U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0170 BLA

ROBERT SPENCE, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC GENERAL INSURANCE CORPORATION	)	DATE ISSUED: 02/27/2018
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (15-BLA-5789) of Administrative Law Judge Thomas M. Burke rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on August 18, 2014.[1]

The administrative law judge credited claimant with thirteen years and ten months of coal mine employment,[2] and found that the new x-ray evidence, medical opinion evidence, and CT scan evidence established the existence of clinical pneumoconiosis[3] pursuant to 20 C.F.R. §718.202(a)(1),(4). He further found that the new medical opinion evidence established the existence of legal pneumoconiosis[4] pursuant to 20 C.F.R. §718.202(a)(4). Because claimant established the existence of pneumoconiosis, the administrative law judge found that he established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). Considering the claim on its merits, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R.

[1] Claimant's initial claim, filed on August 23, 1994, was denied by the district director on February 3, 1995, because the evidence did not establish any element of entitlement. Director's Exhibit 1.

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

[3] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[4] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

§§718.202(a), 718.203(b), and that claimant is totally disabled by a respiratory or pulmonary impairment that is due to both clinical and legal pneumoconiosis, pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, he awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant has clinical and legal pneumoconiosis, that he is totally disabled, and that his total disability due to pneumoconiosis.[5] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief. Employer has filed a reply, reiterating its 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).

To be entitled to benefits under the Act, claimant must establish that he has pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his total disability is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits.[6] *Anderson*

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant has thirteen years and ten months of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Because claimant did not establish at least fifteen years of coal mine employment, he was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012). Decision and Order at 13 n.4.

[6] Additionally, where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he failed to establish any element of entitlement. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing any element of entitlement. 20 C.F.R. §725.309(c)(3), (4).

v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

Existence of Pneumoconiosis

Clinical Pneumoconiosis

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered ten readings of five new x-rays, all of which were read by physicians who are dually-qualified as Board-certified radiologists and B readers. Decision and Order at 4, 14-15. Dr. Smith read the August 14, 2012 x-ray as positive for pneumoconiosis, while Dr. Meyer read the same x-ray as negative. Director's Exhibits 11, 14; Employer's Exhibit 2. Dr. Smith read the August 2, 2013 x-ray as positive for pneumoconiosis; his reading was uncontradicted. Claimant's Exhibit 1. Both Drs. Smith and Alexander read the October 2, 2014 x-ray as positive for pneumoconiosis, while Dr. Meyer read the same x-ray as negative.[7] Director's Exhibits 11-13; Employer's Exhibit 3. Dr. Smith read the March 9, 2015 x-ray as positive for pneumoconiosis, while Dr. Meyer read the same x-ray as negative. Director's Exhibit 14; Employer's Exhibit 1. Finally, Dr. DePonte read the January 25, 2016 x-ray as positive for pneumoconiosis, while Dr. Meyer read the same x-ray as negative. Claimant's Exhibit 8; Employer's Exhibit 11.

The administrative law judge noted that the x-rays dated August 14, 2012, March 19, 2015, and January 25, 2016 were each read as positive and negative by two physicians with "equivalent" radiological qualifications. Decision and Order at 15. Finding "no apparent reason to credit either reading over the other," the administrative law judge determined that those three x-rays were in equipoise for the existence of pneumoconiosis. *Id.* The administrative law judge found that the August 2, 2013 x-ray was positive for pneumoconiosis, as it was read only as positive by a dually-qualified physician. *Id.* Additionally, he found the October 2, 2014 x-ray to be positive for pneumoconiosis because a preponderance of the readings by dually-qualified physicians was positive. *Id.*

Based on his finding that two x-rays were positive for pneumoconiosis and three x-rays were in equipoise, the administrative law judge concluded that "the x-ray readings by B-readers are considered to evidence clinical pneumoconiosis." *Id.* The administrative law judge additionally noted that claimant's treatment records included nine x-ray readings that did not mention pneumoconiosis. He declined to credit those readings over the positive x-rays, because the treatment records did not indicate that the

[7] Dr. Gaziano, a B reader, reviewed the October 2, 2014 x-ray to assess its film for quality only. Director's Exhibit 11.

x-rays were read for the purpose of determining the presence or absence of pneumoconiosis, and the readers' qualifications were not of record. Consequently, the administrative law judge found that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Employer contends that the administrative law judge erred in finding the October 2, 2014 x-ray to be positive for pneumoconiosis because he relied solely on the numerical superiority of the positive readings. Employer's Brief at 21. Employer's contention lacks merit. The administrative law judge performed a quantitative and qualitative analysis of the readings of that x-ray, taking into consideration the radiological qualifications of the interpreting physicians, and permissibly found that the preponderance of the readings by dually-qualified physicians is positive for pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003).

Employer argues further that the administrative law judge did not adequately explain his decision "to credit two positive x-rays over the three inconclusive ones," in violation of 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). Employer's Brief at 22. We disagree.

If a reviewing court can discern what the administrative law judge did, and why he did it, the duty of explanation under the APA is satisfied. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557, 25 BLR 2-339, 2-351 (4th Cir. 2013); *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354, 21 BLR 2-83, 2-87 (3d Cir. 1997). As noted above, the administrative law judge conducted a qualitative analysis of the conflicting x-ray readings to determine the status of each x-ray. He explained that for the three x-rays in which a positive and negative reading by equally qualified physicians conflicted, he found no reason to credit one reading over the other. He therefore found that the August 14, 2012, March 19, 2015, and January 25, 2016 x-rays are each in equipoise, i.e., inconclusive, for the existence of pneumoconiosis. In light of his finding that the August 2, 2013 and October 2, 2014 x-rays are positive for pneumoconiosis, he then found that "there are two positive x-rays and three x-rays considered to be in equipoise. Thus, the x-ray readings by B-readers are considered to evidence clinical pneumoconiosis." Decision and Order at 15. It is sufficiently clear that the administrative law judge treated the equipoise x-rays as inconclusive, weighing neither for nor against the remaining two x-rays, each of which were determined to be positive for pneumoconiosis. Because we can discern the analytical process behind the result, we reject employer's contention that the administrative law judge's decision violates the APA. *See Owens*, 724 F.3d at 557, 25 BLR at 2-351; *Witmer*, 111 F.3d at 354, 21 BLR at 2-87.

Further, we reject employer's argument that the administrative law judge erred in declining to find that the x-rays in claimant's treatment records weighed against a finding of clinical pneumoconiosis. Employer's Brief at 22-23. The administrative law judge reasonably declined to credit the x-rays in the treatment records over the positive x-rays from August 2, 2013 and October 2, 2014, because there was no indication that the treatment record x-rays were read to determine the presence or absence of pneumoconiosis, nor were the radiological qualifications of the physicians who read those x-rays in the record. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). Therefore, we affirm the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the new medical opinions of Drs. Celko, Go, Sood, Basheda, and Rosenberg. Decision and Order at 15-16. Drs. Celko, Go, and Sood diagnosed claimant with clinical pneumoconiosis, while Drs. Basheda and Rosenberg opined that he does not have the disease. Director's Exhibit 11; Claimant's Exhibits 6, 6a, 10; Employer's Exhibits 4, 5, 10, 12. The administrative law judge noted that Drs. Basheda and Rosenberg relied, in part, on their review of x-ray readings to conclude that claimant does not have clinical pneumoconiosis. He discounted their opinions because he found that the preponderance of the x-ray evidence was positive for clinical pneumoconiosis and therefore did not support their conclusions. Decision and Order at 15-16; *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997). Conversely, the administrative law judge found that the opinions of Drs. Celko, Go, and Sood were supported by the x-ray evidence. *Id*. at 16.

Apart from its challenge to the administrative law judge's weighing of the x-ray evidence, employer does not challenge the administrative law judge's findings regarding the medical opinion evidence on the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). Therefore, the administrative law judge's finding that the medical opinion evidence "support[s] a finding that [c]laimant suffers from clinical coal workers' pneumoconiosis" is affirmed. Decision and Order at 16; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Before completing his analysis of whether the evidence established clinical pneumoconiosis, the administrative law judge considered conflicting readings of two CT scans dated October 8, 2013 and July 26, 2014. Decision and Order at 5, 16. The readings were by two dually-qualified physicians who also read claimant's x-rays, Drs. Smith and Meyer. Dr. Smith interpreted both CT scans as positive for pneumoconiosis, while Dr. Meyer interpreted them as negative. Claimant's Exhibit 3; Employer's Exhibits 6, 7. The administrative law judge explained that he credited Dr. Smith's

positive CT scan readings because they were supported by the weight of the x-ray evidence, while Dr. Meyer's negative readings were not. Decision and Order at 16.

Employer contends that the administrative law judge failed to properly weigh the x-ray evidence and CT scan evidence together to determine whether clinical pneumoconiosis was established. Employer's Brief at 23. Employer argues that the administrative law judge improperly focused on the positive x-ray evidence when assessing the credibility of the CT scan readings. *Id*. Employer asserts that, had the administrative law judge properly analyzed the evidence, he would have seen that "it is the other way around," because CT scans are more sensitive than x-rays for detecting pneumoconiosis. *Id*. We disagree.

A review of the administrative law judge's Decision and Order reflects that he considered the CT scan readings in conjunction with the x-ray evidence and medical opinion evidence in finding that claimant established the existence of clinical pneumoconiosis. We therefore reject employer's argument that the administrative law judge did not properly consider all the relevant evidence. *See Williams*, 114 F.3d at 25, 21 BLR at 2-111. Contrary to employer's additional contention, the administrative law judge permissibly accorded greater weight to Dr. Smith's positive CT scan readings, because he found that they were supported by the weight of the x-ray evidence.[8] *See Williams*, 114 F.3d at 25, 21 BLR at 2-112; *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). The Board is not authorized to reweigh the evidence. *Anderson*, 12 BLR at 1-113. Therefore, we reject employer's allegations of error, and affirm the administrative law judge's finding that the CT scan evidence is positive for clinical pneumoconiosis.

Because substantial evidence supports the administrative law judge's findings that the x-rays, medical opinions, and CT scans establish the existence of clinical pneumoconiosis, we affirm his determination that claimant established the existence of

[8] Employer argues that the administrative law judge erred in failing to consider statements by Drs. Meyer, Basheda, and Rosenberg that CT scans are more sensitive than chest x-rays. Employer's Exhibits 4-6. Employer, however, does not explain how the administrative law judge's consideration of its physicians' statements would alter the result. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). The two CT scans were not read as negative only; each was also read as positive by Dr. Smith, the same dually-qualified physician who read claimant's August 2, 2013 and October 2, 2014 x-rays as positive. The administrative law judge found that the CT scans, as supported by the two positive x-rays, are supportive of a finding that claimant has clinical pneumoconiosis. Decision and Order at 15-16.

clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[9] Therefore, we also affirm his finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. As employer does not challenge the administrative law judge's finding that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), that finding is also affirmed.[10] *See Skrack*, 6 BLR at 1-711.

Total Disability

Pursuant to 20 C.F.R. §718.204(b)(2)(i),(ii), the administrative law judge considered three pulmonary function studies and three blood gas studies. Because all three pulmonary function studies, dated October 1, 2014, March 19, 2015, and January 25, 2016 produced qualifying[11] values for total disability, the administrative law judge determined that the pulmonary function studies support a finding of total disability. Decision and Order at 5, 21-22; Director's Exhibits 10, 11; Claimant's Exhibit 4; Employer's Exhibit 4. The blood gas studies dated October 1, 2014 and March 19, 2015 were non-qualifying, while the most recent study, dated January 25, 2016, was qualifying. According greater weight to the qualifying values of the most recent study, the administrative law judge found that the blood gas studies also support a finding of total disability. Decision and Order at 5, 22; Director's Exhibits 10, 11; Claimant's

[9] Because we have affirmed the administrative law judge's finding of clinical pneumoconiosis, we need not address employer's contentions of error regarding the administrative law judge's finding that claimant also established the existence of legal pneumoconiosis. *See Larioni*, 6 BLR at 1-1278.

[10] In considering the merits of the claim, the administrative law judge discounted the November 9, 1994 negative x-ray and Dr. Cho's medical report submitted in the first claim, stating that claimant did not have pneumoconiosis. Director's Exhibit 1. The administrative law judge accorded greater weight to the more recent evidence, considering that pneumoconiosis is recognized as a latent and progressive disease. Decision and Order at 20-21. Employer does not challenge the administrative law judge's analysis of the evidence from the prior claim. *See Skrack*, 6 BLR at 1-711.

[11] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

Exhibit 5; Employer's Exhibit 4. As employer does not challenge these findings, they are affirmed.[12] *See Skrack*, 6 BLR at 1-711.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Celko, Go, Sood, Basheda, and Rosenberg. Decision and Order at 22-23. Dr. Celko opined that, based on claimant's pulmonary function study values, claimant does not have the pulmonary capacity to perform his last coal mine job as a dispatcher. Director's Exhibit 11. Drs. Go and Sood opined that claimant is totally disabled based on the results of both his pulmonary function and blood gas studies. Claimant's Exhibits 6, 10.

In his April 4, 2015 medical report, Dr. Basheda opined that claimant's pulmonary function studies and blood gas studies did not reflect any significant pulmonary impairment that would prevent claimant from performing his usual work as a dispatcher. Employer's Exhibit 4. Based on the pulmonary function studies, Dr. Basheda diagnosed claimant with mild restrictive lung disease due to obesity, a nonpulmonary condition. Employer's Exhibit 4 at 25. When later deposed, Dr. Basheda noted that claimant's most recent blood gas study of January 25, 2016, reflected an increased PCO2 value "probably from a respiratory component," and hypoxemia that could be caused by obesity, hypoventilation, or heart disease. Employer's Exhibit at 23-24. Dr. Rosenberg acknowledged that claimant's pulmonary function studies "are below qualifying levels," and opined that "obesity is causing [claimant's] reduced lung volumes and resultant disabling spirometric values." Employer's Exhibit 5 at 9. Dr. Rosenberg concluded that claimant "is not disabled from a primary pulmonary problem, but has extrinsic restriction related to morbid obesity." *Id.*

The administrative law judge found that the opinions of Drs. Celko, Go, and Sood are better reasoned and documented than the opinions of Drs. Basheda and Rosenberg. He discounted Dr. Basheda's opinion that claimant is not totally disabled because he found it to be undercut by the qualifying values of the most recent blood gas study. Decision and Order at 23. The administrative law judge further found the opinions of Drs. Basheda and Rosenberg "unreasoned," to the extent they opined that claimant is not totally disabled by a respiratory or pulmonary impairment because his reduced pulmonary function and blood gas study values are due to extrinsic factors. *Id.* Finding the opinions of Drs. Celko, Go, and Sood to be better supported by the objective evidence, the administrative law judge credited their opinions that claimant is totally disabled.

[12] The record contains no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure, pursuant to 20 C.F.R. §718.204(b)(2)(iii).

Employer argues that the administrative law judge's discrediting of the opinions of Drs. Basheda and Rosenberg – that claimant's impairments are due to extrinsic factors – was tainted by the administrative law judge's allegedly erroneous discrediting of their opinions that claimant does not have legal pneumoconiosis. Employer's Brief at 26. We reject this argument. Under the regulations, a miner is considered totally disabled "if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner" from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). The cause of a miner's pulmonary or respiratory impairment relates to the issue of disability causation, which is addressed at 20 C.F.R. §718.204(c). Thus, the administrative law judge did not err in discounting the opinions of Drs. Basheda and Rosenberg, to the extent the physicians focused on the *cause* of the miner's qualifying pulmonary function and/or blood gas study values, rather than on whether a disabling respiratory impairment existed. *See W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 698 (4th Cir. 2018).

Further, employer does not challenge the administrative law judge's additional finding that Dr. Basheda's opinion that claimant is not totally disabled is at odds with the qualifying values of the most recent blood gas study of January 25, 2016. That finding is therefore affirmed. *See Skrack*, 6 BLR at 1-711. As employer raises no further challenges to the finding that the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv), or the finding that all of the evidence when weighed together, establishes total disability at 20 C.F.R. §718.204(b)(2), those findings are affirmed.

Disability Causation

To establish the element of disability causation, the evidence must show that claimant's pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment.[13] 20 C.F.R. §718.204(c)(1); *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 734, 13 BLR 2-23, 2-37 (3d Cir. 1989). Drs. Go and Sood opined that claimant's totally disabling respiratory impairment is due to both clinical pneumoconiosis and legal pneumoconiosis, with claimant's smoking history, heart disease, and obesity also contributing. Claimant's Exhibits 6 at 12; 6A at 2; 10 at 14. Dr. Celko opined that "[c]oal mine dust, tobacco smoke exposure[,] and obesity are all

[13] Pneumoconiosis is a "substantially contributing cause" of total disability if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

significant co-contributors to [claimant's] pulmonary disability." Director's Exhibit 11 at 12. Dr. Rosenberg attributed claimant's qualifying pulmonary function study results and blood gas study results to the effects of obesity. Employer's Exhibits 5 at 9; 12 at 17, 19. Dr. Basheda maintained that claimant is not totally disabled based on his pulmonary function study results, and attributed the restrictive impairment that was detected to obesity. Employer's Exhibits 4 at 25; 10 at 23. Additionally, Dr. Basheda opined that the hypoxia detected on claimant's most recent blood gas study was not related to coal dust exposure, but could be due to obesity, hypoventilation syndrome, or heart disease. Employer's Exhibit 10 at 23-24.

The administrative law judge credited the opinions of Drs. Celko, Go, and Sood that clinical pneumoconiosis has contributed significantly to claimant's totally disabling respiratory or pulmonary impairment. Decision and Order at 23-24. Conversely, the administrative law judge found that "since neither Dr. Basheda nor Dr. Rosenberg found a total pulmonary disability their opinions on whether . . . [c]laimant's total pulmonary disability is caused by pneumoconiosis are of little weight." Decision and Order at 24. The administrative law judge therefore found that claimant established that he is totally disabled due to pneumoconiosis.

Employer asserts that the reason provided by the administrative law judge for discounting the disability causation opinions of Drs. Basheda and Rosenberg is erroneous. Employer's Brief at 26. Employer notes that the issues of total disability and disability causation are separate elements of entitlement, and argues that the administrative law judge erred by combining them at 20 C.F.R. §718.204(c). *Id.*

On the facts of this case, employer has not presented a reason to remand this case for the administrative law judge to reconsider disability causation at 20 C.F.R. §718.204(c). The United States Court of Appeals for the Third Circuit has held that, absent "specific and persuasive reasons," an administrative law judge may not rely on a physician's opinion assessing the contribution of pneumoconiosis to a miner's total disability, if the physician incorrectly concludes that the disease is not present. *Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004). Here, the administrative law judge found that claimant has clinical pneumoconiosis, whereas Drs. Basheda and Rosenberg concluded that claimant does not have the disease. As the Third Circuit recognized in *Soubik*, "[c]ommon sense suggests that it is usually exceedingly difficult for a doctor to properly assess" whether pneumoconiosis caused the miner's disability if he does not believe the miner has the disease. *Id*. Employer does not argue that Dr. Basheda's and Dr. Rosenberg's belief that claimant does not have clinical pneumoconiosis was not a necessary part of their opinions that he is not totally disabled due to pneumoconiosis. Review of the record does not suggest otherwise. Therefore, no reason is presented to remand this case for the administrative law judge to attempt to set

forth specific and persuasive reasons for crediting the disability causation opinions of Drs. Basheda and Rosenberg. *See Soubik*, 366 F.3d at 234, 23 BLR at 2-99; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

With respect to the administrative law judge's crediting of the opinions of Drs. Celko, Go, and Sood, employer does not set forth any allegations of error apart from its contention that the administrative law judge erred in finding that claimant has pneumoconiosis. Because we have affirmed the finding that claimant has clinical pneumoconiosis, and because the opinions of Drs. Celko, Go, and Sood constitute substantial evidence that claimant's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis, we affirm the administrative law judge's finding that claimant established disability causation pursuant to 20 C.F.R. §718.204(c)(1).[14] *See Helen Mining Co. v. Elliott*, 859 F.3d 226, 233 (3d Cir. 2017); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003).

[14] Employer argues that an award of benefits cannot be reconciled with the Act because "[n]o pulmonary problems prevented [claimant] from working when he left mining in 1984," and he thereafter became disabled by nonpulmonary conditions such as obesity, heart disease, and diabetes. Employer's Brief at 18-21, *citing Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994). Contrary to employer's argument, a pre-existing disability or co-existing non-respiratory impairment does not defeat entitlement to benefits under the Act if the miner is able to establish total disability due to pneumoconiosis. *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 216-17, 20 BLR 2-362, 2-370-71 (6th Cir. 1996). Moreover, in claims such as this one, filed after January 19, 2001, the applicable regulation states that a nonpulmonary condition that causes an independent disability unrelated to the miner's pulmonary disability "shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge