BRB No. 00-0336 BLA

BERNARD B. HAPNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 06/29/2001
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER *EN BANC*

Appeal of the Decision and Order On Remand Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Perry D. McDaniel (Crandall, Pyles, Haviland & Turner, LLP), Charleston, West Virginia, for claimant.

Mark Solomons (Greenberg Traurig LLP), Washington, D.C., for employer.

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

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order On Remand Awarding Benefits (96-BLA-1824) of Administrative Law Judge Richard A. Morgan 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).[1] This case is before the Board for the second

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted,

time. In *Hapney v. Peabody Coal Co.*, BRB No. 98-0212 BLA (June 18, 1999)(unpub.), the Board affirmed the administrative law judge's finding that the newly submitted evidence establishes a material change in conditions under 20 C.F.R. §725.309 (2000). The Board, however, vacated the administrative law judge's finding that the existence of pneumoconiosis was established at 20 C.F.R. §718.202(a)(2) (2000) as the record contains no biopsy evidence affirmatively linking the diagnosis of "anthracosis" included in claimant's 1972 biopsy results with claimant's coal mine employment, as required for a finding of pneumoconiosis under the Act, *see* 20 C.F.R. §718.201 (2000). The Board also vacated the administrative law judge's findings of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000), etiology at 20 C.F.R. §718.203 (2000), and disability causation at 20 C.F.R. §718.204(b) (2000).[2] The Board remanded the case and instructed the administrative law judge to redetermine, if reached on remand, whether claimant had established the requisite etiology and whether claimant's disability[3] was due to pneumoconiosis. The Board's decision included a dissenting opinion by Acting Administrative Appeals Judge Malcolm D. Nelson.

On remand, the administrative law judge determined that claimant established that he has coal workers' pneumoconiosis arising out of his coal mine employment as defined in the Act, and that it substantially contributes to his total respiratory disability.[4] Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge's finding that the biopsy evidence established the existence of occupationally-related pneumoconiosis is contrary to the Board's determination indicating that the record contains no evidence which affirmatively links the diagnosis of anthracosis made on biopsy to claimant's coal mine employment. Employer further asserts that the administrative law judge failed to make a specific finding at Section 718.202(a)(4) (2000), as ordered by the Board, and argues that the medical opinions, including that of Dr. Rasmussen, fail to establish the existence of pneumoconiosis. Lastly, employer contends that the record demonstrates bias and intransigence on the part of the administrative law judge. Employer requests that the Board order that the case be reassigned to a different administrative law judge in the event of a

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refer to the amended regulations.

[2] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[3] The Board affirmed the administrative law judge's finding of total disability at 20 C.F.R. §718.204(c), as unchallenged on appeal. Board's Decision and Order at 2 n.2.

[4] A review of the administrative law judge's Decision and Order reveals that no new evidence was submitted on remand.

remand. Claimant responds, and urges affirmance of the decision below. Employer has filed a reply brief. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in the appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001) (order granting preliminary injunction). In the present case, the Board established a briefing schedule by Order issued on February 27, 2001. The Order gave the parties an opportunity to submit additional briefing on the issue of whether application of the amended regulations challenged in the lawsuit would affect the outcome of this case. The central question in this case is whether the biopsy evidence is sufficient to establish the existence of pneumoconiosis absent any affirmative evidence linking the diagnoses found on biopsy to claimant's coal mine employment. In addition, the Board asked the parties to respond to the following issue:

> Are the diagnoses of "subpleural fibrosis with anthracosis" and "perivascular anthracosis" sufficient, in and of themselves, to establish the existence of pneumoconiosis as defined under [the Act] and its implementing regulation [] to be codified at 20 C.F.R. §718.201, or is affirmative proof linking these diagnoses to claimant's coal mine employment required in order for them to fall within the definition of pneumoconiosis?

Board's Order dated Feb. 27, 2001 at 2. The Board also discussed, in a footnote, the Department of Labor's statement, made in response to comments it had received regarding the regulatory definition of pneumoconiosis, that the revision to the regulation at 20 C.F.R. §718.202(a)(2), which provides that a finding in an autopsy or biopsy of anthracotic pigmentation shall not be sufficient, by itself, to establish the existence of pneumoconiosis, accommodated the concern that "anthracosis" is commonly used to denote anthracotic pigmentation without associated disease process. The Board indicated:

> This comment gives rise to the following issue which the parties additionally may wish to address: Does claimant bear the burden of proving that a diagnosis of anthracosis is not merely a finding of anthracotic pigmentation or does the party opposing entitlement bear the burden of proving that the diagnosis of anthracosis is merely a finding of anthracotic pigmentation?

Board's Order dated Feb. 27, 2001at 2 n.1. The Director and employer have responded to the Board's Order.

The Director submits that application of the revised regulations will not affect the outcome of the case. Specifically, the Director argues that the revised regulation at 20 C.F.R. §718.202(a) has not been amended in any material way. With regard to the issue posed by the Board, the Director responds that under either the former or the revised regulations, "anthracosis" is listed as a disease included within the definition of pneumoconiosis "so a credible diagnosis of anthracosis is sufficient to support a finding of pneumoconiosis. *See* 20 C.F.R. §718.201 (1999); 20 C.F.R. §718.201(a)(1)(65 Fed. Reg. 80048 (Dec. 20, 2000)." Director's Response to Board's Order dated Feb. 27, 2001 at 2. The Director continues:

> Under either version of the regulations, if a miner worked ten or more years in the mines, as Bernard Hapney did, then there arises a rebuttable presumption that his anthracosis/pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b)(repromulgated but unchanged from the 1999 version, *see* 65 Fed. Reg. 79925 (Dec. 20, 2000)). The burden of producing affirmative evidence demonstrating [that] the miner's anthracosis did not arise out of his coal mine employment then shifts to the employer.[] A miner who worked less than ten years in the coal mines bears the burden of proving with competent evidence the necessary causal relationship between anthracosis and coal mine work. 20 C.F.R. §718.203(c)(repromulgated but unchanged from the 1999 version, *see* 65 Fed. Reg. 79925 (Dec. 20, 2000)).

Id. at 3. In a footnote, the Director cites the decisions in *Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989) and *Dobrosky v. Director, OWCP*, 4 BLR 1-680 (1984) in support of his position that a party may be able to prove that a doctor's diagnosis of anthracosis means only anthracotic pigment in a particular case. The Director thus concludes that the Board may decide this case, consistent with the district court's order.

Employer submits that the Board may proceed with its disposition in this case based on the uncontradicted record which shows no connection between claimant's anthracosis and his coal mine employment but rather shows that the condition is related to claimant's smoking history and resulting emphysema. Employer argues:

> The new version of section 718.201 no less than the old version of the rule, requires that anthracosis arise out of coal mine employment to be considered pneumoconiosis.... This position is confirmed by the comment of the DOL referenced by the Board in its footnote in the February 27, 2001 order and found at 65 Fed. Reg. 79944 (2000).

Employer's Response to Board's Order dated Feb. 27, 2001 at 2-3. Employer further argues that a claimant bears the burden of proving that his "anthracosis" is not mere anthracotic pigmentation. Specifically, employer contends:

> This is not a question that need not (sic) be reached in this case because there

> is admittedly no connection between Hapney's anthracosis and coal mining employment no matter whose burden it is.[] Nevertheless, where, as here, claimant relies on a finding of "anthracosis" to establish "pneumoconiosis," claimant bears the burden of proving that the anthracosis is more than a finding of pigment. Claimant bears the burden of proof generally. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, [18 BLR 2A-1] (1994), *[aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).] The fact that section 718.202(a)(2) states that anthracotic pigmentation is not sufficient, by itself, to establish pneumoconiosis further confirms that claimant has the burden of proof as to this particular issue. As to the second question, a party opposing entitlement could certainly negate a finding of pneumoconiosis based on anthracosis by establishing that it was just anthracotic pigmentation but employer emphasizes that a finding of anthracosis, by itself, is insufficient to establish pneumoconiosis. In addition, in order to prove entitlement to benefits, the claimant would also have to prove that anthracosis arose out of coal mine employment. Such a finding is precluded in this case, given Dr. Zaldivar's uncontradicted testimony.

Id. at 3-4. Employer concludes that the Board may proceed with its disposition in this matter and may vacate the award in light of the fact that the uncontradicted record shows no connection between claimant's anthracosis and his coal mine employment. Employer adds:

> However, employer does note that the [] lawsuit pending before Judge Sullivan specifically attacks the inclusion of the term "anthracosis" in the definition of pneumoconiosis.
>
> Section 718.201 was challenged to the extent it:
>
> > Includes the term "anthracosis" in the definition of pneumoconiosis and in the face of scientific rulemaking record dating back to a prior 1978 rulemaking that the condition is not a human disease that is causally related to coal mining or any other exposure.
> >
> > First Amended Complaint, NMA litigation at para. 35. The failure to exclude anthracosis from the definition was challenged because the uncontradicted medical testimony in the rulemaking was that anthracosis was not even a valid medical finding. As a result, the Board could not affirm any award based upon a finding of anthracosis while the challenge is pending, but it could consider and vacate the award given the lack of any relationship between the anthracosis noted in the biopsy slide and coal mine employment.

Id. at 4-5. Lastly, employer generally asserts that the evidence fails to establish a material change in conditions and that the most recent pulmonary function study shows that claimant's airway disease has improved.[5]

Based on the briefs submitted by the parties, and our review of the case, we hold that the disposition of this case is not impacted by the challenged regulations. No party contests the administrative law judge's determination that the diagnoses made upon claimant's 1972 biopsy are credible. The issue thus becomes whether this evidence, along with the other evidence of record, is legally sufficient to meet claimant's burden to establish the existence of pneumoconiosis as defined in the Act, and is legally sufficient to establish that claimant is totally disabled due to the disease. 20 C.F.R. §§718.201, 718.202(a)(2), 718.203, 718.204(c). This issue does not invoke any substantive amendment to the revised regulations. Specifically, both the former and the amended versions of 20 C.F.R. §718.201 list "anthracosis" as a disease within the definition of "pneumoconiosis." 20 C.F.R. §718.201 (2000); 20 C.F.R. §718.201(a)(1), 65 Fed. Reg. 80,048 (2000). Further, the regulation at 20 C.F.R. §718.202(a)(2) was amended to add that a finding on autopsy *or biopsy* of anthracotic pigmentation shall not be sufficient, by itself, to establish the existence of pneumoconiosis. The biopsy findings in the instant case include diagnoses of anthracosis with associated disease process. Employer's Exhibit 22. Thus, the amendment to 20 C.F.R. §718.202(a)(2) is not implicated herein. We, therefore, conclude that we may proceed to adjudicate the merits of this appeal.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer alleges reversible error in the administrative law judge's finding that claimant established the existence of occupational pneumoconiosis. The administrative law judge initially noted that the regulatory definition of pneumoconiosis provided at 20 C.F.R. §718.201 (2000) "includes anthracosis" and that the regulation at Section 718.202(a)(2)

[5] In its 1999 Decision and Order in *Hapney*, the Board affirmed the administrative law judge's finding that claimant established a material change in conditions under 20 C.F.R. §725.309 (2000). The Board also affirmed the administrative law judge's finding of a totally disabling respiratory or pulmonary impairment as unchallenged on appeal. The Board's prior holdings on these issues constitute the law of the case, and shall not be disturbed. *See United States v. U.S. Smelting & Mining Co.*, 339 U.S. 186 (1950); *reh'g denied*, 339 U.S. 972 (1950); *Dean v. Marine Terminals Corp.*, 15 BRBS 394 (1983); *Whitlock v. Lockheed Shipbuilding and Construction Co.*, 15 BRBS 332 (1983); *see also Stark v. Bethlehem Steel Corp.*, 15 BRBS 288 (1983).

(2000) specified that an autopsy finding of anthracotic pigmentation shall not be sufficient to establish the existence of pneumoconiosis thereunder. The administrative law judge thus concluded that the regulations "distinguish between 'anthracotic pigmentation' and a diagnosis of anthracosis." Decision and Order at 2. The administrative law judge then cited to a medical dictionary that defined anthracosis as "[A] disease of the lungs marked by dark pigmentation, hardening, and chronic inflammation, due to prolonged inhalation of dusts containing tiny particles of carbon or coal. Also called *black lung*, *miner's lung*, and *pneumoconiosis*." Decision and Order at 2 n.5. The administrative law judge next found that claimant's 1972 biopsy results included diagnoses of "anthracosis" and "anthracotic pigmentation" and determined that the diagnoses of "anthracosis" fall within the regulatory definition of pneumoconiosis provided at 20 C.F.R. §718.201 (2000). The administrative law judge further found that neither Dr. Khan, the surgeon who performed the 1972 biopsy, nor the unidentified physician from Memorial Hospital in Charleston, West Virginia who reviewed the biopsy specimen, had any "demonstrated financial ties to any of the parties." *Id*. at 7.

The administrative law judge then acknowledged that only Dr. Zaldivar "directly addresses the anthracosis issue." *Id.* He found that Dr. Zaldivar's opinion, that the biopsy findings did not constitute pneumoconiosis and that the biopsy results, including the diagnosed "perivascular anthracosis," were attributable to smoking, Employer's Exhibits 20, 23, was not credible because: (1) Dr. Zaldivar was not aware of the additional finding on autopsy of "peribronchial lymph node showing marked anthracosis;" (2) Dr. Zaldivar's opinion emphasized the absence of evidence of coal macules, while the x-ray evidence, insufficient to establish coal workers' pneumoconiosis from a legal perspective, contains evidence of rounded opacities; and (3) Dr. Zaldivar reported that the miner had significant exposure to coal dust in the mines. Decision and Order at 7. The administrative law judge also found:

> Further, the miner's own reports and testimony establish significant coal dust exposure in his thirty-five years of coal mine employment. Although he smoked cigarettes from about 1951- 1972 and 1985 - 1993, the evidence does not establish a heavy smoking habit. The Board has affirmed my finding [that] the miner suffers from a totally disabling respiratory impairment. Based on the foregoing and considering the medical definitions of anthracosis set forth above, *i.e.*, that it results from deposition of coal dust in the lungs, I find that it is more likely than not that the anthracosis found on biopsy is significantly related to Mr. Hapney's significant inhalation of coal mine dust from his years of underground coal mining rather than from his moderate cigarette smoking habit, as Dr. Zaldivar suggests.

Decision and Order at 8.

The administrative law judge next considered Dr. Rasmussen's opinion. Dr.

Rasmussen diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease due to claimant's coal mine employment and smoking. Director's Exhibits 11, 27. Dr. Rasmussen opined that claimant is totally disabled due to coal mine dust exposure and smoking, with coal mine dust exposure considered to be a major and substantial contributing factor to his disability.[6] *Id.*; Claimant's Exhibit 1. The administrative law judge found that Dr. Rasmussen's opinion, "although not specifically referring to the 1972 surgery observations and biopsy results, provides an additional connection between the miner's significant coal dust exposure, the anthracosis diagnosis and his respiratory affliction, i.e. CWP. The 1972 surgery observations and biopsy results support Dr. Rasmussen's later diagnoses." Decision and Order at 8. The administrative law judge concluded that Dr. Rasmussen's opinion was consistent with the 1972 biopsy results revealing anthracosis and not mere anthracotic pigmentation. *Id.* at 9.

The administrative law judge then found that Dr. Fino's opinion, diagnosing emphysema and asthma due to smoking with a resultant disabling moderate respiratory impairment, Employer's Exhibit 1, suffered from a lack of information as Dr. Fino did not discuss the 1972 biopsy results and was presumably unaware of them. Decision and Order at 8-9. The administrative law judge further determined:

> Doubt is cast upon his evaluation not finding fibrosis or interstitial abnormalities by x-ray readings finding fibrosis and interstitial abnormalities and by similar pathology results, none of which Dr. Fino recognizes or distinguishes. He also admitted Dr. Zaldivar's PFS did not show total reversibility, but only significant reversibility, which casts some doubt on his opinion ruling out CWP, an irreversible condition... I find Dr. Rasmussen's opinion that Mr. Hapney's moderate airways obstruction is "irreversible" more persuasive than Dr. Fino's opinion that it is reversible, in part, because Dr. Rasmussen had the opportunity to conduct two such PFS which had similar results, the fact Dr. Fino admitted Dr. Zaldivar's PFS did not show total reversibility, and, because Dr. Fino did not distinguish or specifically address the contrary x-ray and pathology evidence.

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[6] In his 1997 consultative report, Dr. Rasmussen opined:

> I have no information concerning the extent of the surgical procedure performed in 1972 and am uncertain as to whether sufficient lung tissue was obtained to exclude a diagnosis of coal workers' pneumoconiosis. It is also noteworthy that Mr. Hapney worked about 20 more years after his surgery. Twenty years is certainly a sufficient period of time to acquire coal workers' pneumoconiosis.

Claimant's Exhibit 1 at 1.

Decision and Order at 9. The administrative law judge thus accorded greater weight to Dr. Rasmussen's opinion and less weight to the opinions of Drs. Fino and Zaldivar.

Employer contends that the administrative law judge's finding of occupationally related pneumoconiosis cannot stand in light of the Board's previous indication that the biopsy evidence is insufficient to establish the existence of pneumoconiosis as defined under the Act. Employer also argues that Dr. Rasmussen's opinion is not reasoned and is insufficient to establish that claimant has occupational pneumoconiosis.

We affirm the administrative law judge's determination that the biopsy findings support a finding of the existence of pneumoconiosis. The Act defines the term "pneumoconiosis" as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. §902(b). The implementing regulation at 20 C.F.R. §718.201(a) mirrors this statutory language, and further provides: "This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis." 20 C.F.R. §718.201(a). The regulation at 20 C.F.R. §718.201(a)(1) regarding clinical pneumoconiosis provides:

> "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 lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1). The medical findings made upon claimant's 1972 biopsy include a diagnosis of "Biopsy from the right middle lobe of the lung showing subpleural fibrosis with anthracosis, perivascular anthracosis and chronic pulmonary emphysema." Employer's Exhibit 22. These diagnoses of anthracosis, with related disease process, which the administrative law judge determined to be credible, fall within the definition of "pneumoconiosis" as defined by the Act and implementing regulations. 30 U.S.C. §902(b); 20 C.F.R. §§718.201(a)(1), 718.202(a)(2); 65 Fed. Reg. 79944 (2000).

In holding that the biopsy evidence of record supports a finding of pneumoconiosis, we adopt the Director's position that the etiology of claimant's conditions diagnosed on biopsy is properly considered, not pursuant to the regulation at 20 C.F.R. §718.202(a), but pursuant to the regulation at 20 C.F.R. §718.203. *See* Director's Response to the Board's Order dated Feb. 27, 2001 at 2; *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993), citing *BethEnergy Mines, Inc. v. Pauley*, 501 U.S. 680, 15 BLR 2-155 (l991), *aff'g* 890 F.2d l295, 13 BLR 2-162 (3d Cir. l989) and

Adkins v. Director, OWCP, 878 F.2d 151, 12 BLR 2-313 (4th Cir. 1989).

Subsequent to the issuance of the Board's Decision and Order in *Hapney v. Peabody Coal Co.*, BRB No. 98-0212 BLA (June 18, 1999)(unpub.), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, issued its decision in *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999). The court in *Fuller* stated:

> The definition [of pneumoconiosis provided at 20 C.F.R. §718.201] also includes diseases that are or can be caused by coal dust inhalation. Any "chronic dust disease of the lung and its sequelae... arising out of coal mine employment" will qualify. Many of these diseases are specifically listed in the regulation. One is "coal workers' pneumoconiosis" - often referred to as "clinical" or "medical" pneumoconiosis. *Another is anthracosis*. The autopsy revealed the presence of both the diseases in Mr. Fuller's lungs, and that is what Clinchfield fairly stipulated to when it agreed that Mr. Fuller had pneumoconiosis "as defined in the Act and regulations."
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> Section 718.201 nowhere requires these coal dust-specific diseases to attain the status of an "impairment" to be classified as "pneumoconiosis." The definition is satisfied whenever one of these diseases is present in the miner at a detectable level; whether the particular disease exists to such an extent to be compensable is a separate question.

Fuller, 180 F.3d at 625, 21 BLR at 2-661, 662 (emphasis added). The administrative law judge's finding in the instant case, that the diagnoses of "anthracosis" made on biopsy support a finding of the existence of pneumoconiosis, is consistent with the court's decision in *Fuller*.

If claimant meets his burden to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4), *see* discussion, *infra*, he must then establish the requisite etiology of his pneumoconiosis under 20 C.F.R. §718.203. Since claimant has established more than ten years of coal mine employment, he would be entitled to the presumption that his pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b). It would then be employer's burden to rebut that presumption. *Id.*

As the Board previously recognized in its 1999 Decision and Order in *Hapney*, there is no medical evidence linking the diagnoses made on biopsy to claimant's coal mine employment. Dr. Zaldivar's opinion is the only opinion of record which addresses the substance of the biopsy findings, and he attributes these findings to claimant's smoking. Employer's Exhibits 20, 23, 28. Employer alleges error in the administrative law judge's determination that the evidence establishes that claimant's pneumoconiosis arose from his

coal mine employment and substantially contributes to his total respiratory disability.[7] 20 C.F.R. §§718.203, 718.204(c). Employer correctly argues that the administrative law judge has not heretofore considered Dr. Zaldivar's opinion and determined its credibility relevant to *employer's burden* to rebut the presumption that claimant's anthracosis, as diagnosed on biopsy, arises from his coal mine employment.[8]

Based on the foregoing, we vacate the administrative law judge's determinations that the evidence establishes the requisite etiology of claimant's pneumoconiosis and his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.203, 718.204(c). On remand, the administrative law judge must weigh the evidence with regard to employer's burden to rebut the presumption that claimant's pneumoconiosis arose out of his coal mine employment under 20 C.F.R. §718.203, and, if reached, additionally weigh the evidence with regard to claimant's burden to establish that his totally disabling respiratory or pulmonary impairment is due to his pneumoconiosis under 20 C.F.R. §718.204(c).

Employer further challenges the administrative law judge's reliance on Dr. Rasmussen's opinion in finding that claimant established the existence of pneumoconiosis. Dr. Rasmussen diagnosed coal workers' pneumoconiosis based on the x-ray reading and claimant's thirty-five year history of coal dust exposure, and diagnosed chronic bronchitis

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[7] The administrative law judge considered the issue of the cause of claimant's pneumoconiosis together with the issue of the cause of claimant's disability. 20 C.F.R. §§718.203, 718.204(c).

[8] The administrative law judge on remand considered Dr. Zaldivar's opinion relevant to claimant's burden to establish entitlement. He provided no valid reason to accord this uncontradicted medical opinion less weight. Specifically, the administrative law judge's determination that Dr. Zaldivar was unaware of the additional biopsy finding of "peribronchial lymph node showing marked anthracosis" is refuted by the record, which reveals the physician's specific identification and discussion of the hospital discharge summary containing the diagnosis. Employer's Exhibits 20 at 2, 22 at 16; *see also* Employer's Exhibit 28 at 51-54. Further, inasmuch as there is no medical evidence to support this proposition, the administrative law judge erred in substituting his opinion for that of the medical experts when he opined that Dr. Zaldivar's finding of the absence of coal macules is contrary to the x-ray evidence showing small opacities classified as "p" "q" or "r." Decision and Order at 7; *see Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Finally, contrary to the administrative law judge's indication, the fact that the administrative law judge found that claimant had a "moderate" smoking habit does not undermine Dr. Zaldivar's opinion that the biopsy findings are attributable to smoking. *See* Decision and Order at 8. The physician's reports contain findings with regard to the duration and extent of claimant's smoking habit which are consistent with claimant's smoking history as determined by the administrative law judge. Employer's Exhibits 20, 23. On remand, *see* discussion, *infra*, the administrative law judge must reconsider the credibility of the medical opinion evidence.

and chronic obstructive pulmonary disease due to smoking and coal mine dust based on a physical examination and objective testing. Director's Exhibits 11, 27; Claimant's Exhibit 1. Dr. Rasmussen rendered the only medical opinion of record which supports claimant's burden to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). While employer correctly contends that Dr. Rasmussen did not premise his diagnosis of pneumoconiosis on the biopsy findings, the administrative law judge properly concluded that Dr. Rasmussen's opinion provides "an additional connection between the miner's significant coal dust exposure, the anthracosis diagnosis and his respiratory affliction, i.e. CWP," and that "Dr. Rasmussen's conclusions are consistent with the biopsy results revealing anthracosis and not mere anthracotic pigmentation." Decision and Order at 8, 9; *Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989). In light of the foregoing, we affirm the administrative law judge's findings that the biopsy evidence and Dr. Rasmussen's medical opinion support a finding of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(4).

Employer argues that the administrative law judge was under an obligation to weigh the biopsy evidence which he found to be sufficient to support a finding of pneumoconiosis, against the x-ray evidence which the administrative law judge previously determined to be insufficient to establish the existence of the disease. 20 C.F.R. §718.202(a)(1) and (a)(2). The Board in *Hapney* previously affirmed the administrative law judge's finding that the evidence does not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) and (a)(3). Subsequent to the administrative law judge's consideration of this case on remand and the filing of employer's appellate brief, the Fourth Circuit issued its decision in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), wherein the court held that all relevant evidence must be weighed together at 20 C.F.R. §718.202(a) to determine whether the existence of pneumoconiosis is established. Given the administrative law judge's findings under 20 C.F.R. §718.202(a)(1)-(a)(4), we hold that a remand of the case is necessitated by *Compton*. On remand, the administrative law judge must weigh the relevant evidence as mandated by *Compton* and determine whether claimant has established the existence of pneumoconiosis at 20 C.F.R. §718.202(a).

Employer further asserts that if the Board again remands this case, it should be transferred to a different administrative law judge inasmuch as the administrative law judge on remand failed to follow the Board's instructions and thereby demonstrated intransigence. Employer further asserts: "This [administrative law judge] has lost all objectivity as regards this case. He should be replaced." Employer's Brief at 22. Employer's assertions lack merit. The Board has held that charges of bias or prejudice are not to be made lightly, and must be supported by concrete evidence inasmuch as this is a heavy burden for the charging party to satisfy. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107, 108 (1992). A review of the record reveals no evidence of bias or loss of objectivity on the part of the administrative law judge and employer cites none. *Id.* Further, we recognize that the administrative law judge's determination on remand that the biopsy evidence supports a

finding of pneumoconiosis, conflicted with the majority opinion, and was consistent with the dissenting opinion in the Board's 1999 Decision and Order in *Hapney*. We also recognize that the majority's opinion in the case *sub judice* is consistent with the dissenting opinion in the Board's 1999 Decision and Order in *Hapney*. Given the circumstances of this case, we find no intransigence on the administrative law judge's part, and decline to order that the case be transferred to another administrative law judge on remand.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge and NELSON, Acting Administrative Appeals Judge:

We concur.

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting in part and concurring in part:

I respectfully dissent from the majority opinion. Employer correctly contends that the administrative law judge committed reversible error in finding the existence of pneumoconiosis based on the diagnoses of "anthracosis" with related disease process made on biopsy, where there is no evidence linking these diagnoses to claimant's coal mine employment, as required in the Act and implementing regulations. The Act defines the term "pneumoconiosis" as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, *arising out of coal mine employment.*" 30 U.S.C. §902(b)(emphasis added). The regulation at 20 C.F.R. §718.201(a), defining "pneumoconiosis" provides:

> For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, *arising out of coal mine employment*. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.

20 C.F.R. §718.201(a)(emphasis added). Further, the regulation at 20 C.F.R. §718.201(a)(1) indicates that the definition of "clinical" pneumoconiosis includes, but is not limited to, "coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, *arising out of coal mine employment*." 20 C.F.R. §718.201(a)(1)(emphasis added). The regulation at 20 C.F.R. §718.201(b) provides:

> For purposes of this section, 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). Thus, the provisions of the Act and its implementing regulations require that claimant's diagnosis of "anthracosis" made in connection with his 1972 biopsy, arise from his coal mine employment in order for the disease to fall within the statutory and regulatory definition of "pneumoconiosis." 30 U.S.C. §902(b); 20 C.F.R. §§718.201, 718.202(a), (a)(1) and (b). Because the record contains no affirmative medical evidence linking claimant's diagnoses made on biopsy with his coal mine employment, these diagnoses cannot constitute "pneumoconiosis" within the meaning of the Act and regulations. The majority opinion to the contrary, holding that the biopsy findings support a finding of the existence of pneumoconiosis renders meaningless the statutory and regulatory scheme requiring that claimant's "anthracosis" arise out of his coal mine employment.

The Director's position in the instant case is that a credible diagnosis of "anthracosis" is sufficient to support a finding of "pneumoconiosis" as defined in 20 C.F.R. §718.201(a), notwithstanding the lack of any evidence attributing claimant's "anthracosis" to his coal mine employment. The Director further maintains that the etiology of claimant's "anthracosis" is an issue properly considered not pursuant to the regulation at 20 C.F.R. §718.202 but pursuant to the regulation at 20 C.F.R. §718.203. *See* Director's Response to Board's Order dated Feb. 27, 2001 at 2. The Director's reasonable interpretation of the regulations is entitled to substantial deference. *Pauley v. Bethenergy Mines, Inc.*, 115 L. Ed. 604, 624 (1991); *Adkins v. Director, OWCP*, 878 F.2d 151, 12 BLR 2-313 (4th Cir. 1989). However, in my view, the Director's interpretation of the regulations is unreasonable in this instance and does not merit the deference accorded it by the majority. Specifically, the Director has allegedly changed the regulatory scheme by shifting from 20 C.F.R. §718.202 to 20 C.F.R. §718.203 the issue of the etiology of a miner's "anthracosis," and has done so without

deleting the phrase "arising out of coal mine employment" from the regulatory definition of "pneumoconiosis" provided at 20 C.F.R. §718.201.

Further, I disagree with the majority's conclusion that the administrative law judge's finding in the instant case, that the diagnoses of "anthracosis" made on biopsy support a finding of the existence of pneumoconiosis, is consistent with the decision of the United States Court of Appeals for the Fourth Circuit in *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999). The facts in *Fuller* include the employer's stipulation that claimant had pneumoconiosis "as defined in the Act and regulations." 180 F.3d at 625, 21 BLR at 2-661. The court did not reach the issue *sub judice*.

The statutory and regulatory language is plain. In this case, claimant must establish that his "anthracosis" diagnosed on biopsy arises from his coal mine employment in order for the disease to fall within the statutory and regulatory definition of "pneumoconiosis." Claimant cannot do so, given the evidence in this case. *See* discussion, *supra* at p. 15. I would, therefore, reverse the administrative law judge's determination on remand that the biopsy evidence is sufficient to support a finding of the existence of pneumoconiosis, and hold that claimant cannot meet his burden to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2).

I would also hold that the administrative law judge erred in crediting Dr. Rasmussen's report in finding that claimant established the existence of pneumoconiosis by medical opinion evidence and in finding that claimant's totally disabling respiratory or pulmonary impairment is due to his pneumoconiosis. 20 C.F.R. §§718.202(a)(4), 718.204(c). The administrative law judge found that Dr. Rasmussen's medical opinion:

> provides an additional connection between the miner's significant coal dust exposure, the anthracosis diagnosis and his respiratory affliction, *i.e.* CWP. The 1972 surgery observations and biopsy results support Dr. Rasmussen's later diagnoses.

Decision and Order on Remand at 9. As discussed above, claimant's diagnoses on biopsy in 1972 are not indicative of the existence of "pneumoconiosis" or of any lung disease related to claimant's coal mine employment. The administrative law judge's crediting of Dr. Rasmussen's opinion is thus tainted by his erroneous determination that the diagnoses on biopsy are indicative of "pneumoconiosis." Accordingly, I would vacate the administrative law judge's determination that the medical opinion evidence in the instant case establishes the existence of pneumoconiosis and that claimant is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.202(a)(4), 718.204(c). I would remand the case for the administrative law judge to determine whether claimant has met his burden to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and, if so, whether claimant has additionally established the existence of the disease at 20 C.F.R. §718.202(a), consistent with the holding of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v.*

Compton, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

If, on remand, the administrative law judge finds the existence of pneumoconiosis at 20 C.F.R. §718.202, I would instruct him to determine the issue of the etiology of claimant's "pneumoconiosis" pursuant to 20 C.F.R. §718.203, and, if reached, to determine whether claimant has met his burden to establish that his total respiratory or pulmonary impairment is due to pneumoconiosis under 20 C.F.R. §718.204(c).

I agree with the majority opinion in all other respects.

ROY P. SMITH
Administrative Appeals Judge

DOLDER, Administrative Appeals Judge:

I concur in the dissent.

NANCY S. DOLDER
Administrative Appeals Judge