BRB No. 02-0648 BLA

JIMMIE D. BUCHANAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RAG AMERICAN COAL COMPANY	)	
	)	DATE ISSUED: 08/29/2003
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis and Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

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

Barry H. Joyner (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (00-BLA-0498) of Administrative Law Judge Rudolf L. Jansen 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] The instant case involves a duplicate claim filed on August 27, 1998.[2] After crediting claimant with twenty years of coal mine employment, the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(1)-(3). The administrative law judge, however, found that the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(4). The administrative law judge, therefore, found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. '725.309 (2000). The administrative law judge further found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. '718.203(b). The administrative law judge also found that the evidence was sufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. '718.204(b) and (c). Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the

[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 relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on July 29, 1993. Director=s Exhibit 34. By Decision and Order dated June 25, 1996, Administrative Law Judge J. Michael O=Neill found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(1)-(4) (2000). *Id.* Judge O=Neill also found that the record was Aconvincing that even if the claimant had never worked in surface coal mines but had worked in an unpolluted environment, he would be disabled today because of cigarette-smoke-induced emphysema and bronchitis, together with chronic back pain and somewhat limited range of motion.@ *Id.* Judge O=Neill also found that the evidence was insufficient to establish that claimant was totally disabled due to pneumoconiosis. *Id.* Accordingly, Judge O=Neill denied benefits. *Id.* By Decision and Order dated July 18, 1997, the Board affirmed Judge O=Neill=s findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(1)-(4) (2000). *Buchanan v. Amax Coal Co.*, BRB No. 96-1415 BLA (July 18, 1997) (unpublished). There is no indication that claimant took any further action in regard to his 1993 claim.

Claimant filed a letter concerning benefits under the Black Lung Benefits Act on August 27, 1998. Director=s Exhibit 1. By letter dated August 28, 1998, the Department of Labor advised claimant that his letter was considered an intent to file a claim and would protect his entitlement to benefits back to the date it was received, provided that claimant completed and filed a required Department of Labor claim form within six months. Director=s Exhibit 2. Because claimant filed the required claim form on September 14, 1998, *see* Director=s Exhibit 3, his second claim is considered to have been filed on August 27, 1998.

administrative law judge erred in finding the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. ' 725.309 (2000). Employer also argues that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. ' 718.202(a)(4). Employer further contends that the administrative law judge erred in finding the evidence sufficient to establish that claimant=s total disability was due to pneumoconiosis pursuant to 20 C.F.R. ' 718.204(c).[3] Citing the decision of the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), employer also argues that the administrative law judge erred in awarding benefits because claimant was disabled by a prior non-compensable condition. Claimant responds in support of the administrative law judge=s award of benefits. The Director, Office of Workers= Compensation Programs (the Director), has filed a limited response, contending that the administrative law judge applied the proper material change standard pursuant to 20 C.F.R. ' 725.309 (2000). The Director further notes his disagreement with employer=s contention that legal pneumoconiosis can never be latent or progressive. The Director also asserts that a medical opinion which states that a miner=s obstructive lung condition cannot be attributed to coal mine employment because such employment will never give rise to an obstructive condition is not credible and should be rejected. In a reply brief, employer reiterates its previous contentions.[4]

[3] 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).

[4] Inasmuch as no party challenges the administrative law judge=s finding of twenty years of coal mine employment or his findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. ' 718.202(a)(1)-(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. ' 921(b)(3), as incorporated by 30 U.S.C. ' 932(a); *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in finding the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. ' 725.309 (2000).[5] In *Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991), the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction the instant case arises, held that a material change in conditions means either that the miner did not have black lung disease at the time of the first application but has since contracted it and become totally disabled by it, or that his disease has progressed to the point of becoming totally disabling although it was not at the time of the first application.

In *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997), the Seventh Circuit addressed the evidence that a miner must produce in order to win the right to proceed on a second or subsequent claim. Noting that it had been Amisunderstood in some quarters,@ the Seventh Circuit discussed the scope of its decision in *McNew*. The Seventh Circuit explained that:

> The key point is that the claimant cannot simply bring in new evidence that addresses his condition at the time of the earlier denial. His theory of recovery on the new claim must be consistent with the assumption that the original denial was correct. To prevail on the new claim, therefore, the miner must show that something capable of making a difference has changed since the record closed on the first application. As we said in [*McNew*], if the earlier denial was premised on a failure to show pneumoconiosis, the material change could be evidence showing that the disease has now manifested itself. If the earlier denial was premised on a failure to show total disability, even if the claimant had a mild case of pneumoconiosis, then the material change would need to relate to severity of the disability.

Spese, 117 F.3d at 1008, 21 BLR at 2-127.

In regard to the Director=s Aone-element@ test, the Seventh Circuit stated that:

> If by that the Director means that at least one element that might independently have supported a decision against the claimant has now been shown to be

[5]Although Section 725.309 has been revised, these revisions apply only to claims filed after January 19, 2001.

> different (implying that the earlier denial was correct), then we would agree that the Aone-element@ test is the correct one. If the Director means something more expansive, his position would go beyond the principles of res judicata that are reflected in '725.309(c) and that we endorsed in [*McNew]*.

Spese, 117 F.3d at 1009, 21 BLR at 2-128.

Administrative Law Judge J. Michael O=Neill denied claimant=s prior 1993 claim because he found, *inter alia*, that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(1)-(4) (2000), Director=s Exhibit 34, findings subsequently affirmed by the Board. *Buchanan v. Amax Coal Co.*, BRB No. 96-1415 BLA (July 18, 1997) (unpublished). Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. '725.309 (2000), the newly submitted evidence must support a finding of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(1)-(4).

Employer contends that the administrative law judge, in finding the evidence sufficient to establish a material change in conditions, erred in not determining whether claimant=s Acondition had actually worsened since the time of the last denial.@ Employer=s Brief at 10. Contrary to employer=s contention, the administrative law judge, in his consideration of whether the evidence was sufficient to establish a material change in conditions, applied the proper material change standard set out in *Spese, i.e.*, whether the newly submitted evidence was sufficient to establish the existence of pneumoconiosis.

Employer also argues that although Aclinical@ pneumoconiosis may progress in rare cases after cessation of coal dust exposure, no basis exists for the notion that Alegal@ pneumoconiosis can so progress. Employer=s Brief at 11. Employer argues that the administrative law judge erred in assuming that claimant could contract Alegal@ pneumoconiosis after he stopped working in the mines. *Id.* We disagree. Employer provides no basis for his assertion that Alegal@ pneumoconiosis cannot be latent or progressive. As the Director points out, the regulations, like the prior case law that they codify, recognize that pneumoconiosis is a progressive disease. 20 C.F.R. '718.201(c); s*ee Amax Coal Co. v. Franklin*, 957 F.2d 355, 359, 16 BLR 2-50, 2-57 (7th Cir. 1992) (Black lung disease, at least when broadly defined, is a progressive disease....). The United States Court of Appeals for the District of Columbia has recognized that the medical literature makes clear that pneumoconiosis may be latent and progressive. *Nat=l Mining Ass=n v. Department of Labor*, 292 F.3d 849, 863, --- BLR --- (D.C. Cir. 2002), *aff=g in part and rev=g in part Nat=l Mining Ass=n v. Chao*, 160 F. Supp.2d 47, --- BLR --- (D.D.C. 2001).

Employer next argues that the administrative law judge committed numerous errors in finding the newly submitted medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(4). A finding of either clinical

pneumoconiosis, *see* 20 C.F.R. '718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. '718.201(a)(2),
[6] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(4).
[7]

In finding the newly submitted medical opinion evidence sufficient to establish the existence of pneumoconiosis, the administrative law judge credited Dr. Houser=s opinion that claimant suffered from Alegal@ pneumoconiosis (chronic obstructive pulmonary disease due to both cigarette smoking and coal dust exposure) over the contrary opinions of Drs. Fino, Renn and Tuteur. Decision and Order at 17-19. The administrative law judge explained that:

> Dr. Houser, who not only is a board-certified pulmonary specialist, but who has treated [claimant] for his respiratory condition since 1992, consistently diagnosed coal workers= pneumoconiosis. Dr. Houser=s last report is dated November of 2000, for a total of five office visits during that year as of the date of his letter. This is the most recent examination and medical opinion of

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[6] ALegal pneumoconiosis@ includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. '718.201(a)(2).

[7] In this case, the administrative law judge did not separately address whether the medical opinion evidence was sufficient to establish clinical and legal pneumoconiosis. For example, Dr. Houser diagnosed clinical pneumoconiosis (coal workers= pneumoconiosis, category 1) and legal pneumoconiosis (chronic obstructive pulmonary disease attributable to cigarette smoking and coal dust exposure). Claimant=s Exhibit 2. The administrative law judge focused upon whether the evidence was sufficient to establish the existence of legal pneumoconiosis. *See* Decision and Order at 17-19. On remand, the administrative law judge should address whether the evidence is sufficient to establish either clinical or legal pneumoconiosis.

> record. Therefore, I assign the greatest probative weight to Dr. Houser=s opinion, because of his specialty in the area of pulmonary disease, because of his familiarity with the patient=s pulmonary condition, and because of the recency of his examination and accompanying report.

Decision and Order at 17.

Employer initially contends that the administrative law judge erred in failing to explain why Dr. Houser=s status as claimant=s treating physician entitled his opinion to greater weight than the contrary opinions of Drs. Fino, Renn and Tuteur. The United States Court of Appeals for the Seventh Circuit has rejected a mechanical rule that the views of a treating physician must prevail. *Consolidation Coal Co. v. OWCP*, [*Sisson*], 54 F.3d 434, 19 BLR 2-155 (7th Cir. 1995). The Seventh Circuit has held that Ait is irrational to prefer the opinion of the treating physician, who is often not a specialist, over the opinion of a nontreating specialist *solely* because one physician is the treating physician.@ *Peabody Coal Co. v. Director, OWCP* [*Railey*], 972 F.2d 178, 180, 16 BLR 2-121, 2-126 (7th Cir. 1992) (emphasis in original). The Seventh Circuit has also noted that A[t]reating physicians often succumb to the temptation to accommodate their patients (and their survivors) at the expense of third parties such as insurers, which implies attaching a discount rather than a preference to their views.@ *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001).[8]

[8] In *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001), the

Seventh Circuit explained that:

> The ALJ must have a medical reason for preferring one physician=s conclusion over another=s. In this case the ALJ recognized that the treating physician=s views may not be accepted unless there is good reason to believe that they are accurate. The ALJ thought he had such a reason: Dr. Gelhausen was [the miner=s] treating physician, and treating physicians are (by definition) familiar with patients= medical condition during life. That=s just a restatement of the preference. Circular reasoning cannot avoid the rule. If there is a reason why Dr. Gelhausen=s observations have medical significance, that=s one thing: but the fact that [Dr.] Gelhausen examined [the miner] before his death does not demonstrate that [the miner] was disabled by pneumoconiosis. Dr. Gelhausen=s *beliefs* must be supported by medial *reasons* if they are to be given legal effect.

McCandless, 255 F.3d at 469-470, 22 BLR at 2-318-319 (7th Cir. 2001) (emphasis in original).

In the instant case, the administrative law judge failed to explain how Dr. Houser=s status as claimant=s treating physician provided him with an advantage over the other physicians of record in addressing the etiology of claimant=s chronic obstructive pulmonary disease. Consequently, this basis for according greater weight to Dr. Houser=s opinion cannot stand.

The administrative law judge also accorded greater weight to Dr. Houser=s opinion based upon his Aspecialty in the area of pulmonary disease.@ Decision and Order at 17. An administrative law judge may properly accord greater weight to a physician=s opinion based upon the physician=s superior qualifications. Dillon v. Peabody Coal Co., 11 BLR 1-113 (1988). Dr. Houser is Board-certified in Internal Medicine and Pulmonary Disease. Claimant=s Exhibit 2. However, as the administrative law judge accurately acknowledged, Drs. Fino, Renn and Tuteur are also Board-certified in Internal Medicine and Pulmonary Disease. Decision and Order at 18; Employer=s Exhibits 5, 7, 9. Consequently, the administrative law judge erred to the extent that he credited Dr. Houser=s opinion over the contrary opinions of Drs. Fino, Renn and Tuteur based upon Dr. Houser=s superior qualifications.

Employer also contends that the administrative law judge erred in according greater weight to Dr. Houser=s opinion because he conducted the most recent physical examination. An administrative law judge may properly accord greater weight to the opinion of a physician based upon the recency of his physical examination. *See Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985). However, as employer notes, Drs. Fino, Renn and Tuteur based their respective opinions upon comprehensive reviews of the medical evidence of record. The administrative law judge failed to explain how Dr. Houser=s recent physical examinations provided him with an advantage over the other physicians of record. Consequently, the administrative law judge erred in according greater weight to Dr. Houser=s opinion based upon the fact that he conducted the most recent physical examination.

Employer also contends that the administrative law judge erred in finding that Dr. Shoemaker=s reports and opinions were supportive of Dr. Houser=s final determinations surrounding claimant=s respiratory diagnosis. See Decision and Order at 18. We agree. Because Dr. Shoemaker did not attribute any of claimant=s lung diseases to his coal dust exposure, see Claimant=s Exhibit 2; Employer=s Exhibits 1, 2, his opinions do not support Dr. Houser=s opinion that claimant=s chronic obstructive pulmonary disease was attributable to coal dust exposure.

Employer next contends that the administrative law judge erred in his consideration of the opinions of Drs. Cohen and Hinkamp.

[9] Employer asserts that the administrative law judge failed to scrutinize these opinions Ain any meaningful way.@ Employer=s Brief at 14. Because the administrative law judge accorded the greatest weight to Dr. Houser=s opinion, he did not address the credibility or weight that he accorded the opinions of Drs. Cohen and Hinkamp. On remand, the administrative law judge is instructed to address the weight afforded the opinions of Drs. Cohen and Hinkamp, as well as all of the other relevant evidence.

Employer finally argues that the administrative law judge erred in discrediting the opinions of Drs. Fino, Renn and Tuteur that claimant did not suffer from pneumoconiosis. The administrative law judge stated that:

[Drs. Fino, Renn and Tuteur] provided reports that were quite detailed and which relied on several medical studies and various medical literature which were of the thought that pneumoconiosis was seldom revealed in an obstructive disease, and that, in cases where miner were long-term smokers, any obstructive disease was a result of only the tobacco smoke rather than an exposure to coal dust. However, the Seventh Circuit has reviewed studies of this nature, has specifically considered Dr. Fino=s arguments to this effect, and has determined that this medical view is not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature. Freeman Coal Mining Co. v. Summers, F.3d , Case No. 01-1430 (7th Cir. 2001). Rather, the Board has

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[9] Dr. Cohen reviewed the medical evidence. In a report dated April 18, 1999, Dr. Cohen opined that claimant suffered from coal workers= pneumoconiosis. Director=s Exhibit 20. Dr. Cohen also opined that claimant suffered from obstructive lung disease attributable to his coal dust exposure and cigarette smoking. *Id.* In a supplemental report dated November 6, 2000, Dr. Cohen indicated that it was still his opinion that claimant suffered from coal workers= pneumoconiosis. Claimant=s Exhibit 1. Dr. Cohen further stated that:

> It continues to be my opinion that [claimant=s] severe COPD is the result of both his approximately 20 years of coal dust exposure ending in 1993 and his history of at least one pack per day of cigarette smoking ending in 1994. The large number of x-ray interpretations which are negative for Aclassical@ pneumoconiosis do not change my opinion.

Claimant=s Exhibit 1.

Dr. Hinkamp reviewed the medical evidence and submitted an undated consultative opinion. Claimant=s Exhibit 4. Dr. Hinkamp opined, *inter alia*, that Acigarette smoking and occupational coal dust exposure both contributed substantially to [claimant=s] unfortunate severe respiratory disability.@ Claimant=s Exhibit 4.

held that chronic bronchitis and emphysema fall within the definition of pneumoconiosis if they are related to a claimant=s coal mine employment, as Drs. Cohen, Houser and Hinkamp believed it was in [claimant=s] case. See Huges [sic] v. Clinchfield Coal Co., 21 BLR 1-134, 1-139 (1999). For this reason and the reason that Drs. Renn, Tuteur and Fino are not as familiar with [claimant=s] pulmonary condition as Dr. Houser, I assign less weight to those three doctors= reports and opinions.

Decision and Order at 18.

The administrative law judge relied upon *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001) to discredit Dr. Fino=s opinion. In *Summers*, the Seventh Circuit held that it was Arational to discount Dr. Fino=s opinions, based on a finding that they were not supported by adequate data or sound analysis.@ 272 F.3d at 483, 22 BLR at 2-281. The Seventh Circuit further noted that:

> Dr. Fino stated in his written report of August 30, 1998 that Athere is no good clinical evidence in the medical literature that coal dust inhalation in and of itself causes significant obstructive lung disease.@ (Br. Supp. Pet. Modif=n at 23 (March 10, 1999)). During a rulemaking proceeding, the Department of Labor considered a similar presentation by Dr. Fino and concluded that his opinions Aare not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature.@ 65 Fed.Reg. 79,920, 79,939 (Dec. 20, 2000).

Summers, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7.

The administrative law judge, in this case, failed to explain what particular statements made by Drs. Fino, Renn and Tuteur were Anot in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature.@ Consequently, the administrative law judge=s analysis of the evidence does not comply with the requirements of the Administrative Procedure Act, specifically 5 U.S.C. '557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact,

law or discretion presented in the record.[10] 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, we instruct the administrative law judge, on remand, to provide a basis for his finding that any particular physician=s views are not in accord with the medical and scientific literature.

In light of the above-referenced errors, we vacate the administrative law judge=s finding that the newly submitted medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(4). Because the administrative law judge=s finding of a material change in conditions was based upon his finding pursuant to 20 C.F.R. '718.202(a)(4), we also vacate the administrative law judge=s finding pursuant to 20 C.F.R. '725.309 (2000).

[10] Even if the administrative law judge had properly found that Drs. Fino, Renn and Tuteur expressed opinions hostile to the Act, the Seventh Circuit has held that a physician=s expression of a view that is at odds with the Act is not enough by itself to exclude that opinion from consideration. Rather, the administrative law judge must determine whether, and to what extent, the hostile opinion affected the physician=s medical diagnoses. *See Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987); *see also Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

Employer also argues that the administrative law judge erred in finding the evidence sufficient to establish that claimant=s total disability was due to pneumoconiosis pursuant to 20 C.F.R. '718.204(c).[11] In light of our decision to vacate the administrative law judge=s finding pursuant to 20 C.F.R. '718.202(a)(4), we also vacate the administrative law judge=s finding that the evidence is sufficient to establish that claimant=s total disability was due to pneumoconiosis pursuant to 20 C.F.R. '718.204(c).[12]

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[11] Revised 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 Asubstantially 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); *see also Shelton v. Director, OWCP*, 899 F.2d 690, 693, 13 BLR 2-444, 2-448 (7th Cir. 1990); *Hawkins v. Director, OWCP*, 906 F.2d 697, 14 BLR 2-17 (7th Cir. 1990).

[12] In his consideration of whether the evidence was sufficient to establish that claimant=s total disability was due to pneumoconiosis pursuant to 20 C.F.R. '718.204(c), the administrative law judge stated that:

> For the same reasons that I assigned greater probative weight to the opinions of Drs. Houser and Cohen and assigned less weight to the opinions of Drs. Renn, Tuteur and Fino in concluding that [c]laimant has shown the existence of pneumoconiosis, I assign these doctors= reports the same probative value in resolving the issue of whether [c]laimant is totally disabled due to the disease. Specifically, I find that Dr. Houser, as a specialist and as [c]laimant=s treating pulmonary physician, is able to provide the most comprehensive and reliable opinion about [c]laimant=s progress and current respiratory condition. Dr. Cohen, another pulmonary specialist, provided a well-reasoned and well-documented opinion supporting Dr. Houser=s assessment. Dr. Shoemaker=s notations of [claimant=s] frequent hospitalizations of late verify that he has had several Aacute@ exacerbations of his chronic pulmonary disease and has progressively worsened over the last four or five years. Weighing this

evidence together, I find that Claimant has established he in now totally disabled due to pneumoconiosis as defined under ' 718.204.

Decision and Order at 21.

Citing to the decision of the Seventh Circuit in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), employer finally argues that the administrative law judge erred in awarding benefits because claimant was disabled by a Anon-compensable condition@ prior to becoming totally disabled from a respiratory standpoint.[13] In *Vigna*, the Seventh Circuit held that a claimant=s entitlement was precluded by a disabling stroke which was unrelated to coal mine employment and occurred before any evidence of disability due to pneumoconiosis. The administrative law judge has not addressed whether claimant=s entitlement to benefits is precluded by a preexisting totally disabling impairment. Consequently, on remand, the administrative law judge is instructed to address whether claimant=s entitlement to benefits is precluded by a preexisting nonpulmonary or nonrespiratory condition or disease pursuant to *Vigna*.

[13] Revised regulation 718.204(a) provides that Aany 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 purpose and effect of this rule was to overrule the Seventh Circuit=s decision in *Vigna*. However, the United States Court of Appeals for the District of Columbia has held that the revised regulation set out at 20 C.F.R. '718.204(a) is impermissibly retroactive as applied to pending cases. *Nat=l Mining Ass=n v. Department of Labor*, 292 F.3d 849, 864, --- BLR --- (D.C. Cir. 2002), *aff=g in part and rev=g in part Nat=l Mining Ass=n v. Chao*, 160 F. Supp.2d 47, --- BLR --- (D.D.C. 2001). The Court explained that the effect of its ruling was to Aleave the state of the law on this question exactly as it was prior to the regulations= promulgation for cases that already been filed when the regulations were promulgated.@ *Id.* Thus, the revised regulation at 20 C.F.R. '718.204(a) is not applicable to the instant case.

Accordingly, the administrative law judge's Decision and Order denying 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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BETTY JEAN HALL
Administrative Appeals Judge