BRB No. 03-0338 BLA

ROBERT L. SPIVEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	
	)	DATE ISSUED: 02/26/2004
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 on Remand of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

S. Parker Boggs (Buttermore & Boggs), Harlan, Kentucky, for claimant.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Rita Roppolo (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (99-BLA-0749) of Administrative Law Judge Linda S. Chapman awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

amended, 30 U.S.C. §901 *et seq*. (the Act).[1] This case involves a duplicate claim filed on April 14, 1998[2] and is before the Board for the third time. In her initial Decision and Order addressing the duplicate claim, the administrative law judge credited claimant with at least thirty years of coal mine employment and found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) (2000), but found that the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). The administrative law judge, therefore, found that the newly submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) and considered the merits of claimant's 1998 duplicate claim. Having found that claimant established the existence of pneumoconiosis, the administrative law judge further found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). The administrative law judge also found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000).[3] Accordingly, the administrative law judge awarded benefits.

By Decision and Order dated December 28, 2000, the Board affirmed the administrative law judge's length of coal mine employment finding and her findings pursuant to 20 C.F.R. §718.202(a)(1)-(3) (2000) as unchallenged on appeal. *Spivey v. Mountain Clay, Inc.*, BRB No. 00-0210 BLA (Dec. 28, 2000) (unpublished). The Board

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on May 13, 1991. Director's Exhibit 34. The district director denied the claim on October 16, 1991. *Id.* Although employer submitted additional medical evidence on November 13, 1991, there is no indication that claimant took any further action in regard to his 1991 claim.

Claimant filed a second claim on April 14, 1998. Director's Exhibit 1.

[3] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

vacated the administrative law judge's finding that the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000) and remanded the case for further consideration. *Id.* The Board also vacated the administrative law judge's findings pursuant to 20 C.F.R. §§725.309 (2000) and 718.203(b) (2000) and 718.204(b) and (c) (2000) on the merits of the claim. *Id.*

On remand, the administrative law judge again found that the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000) and, therefore, sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). On the merits of the claim, the administrative law judge found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). The administrative law judge also found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits.

By Decision and Order dated June 12, 2002, the Board affirmed the administrative law judge's finding that the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[4] *Spivey v. Mountain Clay, Inc.*, BRB No. 01-0754 BLA (June 12, 2002) (unpublished). The Board also affirmed the administrative law judge's finding that the newly submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[5] *Id.* The Board vacated, however, the administrative law judge's findings on the merits of the claim pursuant to 20 C.F.R. §718.204(b) and (c) and remanded the case for further consideration. *Id.*

On remand for the second time, the administrative law judge found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge also found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer

[4] The Board rejected employer's contention that the administrative law judge erred in failing to weigh all of the evidence, like and unlike, together under 20 C.F.R. §718.202(a). *Spivey v. Mountain Clay, Inc.*, BRB No. 01-0754 BLA (June 12, 2002) (unpublished).

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

contends that intervening case law requires the administrative law judge to reconsider her findings pursuant to 20 C.F.R. §§718.202(a)(4) and 725.309 (2000). Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Employer further contends that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, contending that the administrative law judge properly found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). In separate replies to the response briefs filed by claimant and the Director, employer reiterates its previous contentions.

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).

Employer initially contends that intervening case law, *Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, BLR (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, BLR (D.D.C. 2001) (*Nat'l Mining Ass'n*), requires reconsideration of the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4) and 725.309 (2000). Two days after the issuance of the Board's 2002 Decision and Order, the United States Court of Appeals for the District of Columbia Circuit issued its decision in *Nat'l Mining Ass'n*. Although counsel for the Director conceded at oral argument in *Nat'l Mining Ass'n* that the occurrence of latent and progressive pneumoconiosis is rare, the Director's concession does not nullify the administrative law judge's substantive weighing of the newly submitted medical opinion evidence in this case.

Employer contends that claimant had the burden of explaining how his pneumoconiosis could develop or progress long after leaving coal mine employment. Employer's Brief at 11. However, neither the regulations nor the case law impose such a burden on claimant. The Department of Labor (DOL) recently published comments regarding the implementation of the revised regulations. The DOL addressed the holding set out in *Nat'l Mining Ass'n*, noting that the court upheld 20 C.F.R. §718.201(c) because it has sufficient support in the rulemaking record. The DOL further commented that:

> The court cited scientific evidence in the rulemaking record indicating that pneumoconiosis can be latent and progressive. The court cited two studies, one "indicating that pneumoconiosis is latent and progressive in – at most –

> eight percent of cases," and the other "indicating that pneumoconiosis is latent and progressive as much as 24% of the time." 292 F.3d at 869. Consistent with the Department's argument, the court therefore interpreted the regulation to mean that pneumoconiosis can be a latent and progressive disease, not that pneumoconiosis is always or typically a latent and progressive disease. *Id.* There is no irrebuttable presumption that each miner's pneumoconiosis is latent or progressive. The burden of proving the existence of pneumoconiosis is always on the miner. As the Department explained in the preamble to the final rule, "the miner continues to bear the burden of establishing all of the statutory elements of entitlement." 65 FR at 79972 (Dec. 20, 2000).

68 FR at 69931-69932 (Dec. 15, 2003).

The comments make clear that although claimants bear the burden of establishing all elements of entitlement, including the existence of pneumoconiosis, they do not bear the additional burden of "establishing that the change in…condition represents latent, progressive pneumoconiosis." 65 FR at 79972 (Dec, 20, 2000). In this case, the administrative law judge considered the newly submitted medical opinion evidence and properly found it sufficient to establish the existence of pneumoconiosis. We, therefore, reject employer's assertion that *Nat'l Mining Ass'n* mandates that the Board revisit its decision to affirm the administrative law judge's finding that the newly submitted medical opinion evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Consequently, we also decline to revisit our affirmance of the administrative law judge's finding that the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).

Employer next contends that the administrative law judge erred in finding the elements of entitlement established. Employer had previously argued that the administrative law judge had erred in her consideration of the evidence on the existence of pneumoconiosis by failing to consider the 1991 medical opinions of Drs. Broudy and Dahhan who had not diagnosed pneumoconiosis. The Board acknowledged that the Sixth Circuit had held that after an administrative law judge determines that claimant has established a material change in conditions, the administrative law judge must consider all of the evidence of record, including that submitted with the previous claims, to determine whether the evidence supports a finding of entitlement. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Nevertheless, the Board held that any error committed by the administrative law judge in overlooking these opinions was harmless:

> Both the Sixth Circuit and the regulations recognize that pneumoconiosis is a progressive disease, which may first become detectable only after the

> cessation of coal dust exposure, *see Ross*, 42 F.3d at 997, 19 BLR at 2-17; *see* definition of pneumoconiosis set forth at 20 C.F.R. §718.201(c), and that the date of the hearing, which in this case was held on July 13, 1999, is the date upon which the extent of disability is assessed by the administrative law judge in a living miner's case, *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984).

Spivey v. Mountain Clay, Inc., BRB No. 01-0754 BLA (June 12, 2002) (unpublished), slip op. at 10.

Employer contends that *Nat'l Mining Ass'n* reveals that the Board erred in holding harmless the administrative law judge's failure to consider 1991 medical reports, when finding that claimant suffered from pneumoconiosis based on evidence developed in 1998 and 1999. Director's Exhibit 9; Claimant's Exhibits 2, 4. Employer would be correct if the court had held in *Nat'l Mining Ass'n* that pneumoconiosis is never latent and progressive. That was not the court's holding. While recognizing that pneumoconiosis is rarely latent and progressive, the court upheld the regulation, stating that it "simply prevents operators from claiming that pneumoconiosis is *never* latent and progressive." *Nat'l Mining Ass'n*, 292 F.3d at 863, ___ BLR at ___ (emphasis in original). The Department quoted this statement in its recent comments on the regulations.[6] 68 FR at 69932 (Dec. 15, 2003).

We agree with the Director that the previously submitted evidence shows only that claimant did not have pneumoconiosis in 1991. Director's Brief at 4. Because the relevant issue is whether claimant suffered from pneumoconiosis at the time of the July 13, 1999 hearing, *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988), and logically, 1991 evidence cannot rebut 1998 and 1999 evidence, we reaffirm our previous holding that any error by the administrative law judge in failing to consider evidence dating from 1991, that was submitted with claimant's prior claim, in determining whether the elements of entitlement were established on the merits in this claim, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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[6] Implicit in employer's argument, that *Nat'l Mining Ass'n* establishes that claimant does not have pneumoconiosis, is a logical fallacy: The court stated that the vast majority of respiratory impairments identified as pneumoconiosis do not develop and progress after leaving coal mine employment; Claimant's respiratory impairment developed and progressed after leaving coal mine employment; Therefore, claimant's respiratory impairment is not pneumoconiosis. The fallacy in this syllogism is that one cannot conclude that claimant's respiratory impairment is not pneumoconiosis unless all respiratory impairments which develop and progress after leaving coal mine employment are excluded from the category of pneumoconiosis. They are not.

Employer also argues that the administrative law judge erred in finding the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Employer initially contends that the administrative law judge erred in finding the pulmonary function study evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). In this case, the only valid pulmonary function study was conducted on June 18, 1993 when claimant was 73 years of age. Director's Exhibit 9. In its previous appeal to the Board, employer argued that because the regulations do not specify qualifying pulmonary function study values for a miner beyond the age of 71, a pulmonary function study performed on a miner over the age of 71 could not be qualifying. Employer also argued that an administrative law judge could not extrapolate additional values from those set forth in the regulations. In its 2002 Decision and Order, the Board rejected employer's contentions, holding that:

> Although the regulations only provide table values for miners up to 71 years of age, the regulations do not prohibit an administrative law judge from finding by extrapolation appropriate table values for miners older than 71 years of age, but the administrative law judge should explain her process for finding the pulmonary function study qualifying under the regulations. Thus, inasmuch as the administrative law judge merely found that the results of the June, 1998, pulmonary function study were "qualifying," but did not explain how she came to that conclusion, and the June, 1998, pulmonary function study is the only objective evidence of record that the administrative law judge found yielded valid and qualifying results and it was relied on, in part, by Drs. Baker, Kiser and Younes, we vacate the administrative law judge's finding that total disability was established under Section 718.204 and remand the case for the administrative law judge to explain her process for finding the pulmonary function study qualifying under the regulations. Moreover, because there are differences in the heights recorded in the pulmonary function studies of record, the administrative law judge should make a factual finding of the miner's actual height and use the height in determining whether the June, 1998, pulmonary function study is qualifying under the regulations.

Spivey v. Mountain Clay, Inc., BRB No. 01-0754 BLA (June 12, 2002) (unpublished), slip op. at 13-14 (footnote and case citations omitted).

On remand for the second time, the administrative law judge found that claimant's height was 67.75 inches. 2003 Decision and Order on Remand at 2. The administrative law judge further stated that:

> I note, as pointed out by the Board, that the results of the [June 18, 1998] study would be qualifying for a miner who is 71 years of age for any of the

> [heights listed on the miner's pulmonary function studies]. However, at the time of the study, the Claimant was 73 years of age. The tables at Part 718, Appendix B set out qualifying FEV1, FVC and MVV values according to age, height, and gender. Starting at least at age 24, these values decrease in small increments each year, with the threshold for establishing total disability steadily diminishing with age.
>
> Given the structure and progression of these tables, it is reasonable to assume that if the tables were extended to age 73, the qualifying values for a miner at the age of 73 would be slightly less than the values for a miner at age 71. Certainly, they would not be higher. As stated above, the Claimant's June 1998 values were qualifying for a male of the age of 71, at any of the heights listed. As the values listed in the tables would only decease with age, I find that it is reasonable to conclude that the Claimant's June 1998 pulmonary function study values, which were qualifying for a man of 71, were also qualifying for a man of 73.

2003 Decision and Order on Remand at 2-3.

We agree with employer that the administrative law judge's reasoning is flawed. It is not reasonable to assume that because claimant's pulmonary function study values would be qualifying for a 71 year old miner, they must also be qualifying for a 73 year old miner.[7] However, the administrative law judge further found that, despite the qualifying or non-qualifying nature of claimant's June 18, 1998 pulmonary function study, it remained "a valid study that reflected significant impairment, as determined by Dr. Baker, Dr. Kiser, and Dr. Younes…." 2003 Decision and Order on Remand at 3. The administrative law judge found that the opinions of these physicians "did not turn on a determination that the pulmonary function test results were "qualifying" under the regulations." *Id.* The administrative law judge's finding is consistent with the Board's previous observation that "[w]hether or not the [administrative law judge] finds the June, 1998, pulmonary function study is qualifying on remand, the significance of even non-qualifying objective tests is for a physician to determine and a physician may

[7] An example demonstrates this point. If a 69 year old miner with a height of 68.1 inches produced a FEV1 value of 1.75, that value would be considered qualifying under the regulations because the applicable table at Part 718, Appendix B indicates that such a miner must produce a FEV1 value equal to or less than 1.76. However, if the same miner a year later again produces a FEV1 value of 1.75, his FEV1 value would be considered non-qualifying because the applicable table reveals that such a miner must produce a FEV1 value of 1.74 or less. In short, because qualifying values decrease with age, a miner's values must decline with age in order to remain qualifying. Consequently, the administrative law judge's method of extrapolation cannot stand.

nevertheless find that such test results indicate that a claimant would be unable to perform his last coal mine employment…." *Spivey v. Mountain Clay, Inc.*, BRB No. 01-0754 BLA (June 12, 2002) (unpublished), slip op. at 14 n.12. Because the administrative law judge reasonably recognized that the physicians relied upon the results of claimant's June 18, 1998 pulmonary function study, rather than whether it was a qualifying or non-qualifying study under the regulations, we find no error in the administrative law judge's consideration of the pulmonary function study evidence.

Employer next contends that the record does not support the administrative law judge's finding that claimant's usual coal mine employment required heavy labor. Before an administrative law judge can determine whether a miner is able to perform his usual coal mine work, she must identify the employment that is or was the miner's usual coal mine work and then compare evidence of the exertional requirements of the usual coal mine employment with the medical opinions as to claimant's work capabilities. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988). In this case, the administrative law judge found that:

> In his last coal mining job, the Claimant worked at a strip mine, running machinery, sweeping coal, and helping on the drills (Tr. 33). He ran dozers, rock trucks, graders, endloaders, and drills (DX 2[,]4). He was required to lift bags of powder weighing at least 50 pounds (Tr. 36).

2003 Decision and Order at 3-4.

We are puzzled by employer's assertion that the record does not support the administrative law judge's finding since the administrative law judge cited claimant's statements on specific pages in the record where she obtained the facts she found. At the hearing claimant summarized his work as follows:

> Well, on the job I was on, was a strip job there last, you had to be able to do everything that they wanted you to on the job. I could run any kind of machinery they had that was on the job, so they would switch you from driving EUC's to running dozers, sweeping coal, helping on the drills, highwall drills, and you didn't have really no certain job.

Transcript at 33.

He also testified that he was required to lift bags weighing "more than 50 pounds." Transcript at 36. Claimant stated that he could no longer do any of the coal mine work he had previously performed because "all I ever done was hard manual work." *Id.* at 37. Reference to the Dictionary of Occupational Titles (4th ed. 1991) provides corroboration: it indicates that both the strip mine positions of machine driller (930.382-010) and driller

helper (930.666-010) entail heavy work. Since the administrative law judge's finding that claimant performed heavy manual labor was based upon her reasonable understanding of claimant's testimony, it cannot be set aside. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 415 (6th Cir. 1997). As long as the administrative law judge's conclusions are supported by the evidence, they will not be reversed, "even if the facts permit an alternative conclusion." *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 246, 19 BLR 2-123. 2-127 (6th Cir. 1995); *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). After review of the administrative law judge's findings, we hold that she acted within her discretion in characterizing claimant's most recent coal mine employment as requiring work at the "heavy exertional level." *See* 2003 Decision and Order at 4.

Employer next contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Because in her 2001 Decision and Order on Remand, the administrative law judge had not compared the exertional requirements of claimant's usual coal mine employment with the opinions of Drs. Baker and Kiser regarding the extent of claimant's impairment, the Board remanded the case to the administrative judge for reconsideration of whether the opinions of Drs. Baker and Kiser were sufficient to establish total disability. *Spivey v. Mountain Clay, Inc.*, BRB No. 01-0754 BLA (June 12, 2002) (unpublished). The Board also instructed the administrative law judge to resolve the inconsistency in her consideration of Dr. Younes's opinion. *Id.*

After determining on remand that claimant's most recent coal mine employment required him to perform work at the heavy exertional level, the administrative law judge considered whether the opinions of Drs. Baker and Kiser supported a finding of total disability:

> Dr. Baker has clearly stated that, due to his respiratory impairment, the Claimant can only work at sedentary jobs, possibly with a moderate degree of exertion. He thus clearly has excluded the Claimant from any jobs that fall in the heavy exertional category, which included the Claimant's last coal mining job. While Dr. Kiser did not characterize the exertional demands of the Claimant's last coal mining job, or his current capabilities, his conclusion that the Claimant could not perform his usual coal mining work was based on a finding that the Claimant's respiratory capacity was significantly reduced, that he had exertional dyspnea, and that he could not climb stairs. I find that his opinion is consistent with Dr. Baker's, and supports a finding that the Claimant has a respiratory impairment that prevents him from doing the heavy work he performed at his last coal mining job.

2003 Decision and Order on Remand at 4.

Employer argues that the administrative law judge erred in her consideration of the opinions of Drs. Kiser and Baker. In regard to Dr. Baker's opinion, employer contends that because claimant's coal mine employment did not require hard manual work, Dr. Baker's finding of a moderate impairment does not support a finding of total disability. Employer's Brief at 19. The law is clear that even a mild impairment may be totally disabling, depending upon the exertional requirements of a miner's usual coal mine employment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). In light of our holding that the administrative law judge acted within her discretion in characterizing claimant's most recent coal mine employment as requiring work at the "heavy exertional level," we reject employer's contention of error regarding the administrative law judge's consideration of Dr. Baker's opinion.

Employer also argues that the administrative law judge erred in not considering whether Dr. Kiser's opinion was sufficiently reasoned. Employer thereby misplaces the burden of proof. The burden in not on the administrative law judge to show how a doctor's report is documented and reasoned. The burden is on employer to show that the report is not documented and reasoned and, therefore, that the administrative law judge erred in crediting it. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). The administrative law judge noted that Dr. Kiser found that claimant had dyspnea on exertion at twenty feet and was unable to climb stairs. 2003 Decision and Order at 4; Claimant's Exhibit 2. Because Dr. Kiser's opinion obviously supports a finding that claimant was totally disabled, the administrative law judge's reliance upon his opinion required no explanation.

In criticizing the administrative law judge's reliance upon Dr. Younes's opinion, employer does not contend that it cannot constitute substantial evidence to support a finding of total disability; employer's only argument is that on remand, the administrative law judge erred in failing to follow the Board's instruction to explain the change in her evaluation of Dr. Younes's opinion between her first and second decisions. Upon reexamination of these decisions, we recognize we had misperceived a change.[8] Moreover, even if there had been a change, the administrative law judge would not be required to explain it. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997). She is required only to analyze correctly the evidence in the decision under review.

On remand, the administrative law judge properly weighed the relevant evidence together, both like and unlike, in determining that the evidence was sufficient to establish

[8] In both decisions, she credited Dr. Younes's opinion on the issue of total disability and accorded it less weight on the issue of causation.

total disability pursuant to 20 C.F.R. §718.204(b). *See Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (*en banc*). This finding is, therefore, affirmed.

Employer also challenges the administrative law judge's finding that the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In its most recent decision, the Board upheld the administrative law judge's determination to give little weight to the opinions of Drs. Broudy and Chandler on the issue of disability causation. *Spivey v. Mountain Clay, Inc.*, BRB No. 01-0754 BLA (June 12, 2002) (unpublished). Employer does not dispute these determinations on appeal. Employer again contends, however, that the opinions of Drs. Kiser and Baker are not reasoned and documented; hence, it was error for the administrative law judge to credit them. The Board previously rejected this argument. *Spivey v. Mountain Clay, Inc.*, BRB No. 01-0754 BLA (June 12, 2002) (unpublished), slip op. at 16. Furthermore, the law in the Sixth Circuit is well established that whether a report is sufficiently documented and reasoned is a credibility matter for the factfinder to decide. *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

Finally, employer asserts that the administrative law judge did not follow the Board's instruction in its prior decision to consider Dr. Branscomb's opinion on the issue of causation. *Spivey v. Mountain Clay, Inc.*, BRB No. 01-0754 BLA (June 12, 2002) (unpublished), slip op. at 16-17. That contention is without merit. On remand, the administrative law judge fully discussed Dr. Branscomb's opinion:

> Dr. Branscomb concluded that the Claimant did not have any evidence of pneumoconiosis, or any pulmonary impairment, whether due to exposure to coal mine dust, pneumoconiosis, or any other disorder. I interpret Dr. Branscomb's opinion as stating that, even if he assumed that the Claimant's x-rays showed changes of pneumoconiosis, there was no indication that there was any impairment caused by pneumoconiosis, *or any other disorder*. In other words, because he did not believe that the Claimant had any pulmonary impairment, even if he had pneumoconiosis, it did not contribute to a pulmonary impairment, *because there was none*. In making my determination as to whether the Claimant's totally disabling respiratory impairment was due to his pneumoconiosis, I do not find Dr. Branscomb's opinion, that the Claimant's non-existent pneumoconiosis did not contribute to his non-existent pulmonary impairment, to be useful or probative; thus, as in my previous opinion, I do not give it any weight.

2003 Decision and Order on Remand at 5 (emphasis in original).

The administrative law judge reasonably determined that Dr. Branscomb's opinion was irrelevant to the issue of causation because there can be no causation of a non-existing pulmonary impairment. In sum, employer has failed to demonstrate any error in the administrative law judge's weighing of the medical opinion evidence on the issue of causation. We, therefore, affirm the administrative law judge's finding that the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

_____
REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

_____
BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring and dissenting:

I concur with my colleagues that *Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, BLR (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, BLR (D.D.C. 2001) does not constitute intervening precedent mandating that the Board revisit its decision to affirm the administrative law judge's finding that the newly submitted medical opinion evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and, therefore, sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). I also concur with my colleagues that the administrative law judge properly found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b).

However, I cannot agree with the majority's decision to hold that the administrative law judge's failure to address the 1991 opinions of Drs. Dahhan and

Broudy pursuant to 20 C.F.R. §718.202(a)(4) constitutes harmless error. An administrative law judge, in considering a duplicate claim on the merits, should consider all relevant evidence. 30 U.S.C. §923(b); *see also Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992) (When considering a duplicate claim on the merits, an administrative law judge must consider and weigh the evidence filed with both the prior claim and the new claim). Consequently, I would vacate the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and remand the case to the administrative law judge for her consideration of all the relevant evidence of record, including the 1991 opinions of Drs. Dahhan and Broudy. Because the administrative law judge's reconsideration of whether the medical opinion evidence is sufficient to establish the existence of pneumoconiosis could affect her weighing of the evidence on the issue of disability causation, I would also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c).

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ROY P. SMITH
Administrative Appeals Judge