BRB Nos. 00-0183 BLA
and 00-0183 BLA/A

CALVIN E. CLINE, SR.	)
	)
Claimant-Petitioner	)
Cross-Respondent	)
	)
v.	) DATE ISSUED:
	)
WESTMORELAND COAL COMPANY	)
	)
Employer-Respondent	)
Cross-Petitioner	)
	)
DIRECTOR, OFFICE OF WORKERS'	)
COMPENSATION PROGRAMS, UNITED	)
STATES DEPARTMENT OF LABOR	)
	)
Party-in-Interest	) DECISION and ORDER
	)

)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order On Remand-Denying Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen (Cohen, Abate & Cohen), Fairmont, West Virginia, for claimant.

Douglas A. Smoot, Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order on Remand-Denying Benefits (94-BLA-1240) of Administrative Law Judge Clement J. Kichuk rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] This case involving a duplicate claim for benefits pursuant to 20 C.F.R. §725.309(d)(2000) is before the Board for the second time. Previously, the Board discussed fully this claim's procedural history. *Cline v. Westmoreland Coal Co*., 21 BLR 1-69, 1-71-72 (1997). We now focus only on those procedural aspects relevant to the issues raised in this appeal and cross-appeal of the administrative law judge's decision to deny benefits.

In *Cline*, the Board vacated the administrative law judge's order denying claimant's motion to compel discovery of medical information obtained by employer which employer did not intend to submit into evidence and considered privileged. *Cline*, 21 BLR at 1-76-77. The Board instructed the administrative law judge on remand to reconsider claimant's motion using 29 C.F.R. §18.14 and 20 C.F.R. §725.455 as his guides, not the Federal Rules of Civil Procedure. *Id*. The Board also vacated the administrative law judge's Decision and Order denying benefits and

[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, refer to the amended regulations. Where a citation to the regulations is followed by "(2000)," the reference is to the old regulations.

instructed the administrative law judge to determine whether claimant established a material change in conditions under the standard set forth in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), and, if the administrative law judge ultimately awarded benefits, to address employer's challenge to its designation as the responsible operator. *Cline*, 21 BLR at 1-73, 1-77.

On remand, because the original administrative law judge was unavailable, the case was reassigned without objection to Judge Kichuk, who, after considering briefs, granted claimant's motion to compel discovery. Order, Jun. 12, 1998; Order on Reconsideration of Claimant's Motion to Compel Discovery, Oct. 14, 1998. Accordingly, employer forwarded the requested items to claimant, who submitted them into the record. After considering supplemental briefs, the administrative law judge applied *Rutter* and found that the evidence developed since the denial of claimant's prior claim established that claimant suffers from a totally disabling respiratory or pulmonary impairment and thus demonstrated a material change in conditions as was required by 20 C.F.R. §725.309(d)(2000). The administrative law judge found, however, that the entire record did not establish the existence of either simple or complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.304(a), (c)(2000). Consequently, the administrative law judge denied benefits. Because he denied benefits, the administrative law judge found it unnecessary to address employer's argument that it was improperly designated as the responsible operator.

On appeal, claimant contends that the administrative law judge made several errors in his analysis of the medical evidence in finding that the existence of pneumoconiosis was not established. Claimant further asserts that his due process rights were violated when the Department of Labor identified Westmoreland Coal Company (Westmoreland) as the responsible operator, instead of holding the corporate officers of claimant's most recent employer, McKenzie Mining Company, individually liable as responsible operators. Employer responds, urging affirmance of the denial of benefits, and cross-appeals, arguing that substantial evidence does not support the finding of a material change in conditions, and that the Department of Labor failed to proceed against the corporate officers of claimant's most recent employer before naming Westmoreland as the responsible operator. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject the parties' responsible operator arguments as contrary to the Board's holdings in *Lester v. Mack Coal Co*., 21 BLR 1-126 (1999)(*en banc*)(McGranery, J., concurring and dissenting), and *Mitchem v. Bailey Energy, Inc*., 21 BLR 1-161 (1999)(*en banc*)(Hall and Nelson, JJ., concurring and dissenting).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States Court of Appeals 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 21, 2001, to which all parties have responded. Claimant and the Director state that none of the regulations at issue in the lawsuit affects the outcome of this case. Employer, however, contends that two challenged regulations, 20 C.F.R. §718.201(c)(defining pneumoconiosis as a latent and progressive disease), and 20 C.F.R. §718.204(a)(specifying that a nonrespiratory disability is irrelevant to whether a miner is totally disabled due to pneumoconiosis), affect the outcome of this case.

Based upon the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Review of the record reveals no evidence implicating 20 C.F.R. §718.201(c). Further review indicates that all of the physicians agree that claimant has an impairment which is respiratory in nature, and that no physician believes that claimant suffers from a nonrespiratory or nonpulmonary disability. Therefore, contrary to employer's assertion, 20 C.F.R. §718.204(a) is not implicated on this record. Additionally, based on our review, we conclude that none of the other challenged regulations affects the outcome of this case. Therefore, the Board will proceed with the adjudication of this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Based on our review of the administrative law judge's Decision and Order in light of the record and applicable law, we conclude that the administrative law judge's analysis of the medical opinion evidence is not in accordance with law. Because we must vacate the denial of benefits and remand this case for the administrative law judge to reconsider whether claimant established the existence of pneumoconiosis as defined by the Act, *see* discussion, *infra*, we must address employer's threshold argument that substantial evidence does not support the

administrative law judge's finding that a material change in conditions was established to permit consideration of the merits of claimant's claim.

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, and the subsequent claim is filed prior to January 20, 2001, 20 C.F.R. §725.2(c), the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d)(2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d)(2000), the administrative law judge must consider all of the new evidence to determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Rutter, supra*. If so, claimant has established a material change in conditions and the administrative law judge must then determine whether all of the record evidence, old and new, supports a finding of entitlement. *Id*.

Claimant's prior claim was denied because the administrative law judge found that the record did not establish a totally disabling respiratory or pulmonary impairment. Therefore, on remand the administrative law judge properly considered whether the evidence developed since the prior denial established total disability.

The administrative law judge found that the predominantly non-qualifying[2] pulmonary function and blood gas studies did not establish total disability, and that there was no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii).[3] Pursuant to Section 718.204(c)(4)(2000), the administrative law judge found that claimant's usual coal mine employment as a foreman required him to perform heavy to very heavy manual labor, and then compared those exertional requirements with the physicians' assessments of whether claimant's moderate obstructive impairment prevented him from performing his work as a foreman. The administrative law judge found that those physicians who had a better understanding of the physical requirements of claimant's job concluded that claimant's moderate respiratory impairment prevented him from performing those duties. Consequently, the administrative law judge accorded greater weight to those opinions to find that claimant is totally disabled.

Employer contends that substantial evidence does not support the administrative law judge's finding because claimant's job did not require heavy

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[2] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[3] The regulation applied by the administrative law judge, Section 718.204, has been restructured. The methods of establishing disability cited by the administrative law judge at 20 C.F.R. §718.204(c)(1)-(4)(2000) are now set forth at 20 C.F.R. §718.204(b)(2)(i)-(iv).

labor. Employer's Brief at 40-44. This contention lacks merit.

A miner is considered totally disabled when "a pulmonary or respiratory impairment . . . prevents or prevented the miner: . . . [f]rom performing his or her usual coal mine work." 20 C.F.R. §718.204(b)(1)(i). Thus, "information regarding the miner's exertional work requirements mandates careful consideration . . . where the physician must determine whether an impairment of a certain degree prevents the miner from performing his usual coal mine work." *Lane v. Union Carbide Corp*., 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997).

Here, contrary to employer's contention, the record indicates that claimant's job as a foreman required more than the mere supervision of other workers. Claimant informed Dr. Rasmussen that he set timbers, shoveled ribs, rock dusted carrying 50-lb. bags of rock dust 100-200 feet, all while crawling in low coal. Claimant's Exhibit 7. Dr. Rasmussen characterized these tasks as "considerable heavy manual labor and some very heavy manual labor." *Id*. The administrative law judge also took into account claimant's testimony that he had to do a lot of crawling in low coal, and that he rock dusted, repetitively dragged rock dust bags, and helped set timbers. [1995] Hearing Tr. at 32-37; [1990] Hearing Tr. at 25-26. The administrative law judge further considered the statements of Drs. Fino and Renn that the job duties as described to Dr. Rasmussen constituted heavy labor. Employer's Exhibits 9 at 28, 11 at 9. On these facts, substantial evidence supports the administrative law judge's finding that claimant's job as a foreman "involved [the] performance of heavy and very heavy manual labor," Decision and Order on Remand at 10, a finding we therefore affirm.

Having found that claimant's job required him to perform heavy and very heavy manual labor, the administrative law judge properly accorded greater weight to the opinions of Drs. Rasmussen, Fino, and Daniel that claimant is disabled by his moderate impairment, because the administrative law judge found that they had more accurate knowledge of the physical efforts required by claimant's usual coal mine employment. *See Lane, supra*; *Walker v. Director, OWCP*, 927 F.2d 181, 184, 15 BLR 2-16, 2-22 (4th Cir. 1991). By contrast, as the administrative law judge found, Drs. Loudon and Crissali did not state their knowledge of the exertional requirements of claimant's job, Dr. Stewart relied on the premise that claimant's job was not particularly strenuous, and Dr. Renn relied on his initial and incorrect understanding of claimant's job duties, when they all concluded that claimant could perform his job despite his impairment. Employer's Exhibits 1, 2, 5, 6, 11 at 30. Because the administrative law judge permissibly weighed the medical opinions, *see Lane, supra*; *Walker, supra*, and substantial evidence supports his finding that claimant's respiratory or pulmonary impairment prevents him from performing his usual coal mine employment, we affirm the administrative law judge's finding that claimant established total disability, and his attendant finding that a material change in conditions was established pursuant to Section 725.309(d)(2000). *See Rutter,*

supra. Accordingly, we now turn to claimant's challenge to the denial of benefits.

Claimant contends that the administrative law judge erred in finding that claimant did not establish the existence of either simple or complicated pneumoconiosis by chest x-ray. Claimant's Brief at 33-44. Section 411(c)(3)(A) of the Act, implemented by Section 718.304(a) of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C. 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §718.304(a). In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must consider all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993), citing *Melnick v. Consolidation Coal Co*., 16 BLR 1-31 (1991).

The administrative law judge considered eighty-one readings of fourteen chest x-rays taken over a seventeen-year period. Of these readings, twenty-five were classified as positive for the existence of pneumoconiosis and forty-nine were classified as negative. Of the twenty-five positive classifications, twenty-four bore notations indicating the presence of Category A or Category B large opacities. The administrative law judge weighed these readings based on the readers' radiological qualifications, *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), and took into account any explanations provided by the reading physicians, as well as any relevant information contained in the medical opinions of record. The administrative law judge found that the weight of the x-ray evidence did not establish the existence of either simple or complicated pneumoconiosis, but rather, demonstrated the presence of abnormalities consistent with old tuberculosis.

Claimant contends that the administrative law judge merely accorded greatest weight to those physicians who read the most x-rays, thereby giving undue weight to cumulative negative readings. Claimant's Brief at 33-36. Contrary to claimant's contention, the administrative law judge did not defer to the readings of Drs. Wheeler, Scott, Wiot, Renn, and Fino simply because each physician read several x-rays, but rather because the administrative law judge considered their having viewed a series of x-rays as relevant to the reliability of their conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). In his discussion of the x-ray readings, the administrative law judge cited the explanations by Dr. Wheeler, a Board-certified radiologist and B-reader, and Dr. Fino, a B-reader, as to why they read the x-rays as negative for pneumoconiosis and why they believed that the abnormalities seen were consistent with healed tuberculosis. Their explanations included the observation that the

lesions seen on claimant's chest x-rays remained stable over time, instead of progressing as would be expected with complicated pneumoconiosis. Employer's Exhibits 7 at 2, 10 at 30. The administrative law judge also noted the repeated comments by Drs. Scott, Renn, and Wiot that the opacities seen on multiple chest x-rays were consistent with the scars of old tuberculosis.[4]

The administrative law judge reasonably weighed these comments and explanations in view of claimant's family history, which revealed that his mother died of tuberculosis and an older brother died in a tuberculosis sanatorium. The administrative law judge was impressed by the fact that those "physicians who were informed that there is a family history of tuberculosis gave great weight to such family history in determining the etiology of the Category A x-ray reading."[5] Decision and Order on Remand at 17. On these facts, we conclude that the administrative law judge permissibly weighed the x-ray readings and found that the weight of the readings did not establish the existence of either simple or complicated pneumoconiosis. *See Adkins, supra*. Substantial evidence supports the administrative law judge's finding.[6] Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1), (3).

The administrative law judge additionally found that the weight of the medical opinion evidence did not establish the existence of pneumoconiosis. Claimant contends that the administrative law judge did not clearly apply the legal definition of pneumoconiosis in making this finding. This contention has merit.

Pneumoconiosis is defined 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). A respiratory impairment arises out of coal mine employment if it is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see Barber v. Director,*

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[4] As did Drs. Wheeler and Fino, Drs. Scott and Renn rendered negative readings and included comments indicating that healed tuberculosis scars were present. Dr. Wiot classified the readings he reviewed as positive under the ILO system, but included comments that the opacities seen may only be old tuberculosis. The administrative law judge ultimately found, however, that the positive readings were outweighed by a preponderance of the medical evidence. Decision and Order on Remand at 22.

[5] Drs. Wheeler, Renn, and Fino testified that exposure to a family member with active tuberculosis is significant because it is the most common method by which tuberculosis spreads. Employer's Exhibits 9 at 14-15, 10 at 28-29, 11 at 14-15.

[6] Contrary to claimant's contention, Claimant's Brief at 42, review of the record does not reveal that the administrative law judge mischaracterized the x-ray readings or the physicians' explanations of their readings. Additionally, the administrative law judge did not ignore the readings of a May 13, 1994 CT scan, but noted those readings and considered them in conjunction with discussing the physicians' x-ray readings and medical opinions. Decision and Order on Remand at 16, 18-22, 23-26.

OWCP, 43 F.3d 899, 900, 19 BLR 2-61, 2-67 (4th Cir.1995).

Here, in addition to diagnosing simple and complicated coal workers' pneumoconiosis, Drs. Zaldivar and Rasmussen diagnosed chronic obstructive pulmonary disease, due in part to coal dust exposure. Claimant's Exhibits 7, 11. Dr. Rasmussen cited several medical studies which he stated establish that coal mine dust exposure causes clinically significant obstruction. Claimant's Exhibits 8, 13, 14. By contrast, Drs. Crisalli, Morgan, Fino, Renn, Loudon, Stewart, and Daniel concluded that claimant's obstructive disease is due to his prior cigarette smoking habit. Director's Exhibits 13, 52A, 59; Employer's Exhibits 1, 2, 5-9, 11. Dr. Fino criticized the medical studies relied upon by Dr. Rasmussen. Employer's Exhibit 9 at 30-33.

In weighing the medical opinions, the administrative law judge did not address this line of reasoning by the physicians, but focused instead on their explanations of their diagnoses that claimant does or does not have simple or complicated coal workers' pneumoconiosis. Decision and Order on Remand at 22-26. The administrative law judge resolved this question based on the physicians' qualifications and the documentation and reasoning of their opinions in view of the x-rays, CT scan readings, and other objective data. The administrative law judge's analysis was proper as far as it went, *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); *Hicks, supra*; *Akers, supra*, but it is not clear that the administrative law judge also addressed whether claimant's obstructive lung disease constitutes pneumoconiosis under the Act. *See* 20 C.F.R. §718.201(a)(1), (2). Therefore, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and remand this case for him to determine whether all of the relevant evidence establishes the existence of pneumoconiosis as defined in the Act.[7]

[7] In the event that benefits are awarded on remand, employer's challenge to its designation as the responsible operator based on the Department's alleged failure to name the corporate officers of McKenzie Mining as responsible operators fails for the reasons set forth in *Lester* and *Mitchem, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand-Denying 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
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON
Administrative Appeals Judge