U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 19-0534 BLA

BOBBY G. GRIM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ABRAXAS, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE	)	DATE ISSUED: 02/17/2021
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Bobby G. Grim, Nippa, Kentucky.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for Employer/Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals Administrative Law Judge John P. Sellers, III's Decision and Order Denying Benefits (2018-BLA-05036) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on June 21, 2016.[2] 20 C.F.R. §725.309.

The administrative law judge credited Claimant with 14.19 years of coal mine employment, and thus found he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] Considering whether Claimant established entitlement to benefits without the benefit of this presumption, the administrative law judge found the new evidence established total disability at 20 C.F.R. §718.204(b)(2) and therefore a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). He also found, based on all the evidence, Claimant did not establish he has clinical or legal pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203.[4] Further, the administrative

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on Claimant's behalf, the Benefits Review Board review the administrative law judge's decision, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co*., 19 BLR 1-88 (1995) (Order).

[2] This is Claimant's seventh claim for benefits. On January 20, 2015, the district director denied Claimant's most recent prior claim, filed on April 1, 2014, because he did not establish a totally disabling pulmonary or respiratory impairment. Director's Exhibit 6 at 4, 68. Claimant took no further action until filing the present claim. Director's Exhibit 8.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses 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). Clinical pneumoconiosis consists of "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

law judge found Claimant did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) and denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer and its Carrier (Employer) respond, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

When a claimant files an appeal without the assistance of counsel, the Benefits Review Board considers whether the Decision and Order is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[5] 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).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, he must establish "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). The district director denied Claimant's prior claim because he did not establish total respiratory disability. Director's Exhibit 6 at 4. Consequently, to obtain review of the merits of his claim, Claimant had to establish he is totally disabled. 20 C.F.R. §725.309(c)(3), (4).

Section 411(c)(4) Presumption – Length of Coal Mine Employment

Because the administrative law judge's determination of Claimant's length of coal mine employment is relevant to whether Claimant can invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis, we will review his finding that Claimant worked 14.19 years in underground coal mine employment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

---

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).

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 9, 11, 12.

Claimant bears the burden of proof to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination on length of coal mine employment based on a reasonable method of calculation that is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

In determining the total length of Claimant's coal mine employment, the administrative law judge considered all relevant evidence, consisting of Claimant's employment history summaries, his Social Security Administration (SSA) earnings records, and his hearing testimony. Decision and Order at 4-9; Director's Exhibits 1-6, 8, 12, 55 at 15-22; Hearing Transcript at 13-24. He noted Claimant alleged between fifteen and eighteen years of underground coal mine employment with numerous employers from 1970 to 1986, but his SSA earnings records show he worked in coal mine employment between 1971 and 1986. He also noted that, although Claimant testified some employers may not have reported his earnings to the SSA, he was unable to recall the names of such employers and when he worked for them. Decision and Order at 5; Hearing Transcript at 22-24. Further, he noted Claimant testified he first worked in coal mine employment for White Ash Mining Company in 1971. Decision and Order at 5; Director's Exhibit 55 at 21. Thus the administrative law judge rationally found the preponderance of the evidence established Claimant worked in coal mine employment between 1971 and 1986. Decision and Order at 7-9; *see Clayton v. Pyro Mining Co.*, 7 BLR 1-551 (1984).

The administrative law judge also determined "the record does not clearly identify the beginning and ending dates of Claimant's coal mine employment," except for his employment with Bowling Mining from 1985 to 1986.[6] Decision and Order at 7. Noting Claimant did not work 125 days in 1985 or 1986,[7] the only years in which the beginning and ending dates of his employment could be determined, the administrative law judge

[6] The administrative law judge noted check stubs indicate Claimant worked for Bowling Mining from October 1, 1985 to April 15, 1986, while a form from the Kentucky Department of Workers' Claims Workers' Compensation Board documents he worked for Bowling Mining from October 1, 1985 to April 30, 1986. Decision and Order at 5; Director's Exhibits 2 at 288, 4 at 41-49.

[7] The administrative law judge noted Claimant would have worked for Bowling Mining for 92 days in 1985 and 120 days in 1986 if he worked for it from October 1, 1985 to April 30, 1986. Decision and Order at 7. Because the administrative law judge determined Claimant did not work 125 days for Bowling Mining in 1985 or 1986, he found Claimant not entitled to a full year of coal mine employment in either year. *Id*.

calculated Claimant's length of coal mine employment for each year from 1971 through 1986 with reference to the formula set forth at 20 C.F.R. §725.101(a)(32)(iii) and the decision of the United States Court of Appeals for the Sixth Circuit in *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (2019).[8] The administrative law judge determined Claimant's SSA earnings records establish his income exceeded the coal mine industry's average earnings in 1972 to 1975, 1977, and 1979 to 1984, as set forth in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*.[9] Decision and Order at 7. Thus, he credited Claimant with eleven years of coal mine employment for these years. *Id*. He calculated the number of days Claimant worked in each remaining year in 1971, 1976, 1978, 1985, and 1986 by dividing Claimant's yearly earnings by the industry's average daily earnings. He next divided the number of days Claimant worked each year by 125 and credited him with a fractional year of coal mine employment for each year. Over these remaining years, the administrative law judge credited Claimant with 3.19 years of coal mine employment. He therefore concluded Claimant established a total of 14.19 years of qualifying coal mine employment. This calculation accords with law. *Shepherd*, 915 F.3d at 402. Because we detect no error in the administrative law judge's

[8] In *Shepherd*, the Sixth Circuit held a miner need only establish 125 working days during a calendar year to be credited with a full year of coal mine employment. 915 F.3d at 401-02. Thus, in calculating a miner's length of coal mine employment pursuant to 20 C.F.R. §725.101(a)(32)(iii), *Shepherd* provides:

> [I]f the beginning and ending dates of the miner's employment cannot be determined or – even if such dates are ascertainable – if the miner was employed by the mining company for "less than a calendar year," the adjudicator may determine the length of coal mine employment by dividing the miner's yearly income from coal mine employment by the average daily earnings of an employee in the coal mining industry. If the quotient from that calculation yields at least 125 working days, the miner can be credited with a year of coal mine employment, regardless of the actual duration of employment for the year. 20 C.F.R. § 725.101(a)(32)(iii). If the calculation shows that the miner worked fewer than 125 days in the calendar year, the miner still can be credited with a fractional portion of a year based on the ratio of the days worked to 125. 20 C.F.R. § 725.101(a)(32)(i).

Id. at 402.

[9] Exhibit 610 to the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, entitled "*Average Wage Base*," contains the coal mine industry daily earnings data referenced in 20 C.F.R. §725.101(a)(32)(iii).

finding that Claimant has fewer than fifteen years of coal mine employment, we affirm his finding that Claimant did not invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b)(1)(i).[10]

Part 718 – Total Disability

Without the assistance of any statutory presumptions, the administrative law judge initially addressed whether Claimant met his burden to establish a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b) and, therefore, a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c).[11]

[10] Employer asserts the administrative law judge's calculation overstates Claimant's coal mine employment by crediting him with: 1) 0.89 years of work in 1971 where Social Security Administration (SSA) records document earnings in only three quarters; 2) one full year of work in 1973 where SSA records indicate Claimant earned only $244.44 in the second quarter, which Employer alleges is evidence Claimant did not work most of that quarter; and 3) one full year of work in 1975 where SSA records document earnings in only three quarters. Employer's Brief at 8 n.1. Contrary to Employer's assertion, the administrative law judge fully considered Claimant's SSA earnings records and based his finding on a reasonable method of computation. *Shepherd*, 915 F.3d at 401 (miner may be credited with a year of coal mine employment, or a fraction thereof, based on 125 working days). Employer also asserts the administrative law judge erred in crediting Claimant with 0.56 years of work in 1986 where he testified to working four months (0.33 years) that year. Although the administrative law judge did not weigh Claimant's testimony in conjunction with his SSA earnings records in calculating the length of his coal mine employment in 1986, any error the administrative law judge made in overstating Claimant's coal mine employment is harmless as he credited Claimant with fewer than fifteen years of coal mine employment. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[11] To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987);); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The record contains five new pulmonary function studies dated March 9, 2016, September 12, 2016, April 20, 2017, January 17, 2018, and April 13, 2018. The March 9, 2016 and April 13, 2018 studies, administered without the use of bronchodilators, produced qualifying values.[12] Director's Exhibit 26; Claimant's Exhibit 4. The September 12, 2016 and January 17, 2018 studies produced qualifying results both before and after the administration of bronchodilators. Director's Exhibit 14; Employer's Exhibit 5. Finally, the April 20, 2017 study, administered without the use of bronchodilators, produced non-qualifying values. Director's Exhibit 27. Considering the validity of the pulmonary function studies, the administrative law judge found all but the April 20, 2017 study technically acceptable. Decision and Order at 12, 22-28. According greater weight to the two most recent studies administered in 2018, the administrative law judge found the preponderance of the pulmonary function study evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). *Id*. at 29.

Employer argues the administrative law judge erred in finding the September 12, 2016 pulmonary function study valid because he erroneously relied on the administering technician's comments rather than the experts' review of the test.[13] Employer's Brief at 16 n. 4.

The administrative law judge noted the technician who conducted the September 12, 2016 study for Dr. Ajjarapu indicated Claimant exhibited good cooperation and the

[12] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[13] We address this contention Employer raises in its response brief as it provides an alternate method, if accepted, of affirming the administrative law judge's denial of benefits. *King v. Tennessee Consolidation Coal Co.*, 6 BLR 1-87 (1983).

ability to understand and follow instructions. Decision and Order at 25. He then considered the validation opinions of Drs. Ajjarapu, Gaziano, Fino, Vuskovich, and Rosenberg. *Id*. at 25-26. He determined Drs. Vuskovich and Fino invalidated the study while Drs. Ajjarapu,[14] Gaziano,[15] and Rosenberg[16] did not. He noted while Dr. Fino opined the study is "clearly invalid" because it was "submaximal," he did not identify how the test contravened the quality standards. *Id*. at 25. He also noted if the FEV1 and FVC procedures described in Appendix B to Part 718 are the basis for Dr. Fino's opinion that the test was suboptimal, he neither stated as much nor explained how he was able to determine from the tracings that Claimant was not blowing "as hard, fast, and completely as possible" for the required duration. *Id*. Further, he noted while Dr. Vuskovich opined the results are "unacceptable," he did not offer any further explanation for his conclusion, identify how the test failed to comply with the quality standards, or state why the test was invalid. *Id*. at 25-26.

Because the administrative law judge permissibly found Drs. Fino and Vuskovich did not adequately explain the bases for their conclusions that the September 12, 2016 study is invalid, his error, if any, in crediting the first-hand observations of the technician who conducted that study over Dr. Fino's and Dr. Vuskovich's invalidation opinions, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Moreover, the administrative law judge permissibly accorded greater weight to the January 17, 2018 and April 13, 2018 qualifying pulmonary function studies based on their recency. *See 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). We therefore affirm the administrative law judge's finding that the pulmonary

[14] The administrative law judge observed Dr. Ajjarapu found the September 12, 2016 pulmonary function study suboptimal due to a lack of consistency and effort in Claimant's MVV. Decision and Order at 25. Noting Dr. Ajjarapu's comments appear to be specific to the MVV results as opposed to an intention to invalidate the entire test, the administrative law judge determined the study is qualifying with or without consideration of the MVV results. *Id*.

[15] The administrative law judge noted Dr. Gaziano, unlike Dr. Ajjarapu, did not make a lack of consistency or effort finding regarding the MVV portion of the September 12, 2016 pulmonary function study after reviewing the tracings, but rather found the tracings acceptable in their entirety. Decision and Order at 25.

[16] The administrative law judge noted that, while Dr. Rosenberg observed no plateau on exhaustion in reviewing the September 12, 2016 pulmonary function study results, he also observed good effort was apparent. Decision and Order at 26.

function studies support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i) as supported by substantial evidence.

The administrative law judge then correctly found none of the blood gas studies produced qualifying values[17] and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 29.

The administrative law judge next considered the opinions of Drs. Ajjarapu, Rosenberg, and Fino. Drs. Ajjarapu and Rosenberg opined Claimant has a totally disabling pulmonary impairment while Dr. Fino opined he does not. Director's Exhibits 18 at 2; 27 at 10; Employer's Exhibits 5 at 4-5; 7 at 2; 13 at 5. The administrative law judge found the opinions of Drs. Ajjarapu and Rosenberg do not constitute contrary evidence precluding the use of the pulmonary function studies to establish total disability. Decision and Order at 29. Noting Dr. Fino based his opinion on the inaccurate premise that Claimant's qualifying pulmonary function studies are invalid, the administrative law judge found Dr. Fino's opinion unpersuasive. *Id*. He therefore found the weight of the medical opinion evidence supports the use of the pulmonary function studies to establish total disability. *Id*. Considering all relevant evidence together, the administrative law judge found Claimant established total respiratory disability.[18] 20 C.F.R. §718.204(b)(2); Decision and Order at 30.

As substantial evidence supports the administrative law judge's weighing of the evidence at 20 C.F.R. §718.204(b)(2), we affirm his finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2). Further, we affirm his finding that Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c).

Clinical Pneumoconiosis

The administrative law judge next found the evidence as a whole does not establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a). He stated he "fully considered"

[17] The record contains three blood gas studies conducted on September 12, 2016, April 20, 2017, and January 17, 2018. Director's Exhibits 18, 25, 27; Employer's Exhibit 5.

[18] The administrative law judge properly found the blood gas studies do not contradict the pulmonary function studies because they measure different components of lung function. *See Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984); 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 29.

the evidence submitted in Claimant's prior claims, but found the new evidence more probative of Claimant's current condition.[19] Decision and Order at 30.

The administrative law judge considered eleven interpretations of five new x-rays dated June 29, 2015, March 9, 2016, September 12, 2016, April 20, 2017, and January 17, 2018.[20] 20 C.F.R. §718.202(a)(1); Decision and Order at 31. Dr. DePonte, dually qualified as a Board-certified radiologist and B reader, read the June 29, 2015, March 9, 2016, April 20, 2017, and January 17, 2018 x-rays as positive for pneumoconiosis, while Dr. Meyer, also a dually-qualified radiologist, read the same x-rays as negative. Director's Exhibit 28; Claimant's Exhibits 1, 2, 3; Employer's Exhibits 1, 2, 3, 15. Dr. Miller, a dually-qualified radiologist, read the September 12, 2016 x-ray as positive for pneumoconiosis, while Dr. DePonte and Dr. Seaman, also a dually-qualified radiologist, read the same x-ray as negative.[21] Director's Exhibits 18, 29; Employer's Exhibit 4.

The administrative law judge found the June 29, 2015, March 9, 2016, April 20, 2017, and January 17, 2018 x-rays inconclusive because an equal number of dually-qualified radiologists read the respective films as positive and negative for pneumoconiosis. Decision and Order at 31. He found the September 12, 2016 x-ray negative for pneumoconiosis because two-dually qualified radiologists read this x-ray as negative and one dually-qualified radiologist read it as positive. *Id*. Finding the new evidence consists of one negative x-ray and four inconclusive x-rays, the administrative law judge concluded the x-ray evidence does not establish clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Id*. at 31-32.

We disagree that evidence from Claimant's prior claim is necessarily of less probative value than evidence developed in conjunction with his current subsequent

[19] The administrative law judge noted "the x-ray interpretations and medical reports designated in this claim constitute the most recent evidence of record." Decision and Order at 32. He did not summarize the previously submitted evidence or weigh it in conjunction with the new evidence on the issue of clinical pneumoconiosis. *Id*. at 30.

[20] The administrative law judge noted Claimant's treatment records contain two x-rays taken at Kings Daughters' Medical Center and East Kentucky Cardiology. Decision and Order at 10 n.5. He further noted that while both x-rays were submitted in accordance with 20 C.F.R. §725.414(a)(4), they were not reported in accordance with the classification system at 20 C.F.R. §718.102. *Id*. Thus he found the treatment x-ray readings cannot be used to establish the presence or absence of pneumoconiosis. *Id*.; 20 C.F.R. §718.102(h).

[21] Dr. Lundberg, dually qualified as a Board-certified radiologist and B reader, read the September 12, 2016 x-ray for quality only. Director's Exhibit 23.

claim.[22] The Sixth Circuit has held that it is not logical or rational to rely solely on the fact that pneumoconiosis is a progressive and irreversible disease to credit x-ray evidence on the basis of its recency where the evidence indicates "improvement in [a miner's] physical condition, which is inconsistent with the normal course of the disease." *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992). Because the administrative law judge did not provide an adequate rationale for assigning controlling weight to the most recent negative x-ray evidence, we vacate his finding that Claimant did not establish the existence of clinical pneumoconiosis based on the x-ray evidence. 20 C.F.R. §718.202(a)(1); *see Woodward*, 991 F.2d at 319-20.

The administrative law judge accurately found the only computed tomography (CT) scan of record is silent as to the presence or absence of pneumoconiosis. *See* 20 C.F.R. §718.107; Decision and Order at 32; Employer's Exhibit 12 at 182-183. We therefore affirm his finding that the CT scan evidence does not establish the existence of clinical pneumoconiosis as supported by substantial evidence.

Claimant cannot establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(2) as the record contains no biopsy or autopsy evidence of pneumoconiosis. Further, Claimant cannot establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(3) as the record contains no evidence of complicated pneumoconiosis. Decision and Order at 22.

The administrative law judge next considered the new medical opinions and treatment records. He accurately observed none of the physicians who authored medical reports diagnosed clinical pneumoconiosis. Decision and Order at 32. He also permissibly found the only treatment record diagnosing pneumoconiosis not well-documented because it is based on an unidentified x-ray. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Claimant's Exhibit 5 at 13; Decision and Order at 32. The administrative law judge did not, however, address the medical reports submitted with the prior claims regarding the

[22] Dr. DeGuzman read a January 7, 1998 x-ray as positive for pneumoconiosis. Director's Exhibit 3. Dr. Rasmussen, a B reader, read a December 8, 2009 x-ray as positive for pneumoconiosis. Director's Exhibit 5. Dr. Alexander, a dually-qualified radiologist, read a May 14, 2014 x-ray as positive for pneumoconiosis. Director's Exhibit 6.

existence of clinical pneumoconiosis.[23] As the administrative law judge did not address all relevant evidence, we vacate his finding that the medical opinion evidence does not establish clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand this case for further consideration. *See* 30 U.S.C. §923(b); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The Sixth Circuit holds a miner can establish a lung disease or impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014).

The administrative law judge considered both the new opinions of Drs. Ajjarapu, Fino, and Rosenberg and the previously submitted opinions of Drs. Sutherland, Anderson,[24] Myers, Penman, Broudy, Fritzhand,[25] Dahhan, Branscomb, Lane, Guzman,[26]

[23] We note, however, that a physician's opinion which is merely a restatement of an x-ray interpretation is not a reasoned medical opinion. 20 C.F.R. §§718.202(a)(1), (4), 725.414(a).

[24] At a deposition taken on August 4, 1988, Dr. Anderson noted he examined Claimant on December 4, 1987, and interpreted a pulmonary function study he conducted as showing a "mild restrictive defect." Director's Exhibit 1 at 190, 197.

[25] In a report dated May 28, 1997, Dr. Fritzhand diagnosed chronic obstructive pulmonary disease (COPD) related to cigarette smoking. Employer's Exhibit 3 at 78.

[26] In a report dated January 28, 1998, Dr. Guzman diagnosed COPD, but did not address the etiology of the disease. Director's Exhibit 3 at 25.

Ammisetty, and Rasmussen. Drs. Ajjarapu,[27] Myers,[28] Penman,[29] and Ammisetty[30] diagnosed legal pneumoconiosis in the form of chronic bronchitis related to coal dust exposure. Director's Exhibit 1 at 146. Similarly, Dr. Rasmussen[31] diagnosed legal pneumoconiosis in the form of a pulmonary impairment related to coal dust exposure. Director's Exhibit 5 at 48. In contrast, Drs. Sutherland,[32] Broudy,[33] and Branscomb[34]

[27] In a December 21, 2016 report, Dr. Ajjarapu diagnosed chronic bronchitis based on Claimant's respiratory symptoms of daily cough with sputum production and shortness of breath, and attributed it to a thirteen-year history of coal mine employment and a 37.5 pack-year smoking history. Director's Exhibit 18 at 2. Dr. Ajjarapu did not specifically attribute any other cardiopulmonary conditions to coal mine employment or refer to any other cardiopulmonary condition as "legal pneumoconiosis," like she did with Claimant's chronic bronchitis. *Id*. However, she stated that the etiology of the impairment demonstrated on Claimant's pulmonary function study is "multifactorial, which includes coronary artery disease, tobacco smoke and his work in the mines." *Id*.

[28] At a deposition taken on August 4, 1988, Dr. Myers diagnosed chronic bronchitis and COPD related to coal dust exposure. Employer's Exhibit 1 at 168.

[29] At a deposition taken on July 11, 1998, Dr. Penman opined Claimant has a restrictive impairment. Employer's Exhibit 1 at 145.

[30] Dr. Ammisetty also opined Claimant has an impairment due to "chronic smoking." Employer's Exhibit 4 at 59.

[31] In a report dated December 8, 2009, Dr. Rasmussen noted Claimant's pulmonary function studies show minimal restrictive ventilatory impairment. Director's Exhibit 5 at 48.

[32] In a March 30, 1987 report, Dr. Sutherland diagnosed chronic bronchitis and COPD not related to coal dust exposure. Director's Exhibit 1 at 14.

[33] In a March 7, 1989 report and at a deposition taken on April 25, 1989, Dr. Broudy diagnosed chronic bronchitis and mild airways obstruction due to cigarette smoking. Director's Exhibits 2 at 32, 3 at 197. He further opined Claimant has not suffered any respiratory or pulmonary impairment related to coal dust exposure. Director's Exhibits 2 at 35, 3 at 197.

[34] In reports dated May 5, 1988, and March 9, 1989, and a deposition taken on April 25, 1989, Dr. Branscomb diagnosed chronic bronchitis with mild airways obstruction related to cigarette smoking. Employer's Exhibits 2 at 29, 3 at 194, 196. He further opined

opined Claimant does not have legal pneumoconiosis but chronic bronchitis unrelated to coal dust exposure. Drs. Fino[35] and Rosenberg[36] also opined Claimant does not have legal pneumoconiosis but a restrictive impairment unrelated to coal dust exposure. Drs. Dahhan,[37] Branscomb,[38] and Lane[39] opined Claimant does not have a pulmonary impairment or disability resulting from coal dust exposure. Employer's Exhibits 2 at 83, 3 at 77 and 270.

The administrative law judge noted Dr. Ajjarapu diagnosed chronic bronchitis based on Claimant's symptoms of cough and sputum production. Decision and Order at 34. He also noted Drs. Fino and Rosenberg recorded symptoms of cough and sputum production,

---

Claimant does not have any significant pulmonary disease or respiratory impairment related to coal dust exposure. *Id*.

[35] In an April 26, 2017 report, Dr. Fino examined Claimant and opined there is insufficient medical evidence to justify a diagnosis of legal pneumoconiosis. Director's Exhibit 27. He further opined there is no objective evidence of any respiratory or pulmonary disability. *Id*. In a supplemental report dated December 13, 2018, Dr. Fino reviewed medical evidence and opined Claimant is not disabled as a result of coal dust. Employer's Exhibit 17. In a supplemental report dated October 22, 2018, Dr. Fino reviewed medical evidence and found Claimant's spirometry is normal with no evidence of obstruction or restriction when he gives good effort. Employer's Exhibit 17.

[36] In a report dated March 12, 2018, Dr. Rosenberg opined Claimant has a restriction that does not relate to a pneumoconiosis. Director's Exhibit 23. In a supplemental report dated July 24, 2018, Dr. Rosenberg opined Claimant has a mild to moderate restriction related to obesity and a previous sternotomy. Employer's Exhibit 7. He further opined Claimant does not have an obstruction. *Id*. In a supplemental report dated November 20, 2018, Dr. Rosenberg opined Claimant's respiratory impairment does not relate to coal dust exposure. Employer's Exhibit 14.

[37] In a report dated August 4, 1997, Dr. Dahhan opined Claimant has a mild obstructive ventilatory defect resulting from his previous smoking habit. Employer's Exhibit 3 at 76.

[38] Dr. Branscomb noted, in a September 2, 1991 report, that "[i]f [Claimant] has chronic bronchitis it is the result of cigarette smoking." Employer's Exhibit 3 at 270.

[39] At a deposition taken on September 20, 1991, Dr. Lane opined Claimant does not have a respiratory or pulmonary impairment caused by coal dust exposure. Employer's Exhibit 3 at 221-22.

but they neither explained the source of these symptoms nor diagnosed chronic bronchitis based on them.[40] *Id*.; *see* n.35, 36, *supra*. He further found their opinions unpersuasive as to the source of Claimant's symptoms of cough and sputum production because they did not directly address Dr. Ajjarapu's diagnosis of chronic bronchitis.[41] *Id*.

Addressing the new and previously submitted medical opinions, the administrative law judge stated:

> Although the weight of the medical evidence demonstrates that the Claimant has cough and sputum production sufficient [to] diagnose chronic bronchitis, the evidence is conflicting regarding whether it is due to his smoking, coal dust, or a combination of both. I find very little evidence that the Claimant has other obstructive disease or any significant obstructive impairment attributable to coal dust exposure. Although some physicians diagnosed a mild obstructive impairment, it is unclear whether this diagnosis was meant to be separate from the Claimant's bronchitis. Those that did diagnose an obstructive impairment generally described it as mild and due to smoking.
>
> ***
>
> In sum, I find that there is substantial evidence that the Claimant has cough and sputum production, which would support a diagnosis of chronic bronchitis. However, I find that the medical evidence is conflicting regarding the origin of his chronic bronchitis. Therefore, I find that the Claimant has failed to establish, by a preponderance of the evidence, that he has legal pneumoconiosis.

Id. at 37, 38.

The fact that the relevant evidence may be conflicting does not authorize the administrative law judge to declare Claimant failed to establish legal pneumoconiosis. *See generally Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1024 (10th Cir. 2010) ("administrative law judge has a duty to explain, on scientific grounds, why a conclusion

[40] The administrative law judge noted that while Dr. Rosenberg attributed Claimant's shortness of breath to restriction caused by his sternotomy and obesity, the doctor "did not suggest that these two conditions would also account for the Claimant's cough and sputum production." Decision and Order at 34.

[41] The administrative law judge accurately acknowledged chronic bronchitis is a form of COPD. Decision and Order at 37 n.13.

cannot be reached"); *cf. Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 279-81 (1994) ("credible and credited evidence . . . may not be ignored except upon the requisite kind and quality of contrary evidence;" proponent of an order has the burden of proof and "when the evidence is evenly balanced, the benefits claimant must lose"). The Sixth Circuit has recognized it is the job of the administrative law judge to evaluate conflicting evidence, draw appropriate inferences, and assess probative value. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Tennessee Consolidated 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, 1-155 (1989) (en banc).

In this case, the administrative law judge did not resolve the conflict in the medical opinions relevant to whether Claimant's chronic bronchitis is related to coal dust exposure. Decision and Order at 37, 38. Because the administrative law judge did not address all relevant evidence, resolve the conflicts in it, and set forth a rationale for his conclusions, we vacate his finding that Claimant did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and remand the case for further consideration of the old and new medical evidence. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *see also Gunderson*, 601 F.3d at 1024; *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993).

If Claimant establishes pneumoconiosis on remand, the administrative law judge must consider whether he has established the remaining elements of entitlement. If the administrative law judge finds Claimant has not established pneumoconiosis, Claimant will have failed to establish an essential element of entitlement. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Disability Causation

Because we vacate the administrative law judge's finding that Claimant failed to establish the existence of pneumoconiosis, we must also vacate his findings as to disability causation at 20 C.F.R. §718.204(c)(2). To establish this element, Claimant must prove that pneumoconiosis caused or contributed to his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Thus, the administrative law judge's findings on remand as to the existence of the disease will necessarily affect his causation analysis. [42]

[42] In the interest of judicial economy, we note the administrative law judge's disability and disability causation findings with respect to Dr. Ajjarapu's opinion are apparently conflicting. Specifically, in discounting Dr. Ajjarapu's causation opinion, the administrative law judge found it to be unclear whether she invalidated, or relied upon, the September 12, 2016 pulmonary function study. Decision and Order at 39. This finding,

20 C.F.R. §§718.201(a)(2), 718.204(c)(1); *see Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013).

On remand, after the administrative law judge considers whether the evidence establishes clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b), or legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), then he must determine whether the evidence establishes that clinical or legal pneumoconiosis is a substantially contributing cause of Claimant's total disability at 20 C.F.R. §718.204(c).

Accordingly, we affirm in part and vacate in part the administrative law judge's Decision and Order Denying Benefits, and remand the case for further consideration consistent with this decision.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

however, appears inconsistent with the finding at 20 C.F.R. §718.204(b)(2)(i) that Dr. Ajjarapu questioned only the MVV results and did not invalidate the entire test. Decision and Order at 25. Moreover, Dr. Ajjarapu explicitly stated the study evidences a "severe pulmonary impairment" and Claimant "meets DOL criteria for total and complete pulmonary impairment." Director's Exhibit 18 at 2.