BRB No. 00-0284 BLA

ETHEL EVERSOLE (o/b/o and Widow of J.C. EVERSOLE) Claimant-Respondent v. PEABODY COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand - Awarding Benefits on the Miner's Claim and the Survivor's Claim of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits on the Miner's Claim and the Survivor's Claim (95-BLA-2312) of Administrative Law Judge Thomas F. Phalen, Jr. on claims filed pursuant to the provisions of Title IV of the Federal

[1] Claimant, Ethel Eversole, is the widow of J.C. Eversole, the miner, who died on

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. In the initial Decision and Order, the administrative law judge adjudicated the claims pursuant to 20 C.F.R. Part 718 and credited the parties' stipulation that the miner worked in qualifying coal mine employment for thirty-six years. Addressing the miner's duplicate claim, the administrative law judge considered the newly submitted evidence and determined that, because the miner failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), he failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Addressing the survivor's claim, the administrative law judge considered all of the medical evidence of record and found that claimant failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in both the miner's and survivor's claims.

Subsequently, claimant appealed and the Board initially reversed the administrative law judge's Section 725.309(d) determination on the basis that the administrative law judge had found that the evidence was sufficient to demonstrate that the miner was totally disabled from a respiratory standpoint, an element that had been previously adjudicated against him. Furthermore, the Board vacated the administrative law judge's consideration of specific medical opinions under Sections 718.202(a)(4) and 718.204(b) and, therefore, remanded the case for the administrative law judge to reconsider the relevant evidence under those sections. Regarding the survivor's claim, the Board also vacated the administrative law judge's finding that the evidence of record as a whole did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and vacated the administrative law judge's treatment of the medical opinion evidence under Section 718.205(c)(2). *Eversole v. Peabody Coal Co.*, BRB No.

August 19, 1994. Director's Exhibit 29. The miner filed his first application for benefits on August 13, 1986, which was finally denied by the district director on September 26, 1989. Director's Exhibit 27. The miner took no further action on this claim, and subsequently, filed a duplicate application for benefits on January 22, 1993. Director's Exhibit 2. After the miner's death, the widow filed her application for benefits on September 19, 1994. Director's Exhibit 29. Both claims are presently pending.

98-0548 BLA (Jul. 22, 1999)(unpub.).

On remand, the administrative law judge considered all of the medical evidence of record and determined that claimant affirmatively established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(4) and 718.203(b), total disability due to pneumoconiosis pursuant to Section 718.204(b), and death due to pneumoconiosis pursuant to Section 718.205(c)(2). Accordingly, the administrative law judge awarded benefits on both the miner's and survivor's claims.

On appeal, employer contends that the Board's reversal, in its previous decision, of the administrative law judge's Section 725.309(d) determination was erroneous as a matter of law. Additionally, employer argues that the administrative law judge erred by finding that claimant established the existence of pneumoconiosis at Section 718.202(a)(4), total disability due to pneumoconiosis at Section 718.204(b), and death due to pneumoconiosis at Section 718.205(c)(2). Claimant responds, urging affirmance of the award of benefits on both claims. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a limited response, noting his continuing disagreement with the Board's decision in *Flynn v. Grundy Mining Co.*, 21 BLR 1-41 (1997), which the Board previously held was applicable to the instant case. *See Eversole*, *slip op.* at 3. Otherwise, the Director expressed no opinion on the merits of employer's material change argument or on claimant's entitlement to benefits. Employer filed a Reply Brief, arguing that the legal errors committed by the administrative law judge compel a remand and cannot be cured by the alternative routes suggested by claimant or the Director in the instant case.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially argues that the Board, in its previous decision, exceeded its scope of review by finding that a material change in conditions was established solely based on the administrative law judge's statement that the miner "was totally disabled due to his other lung disease, namely cancer." [1997] Decision and Order at 14. Employer avers specifically that the Board erroneously found that the miner's first claim was denied because the miner failed to demonstrate total disability. Alternatively, employer contends that, in the event the prior claim was denied because the miner failed to establish total disability, the Board did not conduct a qualitative analysis of the previously submitted evidence to determine whether the evidence affirmatively demonstrated a material change in conditions. Claimant responds, arguing that because the Board's holding was not challenged by employer through either a Motion for Reconsideration or an appeal to the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, employer is precluded from raising this issue to the Board at this time. Employer

likewise responds, urging that "the 'law of the case' doctrine does not shield the decision from reconsideration" and that reconsideration by the Board is warranted because the Board mischaracterized the denial letter issued by the Department of Labor (DOL) in the miner's original claim. We agree with claimant.

The Board held that the miner was entitled to demonstrate a material change in conditions under Section 725.309(d) by proving total disability inasmuch as he had failed to establish total disability in his previous claim. *See* Director's Exhibit 27. The Board held, consequently, that the administrative law judge's finding "that the evidence was sufficient to establish that the miner was totally disabled from a respiratory standpoint, a finding that is unchallenged on appeal," constituted a material change in conditions. *Eversole*, *slip op.* at 3. Employer filed neither a Motion for Reconsideration with the Board nor an appeal with the Sixth Circuit court challenging the Board's holding on this issue. Inasmuch as employer has not demonstrated an exception to the law of the case doctrine, nor is any apparent, the Board's holding constitutes the law of the case. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990), *overruled on other grounds*, *Peabody Coal Co. v. Director, OWCP [Brinkley]*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (2-1 opinion with Brown, J., dissenting); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989 (1984). Inasmuch as employer had full opportunity to challenge the Board's finding at Section 725.309(d) but failed to do so, we decline to address employer's contentions in this regard.

Employer challenges the administrative law judge's determination at Section 718.202(a)(4), contending that the administrative law judge did not reweigh the medical opinion evidence, but rather, adopted the Board's findings as his own. Employer based this argument on the administrative law judge's finding that "[a]s the BRB discussed in its Decision and Order, Dr. O'Bryan's diagnosis of a moderate obstructive impairment causally related to coal dust exposure, is enough to satisfy the legal definition of pneumoconiosis. Accordingly, I find that his opinion favors the existence of pneumoconiosis." Remand Decision and Order at 7. In addition, employer contends that the administrative law judge erred by finding that Dr. O'Bryan's opinion was sufficient to establish the existence of pneumoconiosis because the physician did not ultimately opine

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2 Inasmuch as we decline to address employer's contentions regarding Section 725.309(d), we also need not address the Director's disagreement with the decision in *Flynn*, *supra*. Likewise, because claimant established total respiratory disability pursuant to Section 718.204(c), we need not address employer's arguments contesting the administrative law judge's treatment of the opinions of Drs. O'Bryan, Norsworthy, and Wong with respect to total disability. *See* Employer's Brief in Support of Petition for Review at 28-30; *Eversole*, *slip op.* at 3.

that the miner's pulmonary impairment was significantly related to coal dust exposure as required at Section 718.201, but instead opined that it was insignificant. We disagree.

Although the administrative law judge noted the Board's statement that "Dr. O'Bryan's diagnosis of moderate obstructive ventilatory impairment due in part to coal dust exposure is sufficient to meet the definition of pneumoconiosis at Section 718.201," *Eversole, slip op.* at 4, the administrative law judge properly provided ample rationale for his determination that Dr. O'Bryan's opinion was sufficient to establish the existence of pneumoconiosis. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, BLR (4th Cir. 2000); Remand Decision and Order at 7. The administrative law judge, within a proper exercise of his discretion, credited Dr. O'Bryan's opinion because Dr. O'Bryan administered a chest x-ray revealing a lung mass, a pulmonary function study demonstrating a moderate obstructive impairment, adequately documented the miner's coal mine employment and cigarette smoking histories, was familiar with the miner's condition based on several physical examinations, consistently noted the miner's symptomatology and diagnosed chronic obstructive pulmonary disease. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984); Remand Decision and Order at 7. The administrative law judge, therefore, permissibly found that Dr. O'Bryan's opinion was well documented and well reasoned. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). Furthermore, contrary to employer's argument, Dr. O'Bryan's opinion that cigarette smoking and coal dust exposure contributed to the miner's chronic obstructive lung disease is sufficient to establish the existence of pneumoconiosis as defined by the Act, 20 C.F.R. §718.201, even though Dr. O'Bryan qualified his diagnosis by stating that the miner did not have "*significant pneumoconiosis* because of his improvement in gas exchange with exercise," and that cigarette smoking was a more important factor in the development of the disease. Director's Exhibit 10; *see* 20 C.F.R. §718.201; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984); *see also Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988). Moreover, we note that employer concedes that statements made by Dr. O'Bryan "[meet] the definition of 'legal' pneumoconiosis[.]" Employer's Brief at 22. Further, we reject employer's assertion that Dr. O'Bryan's statement that the miner does not have "significant pneumoconiosis" necessarily means that his pulmonary disease is not "significantly related" to coal mine employment. *See* 20 C.F.R. §718.201; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Consequently, we hold that the administrative law judge reasonably found that Dr. O'Bryan's opinion was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

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3 In a report dated February 24, 1993, Dr. O'Bryan opined that the miner had obstructive lung disease due to cigarette smoking and coal dust exposure. Director's Exhibit 10.

Similarly, employer asserts that the administrative law judge adopted the Board's language in crediting Dr. Norsworthy's diagnosis of coal workers' pneumoconiosis. Employer avers that because the administrative law judge "parroted" the Board's holding by stating, "the fact that Dr. Norsworthy's notes were not present at the deposition does not render his opinion unreliable" and by finding, as did the Board, that Dr. Norsworthy relied upon a physical examination, x-ray interpretation, and review of pulmonary function studies. Remand Decision and Order at 7.

In our previous decision, we stated, "Inasmuch as the fact that Dr. Norsworthy was unable to locate the miner's records at the time of his deposition does not necessarily render the entirety of Dr. Norsworthy's conclusions undocumented" based on the fact that the evidence of record contained additional letters and reports prior to the deposition from Dr. Norsworthy detailing his treatment of the miner. *Eversole*, *slip op.* at 4; Director's Exhibit 29; Claimant's Exhibits 1, 2; Employer's Exhibit 3. Contrary to employer's argument, the administrative law judge "reexamined" Dr. Norsworthy's opinion, and independently and reasonably credited Dr. Norsworthy's diagnosis of "coal miner's pneumoconiosis" because it was supported by the physical examination findings, chest x-ray interpretations, and pulmonary function studies. *See King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Remand Decision and Order at 7. Furthermore, the administrative law judge reasonably found that Dr. Norsworthy's opinion, contained in his letters, was based on his medical notes and data and was not undermined by his deposition testimony, taken at a time when he did not have his charts on the miner. *See Rowe*, *supra*; Employer's Exhibit 3.

Employer also urges that the administrative law judge improperly failed to consider Dr. Norsworthy's medical qualification as a family practitioner and failed to consider the extent or sophistication of his treatment of the miner inasmuch as Dr. Norsworthy had only started treating the miner in December of 1993 and had not conducted independent tests to confirm a diagnosis of pneumoconiosis. Employer's contentions lack merit.

Initially, while a physician's medical qualifications are a factor to be considered in determining the probative value of that physician's opinion, the administrative law judge is not required to defer to the physicians with superior qualifications. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark*, *supra*. Contrary to employer's contention that Dr. Norsworthy's opinion was not "substantial evidence of pneumoconiosis," Dr. Norsworthy testified during his deposition on September 4, 1997 that his treatment of the miner, beginning on December 13, 1993 with the last visit held

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4 Dr. Norsworthy is Board-certified in family medicine. Employer's Exhibit 3 at 4.

on July 18, 1994, consisted of approximately seven office and/or hospital visits. Employer's Exhibit 3 at 7, 10. Moreover, the administrative law judge acknowledged that Dr. Norsworthy had not administered several objective tests, however, the administrative law judge rationally found that Dr. Norsworthy was still able to confirm the existence of pneumoconiosis based on his own physical examinations of the miner, chest x-ray interpretations, and a review of other treating physicians' opinions, thereby corroborating the diagnosis of pneumoconiosis. *See Hill*, *supra*. Inasmuch as it is the role of the administrative law judge to determine both the relative credibility of the evidence and the inferences to be drawn therefrom and such determinations must be upheld unless they are unreasonable or unsupported by the record, we affirm the administrative law judge's weighing of Dr. Norsworthy's opinion as his credibility determinations regarding this opinion are rational and supported by substantial evidence. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); *see also Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

Employer likewise contends that the administrative law judge impermissibly accorded determinative weight to Dr. Penman's diagnosis of pneumoconiosis because it was based on a discredited chest x-ray reading. Employer argues further that Dr. Penman did not opine that the miner's lung function impairment was due to coal dust exposure. Employer's arguments are without merit. The Board has consistently held that a physician's report may not be discredited simply because it is based on an x-ray interpretation which is outweighed by the other x-ray interpretations of record. *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-47 n.2 (1986); *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Furthermore, Dr. Penman's definitive diagnosis of coal workers' pneumoconiosis stage I progressing to stage II obviated the need for Dr. Penman to indicate the etiology of the miner's lung function impairment with respect to the sufficiency of his opinion under Section 718.202(a)(4). Director's Exhibit 27. The administrative law judge properly found that Dr. Penman's opinion was well documented and reasoned inasmuch as Dr. Penman relied on a positive x-ray interpretation, a pulmonary function study revealing an airway obstruction, an arterial blood gas study demonstrating mild hypoxia, a physical examination indicating rales and rhonchi, and accurate coal mine employment and cigarette smoking histories. *See Trumbo*, *supra*; *Fields*, *supra*; *Lucostic*, *supra*; Remand Decision and Order at 8. Consequently, we affirm the administrative law judge's crediting of Dr. Penman's opinion.

Employer additionally asserts that the administrative law judge irrationally accorded persuasive weight to Dr. Mercer's opinion that the miner had "chronic obstructive pulmonary disease in the setting of cigarette smoking and coal mining" because this opinion is unexplained, unreasoned, and undocumented, Director's Exhibit 29. We disagree. Acknowledging that Dr. Mercer's opinion, standing alone, was not "strongly persuasive," the administrative law judge nevertheless, properly found that it

corroborated the pneumoconiosis diagnoses of Drs. O'Bryan, Norsworthy, and Penman, and accordingly, assigned weight to it. *See Rowe, supra*; Remand Decision and Order at 8. Examining the credibility of Dr. Mercer's opinion, the administrative law judge permissibly found that Dr. Mercer had evaluated the miner on several occasions in 1987, 1993, and 1994, reviewed the miner's hospitalization records, and adequately recorded the miner's coal mine employment and cigarette smoking histories. It is well established that the administrative law judge has the sole power to render credibility determinations and resolve inconsistencies in the evidence. *See Meyer v. Zeigler Coal Co.*, 894 F.2d 902, 908, 13 BLR 2-285, 2-292 (7th Cir. 1990); *Rowe, supra*; Remand Decision and Order at 8. Inasmuch as the administrative law judge's determination to accord some, though not necessarily dispositive, weight to Dr. Mercer's opinion is not irrational or an abuse of his discretion, we reject employer's contention.

Employer argues further that the administrative law judge failed to comply with his duty under the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), in analyzing the conflicting evidence in the record because he ignored relevant evidence, namely the opinions of Drs. Ward, Chumley, Prajapati, Fulton, Edds, Graham, Gilliam, and Briones. We disagree. The administrative law judge previously considered these physicians' opinions in his initial Decision and Order. Decision and Order at 8, 10-12. Moreover, the administrative law judge properly considered the appropriate physicians' opinions specified by the Board under the pertinent regulatory provisions. *See Hall v. Director, OWCP*, 12 BLR 1-80, 1-82 (1988); Remand Decision and Order at 7-8. Inasmuch as the administrative law judge properly rendered a Decision and Order that comports with the Board's remand instructions, we reject employer's argument.

In contending that the administrative law judge failed to render a Decision and Order that comports with the APA, employer argues that the administrative law judge impermissibly discredited the opinions of Drs. Caffrey and Branscomb because they did not physically examine the miner and their opinions did not corroborate that of an examining physician. Employer's argument has merit. The administrative law judge impermissibly discounted the opinions of Drs. Caffrey and Branscomb because they did not physically examine the miner and their opinions do not corroborate an examining physician's opinion. Remand Decision and Order at 8. It is well established that there is no requirement that a non-examining physician's opinion must be given less weight than an examining physician's opinion. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997); *King v. Cannelton Industries, Inc.*, 8 BLR 1-146, 1-149 (1985); *Hall v. Consolidation Coal Co.*, 6 BLR 1-1306, 1-1309 (1984); Employer's Exhibits 1, 2. Notwithstanding that, likewise, there is no requirement that a non-examining physician's opinion corroborate that of an examining physician, we note that the opinions of Drs. Caffrey and Branscomb corroborate that of Dr. Lane, a physician

who conducted a physical examination of the miner on May 28, 1986. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994); *Turner v. Director, OWCP*, 927 F. 2d 778, 15 BLR 2-6 (4th Cir. 1991); *Johnson v. Director, OWCP*, 19 BLR 1-103, 1-109-110 (1995); Director's Exhibit 27. Although the administrative law judge found that the opinions of Drs. Caffrey and Branscomb were outweighed by those of Drs. O'Bryan, Norsworthy, and Mercer, he provided an improper basis for rejecting the opinions of Dr. Caffrey and Branscomb, and we, therefore, vacate the administrative law judge's weighing of these opinions under Section 718.202(a)(4).

Next, we turn to employer's challenge of the administrative law judge's determination that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(b). Employer contends that the administrative law judge improperly discounted the opinions of Drs. Caffrey and Branscomb on the basis that these physicians did not diagnose pneumoconiosis, when the administrative law judge had found the existence of pneumoconiosis established by the medical opinion evidence, because each physician nonetheless considered the effect that the presence of pneumoconiosis would have on their opinions regarding the etiology of claimant's total respiratory disability. We agree.

Drs. Caffrey and Branscomb each opined that the miner's totally disabling respiratory impairment was solely due to cigarette smoke-induced chronic obstructive pulmonary disease. Employer's Exhibits 1, 2. Both physicians went on, however, to conclude that, even assuming that the miner had evidence of simple coal workers' pneumoconiosis, any pulmonary impairment claimant had was the result of cigarette smoking and was neither caused nor aggravated by coal workers' pneumoconiosis or coal dust exposure. Employer's Exhibits 1, 2.

A physician's medical opinion regarding the etiology of a miner's total respiratory disability is deprived of probative value where the underlying premise of the medical opinion, *i.e.*, that there is insufficient evidence to establish coal workers' pneumoconiosis, runs contrary to the established fact that the miner did suffer from pneumoconiosis. *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S.Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995);

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5 Contrary to employer's argument, it was within a permissible exercise of the administrative law judge's discretion to accord less weight to Dr. Lane's opinion based on Dr. Lane's failure to provide any explanation in support of his opinion that the miner's obstructive defect and hypoxemia were due solely to cigarette smoking. *See Clark, supra*; *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984); Remand Decision and Order at 8; Director's Exhibit 27.

Tussey v. Island Creek Coal Co., 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). However, a medical opinion that acknowledges the miner's respiratory or pulmonary impairment, but nevertheless concludes that an ailment other than pneumoconiosis caused the miner's total disability, is relevant because it directly rebuts the miner's evidence that pneumoconiosis contributed to his disability. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1193, 19 BLR 2-304, 2-315-316 (4th Cir. 1995), *citing Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995).

In the instant case, the administrative law judge found the opinions of Drs. Caffrey and Branscomb entitled to less weight because these physicians "did not diagnose pneumoconiosis." Remand Decision and Order at 10. In so doing, however, the administrative law judge did not consider these physicians' opinions in their entirety. Specifically, both physicians stated that even assuming the miner had evidence of mild coal workers' pneumoconiosis, they considered any pulmonary impairment the miner had was the result of cigarette smoking and was neither caused nor aggravated by coal workers' pneumoconiosis or coal dust exposure. Employer's Exhibits 1, 2. Because the opinions of Drs. Caffrey and Branscomb in their entirety regarding the cause of the miner's total respiratory disability constitute probative evidence which warrants due consideration by the administrative law judge, we vacate the administrative law judge's Section 718.204(b) determination and remand the case for further consideration of the medical opinion evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998). In particular, the administrative law judge must discuss the opinions of Drs. Caffrey and Branscomb in their entirety and assess the weight, if any, to assign their opinions as compared to the other physicians' opinions of record. *See Rowe, supra*.

Employer similarly argues that the administrative law judge erroneously relied on the miner's coal mine employment to find that the miner's total respiratory disability was due to pneumoconiosis. Employer is correct. The administrative law judge found that "the significant length of [the] Miner's coal mine employment (more than 30 years) corroborates the physicians determination [sic] that coal dust contributed to his disability." Remand Decision and Order at 10. Inasmuch as the length of a miner's coal mine employment does not compel the conclusion that the miner's disability arose out of his coal mine employment, we vacate the administrative law judge's determination in this regard. *See Hicks, supra*.

Finally, we turn to employer's challenges regarding the survivor's claim and the administrative law judge's determination pursuant to Section 718.205(c)(2). Employer urges that the administrative law judge erroneously failed to consider the opinions of Drs. Caffrey and Broudy inasmuch as he found that the only opinions relevant to Section 718.205(c)(2) were those of Drs. Branscomb and Norsworthy. We agree.

The administrative law judge stated, "The reports of Drs. Norsworthy and Branscomb are relevant to this analysis." Remand Decision and Order at 10. Although the administrative law judge complied with the Board's remand instructions to specifically consider all of the components of Dr. Norsworthy's reports and deposition testimony, the administrative law judge failed to consider the reports of Drs. Caffrey and Broudy in reconsidering whether pneumoconiosis hastened the miner's death. Remand Decision and Order at 8; Director's Exhibit 29; Employer's Exhibit 1. Inasmuch as the APA requires the administrative law judge to consider all relevant evidence when making findings of fact and conclusions of law, *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). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *see also Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988), we vacate the administrative law judge's finding under Section 718.205(c)(2) and remand the case for him to reconsider and reweigh all of the relevant medical opinion evidence, in accordance with *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Citing excerpts from Dr. Norsworthy's deposition testimony, employer contends that the administrative law judge ignored Dr. Norsworthy's disclaimers regarding the role that pneumoconiosis played in the miner's death. Employer's contention lacks merit. On the contrary, the administrative law judge found, "Dr. Norsworthy's opinions given in the deposition are less persuasive than his letters and medical reports... ." Remand Decision and Order at 11. Hence, we reject employer's argument.

Employer similarly argues that the administrative law judge's weighing of Dr. Branscomb's opinion was improper. Specifically, employer asserts that the administrative law judge irrationally rejected the opinion of Dr. Branscomb on the grounds that Dr. Branscomb opined that coal workers' pneumoconiosis did not cause the miner's lung cancer or chronic obstructive pulmonary disease and did "not wholly refute that pneumoconiosis may have hastened [the] Miner's death." Remand Decision and Order at 11. Contrary to the administrative law judge's determination, Dr. Branscomb opined, assuming that coal workers' pneumoconiosis was present, "[n]either the CWP nor the COPD contributed to the time and manner of his death from cancer" and that "[t]he records firmly establish widespread metastases, cancer of the larynx, severe heart problems, and a terminal state on which a 'no code' was ordered." Employer's Exhibit 2. In light of our decision to vacate the administrative law judge's finding under Section 718.205(c)(2), the administrative law judge should reconsider all of the relevant opinions of evidence inasmuch as his credibility determinations on remand may impact his weighing of the conflicting evidence. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Fields, supra*; *Lucostic, supra*; Remand Decision and Order at 11. It is within the discretion of the administrative law judge to determine whether a medical opinion is more credible

because it presents a more complete picture of the miner's health. *See Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). Accordingly, inasmuch as we are remanding this case for further consideration of the medical opinion evidence, this is also a factor which may be considered when determining the relative weight to assign the physicians' opinions of record. *See Fields, supra*; *Stark, supra*; *Lucostic, supra*.

Accordingly, we affirm the administrative law judge's determination that claimant affirmatively established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) inasmuch as this finding is rational, contains no reversible error, and is supported by substantial evidence. However, we vacate the administrative law judge's determination that claimant demonstrated that pneumoconiosis contributed to the miner's total disability pursuant to Section 718.204(b), and accordingly, remand the case for the administrative law judge to reconsider the medical opinion evidence and determine whether the preponderance of the evidence establishes that claimant's disability is due, at least in part, to coal workers' pneumoconiosis in the miner's claim. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Furthermore, we vacate the administrative law judge's determination that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death pursuant to Section 718.205(c)(2), and remand the case for the administrative law judge to determine whether pneumoconiosis actually hastened the miner's death. *See Brown, supra*.

Additionally, we note that, although the onset date has not been challenged, if in reconsidering the medical opinion evidence the administrative law judge is able to determine that the medical evidence establishes a date that disability due to pneumoconiosis began, he must award benefits from the beginning of the month the evidence establishes that onset date. 20 C.F.R. §725.503(d). If, however, the administrative law judge again awards benefits in the miner's claim and is unable to determine the month of onset of total disability, benefits will commence as of the first day of the month the miner filed his duplicate claim, January 1, 1993. *Shupink v. LTV Steel Co.*, 17 BLR 1-24, 1-30 (1992); *Henning v. Peabody Coal Co.*, 7 BLR 1-753, 1-757 (1985).

Accordingly, the Decision and Order on Remand on Remand - Awarding Benefits on the Miner's Claim and the Survivor's Claim of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge