BRB No. 10-0427 BLA

GEORGE R. SMITH (o/b/o WILLIAM L. SMITH, deceased) Claimant-Respondent v. TWR, INCORPORATED/ KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/18/2011 DECISION and ORDER

Appeal of the Decision and Order of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer/carrier.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

TWR, Incorporated (TWR) appeals the Decision and Order (07-BLA-5443) of Administrative Law Judge Kenneth A. Krantz (the administrative law judge) awarding

benefits on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Public L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge determined that TWR was properly designated as the responsible operator that was liable for any benefits awarded in this case. The administrative law judge also credited the miner with 18.04 years of coal mine employment, accepted the parties' stipulation that the miner had a total respiratory disability, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge further found that the new x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that the new medical opinion evidence established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that the x-ray evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). The administrative law judge also found that the medical opinion evidence established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[2] Further, the administrative law judge found that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, TWR challenges the administrative law judge's determination that it

[1] The miner filed his first claim on December 18, 1985. Director's Exhibit 1. On June 12, 1991, Administrative Law Judge John C. Holmes issued a Decision and Order denying benefits because the miner failed to establish the existence of pneumoconiosis and a total respiratory disability. *Id*. The miner filed his second claim (a duplicate claim under 20 C.F.R. §725.309 (2000)) on August 28, 1996. *Id*. On September 29, 2003, Administrative Law Judge Thomas F. Phalen, Jr. issued a Decision and Order denying benefits because the miner failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. *Id*. The Board affirmed Judge Phalen's denial of benefits, based the miner's failure to establish total disability due to pneumoconiosis. *Smith v. Cracksteel Mining Co.*, BRB No. 04-0120 BLA (July 14, 2004)(unpub.). The miner filed this claim (a subsequent claim under 20 C.F.R. §725.309) on February 8, 2006. Director's Exhibit 3.

[2] The administrative law judge accurately stated that "[t]he etiology of legal pneumoconiosis need not be separately addressed under Section 718.203 because a finding of legal pneumoconiosis necessarily includes a finding that the pneumoconiosis arose out of coal mine employment." Decision and Order at 30; *see Kiser v. L&J Equipment Co.*, 23 BLR 1-246 (2006).

was properly designated as the responsible operator that was liable for any benefits awarded in this case. TWR also challenges the administrative law judge's findings that the x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) and that the medical opinion evidence established the existence of clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Further, TWR challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that collateral estoppel does not preclude relitigation of the identity of the responsible operator in a subsequent claim because that finding was not necessary to the prior decision denying benefits. The Director also asserts that the administrative law judge properly determined that the miner's condition had changed since the denial of his prior claim because the new evidence established elements of entitlement previously adjudicated against him, namely the existence of pneumoconiosis and total disability due to pneumoconiosis. The Director additionally asserts that, if the Board does not affirm the administrative law judge's award of benefits, the case must be remanded for the administrative law judge to consider whether the Section 411(c)(4) presumption of total disability due to pneumoconiosis should be invoked.[3] 30 U.S.C. §921(c)(4). Further, the Director asserts that the administrative law judge should allow for the submission of additional evidence before the Section 411(c)(4) presumption is considered on remand. The Director notes that successful invocation of the presumption alters the parties' burdens of proof and imposes on the employer the obligation of proving either that the miner did not suffer from pneumoconiosis or that his totally disabling impairment was unrelated to pneumoconiosis, in order to defeat entitlement. Lastly, the Director asserts that the sponsoring party of additional evidence that exceeds the evidentiary limitations must establish good cause for its admission.

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 applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the

[3] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

[4] The record indicates that the miner was employed in the coal mining industry in Kentucky. Director's Exhibit 1. Accordingly, the law of the United States Court of Appeals for the Sixth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner was 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 (1989).

Initially, we will address TWR's contention that the administrative law judge erred in determining that it was properly designated as the responsible operator that was liable for any benefits awarded in this case. The administrative law judge found that the miner's coal dust exposure contributed to his disability, and that he was regularly and continuously exposed to coal mine dust during his employment with TWR, as it failed to rebut the presumption that this was the case. The administrative law judge also found that TWR's stipulation that it employed the miner for more than one year was, in effect, an admission of its status as a successor operator to Cracksteel Mining Company (Cracksteel), inasmuch it has never been disputed that TWR actually employed the miner for less than one year, without counting his employment with Cracksteel. Further, the administrative law judge noted that TWR conceded that it was capable of assuming liability for the payment of benefits in this case, and that the evidence in the record established that it was the miner's most recent employer. Hence, the administrative law judge determined that TWR was properly designated as the responsible operator in this case.

TWR asserts that the Department of Labor (the Department) was precluded from designating it as the responsible operator, based on the doctrine of collateral estoppel, as liability was imposed on Cracksteel in the prior final decisions in this case. TWR therefore argues that it must be dismissed as the responsible operator. We disagree.

To successfully invoke the doctrine of collateral estoppel in this case, TWR must establish the following criteria:

> (1) the issue sought to be precluded is identical to the one previously litigated;
> (2) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;
> (3) determination of the issue must have been necessary to the outcome of the prior determination;
> (4) the prior proceeding must have resulted in a final judgment on the merits; and

(5) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Collins v. Pond Creek Mining Co., 468 F.3d 213, 218-219, 23 BLR 2-394, 2-403-406 (4th Cir. 2006); *Sedlack v. Braswell Services Group, Inc*., 134 F.3d 219, 224 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co*., 21 BLR 1-134, 1-137 (1999) (*en banc*). A fact established by stipulation or concession may not be given collateral estoppel effect in a subsequent proceeding because "the issue was not actually litigated." *Justice v. Newport News Shipbuilding & Drydock Co*., 34 BRBS 97, 98 (2000).

The district director named Cracksteel as the responsible operator in the miner's 1985 and 1996 claims. In a Decision and Order dated June 12, 1991, Administrative Law Judge John C. Holmes determined that Cracksteel was the miner's last employer. Similarly, in a Decision and Order dated September 29, 2003, Administrative Law Judge Thomas F. Phalen, Jr. determined that Cracksteel was properly designated as the responsible operator because the miner spent his last cumulative one year period of coal mine employment with it. In his Decision and Order, the administrative law judge noted that "[t]he comments to the amended regulations discuss this issue and state, 'To the extent that a denied claimant files a subsequent claim pursuant to §725.309, of course the Department's ability to identify another operator would be limited only by the principles of issue preclusion.' 65 Fed. Reg. 79,990-91." Decision and Order at 9. Nevertheless, the administrative law judge found that the designation of the responsible operator was not necessary to the outcome of the prior proceedings in this case, because the miner was denied benefits in each of the prior claims. The administrative law judge therefore determined that the required elements of the doctrine of collateral estoppel have not been established.

Because the administrative law judge's denial of benefits would stand, notwithstanding his responsible operator determination, the administrative law judge's determination that Cracksteel was the properly designated responsible operator was not essential to the denial of the prior proceeding. *Hughes*, 21 BLR at 1-137-138. Consequently, a required element of collateral estoppel was not established. *Collins*, 468 F.3d at 217, 23 BLR at 2-401. Thus, we reject TWR's assertion that the Department was precluded from designating it as the responsible operator based on the doctrine of collateral estoppel.[5]

[5] We also reject TWR's assertion that the Department of Labor (the Department) was precluded from designating it as the responsible operator, based on the doctrine of *res judicata*. Contrary to TWR's assertion, the principle of *res judicata* generally has no application in the context of subsequent claims, as such claims relate to the miner's condition and related issues at a different point in time. *See* 20 C.F.R. §725.309(d)(4); *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994); *Lisa Lee*

TWR also asserts that the Director waived the responsible operator issue in the instant claim because he acquiesced to Cracksteel's "stipulation," at the hearing before Judge Phalen in the prior claim, that it was the proper responsible operator. TWR maintains that the Director failed to object to the "stipulation," or to cross-appeal from the decision, naming Cracksteel as the responsible operator. Section 725.309(d)(4) provides that "any stipulation made by any party in connection with the prior claim *shall be binding on that party* in the adjudication of the subsequent claim." 20 C.F.R. §725.309(d)(4) (emphasis added). Here, the administrative law judge considered whether, in the prior claim, the Director was a party to Cracksteel's "stipulation" that it was the responsible operator, based on the Director's motion to reform the caption of the Board's Decision and Order.[6] The administrative law judge stated, "[e]xamining the Director's motion, it is clear that its purpose was to rectify a clerical error in the caption by a party and to notify that employer of the [m]iner's appeal." Decision and Order at 10. Thus, the administrative law judge reasonably determined that Cracksteel's prior "stipulation" that it was the responsible operator was not binding on the Director, as he found that it was not a party to that "stipulation." Consequently, we reject TWR's assertion that the Director waived the responsible operator issue in the instant claim because he acquiesced to Cracksteel's "stipulation," at the hearing before Judge Phalen in the prior claim, that it was the proper responsible operator.

Because it is supported by substantial evidence, we affirm the administrative law judge's determination that TWR was the properly designated responsible operator in this case.

Next, we address TWR's contention that the administrative law judge erred in failing to properly apply the requirements of the standard for establishing a change in an

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Mines v. Director, OWCP [*Rutter*], 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996)(*en banc*); *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 450, 21 BLR 2-50, 2-60 (8th Cir. 1997); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 314, 20 BLR 2-76, 2-87 (3d Cir. 1995); *White v. New White Coal Co., Inc*., 23 BLR 1-1, 1-3 (2004).

[6] The administrative law judge stated: "At the hearing [in the prior claim], Cracksteel stipulated to being the responsible operator, but no representative of the Director was present to either accept or reject this stipulation. (DX 1 at 60). Judge Phalen accepted the stipulation and found that Cracksteel was properly designated as the responsible operator. (DX 1 at 34.) However, when the [m]iner filed his appeal with the Board, he used the caption 'In the matter of: William L. Smith vs. Director, Office of Workers' Compensation Programs,'[] and no employer was listed on the service sheet. (DX 1 at 28-29.) The Board used the same caption when it sent out the Notice of Appeal, with no employer being listed on the service sheet, and so the Director filed a motion to reform the caption of the appeal. (DX 1 at 26-27.)." Decision and Order at 9-10.

applicable condition of entitlement at 20 C.F.R. §725.309. Specifically, TWR asserts that the administrative law judge failed to properly impose the burden on claimant to prove that the miner's condition actually changed, subsequent to the prior denial. TWR argues that the administrative law judge violated the Administrative Procedure Act (APA) by failing to weigh all of the prior evidence in evaluating the new evidence. TWR maintains that "Dr. Baker never even bothered to consider the prior evidence and he never explained how [the miner] progressed from being disabled solely by cigarette smoking in 2003 to being disabled in substantial part by pneumoconiosis in 2006." Employer's Brief in Support of Petition for Review at 19. We disagree.

Contrary to TWR's assertion, the administrative law judge properly applied the requirements at Section 725.309. The administrative law judge noted that, "[u]nder Section 725.309(d), subsequent claims must be denied on the grounds of the prior denial unless new evidence submitted in connection with the subsequent claim demonstrates that one of the applicable conditions of entitlement that was previously found against the [m]iner has changed." Decision and Order at 23. After noting that the initial analysis was limited to a review of the condition or conditions of entitlement that were the bases of the prior denial of benefits, the administrative law judge stated:

> In the denial of the [m]iner's 1996 claim, [the Board] affirmed Judge Phalen's decision, which found that the [m]iner had failed to establish the presence of pneumoconiosis or that his total disability was due to pneumoconiosis. Therefore, if the newly-submitted evidence establishes either of these elements, then I must review the entire record to determine entitlement to benefits.

Id. Based on his consideration of the new medical evidence, the administrative law judge found that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4). Hence, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. The administrative law judge then acknowledged that all of the evidence of record must be considered *de novo* to determine whether claimant was entitled to benefits.

Contrary to TWR's assertion, the administrative law judge was not required to compare the prior evidence with the new evidence since, under Section 725.309(d)(3), a claimant establishes a change in an applicable condition of entitlement "only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement." 20 C.F.R. §725.309(d)(3). The pertinent regulation does not mention a qualitative comparison of the old and new evidence.[7] Thus, we reject

[7] As argued by TWR, in *Ross*, the Sixth Circuit held, under the material change in conditions standard at 20 C.F.R. §725.309 (2000), that a miner must establish, with

TWR's assertion that the administrative law judge was required to conduct a qualitative comparison at Section 725.309.

Further, claimant was not required to establish the disability causation element in order to establish a change in an applicable condition of entitlement. As noted by the administrative law judge, the miner's prior claim was denied because he failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing only one of these elements of entitlement. 20 C.F.R. §725.309(d)(2), (3); *Sharondale Corp v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him). The administrative law judge found that the new evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), thereby proving that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. We, therefore, reject TWR's assertion that, in addition to meeting the threshold requirement with new evidence establishing pneumoconiosis, claimant also was required to establish total disability due to pneumoconiosis, in order to establish a change in an applicable condition of entitlement at Section 725.309, as a threshold matter.

Employer also contends that the administrative law judge erred in finding that the new x-ray evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The new evidence consists of nine interpretations of three x-rays, dated May 13, 2005, April 18, 2006,[8] and August 15, 2006. Dr. Alexander, a B reader and Board-certified radiologist, read the May 13, 2005 x-ray as positive for pneumoconiosis, Director's Exhibit 22, while Dr. Wiot, a B reader and Board-certified radiologist, read this x-ray as negative, Employer's Exhibit 1. Dr. Baker, a B reader, and Drs. Cappiello and Miller, B readers and Board-certified radiologists, read the April 18, 2006 x-ray as positive for pneumoconiosis, Director's Exhibits 19; Claimant's Exhibits 1, 4, while Drs. Wiot and Meyer, B readers and Board-certified radiologists, read this x-ray as negative, Director's Exhibit 24; Employer's Exhibit 7. Dr. Miller, a B reader and Board-certified

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qualitatively different evidence, at least one element of entitlement previously adjudicated against him. *Ross*, 42 F.3d at 999, 19 BLR at 2-21. However, in amending 20 C.F.R. §725.309, the Department adopted a threshold test effectuating the standard set forth in *Rutter*, 86 F.3d at 1362, 20 BLR at 2-235, which does not require a qualitative analysis of the old and new evidence. *See* 65 Fed. Reg. 79968 (Dec. 20, 2000); 64 Fed. Reg. 54984 (Oct. 8, 1999).

[8] Dr. Barrett, a B reader and a Board-certified radiologist, also read the April 18, 2006 x-ray. Director's Exhibit 20. However, Dr. Barrett did not read this x-ray for the presence or absence of pneumoconiosis.

radiologist, read the August 15, 2006 x-ray as positive for pneumoconiosis, Claimant's Exhibit 2, while Dr. Dahhan, a B reader, read this x-ray as negative, Director's Exhibit 21.

The administrative law judge reasonably found that the May 13, 2005 x-ray was in equipoise "[a]s the film was read by two dually-qualified physicians with contrary findings." Decision and Order at 25. In addition, the administrative law judge reasonably found that the April 18, 2006 x-ray was in equipoise "[a]s the film was read by four dually-qualified physicians with contrary findings." *Id*. Further, the administrative law judge reasonably found that the August 15, 2006 x-ray was positive for pneumoconiosis, based on the superior qualifications of a dually-qualified radiologist. The administrative law judge therefore concluded, "[g]iven that there is one positive x-ray, zero negative x-rays, and two x-rays in equipoise, I find that the chest x-ray evidence establishes the presence of pneumoconiosis." *Id*.

TWR asserts that the administrative law judge erroneously relied on the numerical superiority of the positive x-ray readings. Specifically, TWR argues that the administrative law judge erred in failing to weigh the prior x-rays that Judge Phalen found to be negative for pneumoconiosis. Contrary to TWR's assertion, the administrative law judge properly considered only the new x-rays at Section 725.309(d)(3). As discussed *supra*, a claimant establishes a change in an applicable condition of entitlement "only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement." 20 C.F.R. §725.309(d)(3). Thus, we reject TWR's assertion that the administrative law judge erred in failing to weigh the prior x-rays in this case at Section 718.202(a)(1), as a threshold matter. As we note, *infra*, in establishing entitlement, the administrative law judge considered both the old and new x-rays, permissibly giving greater weight to the latter.

TWR also asserts that the administrative law judge erred in failing to explain why he used an inconsistent approach to weighing Dr. Miller's x-ray readings, inasmuch as he credited the doctor's reading of the August 15, 2006 x-ray, but did not credit the doctor's reading of the April 18, 2006 x-ray. Contrary to TWR's assertion, the administrative law judge properly explained why he found that Dr. Miller's positive reading of the August 15, 2006 x-ray established the existence of pneumoconiosis at Section 718.202(a)(1). As discussed *supra*, the administrative law judge properly found that the April 18, 2006 x-ray was in equipoise because dually-qualified radiologists, Drs. Miller, Wiot and Meyer, read it as both positive and negative for pneumoconiosis. Additionally, the administrative law judge properly accorded greater weight to Dr. Miller's positive reading of the August 15, 2006 x-ray than to Dr. Dahhan's negative reading of this x-ray, based on Dr. Miller's superior qualifications as a dually-qualified radiologist. Thus, we reject TWR's assertion that the administrative law judge erred in applying an inconsistent approach to weighing Dr. Miller's x-ray readings.

TWR further asserts that the administrative law judge erred in excluding the negative readings of the March 1, 2007 x-ray by Drs. Wiot and Spitz under the criteria set forth at 20 C.F.R. §718.107. Specifically, TWR argues that the administrative law judge erred in applying the criteria set forth at 20 C.F.R. §718.107 because the evidence in the record does not support the administrative law judge's determination that the March 1, 2007 x-ray was a digital x-ray. TWR maintains that "[the administrative law judge] has relied upon Dr. Alexander's notation [that the film was a digital x-ray], but has given no valid reason for discounting the indications by Drs. Wiot and Spitz that the film simply was 'a PA and lateral chest x-ray' from Buchanan General Hospital." Employer's Brief in Support of Petition for Review at 30. We disagree.

Contrary to TWR's assertion, the administrative law judge reasonably found that the March 1, 2007 x-ray was a digital x-ray. Quoting *Webber v. Peabody Coal Co.*, 24 BLR 1-1 (2007)(*en banc*), *aff'g on recon.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring), the administrative law judge stated, "[a]lthough the reviewing physicians [Drs. Wiot and Spitz] apparently reviewed films, I note that 'while digital x-rays may be viewed on film, they are not captured on film.'" Decision and Order at 12. The administrative law judge reasonably determined that "the fact that the physicians examined films does not contradict Dr. Alexander's statement that the March 1, 2007, x-ray was a digital x-ray. Thus, we reject TWR's assertion that the evidence in the record does not support the administrative law judge's determination that the March 1, 2007 x-ray was a digital x-ray.

TWR also asserts that the March 1, 2007 x-ray was admissible as part of the miner's treatment records because it was obtained during the course of a hospitalization. Contrary to TWR's assertion, while Buchanan General Hospital was listed as the facility providing the roentgenographic examination, the record does not indicate that the March 1, 2007 x-ray was part of any records of the miner's hospitalization or treatment for a respiratory or pulmonary or related disease. *See* 20 C.F.R. §725.414(a)(4).

TWR additionally asserts that the March 1, 2007 x-ray was admissible pursuant to 20 C.F.R. §718.102(e) because the miner is deceased and qualified radiologists, Drs. Alexander, Wiot and Spitz, found the x-ray to be of sufficient quality. Section 718.102(e) provides that "[i]n the case of a deceased miner where the only available [x]-ray does not substantially comply with paragraphs (a) through (d), such [x]-ray may form the basis for a finding of the presence or absence of pneumoconiosis if it is of sufficient quality for determining the presence or absence of pneumoconiosis and such [x]-ray was interpreted by a Board-certified or Board-eligible radiologist or a certified 'B' reader." 20 C.F.R. §718.102(e). As noted by the administrative law judge, the miner died on June 30, 2008. However, the March 1, 2007 x-ray was not the only x-ray of record that could form the basis for a finding of the presence or absence of pneumoconiosis. Rather, as

noted above, the record consists of nine readings of three x-rays relevant to the presence or absence of pneumoconiosis. Consequently, we reject TWR's assertion that the March 1, 2007 x-ray is admissible pursuant to Section 718.102(e). The administrative law judge correctly found that, "[i]n this case, none of the physicians who reviewed the digital x-ray commented on the medical acceptability of digital x-rays or their relevance to diagnosing pneumoconiosis." Decision and Order at 13. Thus, the administrative law judge acted within his discretion in excluding the readings of the March 1, 2007 x-ray from the record. 20 C.F.R. §718.107(b); *Webber*, 24 BLR at 1-7-8.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new x-ray evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Furthermore, in view of our affirmance of the administrative law judge's finding that the new x-ray evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1),[9] we affirm the administrative law judge's finding that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

Turning to the merits of the case, TWR contends that the administrative law judge erred in finding that the x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). Specifically, TWR asserts that the administrative law judge erred in failing to weigh the negative x-ray interpretations from the prior claim. In considering the case on the merits, the administrative law judge noted that the most recent evidence in the prior claims was submitted approximately nine years before the current claim was filed. The administrative law judge stated that "[a] significant amount of medical evidence was submitted in the prior claims, including numerous x-ray interpretations and medical reports." Decision and Order at 30. The administrative law judge further stated, "because the other medical evidence from the prior claims is significantly older than the evidence submitted in this claim, I find that the

[9] The Board has long held that Section 718.202 provides four alternative methods for establishing the existence of pneumoconiosis, *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985), and has declined to extend the holding in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), and *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), outside of the jurisdiction of the United States Courts of Appeals for the Third and Fourth Circuits, respectively. *See Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-227 (2002)(*en banc*). Thus, in light of our affirmance of the administrative law judge's finding that the new x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), we need not address the administrative law judge's findings that the new medical opinion evidence established the existence of clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

evidence submitted in the current claim is the most probative of the [m]iner's condition." *Id*. Thus, the administrative law judge reasonably relied upon the more recent medical evidence because he found that it more accurately reflected the miner's ultimate condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985). Consequently, we reject TWR's assertion that the administrative law judge erred in failing to weigh the negative x-ray interpretations from the prior claim.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1).

TWR also contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4).[10] The administrative law judge considered the reports of Drs. Baker and Dahhan. Dr. Baker opined that the miner had coal workers' pneumoconiosis. Director's Exhibit 19. By contrast, Dr. Dahhan opined that the miner did not have coal workers' pneumoconiosis. Director's Exhibit 21; Employer's Exhibits 4-6. The administrative law judge found that Dr. Baker's opinion was well-documented and well-reasoned. The administrative law judge also found that Dr. Dahhan's opinion was well-documented. However, the administrative law judge found that Dr. Dahhan's opinion was not well-reasoned. Hence, the administrative law judge found that Dr. Baker's opinion that the miner had clinical pneumoconiosis outweighed Dr. Dahhan's contrary opinion.

TWR asserts that the administrative law judge erred in failing to consider the medical opinion evidence submitted in the prior claims with the medical opinion evidence submitted in the current claim. As discussed *supra*, the administrative law judge reasonably gave greater weight to the more recent medical evidence because he found that it more accurately reflected the miner's condition. *See Cooley*, 845 F.2d at 624, 11 BLR at 2-149; *Wetzel*, 8 BLR at 1-142 n.6; *Gillespie*, 7 BLR at 1-841. Consequently, we reject TWR's assertion that the administrative law judge erred in his

[10] As discussed *supra*, ordinarily, affirmance of the administrative law judge's finding that pneumoconiosis was established at Section 718.202(a)(1) would obviate the need to review his finding that the medical opinion evidence established the existence of pneumoconiosis at Section 718.202(a)(4). *See Dixon*, 8 BLR at 1-345. In this case, however, the administrative law judge's analysis of the medical opinion evidence regarding the existence of clinical and legal pneumoconiosis on the merits at Section 718.202(a)(4) affected his consideration of the disability causation issue at Section 718.204(c).

consideration of the medical evidence.

TWR also asserts that the administrative law judge erred in failing to provide a valid reason for according greater weight to Dr. Baker's opinion, that the miner had clinical pneumoconiosis, than to Dr. Dahhan's contrary opinion. TWR maintains that "[Dr. Baker's opinion] is not equivalent to a reasoned medical judgment under Section 718.202(a)(4)." Employer's Brief in Support of Petition for Review at 35. Dr. Baker diagnosed coal workers' pneumoconiosis based on "abnormal chest x-ray & coal dust exposure." Director's Exhibit 19. The administrative law judge noted that Dr. Baker's opinion that the miner had clinical pneumoconiosis was based "largely" on the doctor's positive reading of an x-ray dated April 18, 2006, which the administrative law judge found to be in equipoise. The administrative law judge also noted, based on his weighing of the x-ray evidence as a whole, that he found that the x-ray evidence established the existence of pneumoconiosis.[11] The administrative law judge therefore stated:

> Given his affirmative diagnosis of coal workers' pneumoconiosis with a profusion of 3/2 and the equivocal nature of his diagnosis of the Category B opacity, it is reasonable to conclude that his opinion regarding the etiology of the [m]iner's condition was based primarily on the former rather than the latter. Accordingly, because the x-ray findings relied upon by Dr. Baker are similar to those on the August 15, 2006 x-ray, I find Dr. Baker's opinion to be well-reasoned.

Decision and Order at 26.[12]

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[11] The administrative law judge noted: "[i]n particular, the August 15, 2006, x-ray was found to be positive for pneumoconiosis based on Dr. Miller's interpretation of that x-ray. Dr. Miller's reading contains findings similar to those relied upon by Dr. Baker, including small rounded and irregular opacities in all zones with a profusion on the border between Category 2 and Category 3 (2/3 on Dr. Miller's report and 3/2 on Dr. Baker's report.) (DX 19 at 1; CX 2.) The major difference between the two interpretations is Dr. Baker's finding of a large Category B opacity." Decision and Order at 27.

[12] After noting that Dr. Baker found a Category B opacity on his x-ray, the administrative law judge stated: "[h]owever, in his report, he diagnosed the [m]iner with 'Coal Workers['] Pneumoconiosis 3/2 with possible B opacity,' noting that a biopsy might be needed to evaluate the possible B opacity. (DX 19 at 3.) At no point in his opinion did he diagnose the [m]iner with complicated pneumoconiosis or pulmonary massive fibrosis." Decision and Order at 27.

In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 575-6, 22 BLR 2-107, 1-120 (6th Cir. 2000), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, agreed with an administrative law judge's assertion that a diagnosis of pneumoconiosis that was based on an x-ray and a history of coal dust exposure was not a reasoned medical opinion at Section 718.202(a)(4). Because Dr. Baker's opinion is insufficient to establish *clinical* pneumoconiosis, as it was based only on an x-ray reading and a history of coal dust exposure, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4).[13] *Cornett*, 227 F.3d at 575-6, 22 BLR at 1-120.

TWR additionally contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Dr. Baker opined that the miner had chronic obstructive pulmonary disease (COPD), severe resting arterial hypoxemia, and chronic bronchitis related to coal dust exposure and cigarette smoking. Director's Exhibit 19. By contrast, Dr. Dahhan opined that the miner did not have any pulmonary impairment related to coal dust exposure. Director's Exhibit 21; Employer's Exhibits 4, 5. The administrative law judge found that the miner's hypoxemia was related to coal dust exposure based on Dr. Baker's opinion, rather than Dr. Dahhan's opinion, because he found that Dr. Dahhan did not discuss the etiology of this impairment. The administrative law judge noted that Dr. Dahhan's opinion, that the miner's ventilatory impairment was not related to coal dust exposure, was based on objective test results, personal and occupational histories, as well as general scientific facts and medical literature. Nevertheless, the administrative law judge found that Dr. Dahhan's opinion was inconsistent with the scientific evidence that was accepted by the Department. Specifically, the administrative law judge found that "Dr. Dahhan's opinion that industrial bronchitis necessarily resolves after a miner leaves the mines is in conflict with the scientific evidence credited by [the Department]."[14] Decision and Order at 28. The administrative law judge also found that Dr. Dahhan's opinion, that an obstructive defect was not usual for a pulmonary disability induced by

[13] In view of our disposition of the case with regard to Dr. Baker's opinion, we need not address TWR's assertion that the administrative law judge erred in weighing Dr. Dahhan's opinion that the miner did not have clinical pneumoconiosis.

[14] The administrative law judge stated: "Dr. Dahhan noted that the [m]iner had not been exposed to coal dust for 15 years and that any industrial bronchitis would have resolved by the time of the [m]iner's evaluation. (DX 21 at 3.) However, [the Department] rejected a similar argument regarding the progressive nature of industrial bronchitis." Decision and Order at 28. The administrative law judge further stated that the Department "not[ed] that there was evidence that lung function could continue to deteriorate after a miner left the coal mining industry." *Id.*

coal dust, was inconsistent with medical literature credited by the Department. The administrative law judge also found that "Dr. Dahhan did not adequately explain why the [m]iner's responsiveness to treatment with bronchodilators necessarily eliminated a finding of legal pneumoconiosis or why he believes that coal dust exposure did not exacerbate the [m]iner's allegedly non-dust-related impairment." *Id*. at 29. In addition, the administrative law judge found that Dr. Dahhan's suggestion, that coal mine dust exposure does not often cause an obstructive abnormality in the absence of complicated pneumoconiosis or progressive massive fibrosis, was inconsistent with the medical literature credited by the Department. The administrative law judge further stated that "Dr. Dahhan did not offer any explanation as to why the [m]iner's type of obstructive impairment would only manifest from coal mine dust exposure if he suffered from complicated pneumoconiosis." *Id*. at 30. Hence, the administrative law judge concluded that Dr. Baker's opinion that the miner had legal pneumoconiosis was well-documented and well-reasoned, and he gave the doctor's opinion greater weight than Dr. Dahhan's contrary opinion.

TWR asserts that the administrative law judge erred in applying different standards to the opinions of Drs. Baker and Dahhan. TWR maintains that the administrative law judge imposed a heavier burden on Dr. Dahhan to explain his medical judgment regarding the presence of legal pneumoconiosis than he imposed on Dr. Baker. The APA requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge failed to subject all of the conflicting medical opinions to the same scrutiny, as he discounted Dr. Dahhan's opinion for failing to adequately explain why coal dust was not a contributing or aggravating factor in the miner's respiratory impairment, while crediting Dr. Baker's opinion, that the miner's respiratory impairment was due to coal dust and smoking, without requiring a similarly detailed explanation as to why coal dust exposure was a contributing factor. *See Hughes*, 21 BLR at 1-139-40. We find merit in TWR's argument that the administrative law judge failed to provide an adequate explanation for finding Dr. Baker's opinion to be well-reasoned, well-documented, and sufficient to establish the existence of legal pneumoconiosis. *See Wojtowicz*, 12 BLR at 1-165; *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). While Dr. Baker opined that coal dust exposure was a substantially contributing factor in the miner's COPD and respiratory impairment, the administrative law judge did not explain how Dr. Baker's conclusions were supported by his medical findings. The administrative law judge also failed to explain why he credited Dr. Baker's opinion over Dr. Dahhan's contrary opinion. *Id*. Further, the administrative law judge did not explain how Dr. Baker, who based his opinion on the miner's symptoms and his smoking, employment and medical histories, was better able to link his general medical determinations with the miner's individual circumstances, than was Dr. Dahhan, who also examined the miner and relied on the miner's symptoms and his smoking, employment and medical histories,

in opining that the miner's respiratory impairment was due solely to smoking. *Id*. Thus, because the administrative law judge applied an inconsistent standard when assessing the credibility of the medical opinions, the administrative law judge's finding that Dr. Baker's opinion outweighed Dr. Dahhan's contrary opinion cannot be affirmed. *See Hughes*, 21 BLR at 1-139-40. Consequently, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for further consideration of all the medical opinion evidence, in accordance with the APA.

TWR further contends that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge considered the reports of Drs. Baker and Dahhan. Dr. Baker opined that the miner's clinical and legal pneumoconiosis contributed to his respiratory impairment,[15] Director's Exhibit 19, while Dr. Dahhan opined that the miner's respiratory impairment did not result from clinical or legal pneumoconiosis,[16] Director's Exhibit 21; Employer's Exhibits 4, 5. At Section 718.204(c), the administrative law judge stated:

> Both Dr. Baker and Dr. Dahhan opined that the [m]iner was totally disabled, and [TWR] does not contest this finding. Dr. Baker opined that the [m]iner's coal workers' pneumoconiosis, [COPD], severe resting arterial hypoxemia, and chronic bronchitis all had a material adverse effect on his respiratory condition and contributed to his impairment. Dr. Dahhan attributed the [m]iner's total disability to his obstructive impairment. As discussed above, I have found that the [m]iner's [COPD], hypoxemia, and chronic bronchitis qualify as legal pneumoconiosis. Accordingly, I find that the medical evidence establishes that the [m]iner was totally disabled due to pneumoconiosis.

Decision and Order at 31.

[15] Dr. Baker opined that the miner's coal workers' pneumoconiosis and COPD with moderate obstructive ventilatory defect, severe resting arterial hypoxemia and chronic bronchitis had a material adverse effect on his respiratory condition and contributed to his impairment. Director's Exhibit 19. Dr. Baker also opined that, although the miner's impairment had been caused primarily by his cigarette smoking history, "there [had] been a significant contribution from his coal dust exposure as well with advanced pneumoconiosis present on his x-ray." *Id*.

[16] Dr. Dahhan opined that "[the miner's] respiratory impairment has not resulted from the inhalation of coal dust or coal workers' pneumoconiosis." Director's Exhibit 21.

Because we herein vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) and remand the case for further consideration of all the evidence in accordance with the APA.[17]

If reached, on remand, the administrative law judge must consider the evidence in accordance with the disability causation standard set forth at 20 C.F.R. §718.204(c).[18] *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). The administrative law judge must specifically consider whether clinical or legal pneumoconiosis contributed to the miner's totally disabling respiratory impairment at 20 C.F.R. §718.204(c).

At the outset, however, the administrative law judge must consider whether claimant is entitled to the presumption at Section 411(c)(4) of the Act, as the miner's most recent claim (a subsequent claim) was filed after January 1, 2005, and the administrative law judge credited the miner with 18.04 years of coal mine employment and accepted the parties' stipulation that the miner had a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4). If the administrative law judge finds that claimant is entitled to the presumption that the miner was totally disabled due to pneumoconiosis at

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[17] While the administrative law judge found that the evidence established that the miner had clinical pneumoconiosis, he did not make a finding on the issue of whether the miner's totally disabling respiratory impairment was due to clinical pneumoconiosis.

[18] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> > (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> >
> > (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

Section 411(c)(4), the administrative law judge must then determine whether TWR has rebutted the presumption by establishing that the miner's "respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." *Id*. On remand, the administrative law judge must allow for the submission of additional evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Further, any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, the proponent of this evidence must establish good cause for its admission. 20 C.F.R. §725.456(b)(1).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge