

BRB No. 02-0443 BLA

THEODORE BATEMAN)
)
 Claimant-Respondent)
)
 v.)
)
 EASTERN ASSOCIATED COAL)
 CORPORATION)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS=
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order on Remand of Stuart A. Levin , Administrative Law Judge, United States Department of Labor.

Mary Z. Natkin and Matthew Smith-Kennedy (Washington & Lee University School of Law), Lexington, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (96-BLA-1441) of Administrative Law Judge Stuart A. Levin awarding benefits 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).¹ This case is before the Board for the third time. In the original Decision and Order, the administrative law judge credited claimant with thirty-three years of coal mine employment and adjudicated this claim 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 pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. ' ' 718.202(a)(4) (2000) and 718.203(b) (2000). The administrative law judge also found the evidence sufficient to establish total disability pursuant to 20 C.F.R. ' 718.204(c) (2000) and total disability due to pneumoconiosis pursuant to 20 C.F.R. ' 718.204(b) (2000).² Accordingly, the administrative law judge awarded benefits. In response to employer=s appeal, the Board affirmed the administrative law judge=s length of coal mine employment finding and his findings at 20 C.F.R. ' ' 718.202(a)(4) (2000), 718.203(b) (2000) and 718.204(c) (2000). However, the Board vacated the administrative law judge=s finding at 20 C.F.R. ' 718.204(b) (2000) and remanded the case for further consideration. *Bateman v. Eastern Associated Coal Corp.*, BRB No. 98-0997 BLA (Sept. 30, 1999)(unpub.).

On first remand, the administrative law judge found the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. ' 718.204(b) (2000).³ Accordingly, the administrative law judge again awarded benefits. In disposing of employer=s second appeal, the Board vacated the administrative law judge=s finding at 20 C.F.R. ' 718.204(b) (2000) and remanded the case for further consideration. The Board also instructed the administrative law judge to reconsider the issue of the existence of

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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, 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 administrative law judge noted that A[t]he Board concluded that the prior decision in this matter properly weighed the probative evidence at [Section] 718.202(a)(1)-(4) [(2000)], pro and con, [and] Section 718.204(c)(1)-(4) [(2000)] in concluding that the [c]laimant had established that he has pneumoconiosis and a totally disabling respiratory impairment.@ 2000 Decision and Order on Remand at 3. The administrative law judge therefore found that A[s]ince contrary probative evidence was considered these issues need not be revisited here.@ *Id.*

pneumoconiosis at 20 C.F.R. ' 718.202(a) in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).⁴ *Bateman v. Eastern Associated Coal Corp.*, BRB No. 00-1012 BLA (Aug. 14, 2001)(unpub.).

On second remand, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. ' 718.202(a). The administrative law judge also found the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. ' 718.204(c). Accordingly, the administrative law judge again awarded benefits.

On appeal, employer challenges the administrative law judge=s finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. ' 718.202(a). Employer also challenges the administrative law judge=s finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. ' 718.204(c). Claimant responds, urging affirmance of the administrative law judge=s award of benefits. The Director, Office of Workers= Compensation Programs, has declined to participate in this appeal.⁵

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

Initially, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. ' 718.202(a). Employer=s contention is based upon its assertions that the administrative law judge failed to properly weigh the x-ray evidence at 20 C.F.R. ' 718.202(a)(1), that the administrative law judge failed to comply with the Board=s remand instruction to reconsider the medical opinion evidence at 20 C.F.R. ' 718.202(a)(4), and that the administrative law judge failed to weigh together all the relevant evidence at 20 C.F.R. ' 718.202(a)(1)-(4) in accordance with *Compton*.

⁴ The Board rejected employer=s argument that the case should be remanded for reconsideration of whether pneumoconiosis arose out of coal mine employment and whether total respiratory disability was established.

⁵ Employer filed a brief in reply to claimant=s response brief, reiterating its prior contentions.

With regard to 20 C.F.R. ' 718.202(a)(1), employer asserts that the administrative law judge erred by only relying on the B reader status of physicians who provided x-ray readings rather than relying on the other qualifications of the physicians who provided x-ray readings. We disagree. In considering the x-ray evidence on the most recent remand, the administrative law judge adopted and incorporated his prior x-ray findings from a decision dated March 16, 1998.⁶ 2002 Decision and Order on Remand at 2. In the March 16, 1998 decision, the administrative law judge stated:

The record includes x-ray interpretations by several >B= readers. Thus, Drs. Scott, Wheeler, Gayler, Alexander, Franke, and Zaldivar are all >B= readers. Drs. Wheeler and Scott are also professors of radiology. As the [e]mployer notes, Drs. Wheeler and Scott read each x-ray they reviewed as negative for pneumoconiosis, while Drs. Gayler and Alexander interpreted each x-ray they reviewed as positive. (Emp. Br. at 5). Considering these four physicians, none of whom is a >C= reader but whose skills in interpreting x-rays for pneumoconiosis appear comparable at the >B= reader level, the [e]mployer believes the evidence >at best= is in equipoise and, therefore, [c]laimant has failed to sustain his burden of proof in accordance with *Director v. Greenwich Collieries*, 512 U.S. 267 (1994). (Emp. Br. at 12.).

Yet, Drs. Zaldivar and Franke are also >B= readers. Dr. Zaldivar interpreted [an] August 14, 1996, x-ray as positive, while Dr. Franke, whose reading I have re-reviewed for legibility and found acceptably clear, (DX 18), interpreted a September 6, 1995, x-ray as positive for pneumoconiosis.@

⁶ Although the administrative law judge indicated in the March 16, 1998 decision that he considered readings of x-rays dated between November 29, 1983 and November 9, 1994 by Drs. Dehgan and Goodzari, the record does not contain this evidence. The Board directed the parties to provide copies of the above mentioned missing x-ray readings. *Bateman v. Eastern Associated Coal Corp.*, BRB No. 02-0443 BLA (Jan. 31, 2003)(Order)(unpub.). In response to the Board=s order, both claimant and employer stated that the x-ray readings requested by the Board were not submitted into the record other than through the reports of Drs. Fino and Renn. The pertinent regulation provides that A[a] decision and order shall be based upon the record made before the administrative law judge.@ 20 C.F.R. ' 725.477(b). Nonetheless, because Drs. Dehgan and Goodzari are not B readers, the administrative law judge did not rely on their x-ray readings to find the existence of pneumoconiosis established at 20 C.F.R. ' 718.202(a)(1). Thus, we hold that any error by the administrative law judge in considering this evidence is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

2002 Decision and Order on Remand at 3-4.⁷ Based upon his consideration of the aforementioned x-ray evidence, the administrative law judge stated that Awhile two >B= readers [have] consider[ed] [c]laimant=s x-rays [as] negative for pneumoconiosis, four >B= readers have interpreted his x-rays as positive for pneumoconiosis.@ *Id.* at 4. The administrative law judge therefore stated, A[o]n balance, then, I find and conclude that the weight of the x-ray evidence provided by the highly qualified >B= readers, considered qualitatively and quantitatively, is positive for pneumoconiosis.@⁸ *Id.* The administrative law judge, within his discretion as trier of fact, properly accorded greater weight to the positive x-ray readings which were provided by physicians who are B readers. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Thus, we reject employer=s assertion that the administrative law judge erred by only relying on the B reader status of physicians who provided x-ray readings rather than relying on the other qualifications of the physicians who provided x-ray readings. Since it is supported by substantial evidence, we affirm the administrative law judge=s finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. ' 718.202(a)(1).

Employer also asserts that the administrative law judge erred in finding the evidence

⁷ The administrative law judge stated that A[t]he Board noted that the prior decisions set forth the x-ray readings in evidence, but did not resolve whether, on balance, the x-ray evidence was positive or negative for pneumoconiosis.@ 2002 Decision and Order on Remand at 2. The administrative law judge also noted that A[t]he March 16, 1998 decision in this matter included 51 interpretations of 29 x-rays administered between May, 1983 and April, 1997.@ *Id.* The administrative law judge therefore stated that A[t]he x-ray evidence findings set forth on pages 2-6 of the March 16, 1999 [d]ecision were not disturbed by the Board on appeal and are hereby adopted and incorporated herein by reference. (*See, Empl. Br.* at 5).@ *Id.* Lastly, the administrative law judge noted that A[p]rior to 1994, the decision listed six x-rays.@ *Id.*

⁸ Citing *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), and *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994), employer argues that the administrative law judge erroneously based his x-ray evidence analysis on a Ahead count.@ Contrary to employer=s assertion, the administrative law judge=s conclusions with respect to the conflicting x-rays were based upon both a quantitative and a qualitative analysis of the x-ray evidence. In addition to noting the number of physicians who provided positive x-ray readings, the administrative law judge also considered the B reader status of the various physicians who provided x-ray readings. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Fitts, supra.*

sufficient to establish the existence of pneumoconiosis at 20 C.F.R. '718.202(a)(4). Specifically, employer argues that the administrative law judge violated the Administrative Procedure Act (APA) by failing to re-evaluate the medical opinion evidence and by failing to explain his rationale for finding the existence of pneumoconiosis. The administrative law judge stated that A[t]he analysis of the medical opinion evidence relating to the existence of pneumoconiosis as discussed on the last line on page 16 and the top of page 17 of [the] [d]ecision issued on March 16, 1998 is hereby adopted and incorporated herein by reference.@ 2002 Decision and Order on Remand at 5. In its 1999 Decision and Order, the Board affirmed the administrative law judge=s prior finding, in his 1998 decision, that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. '718.202(a)(4) (2000). *Bateman v. Eastern Associated Coal Corp.*, BRB No. 98-0997 BLA, slip op. at 4 (Sept. 30, 1999)(unpub.). Employer, however, argues that the Board erred in affirming that finding because the administrative law judge=s analysis of the medical opinion evidence in his 1998 decision lacked substance.

Citing *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), and *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994), employer asserts that the opinions of Drs. Rasmussen and Bembalkar are insufficient to satisfy claimant=s burden of establishing the existence of pneumoconiosis at 20 C.F.R. '718.202(a)(4) since they are based on nothing more than a disputed x-ray reading and claimant=s history of coal dust exposure. However, in its 1999 Decision and Order, the Board correctly held that Athe administrative law judge...properly found the medical opinions of Drs. Rasmussen...and Bembalkar, which diagnose the existence of pneumoconiosis, well-reasoned as each physician stated that he based his conclusion of the presence of pneumoconiosis on x-ray, *clinical findings* and/or claimant=s years of work in the coal mines.@ *Bateman v. Eastern Associated Coal Corp.*, BRB No. 98-0997 BLA, slip op. at 3 (Sept. 30, 1999)(unpub.) (emphasis added)(footnote omitted). Thus, since the diagnoses of pneumoconiosis by Drs. Rasmussen and Bembalkar were not based solely on x-ray readings and claimant=s coal mine employment history, we reject employer=s assertion that the opinions of Drs. Rasmussen and Bembalkar are insufficient to satisfy claimant=s burden to establish the existence of pneumoconiosis at 20 C.F.R. '718.202(a)(4).

Employer further asserts that the notation of radiographic evidence of pneumoconiosis by Drs. Zaldivar and Fino does not satisfy claimant=s burden to establish the existence of pneumoconiosis at 20 C.F.R. '718.202(a)(4). In his 1998 decision, the administrative law judge stated that ADr. Zaldivar examined [c]laimant on August 14, 1996, and diagnosed pneumoconiosis, asthma and emphysema.@ 1998 Decision and Order

at 17. The administrative law judge also stated that ADr. Fino, who reviewed the record, diagnosed pneumoconiosis in his report of July 14, 1997.@ *Id.* In its 1999 Decision and Order, the Board stated that Athe administrative law judge correctly determined that the opinions of Drs. Zaldivar and Fino established the existence of pneumoconiosis at Section 718.202(a)(4) [(2000)] because although they stated that claimant=s chronic obstructive pulmonary disease (CHRONIC OBSTRUCTIVE PULMONARY DISEASE) was not attributable to coal mine employment, each specifically diagnosed coal workers= pneumoconiosis.@ *Bateman v. Eastern Associated Coal Corp.*, BRB No. 98-0997 BLA, slip op. at 4 (Sept. 30, 1999)(unpub.). In a deposition dated August 20, 1997, Dr. Fino opined that claimant suffers from a lung disease which arose from coal mine dust exposure. Employer=s Exhibit 3 at 19. However, further review of the record reveals that Dr. Zaldivar opined that claimant does not suffer from coal workers= pneumoconiosis. Employer=s Exhibit 5 at 20, 33. Based upon his analysis of the x-ray evidence, Dr. Zaldivar noted that there is radiographic evidence of simple coal workers= pneumoconiosis and radiographic evidence of a dust disease caused by coal mine employment. Employer=s Exhibits 1, 5 at 20, 40, 53. Nonetheless, Dr. Zaldivar ultimately opined that claimant does not suffer from pneumoconiosis based upon all of the evidence that was before him. Employer=s Exhibit 5 at 20, 33. Thus, the administrative law judge and the Board mischaracterized Dr. Zaldivar=s opinion by stating that Dr. Zaldivar diagnosed pneumoconiosis. In view of the prior mischaracterization of Dr. Zaldivar=s opinion by the administrative law judge and the Board, we vacate the administrative law judge=s prior finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. '718.202(a)(4) (2000), and remand the case for further consideration. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Citing *Akers and Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989), employer asserts that the administrative law judge erred in discounting Dr. Renn=s opinion solely because he did not examine claimant. In his 1998 decision, the administrative law judge stated, A[a]lthough Dr. Renn reached a contrary conclusion, he did not examine [claimant], and I accord his opinion less weight than the opinions of Drs. Rasmussen, Zaldivar, and Bembalker (sic) for that reason.@ 1998 Decision and Order at 17. In its 1999 Decision and Order, the Board stated that Any error in the administrative law judge=s decision to accord less weight to the medical opinion of Dr. Renn, who concluded that claimant did not suffer from clinical or legal pneumoconiosis, because Dr. Renn did not examine claimant, is harmless as employer cites no reason for finding that Dr. Renn=s opinion should outweigh the opinions of examining physicians diagnosing pneumoconiosis upon which the administrative law judge relied.@ *Bateman v. Eastern Associated Coal Corp.*, BRB No. 98-0997 BLA, slip op. at 4 (Sept. 30, 1999)(unpub.).

In *Akers*, the administrative law judge concluded that the claimant established that pneumoconiosis contributed to the miner=s death based on the testimony of Drs. Bembalkar and Hamdan, who had examined or treated the miner for only a month. The administrative law judge credited the testimony of Drs. Bembalkar and Hamdan over the testimony of all of the other doctors for no reason except that Drs. Bembalkar and Hamdan treated the miner. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, observed in *Akers* that in reaching his conclusion, the administrative law judge ignored entirely 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. Hence, the Fourth Circuit held that the administrative law judge=s invocation of a rule of absolute deference to treating and examining physicians relieved the administrative law judge of his statutory obligation to consider all of the relevant evidence of record and therefore was improper.

In the instant case, the only basis that the administrative law judge provided for discrediting Dr. Renn=s opinion was his status as a non-examining physician. Thus, upon further reflection, we hold that the administrative law judge erred in discrediting Dr. Renn=s opinion. On remand, the administrative law judge must reconsider Dr. Renn=s opinion in his weighing of the conflicting medical opinions in accordance with *Akers*. Moreover, if the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. ' 718.202(a)(1) or (a)(4), the administrative law judge must weigh all types of relevant evidence together at 20 C.F.R. ' 718.202(a)(1)-(4) to determine whether claimant has established the existence of pneumoconiosis in accordance with *Compton*. See also *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Next, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. ' 718.204(c). Whereas Drs. Bembalkar and Rasmussen opined that claimant suffers from a disabling respiratory impairment contributed to or caused by coal mine dust exposure, Claimant=s Exhibits 7, 9; Employer=s Exhibit 15, Drs. Fino, Renn and Zaldivar opined that claimant does not suffer from a disabling respiratory impairment contributed to or caused by coal mine dust exposure, Employer=s Exhibits 1-5. In a report dated July 15, 1997, Dr. Amjad diagnosed pneumoconiosis and noted, Acoal mines, it is totally disabling.@ Claimant=s Exhibit 3. The administrative law judge permissibly found the opinion of Dr. Rasmussen to be supported by the opinion of Dr. Bembalkar. See *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286

(1984). However, the administrative law judge failed to consider the opinions of Drs. Amjad, Renn and Zaldivar. While an administrative law judge is not required to accept evidence that he determines is not credible, he nonetheless must address and discuss all of the relevant evidence of record. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966 (1984). Thus, we vacate the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. ' 718.204(c), and remand the case for further consideration.

Employer asserts that the Fourth Circuit, in *Hicks and Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), adopted the holding of the United States Court of Appeals for the Seventh Circuit, in *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1399 (1995), and *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), that a claimant cannot satisfy his burden of establishing total disability due to pneumoconiosis if he is totally disabled from a pre-existing nonrespiratory disability. In *Foster*, the Seventh Circuit held that the evidence was sufficient to establish rebuttal of the interim presumption at 20 C.F.R. ' 727.203(b)(2) where the miner's inability to work was not due to pneumoconiosis, but a back injury that occurred during his coal mine employment. Similarly, the Seventh Circuit held, in *Vigna*, that the evidence was sufficient to establish rebuttal of the interim presumption at 20 C.F.R. ' 727.203(b)(3) where the miner had become totally disabled by a stroke that was not caused by coal dust exposure and where there was no evidence establishing a nexus between the miner's stroke and his respiratory condition.

In *Ballard*, the administrative law judge found that claimant suffered from simple pneumoconiosis and a totally disabling respiratory impairment. However, the administrative law judge found claimant ineligible for benefits because the record did not support the conclusion that claimant's totally disabling respiratory condition was due to pneumoconiosis. In addressing the issue of whether claimant's pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment, the Fourth Circuit stated:

Accordingly, we ask whether the claimant's coal mining [was] a necessary condition of his disability. If the claimant would have been disabled to the same degree and by the same time in his life if he had never been a miner, then benefits should not have been awarded. *Robinson*, 914 F.2d at 38 (emphasis added)(citing *Shelton v. Director, OWCP*, 899 F.2d 690, 693 (7th Cir. 1990)(AA miner is not entitled to benefits if by reason of his heavy smoking or some other activity or condition of his that is not itself mining, he would have become totally disabled...@)); *see Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 838-39 (7th Cir. 1994)(rejecting use of a disability unrelated to extant simple pneumoconiosis to support an award of black lung

benefits), cert. denied, ___ U.S. ___, 115 S. Ct. 1399, 131 L.Ed.2d 287 (1995).

Ballard, 65 F.3d at 1196, 19 BLR at 2-320. Based upon its determination that the physicians' opinions provided substantial evidence that the pneumonectomy, rather than pneumoconiosis, caused the claimant's total disability, the Fourth Circuit affirmed the administrative law judge's denial of benefits.⁹

In *Hicks*, the employer disputed the administrative law judge's findings that the claimant was totally disabled from a respiratory or pulmonary impairment and that pneumoconiosis contributed to the claimant's total disability. In addition to pneumoconiosis, the Fourth Circuit noted that the claimant also suffered from cardiac disease, coronary artery disease, obesity and hypertension. However, the Fourth Circuit stated that the administrative law judge erred in merely giving lip service to the evidence of the claimant's other health problems. The Fourth Circuit also stated that the administrative law judge erred in concluding that even if the claimant's cardiac condition was the primary cause of his total disability, the claimant would still be eligible for benefits because he suffered from pneumoconiosis. The Fourth Circuit declared:

Even if the ADMINISTRATIVE LAW JUDGE determines, after considering all of the relevant evidence, that [claimant] suffered from a totally disabling respiratory condition, [claimant] will not be eligible for benefits if he would have been totally disabled to the same degree because of his other health problems. A claimant cannot establish eligibility for benefits if he would have been totally disabled to the same degree [and] by the same time in his life had he never been a miner. @ *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1196 (4th Cir. 1995); see also *Shelton v. Director, OWCP*, 899 F.2d 690, 693 (7th Cir. 1990) (holding miner not entitled to benefits if he would have become disabled by reason of heavy smoking or other activity or condition).

Hicks, 138 F.3d at 534, 21 BLR at 2-338. Hence, the Fourth Circuit instructed the

⁹ The Fourth Circuit stated that "[t]he clearly articulated opinions of both examining and consulting physicians support the ALJ's conclusion that 'pneumoconiosis...is wholly unrelated to [Ballard's] totally disabling condition, which was caused by the pneumonectomy necessitated by [Ballard's] cigarette induced lung cancer.' @ *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1197, 19 BLR 2-304, 2-323 (4th Cir. 1995). The Fourth Circuit also stated that "[t]he otherwise inexplicable sharp drop in Ballard's pulmonary function results and non-qualifying blood gas studies, as well as Ballard's work history and testimony, also bolster the ALJ's conclusion." @ *Id.*

administrative law judge, on remand, to determine whether claimant suffers from a totally disabling condition that is entirely respiratory or pulmonary in nature and whether claimant would have been totally disabled to the same degree because of his other health problems. Furthermore, the Fourth Circuit noted that in addition to failing to consider all of the relevant evidence relating to claimant=s potential disability, the administrative law judge neglected to consider the relevant evidence relating to the possible causes of such a disability. The Fourth Circuit therefore instructed the administrative law judge to evaluate all of the relevant evidence to determine whether claimant had established a total respiratory disability, and, if so, whether the total respiratory disability was caused, at least in part, by coal workers=pneumoconiosis.

The decisions of the Fourth Circuit, in *Hicks* and *Ballard*, are distinguishable from the decisions of the Seventh Circuit, in *Foster* and *Vigna*. Unlike the Seventh Circuit in *Foster* and *Vigna*, the Fourth Circuit, in *Hicks* and *Ballard*, did not hold that a disability from a nonpulmonary or nonrespiratory condition takes a claimant outside the scope of the Act. To the contrary, the Fourth Circuit merely indicated that an administrative law judge must consider all health problems with regard to the issue of disability causation. The Fourth Circuit decisions focus on insuring that substantial evidence supports a finding that pneumoconiosis, rather than other health ailments, actually contributes to a claimant=s total disability. Thus, in *Hicks*, the Fourth Circuit stated that “[j]ust as the length of a miner=s employment in the coal mines does not compel the conclusion that a miner=s disability was entirely respiratory in nature, it does not conclusively establish that pneumoconiosis contributed to a totally disabling respiratory condition.”@ *Hicks*, 138 F.3d at 535, 21 BLR at 2-340. We, therefore, reject employer=s assertion that the Fourth Circuit has adopted the holding of the Seventh Circuit in *Foster* and *Vigna*, that a claimant is prohibited from establishing entitlement to benefits, even if he is able to establish total disability due to pulmonary problems, if he suffers from a pre-existing nonrespiratory disability.

Employer also asserts that the revised regulation at 20 C.F.R. § 718.204(a) is contrary to the Act and cannot be applied retroactively to this case because it changes existing Fourth Circuit law. The pertinent revised regulation, which overrules *Foster* and *Vigna*, provides that “[a]ny nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner=s pulmonary or respiratory disability, shall not be considered in determining whether a miner is or was totally disabled due to pneumoconiosis.”@ 20 C.F.R. § 718.204(a). The United States Court of Appeals for the District of Columbia, has held that the revised regulation at 20 C.F.R. § 718.204(a) is impermissibly retroactive as applied to pending cases. *National Mining Association v. Department of Labor*, 292 F.3d 849, 21 BLR (D.C. Cir. 2002), *aff=g in part and rev=g in part National Mining Association v. Chao*, 160 F. Supp.2d 47, 21 BLR (D.D.C. 2001).

Thus, we agree with employer that the revised regulation at 20 C.F.R. ' 718.204(a) is not applicable to the instant case. Nonetheless, we decline to apply *Vigna* and *Foster* in cases such as the instant one, which arise outside of the Seventh Circuit.

Employer additionally contests the administrative law judge=s finding that Dr. Rasmussen=s opinion is reasoned and documented because Dr. Rasmussen sets forth his general views on pulmonary medicine. Contrary to employer=s assertion, the administrative law judge stated that ADr. Rasmussen...considered general studies of the effects of smoking and coal dust inhalation, and the specific facts of [c]laimant=s individual case in rendering his etiology assessment.@ 2002 Decision and Order on Remand at 6. The administrative law judge concluded that A[Dr. Rasmussen=s] opinion that coal dust exposure is a >major= factor contributing to [c]laimant=s respiratory impairment, along with cigarette smoking, is, under these circumstances, considering the record as a whole, specific to this [c]laimant, based upon objective medical evidence,...sufficiently documented and reasoned....@¹⁰ *Id.* Thus, we reject employer=s assertion that Dr. Rasmussen=s opinion is not reasoned because Dr. Rasmussen sets forth his general views on pulmonary medicine.

Citing *United States Steel Mining Co. v. Director, OWCP, [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999), employer also asserts that Dr. Rasmussen=s opinion is contrary to Fourth Circuit law because it is based on the unsupported notion that a trained pulmonary expert is incapable of distinguishing the effects of coal dust exposure from the many other risk factors for respiratory obstruction. Employer=s assertion is based upon the premise that Dr. Rasmussen=s opinion is not reliable, probative or substantial. In *Jarrell*, an administrative law judge relied solely upon the opinion of Dr. Rasmussen, a consulting physician, to find that pneumoconiosis was a substantially contributing cause or factor leading to the death of Mr. Jarrell. Hence, the administrative law judge awarded survivor=s benefits to Mrs. Jarrell. In disposing of the case on appeal, the Board affirmed the administrative law judge=s award of survivor=s benefits. However, the Fourth Circuit

¹⁰ The administrative law judge stated that A[t]he individual facts about claimant=s case, ascertained by Dr. Rasmussen on September 6, 1995 as set forth in his attending physician report, are quite detailed and rather extensive.@ 2002 Decision and Order on Remand at 6. The administrative law judge noted that A[Dr. Rasmussen=s] inquiry included medical, work, and smoking histories, consideration of symptoms, a physical examination which detected, *inter alia*, >markedly reduced= breath sounds and bilateral rales, and evaluations of clinical test data including blood gas, pulmonary function, and x-ray test results.@ *Id.*

reversed the administrative law judge's decision on appeal. The Fourth Circuit stated that "Even though the more stringent exclusionary rules of evidence, which are generally applicable to jury trials, are not justified in agency proceedings,"¹¹ the agency process nonetheless requires that the administrative law judge perform a gate keeping function while assessing the evidence to decide the merits of the claim.¹² *Jarrell*, 187 F.3d at 388-89, 21 BLR at 2-647. The Fourth Circuit also stated that "the ADMINISTRATIVE LAW JUDGE has, under ' 556(d) of the [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)], the affirmative duty to qualify evidence as 'reliable, probative, and substantial' before relying upon it to grant or deny a claim." *Jarrell*, 187 F.3d at 389, 21 BLR at 2-647.

Based upon its consideration of Dr. Rasmussen's opinion, the Fourth Circuit in *Jarrell* concluded that "Dr. Rasmussen's opinion does not qualify as 'reliable, probative, and substantial' evidence on which the ADMINISTRATIVE LAW JUDGE could base a black lung benefits award." *Jarrell*, 187 F.3d at 390, 21 BLR at 2-651. The court noted that Dr. Rasmussen lacked knowledge of the circumstances of Mr. Jarrell's death and based his opinion on a review of a record containing no evidence of causation between Mr. Jarrell's pneumoconiosis and his death from cancer. *Jarrell*, 187 F.3d at 390, 21 BLR at 2-649-50. The court also indicated that Dr. Rasmussen never examined or treated the miner. *Jarrell*, 187 F.3d at 387, 21 BLR at 2-645. In addition, the court indicated that although Dr. Rasmussen had treatment records and a death certificate to review, Mr. Jarrell's treating physician did not mention any relationship between the miner's pneumoconiosis and his cancer death. *Jarrell*, 187 F.3d at 390, 21 BLR at 2-649-50. Moreover, the court noted that Dr. Rasmussen admitted that he had no information about the circumstances of Mr. Jarrell's death. *Jarrell*, 187 F.3d at 390, 21 BLR at 2-650. Under these circumstances, the court

¹¹ The United States Court of Appeals for the Fourth Circuit stated that "the exclusionary rule applicable to an agency proceeding is essentially limited to relevance." *United States Steel Mining Co. v. Director, OWCP, [Jarrell]*, 187 F.3d 384, 388, 21 BLR 2-639, 647 (4th Cir. 1999).

¹² Similar to the Fourth Circuit in *Jarrell*, the United States Supreme Court considered the "gatekeeping" obligation of the District Court with respect to Federal Rule of Evidence 702. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). The Court noted that Rule 702 grants the district judge the discretionary authority, reviewable for its abuse, to determine the reliability of evidence in light of the facts and circumstances of a particular case. *Id.* Based on the particular facts of *Carmichael*, the Court held that the District Court did not abuse its discretionary authority by excluding the expert opinion of a tire failure analyst. *Id.*

stated that Dr. Rasmussen was reduced to speculating that it was Apossible@ that Mr. Jarrell=s death Acould have occurred@ due to pneumonia Asuperimposed upon@ his pneumoconiosis. *Jarrell*, 187 F.3d at 387, 21 BLR at 2-652. The court therefore held that such an opinion was insufficient to constitute probative evidence that pneumoconiosis was a substantially contributing cause or factor leading to Mr. Jarrell=s death. *Jarrell*, 187 F.3d at 389-91, 21 BLR at 2-649-53.

The facts of the instant case, however, are distinguishable from those in *Jarrell*. In the instant case, the administrative law judge noted that A[t]he record shows that [c]laimant visited with Dr. Rasmussen at the Southern West Virginia clinic on September 6, 1995.@ 2002 Decision and Order on Remand at 5-6. The administrative law judge also stated that A[f]rom the data he reviewed, Dr. Rasmussen detected a mixed obstructive and restrictive impairment, and reduced oxygen transfer.@ *Id.* at 6. Further, the administrative law judge noted that A[Dr. Rasmussen] evaluated epidemiologic studies relating to coal dust exposure and smoking and noted that there is an additive effect among the two.@ *Id.*

Although Dr. Rasmussen acknowledged that claimant=s totally disabling respiratory impairment is caused by the combined consequence of his cigarette smoking and coal mine dust exposure, he nonetheless unequivocally opined that coal dust exposure is a significant contributing factor to claimant=s disabling respiratory impairment. Director=s Exhibit 15; Claimant=s Exhibit 9. In contrast to the pure speculation in *Jarrell*, in the case at bar, Dr. Rasmussen pointed to medical evidence in the record and his examination of claimant as bases for his opinion.¹³ Director=s Exhibit 15; Claimant=s Exhibit 9. The administrative law judge exercises broad discretion in assessing the persuasiveness and reasoning of a medical opinion. *See Fife v. Director, OWCP*, 888 F.2d 365, 13 BLR 2-109 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Since the administrative law judge reasonably found that Dr. Rasmussen=s disability causation opinion is sufficiently documented and reasoned, we hold that the administrative law judge permissibly relied upon his opinion.

Employer asserts that Dr. Bembalkar=s opinion on disability causation Ais simply an assertion and not substantial evidence@ since Dr. Bembalkar=s opinion rests on the notion that any claimant with many years of coal mine employment is entitled to benefits. Contrary to employer=s assertion, Dr. Bembalkar=s disability causation opinion was based

¹³ Dr. Rasmussen=s opinion is based upon an x-ray, an arterial blood gas study, a pulmonary function study, a smoking history, a coal mine employment history and a physical examination. Director=s Exhibit 15; Claimant=s Exhibit 9.

upon x-ray evidence, clinical findings and claimant=s coal mine employment history. Claimant=s Exhibit 7. In a report dated July 14, 1997, Dr. Bembalkar opined that Asomeone who has worked mostly underground in the coal mines for about 40 years has chest x-ray findings of [c]oal [w]orkers= pneumoconiosis and also has hypoxia requiring supplemental oxygen, has had significant impairment of his respiratory system because of coal mine work.@ *Id.* Dr. Bembalkar further opined that A[c]hronic cigarette smoking and other ailments are also contributory.@ *Id.* Thus, since Dr. Bembalkar=s opinion on disability causation is reasoned and documented, we reject employer=s assertion that Dr. Bembalkar=s opinion Ais simply an assertion and not substantial evidence@ of total disability due to pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Employer additionally asserts that the administrative law judge erred in discrediting Dr. Fino=s opinion. Specifically, employer argues that the administrative law judge distorted Dr. Fino=s opinion by taking statements out of context and referring to irrelevant information, and that the administrative law judge disputed Dr. Fino=s data analysis by offering his own medical analysis. The administrative law judge stated that Awhile the data show statistical variability, Dr. Fino=s medical assessment indicates a consistent impairment which he describes as >mild= but which is nevertheless present over time.@ 2002 Decision and Order on Remand at 12. The administrative law judge further stated that:

Although Dr. Fino testified that, in his opinion, this [c]laimant could not have more than one lung disease superimposed on another that could result in the variability of the hypoxia if one improved, he also testified that the effects of smoking and coal dust are, as Dr. Rasmussen noted, >additive,= (Dep. at pg. 28). Dr. Fino expects >variability= in blood gases of [a] smoker, and he attributes the variations in [c]laimant=s data to [a] smoking induced disease, but there is also a >mild= impairment which Dr. Fino has described as existing over time. **I do not second guess Dr. Fino=s opinion by observing that he does not explain his conclusion that waxing and waning in an >additive= condition would not result in >variability= in the clinical data....** (*See, Island Creek v. Compton, supra*). Since Dr. Fino testified to the existence of a consistent underlying impairment, I find I am unable to conclude that the >variability= explanation adequately supports Dr. Fino=s etiology assessment attributing all of [c]laimant=s impairment to cigarette smoking. As Dr. Fino=s testimony on cross-examination revealed, the blood

gas data are variable in some respects, but consistent in others.

2002 Decision and Order on Remand at 12 (emphasis in original)(footnote omitted). Based upon the aforementioned, the administrative law judge permissibly found that Dr. Fino=s disability causation opinion is not reasoned.¹⁴ *See Clark, supra; Fields, supra; Fuller, supra.*

Thus, we reject employer=s assertion that the administrative law judge mischaracterized Dr. Fino=s opinion. Moreover, we reject employer=s assertion that the administrative law judge substituted his opinion for that of Dr. Fino.

Employer further asserts that the administrative law judge erred in discrediting Dr. Fino=s opinion because Dr. Fino did not personally review the x-rays. While the administrative law judge noted claimant=s observation that Dr. Fino did not actually review the x-rays, the administrative law judge did not discredit Dr. Fino=s opinion on this basis. Rather, the administrative law judge merely noted that while Dr. Fino relied upon clinical findings and objective evidence, the record contains the opinions of other physicians who relied on x-rays in addition to objective evidence and other data. The administrative law judge stated:

Claimant argues...that Dr. Fino never actually reviewed [c]laimant=s x-rays, never personally evaluated the type, size, or profusion of the opacities, and did not personally view the positive manifestations of the physical indications of pneumoconiosis or fibrosis other experts found evident on the x-rays. Claimant=s observation is correct. Dr. Fino testified that he relied upon indirect clinical indications of fibrosis derived from his interpretation of pulmonary function and blood gas data. The Board has held, however, that an etiology assessment may be predicated upon many factors. Consequently, while Dr. Fino=s interpretation of pulmonary function and blood gas data as demonstrating the absence of fibrosis constitutes contrary probative evidence, other physicians have interpreted the x-ray evidence as revealing fibrosis. Further, the record does show that Dr. Rasmussen, based upon the x-rays, pulmonary function, blood gas, and other data diagnosed both obstructive and restrictive impairment, and Dr. Fino did not specifically refute the latter.

2002 Decision and Order on Remand at 13 (footnote omitted). Based upon the aforementioned, we reject employer=s assertion that the administrative law judge erred in

¹⁴ The administrative law judge concluded, AI find that Dr. Fino inadequately reasons that [c]laimant=s impairment should be apportioned 100% to smoking and 0% to coal dust inhalation.@ 2002 Decision and Order on Remand at 13.

discrediting Dr. Fino=s opinion because Dr. Fino did not personally review the x-rays.

Employer also asserts that the administrative law judge erred in discrediting the opinion of Dr. Fino based upon his finding that Dr. Fino=s views are not in accord with the prevailing view in the Amedical community.@ Contrary to employer=s assertion, the administrative law judge merely indicated that this is not a valid basis for discrediting Dr. Fino=s opinion. The administrative law judge noted that ADr. Fino...opines that lung volume and diffusion capacity studies indicate a lack of pulmonary fibrosis which, in turn, indicates the absence of coal dust induced impairment.@ 2002 Decision and Order on Remand at 13. The administrative law judge further stated that A[c]laimant notes that Dr. Fino=s opinions in this regard were reviewed by the Department of Labor which concluded that they were >not in accord with the prevailing view in the medical community....= 65 Fed Reg 79,939 (12/20/2000).@ *Id.* Nonetheless, the administrative law judge determined that ADr. Fino is free to disagree with the prevailing view in the medical community, the findings of the Department of Labor, and the regulations until such time as the BRB or a Court applies a Warth-type standard not only to those physicians whose opinions are contrary to statute but to the implementing regulations as well.@ *Id.* Thus, we reject employer=s assertion that the administrative law judge erred in discrediting the opinion of Dr. Fino based upon his finding that Dr. Fino=s views are not in accord with the prevailing view in the Amedical community.@

In addition, employer argues that the administrative law judge=s alternative rationale for finding total disability due to pneumoconiosis is flawed. Specifically, employer asserts that the administrative law judge=s consideration of the physicians= credentials provides no reason to credit the opinions of Drs. Rasmussen and Bembalkar since neither physician is a Board-certified pulmonary specialist while Drs. Fino, Renn and Zaldivar possess this qualification. Employer also asserts that the administrative law judge erred in relying on the numerical superiority of the medical opinions of Drs. Rasmussen and Bembalkar. The administrative law judge stated:

Should the Board, notwithstanding the foregoing findings, nevertheless, determine that Dr. Fino=s report is both documented and sufficiently reasoned to its satisfaction, I, alternatively, find and conclude, having previously set forth and considered the professional credentials of these physicians, that the opinions of Drs. Rasmussen and Bembalkar are qualitatively sufficient and quantitatively out-weigh the contrary opinion of Dr. Fino.¹⁵

¹⁵ The administrative law judge correctly stated that ADr. Fino is Board Certified in

2002 Decision and Order on Remand at 14 (footnote added). Since the administrative law judge's weighing of the evidence was based upon a qualitative and quantitative analysis of the conflicting medical opinions, we reject employer's assertion that the administrative law judge's weighing of the evidence at 20 C.F.R. ' 718.204(c) is based upon an erroneous head count of the medical opinions. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Moreover, we reject employer's assertion that the administrative law judge erroneously considered the qualifications of Drs. Rasmussen and Bembalkar.

Finally, we reject employer's assertion of bias by the administrative law judge in weighing the conflicting medical evidence because there is no evidence in the record to support this assertion. *See generally Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989).

In light of the foregoing, we affirm the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. ' 718.202(a)(1), but vacate the administrative law judge's prior finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. ' 718.202(a)(4) (2000), and remand the case for further consideration of the evidence thereunder. On remand, the administrative law judge must weigh together the evidence at 20 C.F.R. ' 718.202(a)(1)-(4) in accordance with *Compton*. Additionally, we vacate the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. ' 718.204(c), and remand the case for further consideration of the evidence thereunder.

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 to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

Pulmonary and Internal Medicine.@ 2002 Decision and Order on Remand at 7; Employer's Exhibit 3. Further, the administrative law judge correctly stated that ADr. Rasmussen is Board Certified in Internal Medicine.@ 2002 Decision and Order on Remand at 6; Claimant's Exhibit 5. The record does not contain Dr. Bembalkar's credentials.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge