v. Consolidation Coal Co.*, 23 BLR 1-151 (2006), in support of the proposition that "each party is entitled to submit one x-ray interpretation for each x-ray interpretation offered by the opposing party." Employer's Brief at 15. The Board's holding in *Ward* applied to x-ray interpretations offered in support of each party's affirmative case, however, not to x-ray readings offered in rebuttal. *Ward*, 23 BLR at 1-155.

was positive, the administrative law judge stated, "no reason has been presented why its probative value has been discounted. I therefore conclude that the x-ray evidence is positive for the existence of pneumoconiosis." *Id*. Because the administrative law judge performed both a qualitative and quantitative assessment of the x-ray evidence, we affirm the administrative law judge's finding that claimant has established the existence of pneumoconiosis by the x-ray evidence at 20 C.F.R. §718.202(a)(1). Decision and Order at 27; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).

Employer also contends on appeal that the administrative law judge erred in finding that claimant established the existence of both clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[5] The evidence relevant to 20 C.F.R. §718.202(a)(4) consists of the medical opinions of Drs. Lenkey, Saludes, Altmeyer, and Fino. Dr. Lenkey, claimant's treating physician, provided two medical reports and was deposed twice. Director's Exhibits 22, 25; Claimant's Exhibit 5; Employer's Exhibit 10. Dr. Lenkey diagnosed clinical pneumoconiosis by x-ray and indicated that claimant had a respiratory impairment that was caused, in part, by coal dust exposure. Dr. Saludes performed an examination of claimant at the request of the Department of Labor on November 6, 2002 and was subsequently deposed by employer. Director's Exhibit 13. Dr. Saludes diagnosed chronic obstructive pulmonary disease (COPD) and coal workers' pneumoconiosis and indicated that claimant's COPD was caused by smoking. *Id*. Dr. Fino provided a written report based upon an examination of claimant and a record review and was deposed by employer twice. Employer's Exhibits 3, 8, 11. Dr. Fino opined that claimant does not have clinical pneumoconiosis or any other disease related to coal dust exposure. *Id*. Dr. Altmeyer submitted a written report based upon his examination of claimant and a review of claimant's medical records and was deposed by employer on two occasions. Director's Exhibit 24; Employer's Exhibits 1, 9. Dr. Altmeyer concluded that claimant is not suffering from clinical pneumoconiosis or any other dust related lung disease. *Id*.

[5] Under the terms of 20 C.F.R. §718.201, "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" refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). Pursuant to 20 C.F.R. §718.201(b), a disease arising out of coal mine employment "includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

The administrative law judge accorded Dr. Lenkey's opinion "significant weight" based on his status as claimant's treating physician for several years and upon consideration of the criteria set forth at 20 C.F.R. §718.104(d). Decision and Order at 29. The administrative law judge found that while Dr. Saludes' opinion was entitled to "diminished weight" because he did not have the benefit of CT scans obtained in 2004 and 2005 in rendering his opinion, it was well reasoned and corroborative of Dr. Lenkey's opinion. Decision and Order at 29.

The administrative law judge determined that the opinions of Drs. Fino and Altmeyer were entitled to less "probative weight" because they were "based in significant part upon their conclusions that the x-ray evidence is negative for pneumoconiosis when I have reached the opposite conclusion" and because they "relied extensively on evidence that is inadmissible," i.e., x-ray readings from their own examinations that exceeded the evidentiary limitations. Decision and Order at 29. The administrative law judge also noted with respect to Dr. Fino's opinion, that the doctor initially concluded that claimant suffered from idiopathic pulmonary fibrosis, but subsequently opined, based upon his own interpretation of the 2005 CT scan, that the presence of pneumoconiosis was ruled out, a finding not made by the physician who provided the original CT scan interpretation. *Id*. The administrative law judge indicated further that Dr. Fino's method of interpreting x-rays was questionable and his conclusion that obesity was the cause of claimant's restrictive impairment was not well reasoned. *Id*. at 30-31. The administrative law judge concluded that given Dr. Fino's initial statement that claimant's restrictive impairment was primarily due to some etiology other than obesity, his subsequent decision to accept obesity as the sole cause warranted further explanation. *Id*.

In light of these credibility determinations, the administrative law judge found that "the opinions by Dr. Lenkey and Dr. Saludes, considered together, established that claimant suffers from both clinical and legal pneumoconiosis." *Id*. at 32. Based upon her consideration of the x-ray and medical opinion evidence together, in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208, 22 BLR 2-162, 2-168 (4th Cir. 2000), the administrative law judge concluded that claimant established that he was suffering from both clinical and legal pneumoconiosis by a preponderance of the evidence. *Id*.

Employer contends that the administrative law judge erred in finding that Dr. Fino's CT scan readings were inadmissible and in determining that Dr. Fino's reliance upon them detracted from the probative value of his opinion. Employer asserts that it had the right to proffer Dr. Fino's CT scan interpretations in response to "late" evidence containing CT scans submitted by claimant. Employer's Brief at 13. Employer also argues that the administrative law judge applied a less stringent standard in crediting Dr. Lenkey's opinion as reasoned and documented than she applied to the opinions of Drs. Fino and Altmeyer. Employer further asserts that the administrative law judge erred in

discrediting the opinions of Drs. Fino and Altmeyer and in finding that Dr. Saludes's opinion supports Dr. Lenkey's diagnosis of legal pneumoconiosis. These contentions have merit.

Contrary to the administrative law judge's finding, employer had a right to submit Dr. Fino's CT scan readings. The Board has held that CT scan readings can be admitted as affirmative evidence under 20 C.F.R. §718.107, which allows for the admission of "[t]he results of any medically accepted test or procedure reported by a physician and not addressed [in 20 C.F.R. §§718.102-718.106] which tends to demonstrate the presence or absence of pneumoconiosis… or a respiratory or pulmonary impairment."[6] *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-133 (2006), *aff'd on recon.*, 24 BLR 1-1 (2007) (*en banc*). Moreover, the regulations do not limit the number of separate CT scans that may be admitted into the record; rather, the parties are limited to only one affirmative reading of each separate scan. *See Dempsey v. Sewell Coal Co*., 23 BLR 1-47, 1-59 (2004)(*en banc*).

In this case, the record contains CT scans dated June 7, 2004 and February 2, 2005. The administrative law judge admitted the "CT scan hospital reports from 2004 and 2005 (attached as exhibits to Dr. Lenkey's May 15, 2006 deposition)." Decision and Order at 30 As the Director notes, in accordance with *Webber*, each party was allowed to submit one affirmative reading of each of these CT scans, and one rebuttal reading, as necessary, to respond to the opposing party's affirmative reading. Thus, Dr. Fino's readings of the June 7, 2004 and February 2, 2005 CT scans were admissible. Because the administrative law judge was incorrect in excluding Dr. Fino's CT scan interpretations and in discrediting Dr. Fino's opinion on the ground that he relied upon inadmissible evidence, we must vacate her finding that the medical opinions of record were sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4) and remand the case to the administrative law judge for the admission and consideration of the CT scan interpretations rendered by Dr. Fino and for reconsideration of Dr. Fino's opinion.

We further hold that we must vacate the administrative law judge's findings with respect to the remaining medical opinions under 20 C.F.R. §718.202(a)(4), as there is merit in employer's allegation that the administrative law judge selectively analyzed the relevant medical opinions. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). The administrative law judge noted that Dr. Lenkey relied, in part, upon a November

[6] In light of our application in this case of the holding in *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-133 (2006), *aff'd on recon.*, 24 BLR 1-1 (2007) (*en banc*), we decline to address whether employer's argument that "basic fairness" and due process require the admission of Dr. Fino's CT scan readings. Employer's Brief at 13.

2005 pulmonary function study (PFS) that was not of record to diagnose a mixed obstructive and restrict impairment but, in contrast to her determination that reliance upon evidence that was not properly of record diminished the weight of the opinions of Drs. Fino and Altmeyer, the administrative law judge did not find that Dr. Lenkey's opinion was entitled to less weight for this reason. In addition, although the administrative law judge determined that the February 23, 2005 PFS upon which Dr. Lenkey relied, in part, in diagnosing an obstructive impairment, was nonconforming, the administrative law judge did not address whether this finding affected the credibility of Dr. Lenkey's opinion.[7] *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

Employer also maintains correctly that the administrative law judge did not consider the significance of the fact that Dr. Lenkey's opinion regarding the nature of claimant's respiratory impairment, and the extent to which coal dust exposure contributed to it, has varied over time, although she discredited Dr. Fino's opinion because his conclusion as to the presence of fibrosis in claimant's lungs shifted after he viewed a more recent CT scan.[8] Decision and Order at 30. Similarly, the administrative law judge

[7] The administrative law judge determined that the qualifying pulmonary function study (PFS) dated February 23, 2005 did not meet the quality standards in 20 C.F.R. §718.103 and Appendix B to Part 718, as it did not include three sets of tracings. Decision and Order at 12. The administrative law judge also noted that this PFS contained a typographical error in which claimant's gender was noted as "F" for female, rather than "M" for male, which may have resulted in the use of incorrect predicted values. *Id*. Employer contends that the administrative law judge's speculation as to the possible effect of the typographical error constituted an improper exercise of medical judgment by the administrative law judge. On remand, when reconsidering Dr. Lenkey's opinion in light of his reliance, in part, upon the February 23, 2005 PFS, the administrative law judge must determine whether there is evidence in the record establishing that the wrong predicted values were used and if so, whether this affects the reliability of the PFS and the credibility of Dr. Lenkey's opinion. *See DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Gorman v. Hawk Contracting, Inc.*, 9 BLR 1-76 (1986).

[8] In his first report, dated July 20, 2001, Dr. Lenkey indicated that 75% of claimant's obstructive impairment was attributable to COPD and obesity and 25% to coal dust exposure. Director's Exhibit 22. At his first deposition, conducted on January 7, 2003, Dr. Lenkey altered his estimate of the contribution by coal dust exposure to 50%. Director's Exhibit 25 at 36. In his second report, dated December 19, 2005, Dr. Lenkey reiterated the latter conclusion. Claimant's Exhibit 6. In his first deposition, Dr. Lenkey diagnosed a severe obstructive impairment. Director's Exhibit 25 at 17-18. In his second deposition, conducted on May 15, 2006, Dr. Lenkey diagnosed a mixed defect with mild obstruction and mild to moderate restriction, based on the November 2005 PFS that is not

did not explain her determination that Dr. Saludes's opinion was well reasoned, despite her acknowledgement of the fact that Dr. Saludes characterized his assessment of the extent to which coal dust exposure contributed to claimant's obstructive lung disease as an "educated guess." *Id*. at 17, 29; Director's Exhibit 27 at 31.

Finally, employer alleges correctly that the administrative law judge erred in discrediting the opinions of Drs. Fino and Altmeyer based, in part, upon her finding that clinical pneumoconiosis was established at 20 C.F.R. §718.202(a)(1). The administrative law judge determined correctly that the negative x-ray interpretations made by Drs. Fino and Altmeyer were not admissible because employer had designated negative readings by more qualified readers as affirmative and rebuttal evidence. Decision and Order at 30; 20 C.F.R. §725.414(a)(3)(i), (ii). However, as employer argues, the administrative law judge did not consider the significance of the fact that the negative readings by Drs. Fino and Altmeyer were consistent with the admitted interpretations presented by employer, nor did she acknowledge that she had determined that three of the four films of record, including those read by Drs. Fino and Altmeyer, were in equipoise and, therefore, "neither supported not undermined a finding of pneumoconiosis." Decision and Order at 27; *see Fitch v. Director, OWCP*, 9 BLR 1-45, 1-47 n.2 (1986).

In light of the foregoing, we vacate the administrative law judge's finding that the medical opinion evidence was sufficient to establish the existence of both clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and remand the case to the administrative law judge for reconsideration of this issue. On remand, the administrative law judge must reconsider the medical opinions of Drs. Lenkey, Saludes, Fino, and Altmeyer and render a finding as to the probative value of each opinion, based upon "the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *Sterling Smokeless Coal Company v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998). In rendering her ultimate finding under 20 C.F.R. §718.202(a)(4), the administrative law judge must place the burden of proof on claimant to establish the existence of pneumoconiosis by a preponderance of the reasoned and documented medical opinion evidence. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). The administrative law judge must also set forth her findings in detail, including the underlying rationale, as required

---

in the record. Employer's Exhibit 10 at 25. Dr. Lenkey also indicated that he was attempting to provide an estimate of the extent to which smoking and coal dust exposure contributed to claimant's respiratory impairment that was accurate within 10-15% and that the apportionment was based upon a comparison of the smoking and employment histories. *Id*. at 26, 27.

by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

If the administrative law judge finds that claimant has not established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) on remand, she must reconsider whether the evidence of record, as a whole, is sufficient to establish the existence of pneumoconiosis in accordance with *Compton*, 211 F.3d at 208, 22 BLR at 2-168. If she finds the existence of pneumoconiosis established by a preponderance of all of the relevant evidence, she must determine, pursuant to 20 C.F.R. §718.203, whether claimant's pneumoconiosis arose out of coal mine employment.

With respect to the issue of total disability due to pneumoconiosis, employer alleges that the administrative law judge erred in finding that the medical opinion evidence was sufficient to establish that claimant is totally disabled due to both clinical and legal pneumoconiosis at 20 C.F.R. §718.204(c). In light of our decision to vacate the administrative law judge's determination that claimant established the existence of both clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) by a preponderance of the medical opinions of record, we also vacate the administrative law judge's finding at 20 C.F.R. §718.204(c). If the administrative law judge determines on remand that claimant has established the existence of pneumoconiosis by a preponderance of the evidence of record pursuant to 20 C.F.R. §718.202(a), *see Compton*, 211 F.3d at 208, 22 BLR at 2-168, she must reconsider whether claimant has established, by a preponderance of the evidence, that pneumoconiosis is a substantially contributing cause of his total disability pursuant to 20 C.F.R. §718.204(c). *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002).

Accordingly, the administrative law judge's Decision and Order Granting 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.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge