BRB No. 05-0872 BLA

MICHAEL LOUIS BELLITTS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JEDDO HIGHLAND COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 08/15/2006
LACKAWANNA CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Maureen E. Herron (Cipriani & Werner, P.C.), Scranton, Pennsylvania, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand denying benefits (02-BLA-5339) of Administrative Law Judge Janice K. Bullard on a miner's subsequent 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). This case is before the Board for the second time. Initially, the administrative law judge credited the miner with twenty-nine years and two months of coal mine employment.[2] Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge, therefore, found that claimant demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309. Reviewing the entire record, the administrative law judge determined that the medical evidence failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

In response to claimant's appeal and employer's cross-appeal, the Board vacated the administrative law judge's denial of benefits and remanded the case for further consideration. *Bellitts v. Jeddo Highland Coal Co.*, BRB Nos. 04-0181 BLA, 04-0181 BLA-A (Nov. 30, 2004)(unpub.). Specifically, the Board vacated the administrative law

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[1]Claimant's initial application for black lung benefits, filed with the Social Security Administration on October 20, 1971, was finally denied by a district director with the Department of Labor (DOL) on May 21, 1980. Director's Exhibit 1. Claimant's second application for benefits, filed on February 19, 1991, was denied on April 12, 1991 by a DOL claims examiner. *Id*. Claimant requested a hearing before the Office of Administrative Law Judges, where Administrative Law Judge Robert D. Kaplan dismissed his claim on February 12, 1992, because claimant failed to attend the hearing without good cause for his absence. *See* 20 C.F.R. §725.465(a) (2000). Prior to the dismissal, in his Order to Show Cause, Judge Kaplan noted that an order of dismissal has the same effect as a decision and order disposing of the claim on its merits, citing 20 C.F.R. §725.466(a) (2000). On June 22, 2001, claimant filed his present claim, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309; Director's Exhibit 3. The district director denied benefits and claimant requested a hearing, Director's Exhibits 20, 21, which was held before the administrative law judge on January 8, 2003.

[2]The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

judge's finding of pneumoconiosis pursuant to Section 718.202(a)(1) because she (1) improperly "discounted negative x-ray readings based on some readers' notations that the x-ray film quality was of a lower category;" (2) mischaracterized Dr. Gaia's radiological qualifications by noting that he is a Board-certified radiologist and a B reader, when Dr. Gaia is a Board-certified radiologist only; (3) mischaracterized Dr. Navani's reading of the October 17, 2001 x-ray as negative for the existence of pneumoconiosis when this physician merely rated the x-ray's quality. *Id.* The Board also vacated the administrative law judge's weighing of the medical opinion evidence at Section 718.202(a)(4) and her weighing of all the relevant evidence together at Section 718.202(a) because these findings were based on her flawed Section 718.202(a)(1) findings. *Id.* Additionally, the Board vacated the administrative law judge's Section 718.204(b)(2)(i) finding because she failed to consider whether the pulmonary function studies dated October 23, 2001 and March 19, 2002 substantially complied with the quality standards. *Id.* Moreover, the Board vacated the administrative law judge's Section 718.204(b)(2)(iv) finding and instructed her on remand to reconsider the opinions of Drs. Kraynak and Dittman. *Id.* In response to the request of the Director, Office of Workers' Compensation Programs (the Director), to be allowed to submit a supplemental opinion from Dr. Talati, the Board noted that it is within the administrative law judge's discretion to reopen the record on remand. *Id.*

On remand, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). The administrative law judge also found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), but failed to establish that his total disability is due to pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge denied benefits.

In the present appeal, claimant asserts that the administrative law judge erred in weighing the medical evidence pursuant to Section 718.202(a)(1) and (a)(4). Additionally, claimant asserts that the administrative law judge erred in failing to find total disability due to pneumoconiosis pursuant to Section 718.204(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits.[3] The Director has declined to participate in 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 rational, supported by substantial evidence,

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[3]Employer filed a cross-appeal with the Board, which was assigned BRB No. 05-0872 BLA-A. By Order dated September 7, 2005, the Board dismissed employer's cross-appeal as untimely filed.

and 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).

SECTION 718.202(a)(1)

Claimant initially contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The administrative law judge considered the new x-ray evidence, consisting of twelve readings of three x-rays, taken on October 17, 2001, January 14, 2002, and March 19, 2002. Regarding the October 17, 2001 x-ray, the administrative law judge noted that Dr. Gaia, a Board-certified radiologist, read this x-ray as positive for the existence of pneumoconiosis, that Drs. Ahmed and Cappiello, who are both B readers[4] and Board-certified radiologists, read this x-ray as positive for the existence of pneumoconiosis, and that Drs. Soble and Duncan, who are both B readers and Board-certified radiologists, found this x-ray to be negative.[5] The administrative law judge found that the x-ray readers who are dually qualified are "entitled to greater weight than Dr. Gaia's interpretation" and, therefore, found "evidence regarding this x-ray in equipoise." Decision and Order on Remand at 4. The administrative law judge next noted that the January 14, 2002 x-ray was interpreted as positive by Dr. Cappiello and negative by Dr. Soble. After noting that both Drs. Cappiello and Soble are dually qualified, the administrative law judge also found the evidence regarding the January 14, 2002 x-ray to be in equipoise. Finally, the administrative law judge noted that Drs. Miller and Cappiello, who are both B readers and Board-certified radiologists, read the March 19, 2002 x-ray as positive for the existence of pneumoconiosis, and that Drs. Soble and Duncan, who are also dually qualified, found this x-ray to be negative. Therefore, the administrative law judge found the evidence regarding the March 19, 2002 x-ray to be in equipoise. The administrative law judge concluded that the new x-ray evidence is in equipoise and that, as a result, "Claimant has not met his burden in establishing the existence of pneumoconiosis through x-ray evidence." *Id.*

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[4]A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[5]The administrative law judge also noted that Dr. Navani read the October 17, 2001 x-ray for film quality only. Decision and Order on Remand at 4.

Claimant asserts that the administrative law judge, in finding the x-ray evidence to be equipoise, abrogated her responsibilities under the Administrative Procedure Act to provide a reasoned explanation for her decision. *See* 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). Claimant further contends that the administrative law judge erred in placing substantial weight on the numerical superiority of the x-ray readings and that she failed to discuss what weight, if any, she gave to Dr. Gaia's positive x-ray interpretation. We reject claimant's assertions. Prior to finding the x-ray evidence to be in equipoise, the administrative law judge considered the x-ray readers' radiological qualifications and permissibly accorded greater weight to the readings by the physicians who are dually qualified as B readers and Board-certified radiologists. *See Wensel v. Director, OWCP*, 888 F.2d 14, 13 BLR 2-88 (3d Cir. 1989); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-65 (2004)(*en banc*); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Because the administrative law judge considered the x-ray readers' qualifications, she did not rely solely on the numerical superiority of the negative readings in rendering her finding. Rather, it was only after the administrative law judge considered the qualifications of the x-ray readers, that she determined that there was an equal number of positive and negative x-ray readings rendered by the dually qualified readers to which she accorded greater weight. Moreover, contrary to claimant's contention, the administrative law judge considered Dr. Gaia's positive interpretation of the October 17, 2001 x-ray, but permissibly chose to accord greater weight to the negative readings of this x-ray by Drs. Soble and Duncan because these physicians are dually qualified, whereas Dr. Gaia is not. *Id*.

Additionally, claimant argues that because the amended "regulations limit the parties to an essentially equal number of readings of the chest x-ray films," claimant is deprived "of his due process right to be fully and fairly heard," because of the likelihood, as in the instant case, that an administrative law judge will find that claimant has failed to meet his burden of proof because the x-ray evidence is equally divided. Claimant's Brief at 8. Because an administrative law judge must make credibility determinations regarding each x-ray interpretation submitted, greater weight could be accorded to some x-ray readings over other x-ray readings based, *inter alia*, on the readers' qualifications, the dates of the film, and the actual reading. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts*, 8 BLR at 1-213; *see also Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984); *see generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988). Accordingly, contrary to claimant's contention, the evidentiary limitations contained in the amended regulations do not deprive claimant of his right to be fully and fairly heard. Based on the foregoing, we affirm the administrative law judge's finding that claimant has failed to meet his burden to establish the existence of pneumoconiosis pursuant to

Section 718.202(a)(1).[6] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

SECTION 718.202(a)(4)

Pursuant to Section 718.202(a)(4), claimant asserts that the administrative law judge erred in failing to find the existence of pneumoconiosis based on Dr. Kraynak's opinion. In response to the previous appeal, the Board vacated the administrative law judge's Section 718.202(a)(4) finding because it was based on her flawed analysis of the x-ray evidence, and the Board instructed the administrative law judge, on remand, to reconsider the opinions of Drs. Kraynak and Dittman.[7] In reconsidering the opinions of Drs. Kraynak and Dittman on remand, the administrative law judge found that neither opinion was well-documented or well-reasoned. Specifically, the administrative law judge found that although "Dr. Kraynak completed a thorough review of the evidence, his reliance upon x-rays that are not dispositive for the presence of the disease compromises his opinion." Decision and Order on Remand at 7.

In asserting that the administrative law judge erred in weighing Dr. Kraynak's opinion, claimant states that the administrative law judge provided "absolutely no basis in this record for rejecting [Dr. Kraynak's] opinion regarding the existence of pneumoconiosis" and "notes that Dr. Kraynak relied upon much more than simply a review of the x-rays in offering his opinion." Claimant's Brief at 16. In his medical opinion, Dr. Kraynak stated "[b]ased upon [claimant's] history of having worked in the anthracite coal industry in excess of ten years, the complaints with which he has presented, my physical examination and the diagnostic studies performed, it is my opinion that he is totally and permanently disabled, secondary to Coal Workers' Pneumoconiosis . . . ." Claimant's Exhibit 10. Moreover, as claimant asserts, at his deposition, Dr. Kraynak testified that he based his diagnosis of pneumoconiosis on

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[6]Contrary to claimant's assertion, the administrative law judge did not err in failing to discuss Dr. Soble's alleged conflicting interpretations of the March 19, 2002 x-ray. On his March 19, 2002 x-ray report, in identifying the degree of profusion seen, Dr. Soble crossed out his mark of "1/0" and marked "0/1." Employer's Exhibit 3. Dr. Soble's 0/1 reading is confirmed by his accompanying narrative report in which he stated that he found "[n]o definite evidence of pneumoconiosis, s/t, 0/1." *Id*.

[7]Dr. Kraynak found the existence of coal workers' pneumoconiosis, whereas Dr. Dittman did not. Claimant's Exhibits 10, 24 at 14-15; Director's Exhibit 1; Employer's Exhibit 1.

claimant's medical and social histories, physical complaints, physical examination, and various diagnostic tests and medical records. Claimant's Exhibit 24 at 14. Dr. Kraynak further testified that if there was an equal number of positive and negative x-ray readings regarding the existence of pneumoconiosis, then he would still find the existence of pneumoconiosis based on claimant's coal mine employment of over twenty years. *Id.* at 15. Therefore, we vacate the administrative law judge's Section 718.202(a)(4) finding and remand this case for the administrative law judge to reconsider Dr. Kraynak's opinion and to fully explain the reasoning behind her conclusions. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

While none of the parties challenges the administrative law judge's consideration of Dr. Dittman's opinion,[8] claimant challenges the administrative law judge's findings rendered in her October 22, 2003 Decision and Order, that the opinions of Drs. Kruk and Talati are entitled to less weight because they relied on inaccurate smoking histories. Claimant notes that in his prior appeal, he challenged the administrative law judge's findings regarding Drs. Kruk and Talati, but the Board was silent in its decision "with respect to Claimant's position on appeal that the rejection of the opinions of Drs. Kruk and Talati are [sic] flawed." Claimant's Brief 10. Accordingly, claimant contends "that the errors committed by the Administrative Law Judge in her initial Decision and Order, wherein she rejected the opinions of Drs. Kruk and Talati, are also presently before this Honorable Board for consideration." *Id.* Claimant presently asserts that the administrative law judge erred in discounting Dr. Talati's opinion because it was based on an inaccurate smoking history. Claimant also generally contends that Dr. Kruk's opinion is "equally supportive of the presence of pneumoconiosis based upon his detailed, thorough and well-reasoned medical opinion." Claimant's Brief at 11-12.

In her 2003 Decision and Order, the administrative law judge "discounted" Dr. Kruk's diagnosis of pneumoconiosis and "place[d] less weight" on Dr. Talati's diagnosis of pneumoconiosis because she found that these physicians relied on an inaccurate smoking history. Decision and Order at 10. In doing so, the administrative law judge noted that Drs. Kruk and Talati recorded on their examination forms that claimant never smoked, whereas other physicians whose opinions are in the record noted a smoking history of one pack of cigarettes per week for thirty-three years. Director's Exhibits 1, 8;

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[8]Because none of the parties challenges the administrative law judge's consideration of Dr. Dittman's opinion pursuant to 20 C.F.R. §718.202(a)(4), we affirm, as unchallenged on appeal, the administrative law judge's findings pertaining to Dr. Dittman's opinion. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant's Exhibit 24 at 8, 31. Therefore, we now affirm the administrative law judge's 2003 determinations regarding the opinions of Drs. Kruk and Talati as the administrative law judge permissibly accorded less weight to their opinions because she found them to be based on inaccurate smoking histories. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986).

SECTION 718.202(a)

Pursuant to Section 718.202(a), the administrative law judge noted that "the x-ray evidence is in equipoise" and that "the medical opinion evidence does not establish the existence of pneumoconiosis pursuant to §718.202(a)(4)." Decision and Order on Remand at 7. Accordingly, the administrative law judge considered all of the evidence together and found that it does not establish that claimant has pneumoconiosis. Because we vacate the administrative law judge's findings regarding the medical opinion evidence, we also vacate the administrative law judge's Section 718.202(a) finding and instruct the administrative law judge on remand to again consider all the relevant evidence at Section 718.202(a) in accordance with *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).[9]

SECTION 725.309

In her 2003 Decision and Order, the administrative law judge found that claimant has demonstrated that at least one of the elements of entitlement previously adjudicated against him has changed, based on her finding that claimant has established the existence of pneumoconiosis. Because we affirm the administrative law judge's finding, in her Decision and Order on Remand, that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and vacate the administrative law judge's Section 718.202(a)(4) finding, we also vacate the administrative law judge's finding that claimant has demonstrated that at least one of the elements of entitlement previously adjudicated against him has changed, pursuant to Section 725.309, and instruct her to reconsider this issue on remand. *See White v. New White Coal Co.*, 23 BLR 1-1 (2004).

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[9]In *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), the United States Court of Appeals for the Third Circuit held that although Section 718.202(a) enumerates four distinct methods of establishing the existence of pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease.

SECTION 718.204(b)(2)(i) and (b)(2)(iv)

Because we remand this case for the administrative law judge to reconsider her findings pursuant to Section 718.202(a), we will also address employer's assertions, raised in its response brief, regarding total respiratory disability pursuant to Section 718.202(b)(2)(i), because they are in support of the decision below.[10] 20 C.F.R. §802.212(b); *Barnes v. Director, OWCP*, 18 BLR 1-55, 1-57-58 (1994); *Shelesky v. Director, OWCP*, 7 BLR 1-1034 (1984); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87, 1-91-92 (1983); *see Dalle-Tezze v. Director, OWCP*, 814 F.2d 129, 133, 10 BLR 2-62, 2-68 (3d Cir. 1987); *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994).

Pursuant to Section 718.204(b)(2)(i), employer first asserts that the administrative law judge erred in failing to find that the non-qualifying[11] pulmonary function studies dated October 23, 2001 and March 19, 2002 were valid. In the previous appeal, the Board vacated the administrative law judge's findings regarding the pulmonary function studies dated October 23, 2001 and March 19, 2002 because she failed to consider whether these studies substantially complied with the quality standards. On remand, the administrative law judge found that both of these studies were not in substantial compliance with the quality standards set out in the regulations. Therefore, the administrative law judge found that the non-qualifying October 23, 2001 and March 19, 2002 studies were not entitled to any weight. Regarding the October 23, 2001 study, the administrative law judge found, on remand, that this test was not in substantial compliance with the regulations because the pulmonary function report prepared for the test indicates that the machine was calibrated on October 17, 2001 and contains only one flow-volume loop. Appendix B of the regulations specifically provides that "[a]

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[10]Although employer states in its brief that "the medical opinion evidence was not sufficient to establish total disability," employer does not allege any specific error committed by the administrative law judge in her weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.202(b)(2)(iv) on remand. Employer's Brief at 7. Therefore, we affirm the administrative law judge's finding that the medical opinion evidence is sufficient to demonstrate total respiratory disability at Section 718.204(b)(2)(iv). *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

[11]A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values, *i.e.*, Appendix B to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

calibration check shall be performed on the instrument each day before use . . . ." Appendix B (2)(iv) to 20 C.F.R. Part 718. Moreover, pursuant to 20 C.F.R. §718.103(b), there must be three flow-volume loops. According to the tracings of the October 23, 2001 study, the instrument's calibration was checked on October 17, 2001, six days before claimant was tested, and appears to contain only one flow-volume loop. Director's Exhibit 11. The October 23, 2001 pulmonary function study was administered by Dr. Talati as part of the pulmonary evaluation provided to claimant by the Department of Labor. *Id*. At claimant's request, Dr. Kraynak reviewed the study tracings and stated that the instrument was not calibrated on the day of the test, as required by the quality standards. Claimant's Exhibit 24 at 10. Dr. Kraynak also noted that there were no flow-volume loops with the study. *Id.*

Employer asserts that the administrative law judge should have found the October 23, 2001 study to be valid by according greater weight to the opinion of Dr. Talati, who administered the test and did not invalidate it, over the criticisms of Dr. Kraynak, based on Dr. Talati's superior qualifications.[12] We reject employer's assertion. Notwithstanding Dr. Talati's superior credentials, the administrative law judge properly found the October 23, 2001 pulmonary function study was not entitled to any weight because it was not in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b),[13] 718.103(c); *see also Director, OWCP v. Siwiec*, 894 F.2d 635, 638, 13 BLR 2-259, 2-265 (3d Cir. 1990)(holding, under the former 20 C.F.R. Part 718 regulations, that administrative law judges must apply the quality standards); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1327, 10 BLR 2-220, 2-233 (3d Cir. 1987)(same).

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[12]The record reveals that Dr. Talati is Board-certified in internal medicine and pulmonary disease and Dr. Kraynak is Board-eligible in family medicine. Director's Exhibit 9; Claimant's Exhibit 11.

[13]The DOL 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). In the amended regulations, the general quality standard regulation provides that "[a]ny clinical test . . . subject to these standards shall be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). The quality standards applicable to pulmonary function studies are set forth at 20 C.F.R. §718.103 and Appendix B of 20 C.F.R. Part 718. Section 718.103 specifies, in relevant part, that "no results of a pulmonary function study shall constitute evidence of the presence or absence of a respiratory or pulmonary impairment unless it is conducted and reported in accordance with the requirements of this section and Appendix B of this part." 20 C.F.R. §718.103(c).

In discussing the March 19, 2002 pulmonary function study, the administrative law judge noted that Dr. Kraynak objected to this test's validity by pointing out that the machine was not calibrated until March 27, 2002, eight days after the test was administered. The administrative law judge further noted that the report of the March 19, 2002 pulmonary function study "does not contain a statement regarding Claimant's cooperation or comprehension during the test" and that she could not "determine whether the flow-loop volume [was] complete or whether the tracings indicate that breaks were taken." Decision and Order on Remand at 9. Referring to Appendix B (2)(iv) of the regulations, which requires that "[a] calibration check shall be performed on the instrument each day before use" and Section 718.103(b)(5), which requires that the physician sign a statement that sets forth claimant's ability to understand the test, follow directions, and cooperate in performing the test, the administrative law judge found that the March 19, 2002 pulmonary function study was not in substantial compliance with the quality standards outlined in the regulations. According to the tracings of the March 19, 2002 study, the machine was not calibrated until March 27, 2002, eight days after the test was administered, and there is no notation regarding claimant's ability to understand the test and fully cooperate in performing the test. Employer's Exhibit 1. Employer asserts that the administrative law judge should have found the March 19, 2002 study to be valid by according greater weight to the opinion of Dr. Dittman, who administered the study and did not find the flow-volume loops incomplete, over the criticisms of Dr. Kraynak, based on Dr. Dittman's superior qualifications.[14] Contrary to employer's assertion, we hold that the administrative law judge properly found that the March 19, 2002 pulmonary function study was not entitled to any weight because "there is no indication on the study that the machine was calibrated on the day of the test" and the test does not contain information regarding claimant's comprehension or cooperation. Decision and Order on Remand at 9; *see* 20 C.F.R. §§718.101(b), 718.103(b)(5); Appendix B (2)(iv) to 20 C.F.R. Part 718; *Siwiec*, 894 F.2d at 638, 13 BLR at 2-265; *Mangifest*, 826 F.2d at 1327, 10 BLR at 2-233.

Employer next asserts that the qualifying pulmonary function studies dated September 17, 2002 and October 16, 2002 were invalid. Claimant contends, to the contrary, that the October 16, 2002 pulmonary function study was valid. Claimant additionally asserts, pursuant to Section 718.204(b)(2)(iv), that Dr. Kruk's opinion, that claimant is totally disabled, should not have been rejected because it was based on the allegedly invalid October 16, 2002 pulmonary function study. In its November 30, 2004 Decision and Order, the Board affirmed the administrative law judge's finding that the September 17, 2002 pulmonary function study was valid, as well as her finding that the

[14]The record reveals that Dr. Dittman is Board-certified in internal medicine. Employer's Exhibit 2.

October 16, 2002 pulmonary function study was invalid. Moreover, the Board held that the administrative law judge permissibly gave less weight to Dr. Kruk's opinion regarding claimant's disability because it was based on an unreliable pulmonary function study. We adhere to our previous holdings regarding the administrative law judge's weighing of the September 17, 2002 and October 16, 2002 pulmonary function studies, and Dr. Kruk's disability opinion because neither claimant nor employer has set forth any valid exception to the law of the case doctrine,[15] *i.e.*, a change in the underlying fact situation, intervening controlling authority demonstrating that the initial decision was erroneous, or a showing that the Board's initial decision was either clearly erroneous or resulted in manifest injustice. *See U.S. v. Aramony*, 166 F.3d 655 (4th Cir. 1999); *Church v. Eastern Associated Coal* Corp., 20 BLR 1-8 (1996); *Coleman v. Ramey Coal* Co., 18 BLR 1-9 (1993); *see also Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80, 1-89 (2000)(*en banc*, with Hall, J. and Nelson, J., concurring and dissenting); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(2-1 opinion with Brown, J., dissenting). Based on the foregoing, we affirm the administrative law judge's findings pursuant to Section 718.204(b)(2)(i) and (b)(2)(iv).

SECTION 718.204(b)(2)

Considering all of the medical evidence, the administrative law judge found that claimant established total respiratory disability pursuant to Section 718.204(b)(2). Because none of the parties has challenged the administrative law judge's findings in her 2003 Decision and Order that the claimant failed to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(ii)-(iii), we affirm these findings, as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Because we affirm the administrative law judge's findings pursuant to Section 718.204(b)(2)(i)-(iv), *see* discussion, *supra*, we also affirm the administrative law judge's finding that claimant established total respiratory disability pursuant to Section 718.204(b)(2), based on all of the medical evidence in the record. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

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[15]"The law of the case doctrine is a discretionary rule of practice, based on the policy that when an issue is litigated and decided, that decision should be the end of the matter, such that it is the practice of courts generally to refuse to reopen in a later action what has been previously decided in the same case." *Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80, 1-89 n.4 (2000)(*en banc*, with Hall, J. and Nelson, J., concurring and dissenting)(citing *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(2-1 opinion with Brown, J., dissenting)).

SECTION 718.204(c)

Lastly, claimant contends that the administrative law judge erred in finding that claimant failed to establish total disability due to pneumoconiosis. In her consideration of whether the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis, the administrative law judge noted that only three physicians, Drs. Kraynak, Kruk and Talati, diagnosed pneumoconiosis. The administrative law judge noted that she discredited the diagnoses of pneumoconiosis rendered by Drs. Kruk and Talati because they relied upon inaccurate smoking histories. Decision and Order on Remand at 12. The administrative law judge further noted that she found that Dr. Kraynak's diagnosis of pneumoconiosis was "not entitled to great weight" because it was based upon x-ray evidence that she found "to be not dispositive." *Id.* The administrative law judge also discredited Dr. Kraynak's opinion regarding the etiology of claimant's pulmonary impairment because he did not fully address claimant's smoking history. *Id.* The administrative law judge, therefore, found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.*

Because the administrative law judge must reevaluate whether Dr. Kraynak's opinion is sufficient to establish the existence of pneumoconiosis, an analysis that could affect her weighing of the evidence on the issue of disability causation, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). If the issue of disability causation is again reached on remand, the administrative law judge must consider all the relevant evidence regarding whether claimant's total respiratory disability is due to pneumoconiosis, 20 C.F.R. §718.204(c); *see also Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989), and fully explain the rationale for her conclusions, *see Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

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.

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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