BRB No. 05-0338 BLA

FREDDIE D. JARRELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 12/29/2005
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 - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James M. Phemister and Stephanie J. Dawson (Legal Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (03-BLA-5265) of Administrative Law Judge Daniel L. Leland on a miner's 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). Initially, the administrative law judge found

the miner's claim to be timely filed. Decision and Order at 7. The administrative law judge found that "Claimant's Social Security records and pension records establish thirty-four years of coal mine employment."[1] Decision and Order at 9. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant[2] established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. *Id.* at 7-11. Accordingly, the administrative law judge awarded benefits, commencing September 2001. *Id.* at 11.

On appeal, employer asserts that the administrative law judge erred in his consideration of the x-ray, CT scan, and medical opinion evidence pursuant to 20 C.F.R. §718.202(a). Employer's Brief at 7-30. Employer also contends that the administrative law judge erred in weighing the medical opinion evidence at 20 C.F.R. §718.204(c). *Id.* at 39-43. Additionally, employer asserts that the administrative law judge erred in applying 20 C.F.R. §725.414 to exclude Dr. Wiot's deposition from the record. *Id.* Further, employer challenges the validity of 20 C.F.R. §725.414 because it conflicts with the Black Lung Benefits Act, the Administrative Procedure Act, and precedent of the United States Court of Appeals for the Fourth Circuit.[3] Employer's Brief at 30-39. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief. The Director asserts that the Board should affirm the validity of the evidentiary limitations at 20 C.F.R. §725.414 and the impartiality of the Director's complete pulmonary evaluation pursuant to 30 U.S.C. §923(b) of the Act.[4]

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[1]Employer asserts that the administrative law judge did not render a length of coal mine employment finding. Employer's Brief at 5 n.1. However, as claimant asserts, the administrative law judge, in applying 20 C.F.R. §718.203(b), stated that evidence in the record establishes thirty-four years of coal mine employment. Claimant's Brief at 1 n.2.

[2]Claimant is Freddie D. Jarrell, the miner, who filed his claim for benefits on September 11, 2001. Director's Exhibit 2.

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[4]We affirm the administrative law judge's finding that claimant's claim is timely filed and his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(a)(3), 718.203(b), and 718.204(b) because they are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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, 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).

VALIDITY OF SECTION 725.414 (LIMITATIONS ON EVIDENCE)

Employer raises numerous arguments challenging the validity of Section 725.414.[5] In *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*), the Board upheld the validity of Section 725.414, and we decline to revisit the pertinent holdings in *Dempsey* in this case. To the extent that employer raises a new Section 725.414 argument, specifically that the United States Court of Appeals for the District of Columbia Circuit and the D.C. District Court were without jurisdiction to consider the validity of the revised regulations in *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002) and *Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, --- BLR --- (D.D.C. 2001), we reject it as the same argument was considered and rejected by the D.C. Circuit court. *See Nat'l Mining Ass'n*, 292 F.3d at 856-859, 23 BLR at 2-150-55.

EXISTENCE OF PNEUMOCONIOSIS

X-ray Evidence

Employer asserts that the administrative law judge's weighing of the x-ray evidence is irrational. The administrative law judge considered separately the interpretations of each of the three x-rays contained in the record. The administrative law judge concluded that the x-rays dated November 15, 2001 and October 16, 2002 were positive for the existence of pneumoconiosis and that the May 20, 2002 x-ray "does not support a finding of pneumoconiosis."[6] Decision and Order at 7. The administrative law judge concluded that "the preponderance of the x-ray evidence is positive for pneumoconiosis." *Id.*

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[5]As noted by the Director, Office of Workers' Compensation Programs (the Director), in his brief, the validity of 20 C.F.R. §725.414 is pending before the United States Court of Appeals for the Fourth Circuit in *Elm Grove Coal Co. v. Blake*, No. 05-1108 (4th Cir. 2005) and *Big Bear Mining Co. v. Laxton*, No. 05-1070 (4th Cir. 2005).

[6]The May 20, 2002 x-ray was interpreted in conflicting ways by Drs. Ahmed and Wheeler, both B readers and Board-certified radiologists.

Regarding the October 16, 2002 x-ray, employer contends that the administrative law judge erred in according greater weight to the positive x-ray reading of Dr. Ahmed, who is dually qualified as a B reader[7] and Board-certified radiologist, over the negative reading of Dr. Zaldivar, who is a B-reader. Contrary to employer's contention, it was within the administrative law judge's discretion to accord greater weight to the reading of a physician who is a Board-certified radiologist and a B reader over the reading of a physician who is only a B reader. *See Dempsey*, 23 BLR at 1-65; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Employer additionally challenges the administrative law judge's weighing of interpretations of the November 15, 2001 x-ray. The record contains seven interpretations of the November 15, 2001 x-ray; four were read as positive and three were read as negative for the existence of pneumoconiosis. All of the physicians who read the November 2001 x-ray were dually qualified as B readers and Board-certified radiologists. Employer asserts that the administrative law judge erred in relying on numerical superiority, "based on a 4 to 3 ratio of positive to negative interpretations," to find the November 2001 x-ray to be positive for the existence of pneumoconiosis. Employer's Brief at 9. In considering the interpretations of this x-ray, the administrative law judge noted that all seven physicians were dually qualified. Therefore, contrary to employer's assertion, the administrative law judge permissibly considered the radiological qualifications of the x-ray readers. *See Trent*, 11 BLR at 1-28; *Roberts*, 8 BLR at 1-213. Similarly, because the administrative law judge considered the x-ray readers' qualifications, he did not rely solely on the numerical superiority of the positive readings in rendering his finding. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

Employer next asserts that it was denied the opportunity to present an equal number of interpretations of the November 15, 2001 x-ray as claimant because claimant is allowed an x-ray reading in conjunction with the Director's obligation to provide him with a complete pulmonary evaluation, as required by Section 413(b) of the Act, 30 U.S.C. §923(b). Of the seven readings of the November 2001 x-ray submitted by the parties, Dr. Patel's positive reading was submitted by the Director in conjunction with his

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[7]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 given on behalf of or by the Appalachian Laboratory for 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).

obligation to provide claimant with a complete pulmonary evaluation.[8] The positive readings by Drs. Cappiello and Miller were submitted as claimant's affirmative evidence pursuant to Section 725.414(a)(2)(i) and Dr. Ahmed's positive reading was submitted by claimant as his rebuttal reading pursuant to Section 725.414(a)(2)(ii). The negative readings of Drs. Wiot, Spitz, and Meyer were submitted by employer as its rebuttal readings pursuant to Section 725.414(a)(3)(ii).[9]

We reject employer's argument that it was denied the opportunity to counter Dr. Patel's positive x-ray reading developed by the Director pursuant to Section 413(b) of the Act. As the Director asserts in his response brief, claimant "does not have *carte blanche* to choose the physician he believes most likely to provide a favorable diagnosis for his DOL-provided evaluation." Director's Brief at 19. Rather, claimant must choose from a list of medical facilities and physicians, as outlined in 20 C.F.R. §725.406(b). Section 725.406(b) specifically states that:

> [t]he miner shall select one of the facilities or physicians on the list, *provided* that the miner may not select any physician to whom the miner or the miner's spouse is related to the fourth degree of consanguinity, and the miner may not select any physician who has

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[8]Dr. Porterfield evaluated claimant for the examination provided by the Director and Dr. Patel read the November 15, 2001 x-ray, which was taken as part of Dr. Porterfield's evaluation.

[9]At the hearing, the administrative law judge permitted employer to submit two additional readings of the November 15, 2001 x-ray because he found that claimant's numerical advantage in readings of this x-ray established good cause pursuant to 20 C.F.R. §725.456. Hearing Transcript at 30. As the Director asserts in his brief, however, there was no need for the administrative law judge to find good cause to submit employer's two additional readings of the November 15, 2001 x-ray. The Director correctly maintains that the administrative law judge failed to consider that Section 725.414(a)(3)(ii) permits an employer to provide a rebuttal reading in response to the opposing party's affirmative x-ray *readings*, and not merely one rebuttal reading in response to each opposing party's affirmative *film*. Director's Brief at 17 (citing 64 Fed. Reg. 79920, 79990 (Dec. 20, 2000)(each party would be able to submit one piece of evidence in rebuttal of each piece of evidence submitted by the opposing side). Accordingly, the administrative law judge permissibly allowed employer to submit the same number of readings as claimant, notwithstanding his erroneous rationale for doing so. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

> examined or provided medical treatment to the miner within the twelve months preceding the date of the miner's application.

20 C.F.R. §725.406(b). Consequently, we find no merit in employer's assertions that there is no "level playing field" or that "in this situation claimant always wins."

Based on the foregoing, we affirm the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1).

CT Scan Evidence

Employer contends that the administrative law judge did not adequately consider the CT scan evidence. The record contains four interpretations of a December 9, 2002 CT scan by Drs. Shipley, Wiot, Younis, and Ahmed. Drs. Shipley, Wiot, and Ahmed found no evidence of pneumoconiosis and Dr. Younis's interpretation contained no notations regarding the presence or absence of pneumoconiosis.[10] The administrative law judge noted that Dr. Younis's interpretation was performed in connection with claimant's treatment during hospitalization. Decision and Order at 8. The administrative law judge found Dr. Younis's CT scan interpretation to be entitled to "no weight" because it "was silent as to the existence of pneumoconiosis." *Id.* Although the administrative law judge found the rest of the CT scan evidence to be negative for the existence of pneumoconiosis, he accorded that evidence less weight based on the testimony of Dr. Cohen, who challenged the quality of the CT scan performed in this case. *Id.* Moreover, the administrative law judge dismissed Dr. Zaldivar's testimony regarding the CT scan evidence, stating that this physician "does not provide any rationale for [the CT scan's] reliability." *Id.*

Employer first asserts that the administrative law judge unreasonably excluded Dr. Younis's CT scan interpretation. In this regard, employer asserts that "the CT scan interpretation stands for the proposition that this whole series of diseases not diagnosed are not present." Employer's Brief at 13. Therefore, employer maintains that the "fact that Dr. Younis did not note that [sic] the presence of pneumoconiosis, speaks volumes – pneumoconiosis is not present." *Id.* As employer asserts, Dr. Younis's CT scan was not performed in connection with claimant's black lung claim and, consequently, was not rendered for the purposes "of ruling out all possible diseases that might be claimed to exist in a legal proceeding." Therefore, we vacate the administrative law judge's finding

[10]Dr. Younis found "no malignant nodule or lymphadenopathy" and noted "emphysematous changes . . . within the lungs." Claimant's Exhibit 15.

regarding Dr. Younis's CT scan interpretation and remand this case for the administrative law judge to determine whether the fact that Dr. Younis's CT scan was not performed in connection with claimant's black lung claim affects its probative value. Specifically, we instruct the administrative law judge, on remand, to consider employer's assertion that because Dr. Younis's CT scan was not performed in connection with his black lung litigation, there was no reason for Dr. Younis to have explicitly noted that the CT scan showed no evidence of pneumoconiosis.

Employer next contends that the administrative law judge erred in discrediting the CT scan evidence by requiring Dr. Zaldivar to provide a rationale for his statements regarding the CT scan's reliability without requiring Dr. Cohen to provide a rationale for his opinion on the same issue. In rendering his findings, the administrative law judge did not adequately explain his rationale for accepting Dr. Cohen's testimony, regarding the reliability of the December 9, 2002 CT scan, over Dr. Zaldivar's testimony.[11] Accordingly, we vacate the administrative law judge's finding that that the CT scan evidence will be afforded less weight and remand this case for him to provide an explanation regarding his credibility determinations as to the testimony of Drs. Cohen and Zaldivar. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

Additionally, employer contends that the administrative law judge erred in excluding from the record Dr. Wiot's deposition in which he testified regarding the value of the CT scan performed in this case. At the hearing, employer urged the administrative law judge to admit Dr. Wiot's deposition into the record pursuant to Section 718.107(b),[12] because this physician's testimony "goes to the heart of why the CT scan

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[11]During his deposition, Dr. Zaldivar testified that CT scans are very helpful in diagnosing the presence or absence of coal workers' pneumoconiosis. Employer's Exhibit 19 at 45. Additionally, Dr. Zaldivar stated that the advantage of "the CT scan is that one is looking at a smaller portion of the lungs. So if one was looking at a conventional CT which is ten millimeters in thickness compared to the entire thickness of the chest" with a chest x-ray, one can look at small areas of the lung in more detail. *Id.* at 45-46. Dr. Zaldivar further testified that the December 9, 2002 CT scan of record was taken at ten millimeter cuts, although some recent CT scans are cut at seven millimeters, and it shows no evidence of pneumoconiosis. *Id.* at 46.

[12]The regulation at 20 C.F.R. §718.107(b) states that:

> [t]he party submitting the test or procedure pursuant to this section bears the burden to demonstrate that the test or procedure is medically

evidence in this case, is relevant to refuting" the existence of clinical pneumoconiosis. Hearing Transcript at 20. The administrative law judge stated that he would defer to the Director's position,[13] expressed earlier in this case, and, therefore, he excluded Dr. Wiot's deposition. *Id.* at 40. Employer requested that the administrative law judge reconsider his ruling because the Director, in setting forth his position, did not take into consideration employer's assertion regarding Section 718.107(b). *Id.* Employer explained that Section 718.107(b) dictates that a party submitting "other evidence," *i.e.* CT scan evidence, bears the burden of establishing its relevancy and in his deposition Dr. Wiot "explained how the CT scan interpretation that he has read . . . is relevant to determine this case." *Id.* at 40-41. However, the administrative law judge maintained his position to exclude Dr. Wiot's deposition.

Although an administrative law judge is given broad discretion to handle procedural matters, the administrative law judge, in the instant case, merely accepted the Director's position on the exclusion of Dr. Wiot's deposition without discussing employer's argument regarding Section 718.107(b). *See Dempsey*, 23 BLR at 1-62 (an administrative law judge is given broad discretion to handle procedural matters); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*)(same). However, the Director's discussion regarding his position on the issue does not address employer's argument regarding Section 718.107(b). Accordingly, we vacate the administrative law judge's ruling to exclude Dr. Wiot's deposition testimony from the record and instruct

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> acceptable and relevant to establishing or refuting a claimant's entitlement to benefits.

[13]While this case was pending before the Office of Administrative Law Judges, a pre-trial dispute arose regarding the evidentiary limitations. During the course of that dispute, the Director submitted a brief on July 11, 2003 in response to claimant's Motion to Quash Notice and Cancel Deposition and Employer's Motion to Compel the Director's Position on the issue. In the Director's Brief on Evidentiary Limitations, the Director asserted that because Dr. Wiot has not prepared a medical report, employer can only admit Dr. Wiot's deposition testimony into the record to count as one of the two opinions that employer is allowed to submit at Sections 725.414(a)(3)(i) and 725.414(c). Additionally, the Director argued that employer had not made a showing of good cause pursuant to Section 725.456(b)(1). The Director explained that Dr. Wiot's deposition may be critical to employer's case and that employer is allowed to submit the deposition as long as it complies with Section 725.414. The Director maintained, however, that the only impediment to the admission of Dr. Wiot's deposition is employer's refusal to proffer it as one of the two medical reports it is allowed to submit.

him, on remand, to consider employer's argument that Dr. Wiot's deposition should be admitted into the record pursuant to Section 718.107(b).[14]

Medical Opinion Evidence at Section 718.202(a)(4)

Pursuant to Section 718.202(a)(4), employer asserts that the administrative law judge did not adequately consider the reports of Drs. Zaldivar, Crisalli, Koenig, and Cohen. As discussed below, employer's contentions have merit. For the reasons discussed, *infra*, we vacate the administrative law judge's finding that claimant established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §§718.201 and 718.202(a)(4) and remand this case for him to reconsider the relevant evidence.

At Section 718.202(a)(4), the administrative law judge reviewed the report of Dr. Porterfield, who found the existence of clinical pneumoconiosis, and the reports of Drs. Cohen and Koenig, who found the existence of clinical and legal pneumoconiosis. Decision and Order at 8. The administrative law judge weighed these physicians' opinions against the opinions of Drs. Crisalli and Zaldivar, who found the existence of neither clinical nor legal pneumoconiosis, but found that claimant suffers from asthma and emphysema. *Id.* at 8-9. The administrative law judge accorded greater weight to the opinions of Drs. Cohen and Koenig because he found that these physicians "provided ample medical references to support their conclusions and applied the objective evidence of record in formulating their rationales." *Id.* at 8. Conversely, the administrative law judge found that Drs. Crisalli and Zaldivar gave well-documented reports, but found that both physicians "failed to determine how [claimant's] coal dust exposure was excluded as a contributing cause of [claimant's] emphysema or an aggravating factor to his asthma." *Id.* at 9. The administrative law judge accorded less weight to the reports of Drs. Crisalli and Zaldivar because "neither opined on legal pneumoconiosis beyond making conclusionary statements that the miner's chronic obstructive pulmonary disease was not caused by coal dust exposure." *Id.* Therefore, the administrative law judge found that the medical opinion evidence establishes legal and clinical pneumoconiosis by a preponderance of the evidence. *Id.*

Legal Pneumoconiosis

Employer asserts that the administrative law judge, in rejecting the reports of Drs. Zaldivar and Crisalli as conclusory, failed to fully consider the deposition testimony of

[14]Dr. Wiot's deposition testimony can only be considered to the extent that it is based on admissible medical evidence. *See* 20 C.F.R. §725.414(a)(3)(i).

these two physicians in which they thoroughly explain the reasoning behind their conclusions that claimant does not suffer from legal pneumoconiosis. In considering Dr. Zaldivar's opinion, the administrative law judge noted that this physician, in his deposition, "included a discussion of legal pneumoconiosis, but not a discussion of [claimant's] dust history exposure as a contributing factor to his pulmonary impairment." Decision and Order at 9. However, the administrative law judge did not state why he found Dr. Zaldivar's testimony regarding the absence of legal pneumoconiosis to be inadequate to support his diagnosis. Because Dr. Zaldivar included a discussion of legal pneumoconiosis in his deposition, it is unclear, without further elaboration, why the administrative law judge found Dr. Zaldivar's finding that claimant does not suffer from legal pneumoconiosis to be conclusory. Accordingly, we instruct the administrative law judge to reconsider Dr. Zaldivar's report and testimony, and provide a more detailed analysis for his findings regarding this physician's opinion on remand. *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); *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591. Further, in discussing Dr. Crisalli's report, the administrative law judge did not refer to, or discuss, this physician's deposition. *See* Decision and Order at 5, 8-9. Because the administrative law judge found Dr. Crisalli's opinion to be conclusory without discussing this physician's testimony, we instruct the administrative law judge to do so on remand. *Id.*

Employer next asserts that the administrative law judge did not adequately consider Dr. Koenig's opinion in light of the conflicting opinions provided by Drs. Zaldivar and Crisalli. Dr. Koenig found that claimant suffers from chronic obstructive pulmonary disease [COPD], but does not have asthma. Claimant's Exhibit 4. Dr. Koenig attributes the cause of claimant's COPD to his coal dust exposure based on valid studies set forth in the medical literature and because of claimant's insignificant smoking history. Claimant's Exhibit 4. In deposition testimony, Drs. Zaldivar and Crisalli discussed why they disagree with Dr. Koenig's conclusions and why they believe that the articles cited by Dr. Koenig do not provide convincing proof that coal dust exposure is the cause of claimant's pulmonary impairment. Employer's Exhibits 19 at 50, 55-56; 21 at 46-47, 63-67. The administrative law judge did not consider the opposing testimony of Drs. Zaldivar and Crisalli in crediting Dr. Koenig's opinion. Therefore, we instruct the administrative law judge, on remand, to consider the conflicting opinions of Drs. Zaldivar, Crisalli, and Koenig and provide an explanation regarding the weight to be accorded to each opinion. *See Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Additionally, employer contends that because the June 18, 2003 pulmonary function study conducted by Dr. Koenig fails to comply with the mandatory quality standards found at 20 C.F.R. §718.103(b), Dr. Koenig's analysis of this study cannot

support his finding of legal pneumoconiosis.[15] In considering the pulmonary function study evidence pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found the June 18, 2003 study conducted by Dr. Koenig to be invalid pursuant to 20 C.F.R. §718.103 because an inadequate number of tracings was provided. Decision and Order at 9-10. As employer asserts, the administrative law judge should have considered whether his finding that Dr. Koenig's pulmonary function study is entitled to no weight at Section 718.204(b)(2)(i) affects the credibility of this physician's finding of legal pneumoconiosis. *See Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *see also Defore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Therefore, we instruct the administrative law judge, on remand, to consider whether the invalidity of Dr. Koenig's pulmonary function study affects the credibility of this physician's finding of legal pneumoconiosis.

Employer also contends that the administrative law judge erred in not analyzing and resolving conflicting portions of Dr. Cohen's deposition testimony. Specifically, employer asserts that the administrative law judge should consider whether Dr. Cohen's statements 1.) that claimant be prescribed inhaled steroids, which is the first line of treatment for asthmatics, and 2.) that claimant may benefit from a trial with bronchodilators, do not conflict with his finding that claimant does not suffer from asthma. Employer's Brief at 23-27. As employer points out, in crediting Dr. Cohen's opinion, the administrative law judge did not discuss whether or not this physician's lengthy testimony supports his finding that claimant suffers from chronic obstructive pulmonary disease due to his coal dust exposure. Accordingly, we instruct the administrative law judge, on remand, to address whether Dr. Cohen's testimony supports his conclusions regarding the existence of legal pneumoconiosis. *See Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Employer further asserts that the administrative law judge did not fully explain why he believes that the medical studies relied upon by Dr. Cohen support this physician's conclusion that claimant suffers from legal pneumoconiosis. In according greater weight to Dr. Cohen's report, the administrative law judge stated that this

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[15]Claimant contends that because employer failed to object to the admissibility of Dr. Koenig's report at the hearing, it cannot do so now before the Board. Contrary to claimant's contention, at the hearing, employer's counsel stated that the June 2003 pulmonary function study is admissible, but asserted that this study cannot serve as proof for the evidence for which it is offered because it is invalid. Hearing Transcript at 10-11. Employer expressed the same reservation regarding the administrative law judge's consideration of Dr. Koenig's report because Dr. Koenig's report was based on his analysis of the June 2003 pulmonary function study.

physician provided ample medical references to support his conclusion. Decision and Order at 8. But the administrative law judge did not elaborate upon which studies or which findings in the studies cited by Dr. Cohen support his conclusion, and he did not discuss the testimony Dr. Cohen gave in relation to these studies.[16] Because the administrative law judge did not state why the studies cited by Dr. Cohen support his conclusion, it is difficult to determine whether this reason given by the administrative law judge for crediting Dr. Cohen's opinion is rational. Moreover, in deposition testimony, Drs. Zaldivar and Crisalli question the validity of the studies cited by Dr. Cohen. Employer's Exhibits 19 at 35-36, 55-56; 21 at 43-46. Therefore, we instruct the administrative law judge to more fully explain his reasons for finding that the studies cited by Dr. Cohen support his conclusion, when reexamining the weight to be accorded to his opinion on remand. *See Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Clinical Pneumoconiosis

Employer argues that the administrative law judge's findings regarding clinical and legal pneumoconiosis are "muttled and should be made clear." The administrative law judge noted that Drs. Porterfield,[17] Cohen, and Koenig found the existence of clinical

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[16]Specifically, employer points out that one of the studies relied upon by Dr. Cohen to support his finding that claimant suffers from legal pneumoconiosis showed a much greater loss of FEV1 capacity than claimant has shown on the pulmonary function studies. At his deposition, Dr. Cohen agreed with this statement made by employer's counsel, but responded that the studies do not take into account sensitive individuals such as claimant. Claimant's Exhibit 14 at 61. However, upon further cross-examination by employer's counsel, Dr. Cohen stated that he did not know what the level of claimant's coal dust exposure was during his employment or if claimant used any equipment to protect his breathing in the mines. *Id.* at 61-62. Knowledge of the level of claimant's coal dust exposure and whether he wore any breathing protection during employment may be critical factors in determining how sensitive a miner is to coal dust.

[17]Employer asserts that the administrative law judge's conclusion regarding Dr. Porterfield's diagnosis of clinical pneumoconiosis is flawed because it depends on the dubious value of Dr. Ahmed's interpretation of the November 15, 2001 x-ray. In his November 2001 report, Dr. Porterfield diagnosed clinical pneumoconiosis based on Dr. Patel's reading of the November 15, 2001 x-ray. Dr. Ahmed interpreted the November 15, 2001 x-ray almost two years after Dr. Porterfield's report. Both Drs. Patel and Ahmed are B readers and Board-certified radiologists. Therefore, it is unclear why employer challenges the credibility of Dr. Porterfield's clinical pneumoconiosis diagnosis based on Dr. Ahmed's rereading of the November 15, 2001 x-ray, when both physicians possess the same radiological qualifications.

pneumoconiosis based on positive x-ray evidence and claimant's coal dust exposure. Decision and Order at 8. The administrative law judge concluded that the medical opinion evidence establishes that claimant suffers from clinical pneumoconiosis. *Id.* at 8-9. Prior to determining that the medical opinion evidence establishes the existence of clinical pneumoconiosis, the administrative law judge did not render credibility determinations as to why he found the opinions of Drs. Porterfield, Cohen, and Koenig to be more persuasive than the contrary opinions of Drs. Zaldivar and Crisalli on this issue. Accordingly, we vacate the administrative law judge's finding of clinical pneumoconiosis pursuant to Section 718.202(a)(4) and instruct him to reconsider all of the relevant medical opinions of record and render credibility determinations regarding this evidence on remand. *See Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Employer further asserts that, given Dr. Cohen's deposition testimony,[18] this physician may have diagnosed clinical pneumoconiosis based on a history of coal dust exposure alone. Occupational exposure is not evidence of pneumoconiosis, but merely a reason to expect that evidence of the disease might be found. *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). Therefore, we instruct the administrative law judge, on remand, to reconsider whether Dr. Cohen's finding of clinical pneumoconiosis is adequately reasoned and documented.

COMPTON ANALYSIS AT SECTION 718.202(a)

Employer asserts that the administrative law judge erred in merely giving "lip service" to his weighing of all the relevant evidence together to determine whether claimant has established the existence of pneumoconiosis at Section 718.202(a) in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Pursuant to *Compton*, the administrative law judge found that "[t]aken as a whole, the medical reports, CT scan evidence, and chest x-ray evidence prove by a preponderance of the evidence that Claimant has clinical and legal pneumoconiosis." Decision and Order at 9. Because the administrative law judge found the existence of pneumoconiosis based on the x-ray and medical opinion evidence and because he found

[18]Dr. Cohen testified that he thinks that claimant has clinical pneumoconiosis, but stated that he does not have good evidence of it. Claimant's Exhibit 14 at 88. In doing so, Dr. Cohen indicated that "there were very, very great problems . . . in routine radiography in looking for coal macules. So I think it's a very, very insensitive test." *Id.* Dr. Cohen added that because the CT scan performed was not high resolution, it was not very helpful. *Id.* Additionally, the administrative law judge noted that "Dr. Cohen expressly stated that his diagnosis of pneumoconiosis did not rely upon positive x-ray evidence." Decision and Order at 8.

the CT scan evidence unreliable, there was no conflicting evidence for him to weigh pursuant to Section 718.202(a). However, because we vacate the administrative law judge's findings regarding the CT scan and the medical opinion evidence, we also vacate the administrative law judge's Section 718.202(a) finding and instruct the administrative law judge to again consider all the relevant evidence pursuant to Section 718.202(a) on remand. Specifically, we instruct the administrative law judge to address the significance the negative interpretations of the December 9, 2002 CT scan may have on the x-ray evidence. *See Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591. Additionally, as the Fourth Circuit court in *Compton* noted, the administrative law judge must be mindful of the distinction between clinical and legal pneumoconiosis and of the different diagnostic purposes of the various pieces of evidence, when reconsidering all of the relevant evidence at Section 718.202(a) on remand. *Compton*, 211 F.3d at 210-11, 22 BLR at 2-173-74.

SECTION 718.204(c)

In considering the medical opinion evidence pursuant to Section 718.204(c), the administrative law judge found that the opinions of Drs. Crisalli and Zaldivar are entitled to "little weight" because these physicians did not diagnose pneumoconiosis. Decision and Order at 10. Because the administrative law judge must reevaluate whether the medical opinion evidence is sufficient to establish the existence of pneumoconiosis, an analysis that could affect his weighing of the evidence on the issue of disability causation, we vacate the administrative law judge's 20 C.F.R. §718.204(c) finding. If the issue of disability causation is again reached on remand, we instruct the administrative law judge to consider all the relevant evidence regarding whether claimant's total respiratory disability is due to pneumoconiosis, 20 C.F.R. §718.204(c), and to explain the rationale for his conclusions, *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Pursuant to Section 718.204(c), employer specifically asserts that the administrative law judge erred in mechanically discrediting the opinions of Drs. Zaldivar and Crisalli regarding disability causation because these physicians did not find the existence of pneumoconiosis. In its brief, employer contends that the administrative law judge failed to apply relevant Fourth Circuit case law. We instruct the administrative law judge to consider the holdings of the Fourth Circuit in *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995), and *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995) in reweighing the medical opinion evidence pursuant to Section 718.204(c), if the issue of disability causation is reached on remand.

DATE OF ENTITLEMENT

Finally, because we vacate the administrative law judge's weighing of the evidence at Sections 718.202(a) and 718.204(c), we also vacate the administrative law judge's finding regarding the date of entitlement and instruct the administrative law judge to reconsider this issue, if reached, on remand.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge