BRB No. 09-0592 BLA

BOBBY M. CLARK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 08/27/2010
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, P.S.C.), Greenville, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Ann Marie Scarpino (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:

Employer appeals the Decision and Order Award of Benefits (2007-BLA-05818) of Administrative Law Judge Daniel F. Solomon, with respect to a subsequent miner's claim filed on August 14, 2006, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. 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).[1] After crediting claimant with at least thirty-two years of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined, based on the newly submitted evidence, that claimant established the existence of legal pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203, and a totally disabling respiratory impairment due to coal workers' pneumoconiosis at 20 C.F.R. §718.204(b)(2)(i), (c). Accordingly, the administrative law judge awarded benefits.

Employer argues that the administrative law judge erred in not considering the evidence from the miner's previous claim and in not making an explicit finding regarding the threshold issue of whether claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Employer also asserts that the administrative law judge improperly admitted five medical articles into evidence. Further, employer states that the administrative law judge erred in finding total disability established at 20 C.F.R. §718.204(b)(2)(i) and in considering the medical opinion evidence at 20 C.F.R. §§718.202(a)(4), 718.204(c). Claimant responds, urging affirmance of the administrative law judge's admission of evidence and the award of benefits. The Director, Office of Workers' Compensation Programs (Director), has declined to file a brief in response to employer's appeal.

By Order dated April 7, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.[2] *Clark v. Island Creek Coal Co.*, BRB No. 09-0592 BLA (Apr. 7, 2010)(unpub. Order). The parties have responded.

[1] Claimant filed his initial claim for benefits on November 13, 2001, which was denied by the district director on May 8, 2003, because claimant did not establish any element of entitlement. Director's Exhibit 1. No further action was taken until claimant filed his current claim.

[2] Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4)), reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis.

The Director states that Section 1556 will not affect this case if the Board affirms the administrative law judge's award of benefits. However, the Director further asserts that, if the Board does not affirm the administrative law judge's findings, remand for consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4), and for the submission of additional evidence, would be required, as the present claim was filed after January 1, 2005, and the administrative law judge credited claimant with more than fifteen years of coal mine employment. Claimant responds, agreeing with the Director. Employer indicates that the recent amendments may affect this claim, based on the filing date and claimant's coal mine employment history. Therefore, employer maintains that due process requires the claim to be remanded for it to develop evidence addressing the new standards created. Additionally, employer argues that retroactive application of the amendments is unconstitutional because it denies the operator due process and constitutes an unconstitutional taking of private property.

To determine whether this case must be remanded for consideration of the invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), we will first address employer's allegations of error regarding the administrative law judge's admission of the medical articles submitted by claimant and his findings at 20 C.F.R. §§718.202(a)(4), 718.204(b)(2)(i), (c), 725.309(d).

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

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 he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[3] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

I. 20 C.F.R. §725.309(d)

A. The Administrative Law Judge's Findings

The administrative law judge recognized that this case involves a subsequent claim pursuant to 20 C.F.R. §725.309(d), and cited the pertinent regulations. Decision and Order at 5-6. The administrative law judge then set forth a summary of the newly submitted evidence and initially considered whether it was sufficient to establish total disability under 20 C.F.R. §718.204(b)(2). The administrative law judge found that total disability was proven at 20 C.F.R. §718.204(b)(2)(i). *Id*. at 9. The administrative law judge then determined, based solely on a consideration of the newly submitted evidence, that claimant established the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis, and awarded benefits. *Id*. at 9-18

B. Arguments on Appeal

Employer argues that the administrative law judge failed to make an explicit finding regarding whether claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Further, employer asserts that, even assuming a change in condition was established, the administrative law judge did not consider all of the evidence of record, including that from claimant's initial claim, to determine whether claimant established the requisite elements of entitlement.

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, the miner's prior claim was denied because the evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment or that the miner was totally disabled by pneumoconiosis. Director's Exhibit 1. Therefore, claimant had to submit new evidence establishing one of the requisite elements of entitlement in order to have the administrative law judge review the miner's subsequent claim on the merits. Contrary to employer's argument, the administrative law judge found the newly submitted evidence established all the requisite elements and consequently found that claimant established a change in conditions.[4] *See Sharondale Corp. v. Ross*, 42 F.3d 993,

[4] In concluding his finding regarding disability causation at 20 C.F.R. §718.204(c), the administrative law judge stated that "I find that the totally [sic] of medical opinion

19 BLR 2-10 (6th Cir. 1994). However, the administrative law judge's weighing of the newly submitted evidence pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b)(2), (c), discussed *infra*, cannot be affirmed, and therefore, we must vacate the administrative law judge's award of benefits and remand the case.

II. Admissibility of Evidence

A. Procedural History

On December 2, 2008, claimant submitted five medical articles "in rebuttal to [Dr. Repsher's] comments and opinions" at his November 26, 2008 deposition. Claimant's Exhibit 7. On December 15, 2008, employer objected to the admission of these articles and moved to strike them from the record. During a telephone conference conducted on January 12, 2009, the administrative law judge admitted the five medical articles, for identification purposes only, and instructed the parties to address their admissibility in closing argument briefs. Telephone Conference Hearing Transcript at 8-10.

B. The Administrative Law Judge's Findings

The administrative law judge found that all of the submitted medical articles are "learned." Decision and Order at 2. In addition, the administrative law judge noted that, pursuant to 29 C.F.R. Subpart 18, all evidence is generally admissible unless it is not relevant. *Id*. After indicating that employer characterized the studies as "rebuttal" to Dr. Repsher's deposition, and, therefore, in violation of 20 C.F.R. §725.414(a)(2)(ii), the administrative law judge determined that he may recognize authorities in the public domain after proper notice to both sides. *Id*. Further, the administrative law judge stated that he did not find any authority for employer's argument that a party may not submit medical articles as rebuttal evidence and indicated that Dr. Rasmussen identified eighteen articles as the basis for his opinion. *Id*.

The administrative law judge determined that, pursuant to 29 C.F.R. §18.902, official publications, newspapers, and periodicals may be self-authenticated. Decision and Order at 2. The administrative law judge stated that, under the Administrative Procedure Act, he is given wide latitude in determining the admissibility of, and weight given to, evidence. *Id*. Consequently, the administrative law judge admitted the studies into evidence. *Id*.; *see* Claimant's Exhibit 7.

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evidence establishes total disability arising out of coal mine employment and, thus, a change in his physical condition." Decision and Order at 18.

C. Arguments on Appeal

Employer contends that claimant is not permitted to submit medical articles as rebuttal evidence pursuant to 20 C.F.R. §725.414(a)(2)(ii). Employer also notes that, while the administrative law judge stated that he relied on 29 C.F.R. §18.902 to admit the articles, this is error because under 29 C.F.R. §18.1101(b), this rule of evidence does not apply in black lung cases. In addition, employer asserts that the administrative law judge did not make a determination regarding whether the articles were relevant. Further, employer states that the administrative law judge is not empowered to interpret medical articles and apply these findings to the facts of the case. Employer also maintains that the administrative law judge erred in asserting that experts are not required to establish a foundation for documents to be received into evidence. In addition, employer argues that the administrative law judge confused the mere publication of the articles with the authoritativeness of the articles because, even if they are self-authenticating, it does not mean that they are entitled to great weight.

While the administrative law judge has broad authority to admit relevant evidence, he has not made a specific finding in this case concerning the relevancy of the admitted articles. In addition, our review of the administrative law judge's decision does not indicate that he has attributed any weight to these articles. Further, employer has not demonstrated how it was prejudiced by the admission of the articles. Consequently, error, if any, in admitting the medical articles in this case, is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

III. 20 C.F.R. §718.204(b)(2)(i)

A. The Administrative Law Judge's Findings

In considering whether claimant established total disability at 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the newly submitted evidence, which consisted of the results of four pulmonary function studies performed by Drs. Simpao, Repsher, Selby and Baker, dated August 31, 2006, March 13, 2007, June 7, 2007, and July 2, 2008, respectively.[5] The administrative law judge noted claimant's assertion that Dr. Baker's July 2008 testing produced qualifying values, based on a finding of 1.69 for claimant's FEV1. Decision and Order at 8. In addition, the administrative law judge indicated that, although the pulmonary function studies

[5] The pulmonary function study results from August 31, 2006 were also reviewed by Dr. Mettu for validation purposes only and he found them to be acceptable. Director's Exhibit 14.

performed by Drs. Simpao and Repsher were qualifying, employer argued that claimant was over seventy-one years old, so the values were actually normal for a person of claimant's age. *Id*. The administrative law judge stated that, after reviewing the opinions of Drs. Repsher and Selby, he did not find any medical evidence to support employer's allegation that the pulmonary function tests with qualifying values for a seventy-one year old male were actually normal. Decision and Order at 9. The administrative law judge indicated that, while Dr. Baker did not administer bronchodilators or obtain lung volume and diffusion capacity studies, the test was performed in July 2008, more than a year after those performed by Drs. Repsher and Selby. *Id*. In addition, the administrative law judge determined that there was no testimony or evidence that the test performed by Dr. Baker was invalid. *Id*. Therefore, the administrative law judge concluded that it was appropriate to accord greater weight to Dr. Baker's more recent pulmonary function study results, based on the fact that pneumoconiosis is a progressive and irreversible disease. *Id*. Consequently, the administrative law judge found that claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *Id*.

B. Arguments on Appeal

Employer contends that, although Dr. Baker's pulmonary function study showed a qualifying FEV1 value, the study was not qualifying under 20 C.F.R. §718.204(b)(2)(i) because the regulations also require a qualifying FVC or MVV value or a FEV1/FVC percentage below fifty-five percent. 20 C.F.R. §718.204(b)(2)(i)(A)-(C). Employer also asserts that the administrative law judge erred in rejecting the 2007 results from Drs. Repsher and Selby because he did not fully explain his findings or why the date of the testing is relevant. Further, employer states that the administrative law judge did not explain why Dr. Baker's less rigorous testing was more persuasive and that the administrative law judge incorrectly presumed that pneumoconiosis is always a progressive and irreversible disease.

We agree with employer that Dr. Baker's pulmonary function study results were insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i). The regulations provide that, in addition to a qualifying FEV1 value, claimant must establish either a qualifying FVC or MVV value or a FEV1/FVC ratio equal to or less than fifty-five percent. 20 C.F.R. §718.204(b)(2)(i)(A)-(C). In the instant case, while the test performed by Dr. Baker had a qualifying FEV1 value, there was no MVV value and the FVC and FEV1/FVC amounts were not qualifying. Claimant's Exhibit 1. Accordingly, we must vacate the administrative law judge's determination that total disability was established at 20 C.F.R. §718.204(b)(2)(i). On remand, the administrative law judge must first reconsider the pulmonary function study results and make a determination at 20 C.F.R. §718.204(b)(2)(i). Then, the administrative law judge must consider the evidence and make findings pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iv). Further, the administrative law judge must then weigh together all of the contrary probative evidence

of record, like and unlike, in determining whether the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b), overall. *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*). Therefore, on remand, the administrative law judge must consider all relevant evidence in determining whether claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b) and clearly explain his findings, as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a).[6]

IV. 20 C.F.R. §§718.202(a)(4), 718.204(c)

A. The Administrative Law Judge's Findings

In making his findings regarding the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and disability causation at 20 C.F.R. §718.204(c), the administrative law judge considered the newly submitted medical opinions of Drs. Baker, Selby, Repsher, Rasmussen, and Simpao. In considering the evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge noted that Dr. Baker, who opined that claimant has coal workers' pneumoconiosis, based on a positive x-ray interpretation and chronic obstructive pulmonary disease (COPD), adopted the proposition, set forth by the Department of Labor (DOL) when the revised regulations were promulgated, that smokers who work as miners, have an additive risk for developing significant obstruction. Decision and Order at 15, *citing* 65 Fed. Reg. 79,940 (Dec. 20, 2000); Claimant's Exhibit 1. The administrative law judge also indicated that, although Dr. Selby determined that claimant has a mild impairment due entirely to cigarette smoking, he did not cite any studies describing the effect of mining on COPD. Decision and Order at 15; *see* Employer's Exhibit 2; Employer's Exhibit 3 at 11-13, 17. In addition, the administrative law judge found that the Attfield and Hodous study, cited by Dr. Repsher in his deposition in support of the view that the effect of coal dust is "negligible," actually refuted Dr. Repsher's conclusion and instead supported Dr. Baker's rationale. Decision and Order at 16, *quoting* Employer's Exhibit 4 at 26. Further, the administrative law judge indicated that neither Dr. Repsher nor Dr. Selby accounted for claimant's thirty-two years of coal mine employment, in concluding that claimant did not have legal pneumoconiosis. Decision and Order at 16.

[6] We affirm, as unchallenged on appeal, the administrative law judge's determination that employer did not establish that the pulmonary function studies, yielding qualifying values for an individual seventy-one years of age, were actually normal given that claimant was over seventy-one years of age when the tests were performed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge further found that, although Dr. Rasmussen is not a Board-certified pulmonologist, the United States Court of Appeals for the Sixth Circuit has recognized him as an expert in the field. Decision and Order at 16, *citing Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005). The administrative law judge noted that Dr. Repsher is a Professor of Medicine and found Dr. Rasmussen to be the only physician who had performed relevant research in black lung disease and COPD. Decision and Order at 16. Therefore, the administrative law judge determined that Dr. Rasmussen was the best qualified physician to render an opinion in this case. *Id*. The administrative law judge concluded that the opinions of Drs. Baker and Rasmussen were well-reasoned because they relied on "more rational logic" in determining that claimant's respiratory impairment is due to both smoking and coal dust exposure and cited to medical studies to substantiate their findings. *Id*. at 17. In addition, the administrative law judge credited Dr. Simpao's testimony, that claimant's disabling respiratory impairment is due to coal dust exposure and his history of cigarette smoking. *Id*. Further, the administrative law judge stated that, the fact that the x-ray evidence and CT scans did not establish pneumoconiosis did not mean that they were negative, because the CT scans showed densities in both lungs, representing scarring, and the best qualified reader, Dr. Wiot, diagnosed emphysema. Decision and Order at 16. Accordingly, the administrative law judge found that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*.

At 20 C.F.R. §718.204(c), the administrative law judge found that only the medical reports of Drs. Simpao, Baker, and Rasmussen were relevant to the issue of disability causation because Drs. Repsher and Selby did not diagnose pneumoconiosis. Decision and Order at 18. The administrative law judge found their opinions, that coal dust exposure is a contributing cause of claimant's respiratory impairment, to be thorough and persuasive because they discussed the objective data and provided an articulate analysis to support their conclusions. *Id*. The administrative law judge noted that Dr. Rasmussen addressed the change in claimant's condition since his previous claim and that his opinion was consistent with the opinions of Drs. Simpao and Baker. *Id*. Consequently, the administrative law judge concluded that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *Id*.

B. Arguments on Appeal

On appeal, employer argues that the administrative law judge erred in crediting the opinions of Drs. Simpao, Baker, and Rasmussen over the opinions of Drs. Repsher and Selby. Employer alleges that the administrative law judge deferred to their opinions, based on the presumption that the miner's COPD was caused, in part, by coal dust exposure and improperly shifted the burden of proof to employer by requiring Drs. Repsher and Selby to "rule out" coal dust exposure as a cause of claimant's pulmonary impairment. Employer's Petition for Review and Brief in Support at 20. In addition,

employer asserts that the administrative law judge did not explain why the opinions of Drs. Baker and Rasmussen, diagnosing legal pneumoconiosis, were well-reasoned and well-documented, despite their inability to separate the effects of cigarette smoking and coal dust exposure and their reliance on general medical literature indicating that coal mining can cause COPD, whereas Drs. Repsher and Selby were aware of claimant's coal mine employment history and explained why they did not attribute claimant's respiratory impairment to coal dust exposure. Employer also states that the administrative law judge erred in discrediting Dr. Repsher's opinion, and in crediting Dr. Baker's opinion, based on an Attfield and Hodous study, because the administrative law judge substituted his own opinion for that of the medical experts.

Further, employer argues that the administrative law judge did not explain how Dr. Baker's reliance on a positive interpretation of an x-ray that the administrative law judge determined to be negative, affected the weight given to his opinion and asserts that Dr. Rasmussen's diagnosis of clinical pneumoconiosis is contrary to the administrative law judge's finding at 20 C.F.R. §718.202(a)(1). Employer also contends that the administrative law judge's analysis at 20 C.F.R. §718.204(c) is sparse, as he did not discuss how the objective data supported the opinions of Drs. Simpao, Baker, and Rasmussen or how their opinions were well-documented and well-reasoned.

Despite employer's arguments to the contrary, the administrative law judge did not automatically defer to the opinions of Drs. Simpao, Baker, and Rasmussen, that the miner's COPD was due, in part, to coal dust exposure. Rather, the administrative law judge acted within his discretion in determining that their opinions were supported by the recent medical literature they cited, the DOL's comments to the regulations, and the miner's occupational and social histories and objective test results. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

We also reject employer's argument that the administrative law judge improperly accorded little weight to the opinions of Drs. Repsher and Selby, that claimant's respiratory impairment was not caused, contributed to, or hastened by coal dust exposure. Although claimant bears the burden of proving, by a preponderance of the evidence, that he has pneumoconiosis, *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), when there is conflicting evidence, the administrative law judge must determine the weight to which each item of evidence is entitled. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). While Dr. Repsher discussed evidence related to COPD due to cigarette smoking and COPD due to coal dust exposure, the administrative law judge noted that he did not explain why any contribution to claimant's respiratory impairment from coal dust exposure would be clinically insignificant, especially given that Dr. Repsher agreed that claimant's coal mine employment history was sufficient to cause lung disease in a susceptible individual.

Decision and Order at 16; Employer's Exhibits 1, 4 at 10, 15-16. Similarly, the administrative law judge permissibly determined that Dr. Selby did not account for the effects of claimant's thirty-two years of coal mine employment and exposure in mining. *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; Decision and Order at 16.

We also reject employer's assertion that the administrative law judge erred in discrediting Dr. Repsher's opinion, based on the Attfield and Hodous study he cited, in support of this conclusion. As the administrative law judge noted, in the comments to the regulations, the DOL found that, based on a review of medical literature on this issue, there is a connection between coal mine dust exposure and obstructive lung disease. Decision and Order at 16-17, *citing* 65 Fed. Reg. 79,940 (Dec. 20, 2000). Therefore, the administrative law judge's determination, that Dr. Repsher's opinion was entitled to diminished weight to the extent that the study he relied upon did not support his position that the effect of coal dust is negligible, is rational and supported by substantial evidence. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *see also Lewis Coal Co. v. Director, OWCP* [*McCoy*], 373 F.3d 570, 23 BLR 2-184 (4th Cir. 2004).

However, there is some merit to employer's assertion that the administrative law judge erred in failing to consider what impact, if any, Dr. Baker's positive x-ray reading and Dr. Rasmussen's diagnosis of clinical pneumoconiosis had on their diagnoses of legal pneumoconiosis, and whether their opinions are contrary to the administrative law judge's findings with respect to the x-ray evidence at 20 C.F.R. §718.202(a)(1).[7] Therefore, we vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and remand the case for further consideration. To the extent that the administrative law judge relied on his findings at 20 C.F.R. §718.202(a)(4) to also conclude that claimant established disability causation at 20 C.F.R. §718.204(c), we vacate the administrative law judge's findings under that subsection. Because we vacate the administrative law judge's finding of total disability due to pneumoconiosis, it is not necessary that we address employer's argument that the administrative law judge improperly shifted the burden of proof and failed to explain his credibility findings at 20 C.F.R. §718.204(c). Thus, on remand, the

[7] During his deposition, Dr. Baker was asked whether there is any way to distinguish between symptoms due to coal dust exposure and those due to cigarette smoking. He stated, "Well, there's no specific way to really tell, number one. Number two, we see as a positive x-ray 1/1 and with the hyperinflation that [claimant] undoubtedly has due to his emphysema, this could make the degree of opacities diminish." Claimant's Exhibit 1 at 15.

administrative law judge must consider all relevant evidence at 20 C.F.R. §§718.202(a) and 718.204(c) and clearly explain his findings, in compliance with the APA and this opinion.

In summary, the administrative law judge must make an explicit finding as to whether the newly submitted evidence establishes a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). If such a change is found, then the administrative law judge must consider all the relevant evidence, on the merits, including that submitted with the prior claim, to determine whether all the conditions of entitlement are met.

Based on the fact that we vacated the administrative law judge's award of benefits, we also agree with the Director and claimant that the reconsideration of the claim must include a determination as to whether claimant has established invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4). If the administrative law judge finds that claimant is entitled to the presumption that he is totally disabled due to pneumoconiosis at Section 411 (c)(4), the administrative law judge must then determine whether the medical evidence rebuts the presumption. The administrative law judge, on remand, should 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, as the Director states, any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1). Further, because the administrative law judge has not yet considered this claim under the amendment to Section 411(c)(4) of the Act, we decline to address, as premature, employer's argument that the retroactive application of that amendment to this claim is unconstitutional.

Accordingly, the administrative law judge's Decision and Order Award of Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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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