BRB No. 05-0230 BLA

CHARLES E. RICE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	
	)	DATE ISSUED: 01/30/2006
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY, and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order – Award of Benefits (03-BLA-5748) of Administrative Law Judge Edward Terhune Miller rendered 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). The administrative law judge credited

claimant with twenty-four years of coal mine employment[1] in accordance with the parties' stipulation, and adjudicated this claim pursuant to 20 C.F.R. part 718. The administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(4). The administrative law judge further found that claimant is totally disabled by a respiratory or pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in excluding a medical report that employer proffered at the hearing. Employer further asserts that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence and ignored relevant CT scan evidence, when he found that the existence of pneumoconiosis was established. Employer also contends that the administrative law judge erred in his weighing of the blood gas studies and medical opinion evidence when he found that claimant is totally disabled and that the total disability is due to pneumoconiosis. Claimant has not filed a response brief. The Director, Office of Worker's Compensation Programs (the Director), has filed a letter indicating that he takes no position with regard to claimant's entitlement to benefits. The Director responds, however, urging the Board to reject employer's contentions that the administrative law judge erred in finding that the medical reports employer submitted exceeded the evidentiary limitations of 20 C.F.R. §725.414, and erred in finding total disability established when no physician stated that claimant is totally disabled.

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.201, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer contends that the administrative law judge erred by excluding a medical report submitted by employer that the administrative law judge found to be in excess of

[1] Claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 2. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

the evidentiary limits imposed by 20 C.F.R. §725.414. Employer's Brief at 8-11. The applicable regulations limited employer to "no more than two medical reports," submitted "in support of its affirmative case," absent good cause. 20 C.F.R. §§725.414(a)(3)(i); 725.456(b)(1). At the hearing, employer submitted Dr. Broudy's August 6, 2001 and January 6, 2004 physical examination reports as one medical report, and Dr. Rosenberg's December 18, 2003 consultative medical opinion as the second medical report. Hearing Transcript at 36-38. Although the administrative law judge accepted the submissions at the hearing, he subsequently reconsidered his ruling and determined that Dr. Broudy's 2001 and 2004 physical examination reports were two separate medical reports for purposes of the evidentiary limitations. Accordingly, the administrative law judge ordered employer to designate which two of its three submitted medical reports constituted employer's affirmative case evidence. Employer designated Dr. Broudy's two physical examination reports, and withdrew Dr. Rosenberg's report and deposition.

Employer asserts that the administrative law judge incorrectly determined that Dr. Broudy's 2001 and 2004 physical examination reports were not a single medical report, but were instead two separate medical reports under Section 725.414(a)(3)(i). Employer's Brief at 11. The Director responds that the administrative law judge's approach of counting Dr. Broudy's 2001 report and 2004 report as separate medical reports for purposes of the evidentiary limitations is consistent with the Director's view of the regulation:

> A medical report is defined as a "physician's written assessment of a miner's respiratory or pulmonary condition." The report may be prepared by "a physician who examined the miner and/or reviewed the available admissible evidence." 20 C.F.R. §725.414(a)(1). Nothing in the regulatory language suggests that a party may circumvent the limitations by having the same physician examine the claimant twice and the employer does not point to any language that supports its contention.

Director's Brief at 2. The Director notes that Dr. Broudy examined and tested claimant twice, once in 2001 and again in 2004, and produced a report assessing claimant's pulmonary condition both times. Thus, the Director concludes that Dr. Broudy's two physical examination reports "constitute two separate written assessments of the claimant's pulmonary condition at two different times," and the administrative law judge therefore properly declined to construe them as a single medical report under the evidentiary limitations. *Id.*

The Director's reasonable interpretation of his regulation is entitled to deference. *Cadle v. Director, OWCP*, 19 BLR 1-56, 1-62-63 (1994). Under the facts of this case, we detect no abuse of discretion by the administrative law judge in finding Dr. Broudy's 2001 and 2004 physical examination reports to be two separate medical reports for

purposes of employer's affirmative case evidentiary limitations. *See* 20 C.F.R. §725.414(a)(1), (a)(3)(i); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-55 (2004)(*en banc*). We therefore reject employer's allegation of error.

Pursuant to Section 718.202(a)(1), employer alleges that the administrative law judge ignored a "problematic diagnosis" rendered by Dr. Broudy when the administrative law judge gave greater weight to Dr. Broudy's reading of the January 6, 2004 x-ray to find that the most recent x-ray evidence established the existence of pneumoconiosis. Employer's Brief at 12, 15. Specifically, employer contends that the administrative law judge did not consider Dr. Broudy's comments that the x-ray interpretation could be something other than pneumoconiosis.

On his report interpreting the January 6, 2004 x-ray, Dr. Broudy, a B-reader, indicated that there were abnormalities consistent with pneumoconiosis, but he did not fill out the portion of the form designated for the ILO classification of the x-ray. Employer's Exhibit 5. In his narrative medical report, Dr. Broudy classified the x-ray as ILO "Category 1/1, q/q, in all zones." Employer's Exhibit 5 at 2. He concluded that the x-ray "changes are compatible with early simple coal workers' pneumoconiosis or silicosis." Employer's Exhibit 5 at 3. Dr. Broudy added, however, that "[i]t is also possible that the tuberculosis treated a few years caused the opacities on chest x-ray."[2] *Id*.

The administrative law judge considered Dr. Broudy's reading of the January 6, 2004 x-ray along with three readings of earlier x-rays. The administrative law judge noted that Dr. Broudy read an August 6, 2001 x-ray as negative for pneumoconiosis. The administrative law judge noted further that although Dr. Baker read a September 4, 2001 x-ray as positive, Dr. Baker lacked radiological credentials and his reading was countered by a negative reading from Dr. Wiot, a Board-certified radiologist and B-reader. But because Dr. Broudy classified the January 6, 2004 x-ray as positive, and that x-ray was the most recent, the administrative law judge gave that reading greater weight because pneumoconiosis may be latent and progressive. Decision and Order at 7, citing 20 C.F.R. §718.201(c). In so finding, the administrative law judge did not discuss Dr. Broudy's comment that "[i]t is also possible that the tuberculosis treated a few years caused the opacities on chest x-ray." Employer's Exhibit 5 at 2.

Although comments in an x-ray report that address the source of a pneumoconiosis diagnosed by x-ray are not relevant to the issue of the existence of pneumoconiosis,

[2] Claimant testified and the physicians agree that he was treated for pulmonary tuberculosis beginning in February, 2001. Director's Exhibit 8 at 2, 4; Director's Exhibit 15 at 8, 10; Director's Exhibit 28; Employer's Exhibit 5 at 2, 3.

comments in an x-ray report that undermine the credibility of a positive ILO classification are relevant to the issue of the existence of pneumoconiosis. *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991)(*en banc*). Because the administrative law judge credited Dr. Broudy's ILO classification of the January 6, 2004 x-ray without addressing the significance of the additional comments made by Dr. Broudy in his report, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(1) and remand this case for him to consider the doctor's comments. The administrative law judge should determine whether the comments Dr. Broudy made call into question his positive ILO classification pursuant to Section 718.202(a)(1).[3] *See Cranor*, 22 BLR at 1-5.

Pursuant to Section 718.202(a)(4), employer argues that the administrative law judge erred in failing to consider CT scan evidence that was negative for the existence of pneumoconiosis, when weighing the medical opinion evidence.[4] The administrative law judge, upon determining that the x-ray evidence established the existence of pneumoconiosis, noted that "[b]oth examining physicians of record-Drs. Baker and Broudy-diagnosed Claimant with pneumoconiosis." Decision and Order at 8-9. The administrative law judge's conclusion apparently rests upon the physicians' positive x-ray diagnoses. However, we have vacated the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis. The administrative law judge did not address whether the medical opinions established the existence of legal pneumoconiosis. 20 C.F.R. §718.201. Additionally, the administrative law judge did not consider the August 6, 2001 CT scan evidence. In light of the foregoing, we must vacate the administrative law judge's findings at Section 718.202(a)(4) and remand this case for him to consider the medical opinions along with the CT scan evidence and determine

[3] The administrative law judge stated that although Dr. Broudy had previously read the August 6, 2001 x-ray as negative for pneumoconiosis, Dr. Broudy on January 6, 2004 "attributed the newly positive reading to the progressive nature of pneumoconiosis." Decision and Order 7. Review of Dr. Broudy's report does not disclose such a statement by Dr. Broudy. Employer's Exhibit 5. The administrative law judge on remand should explain his finding on this issue.

[4] Employer's arguments alleging a failure of the administrative law judge to consider Dr. Rosenberg's opinion are misplaced since, as discussed above, Dr. Rosenberg's opinion was stricken from the record pursuant to 20 C.F.R. §725.414(a)(3)(i).

whether claimant has established the existence of clinical or legal pneumoconiosis.[5] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Pursuant to Section 718.204(b)(2)(ii), employer asserts that the administrative law judge erred in finding the blood gas study evidence supportive of a finding of total respiratory disability, when the most recent test was nonqualifying.[6] Employer's Brief at 16, 19. Employer alleges further that the administrative law judge did not consider medical testimony that claimant's blood gas study scores were not the result of any lung disease. Employer's Brief at 17.

Employer's contention that the administrative law judge could not find total disability established merely because the most recent test was non-qualifying lacks merit, because the administrative law judge also had to weigh the two qualifying studies in determining whether total disability was established. *See Collins v. J & L Steel*, 21 BLR 1-181, 1-191 (1999); *Beatty v. Danri Corp.*, 16 BLR 1-11, 1-13-14 (1991); Director's Exhibits 9, 28. There is merit, however, in employer's contention that the administrative law judge did not consider Dr. Repsher's testimony that the cause of claimant's low blood gas scores is not a respiratory or pulmonary condition, but rather, is abdominal obesity. Director's Exhibit 31 at 19. Because the administrative law judge did not consider this medical testimony before relying on the blood gas studies as evidence of total respiratory disability, we must vacate his finding pursuant to Section 718.204(b)(2)(ii) and remand this case for him to consider it. *See Casella v. Kaiser Steel Corp*., 9 BLR 1-131, 1-133-34 (1986); *Jeffries v. Director, OWCP*, 6 BLR 1-1013, 1-1014 (1984).

Pursuant to Section 718.204(b)(2)(iv), employer alleges that the administrative law judge erred in finding that claimant is totally disabled, when Drs. Baker and Broudy opined that claimant is not totally disabled by a respiratory impairment. Employer's Brief at 18. The Director responds that the administrative law judge validly discounted these doctors' opinions that claimant is not totally disabled because they did not adequately address the impairment documented by claimant's blood gas study results. Director's Brief at 3. We agree with the Director's general point that an administrative law judge has the discretion to find that a physician has not adequately explained an

[5] Under the definition of pneumoconiosis, "'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)(emphasis added).

[6] A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii).

opinion with specific reference to the miner's objective test results. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. In the case at bar, however, we have vacated the administrative law judge's finding that the miner's blood gas studies establish that he is totally disabled by a respiratory or pulmonary impairment, which was the basis for the administrative law judge's credibility determination at Section 718.204(b)(2)(iv). Therefore, we also vacate the administrative law judge's finding pursuant to Section 718.204(b)(2)(iv) and instruct him to reconsider the medical opinions. In order to avoid any repetition of error on remand, we note that, contrary to the administrative law judge's finding that Dr. Broudy "ignored" claimant's blood gas study results, Decision and Order at 9, Dr. Broudy was questioned specifically about the results of claimant's blood gas study, including that they were qualifying, and he still concluded that claimant was not totally disabled from a respiratory standpoint. Director's Exhibit 28 at 11. In this connection, we also note that the administrative law judge has not explained the basis for his determination that a finding of moderate hypoxemia equates to an impairment. *See* Decision and Order at 9.

Employer next contends that the administrative law judge erred in finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), when no physician "attributed the causation of [claimant's] blood gas abnormality to coal workers' pneumoconiosis." Employer's Brief at 19. Because we have vacated the administrative law judge's findings that the existence of pneumoconiosis was established and that claimant is totally disabled, we also vacate the finding that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c) and we instruct the administrative law judge to reconsider this issue, if reached.

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated 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

I concur:

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JUDITH S. BOGGS
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's determination to vacate the administrative law judge's decision and to remand the case for reconsideration of the medical evidence. I would affirm the award of benefits. Careful review of the record reveals that the administrative law judge correctly determined that claimant established that he suffers from clinical and legal pneumoconiosis, and that he is totally disabled due to pneumoconiosis.

In holding that the x-ray evidence established the existence of pneumoconiosis, the administrative law judge did not err in stating that Dr. Broudy interpreted the January 6, 2004 x-ray as positive for pneumoconiosis. Four times in his report Dr. Broudy indicated that the x-ray showed pneumoconiosis: (1) On the HHS Roentgenographic Interpretation Form, Dr. Broudy responded to question 2A, "Any parenchymal abnormalities consistent with pneumoconiosis?" by checking the "yes" box, Employer's Exhibit 5 attachment; (2) On page two of his report, Dr. Broudy stated his x-ray interpretation in terms of the ILO classification for pneumoconiosis: "The lungs have increased nodulation which I would categorize as Category 1/1, q/q, in all zones" Employer's Exhibit 5 at 2; (3) On page three of his report, Dr. Broudy wrote:

DIAGNOSES

1. Back pain.
2. Simple coal workers' pneumoconiosis.
3. History of tuberculosis, treated.

Employer's Exhibit 5 at 3; (4) On the same page, Dr. Broudy also wrote: "The radiographic changes are compatible with early simple coal workers' pneumoconiosis or silicosis. It is also possible that the tuberculosis treated a few years caused the opacities on x-ray." Employer's Exhibit 5 at 3.

Despite the fact that Dr. Broudy four times stated that the x-ray showed pneumoconiosis, the majority has determined the case must be remanded for the administrative law judge to discuss the "significance" of Dr. Broudy's additional comments which acknowledge the possibility that tuberculosis could have caused the abnormalities shown on x-ray. Remand of the case for such consideration is unnecessary. The instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit which has long recognized that a medical opinion can be credited which is not given in terms of 100 per cent certainty. *See Tennessee Consolidation Coal Co. v. Crisp*, 866 F.2d 179, 187, 12 BLR 2-121, 2-132 (6th Cir. 1989). Since the administrative law judge's determination that Dr. Broudy interpreted the 2004 x-ray as positive for

pneumoconiosis is supported by substantial evidence, *i.e.*, four statements in the record, it should be upheld. 33 U.S.C. §921(b)(3).

Also unnecessary is the order to remand the case for the administrative law judge to reconsider his determination that claimant established the existence of clinical pneumoconiosis, in light of CT scan evidence of record consisting of two negative interpretations of an August 6, 2001 CT scan. That CT scan was taken the same day as the x-ray which Dr. Broudy read as negative (0/1). Employer's Exhibit 7. The administrative law judge considered Dr. Broudy's negative interpretation of the 2001 x-ray, together with his positive interpretation of the 2004 x-ray and properly applied the "later evidence" rule in light of the progressive nature of pneumoconiosis, to credit the significantly more recent x-ray as establishing the existence of pneumoconiosis. *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-85-86 (6th Cir. 1993); *see Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 151 (1987).

Since CT scan evidence, like x-ray evidence, is relevant to determining the existence of clinical pneumoconiosis, the administrative law judge's rationale for giving less weight to Dr. Broudy's negative reading of the 2001 x-ray would apply with equal force to consideration of negative readings of a CT scan, which was taken the same day as the 2001 x-ray. The administrative law judge's failure to discuss the CT scan evidence must be deemed harmless error because the negative CT scan readings could not reasonably be deemed more persuasive than the negative, 2001 x-ray interpretation to undermine the far more recent, positive, 2004 x-ray interpretation. In sum, there is no need to remand the case for the administrative law judge to discuss Dr. Broudy's report or the two negative readings of the 2001 CT scan because the administrative law judge properly determined that Dr. Broudy's positive interpretation of the 2004 x-ray established the existence of clinical pneumoconiosis.

The administrative law judge also found legal pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(4) based upon Dr. Baker's opinion. Decision and Order at 5, 7-8. Yet employer does not acknowledge this. Employer states that Dr. Baker did not provide any "specifics regarding the etiology of the moderate hypoxemia that he diagnosed." Employer's Brief at 17. Not true. Dr. Baker found an impairment due to "chronic bronchitis, decreased PO_2, and coal workers' pneumoconiosis 1/2," all of which he said were caused by coal dust exposure. Director's Exhibit 8 at 4. The administrative law judge observed:

> Dr. Baker attributed [claimant's] disability to coal dust exposure. (D-8). His opinion is well-reasoned in this regard because claimant worked underground in a coal mine for twenty-four years, never smoked, and the record does not have persuasive evidence of another cause for claimant's hypoxemia.

Decision and Order at 10. Thus, the administrative law judge properly found that claimant had established the existence of both clinical and legal pneumoconiosis.

Likewise, there is no error in the administrative law judge's determination that claimant established total disability pursuant to 20 C.F.R. §718.404(b) based upon qualifying blood gas studies. The Director explains the fundamental fallacies in employer's argument regarding this finding:

> The employer also argues that the ALJ erred by finding total disability established because no physician found the claimant to be disabled. The employer is mistaken. The fact that the physicians did not diagnose a totally disabling respiratory impairment is not fatal to claimant's entitlement. The ALJ permissibly found that the two qualifying . . . [blood gas] studies (DX 8, 28) were sufficient to carry claimant's burden of proof on this issue. *See* 20 C.F.R. §718.204(b)(2)(ii) (qualifying arterial blood gas studies are indicative of total disability). Furthermore, as the ALJ observed, Drs. Baker and Broudy found that claimant suffers from moderate hypoxemia (DX 8, DX 28, EX 5). The ALJ reasonably discounted the doctors' opinions of no respiratory impairment in view of the doctors' failure to address why this degree of hypoxemia was not disabling, particularly in view of claimant's usual coal mine employment as a roof-bolter. *See Cornett v. Benham Coal Company*, 227 F.3d 569, 578 (6th Cir. 2000)(even a "mild" respiratory impairment may preclude the performance of the miner's usual duties, depending on the exertional requirements of the miner's usual coal mine employment).

Director's Letter at 3. Thus, substantial evidence supports the administrative law judge's determination that claimant established a totally disabling respiratory impairment.

I am puzzled by the majority's statement that it acknowledges the validity of the Director's point that an administrative law judge may discredit a physician's opinion where the physician has not adequately explained the opinion in light of objective test results, yet the majority insists the administrative law judge erred in finding "Dr. Broudy 'ignored' claimant's blood gas study results." Majority opinion at 7. Review of the administrative law judge's decision shows that he stated: "Dr. Broudy's opinion completely ignored the disability demonstrated by claimant's blood gases — a disability that Dr. Broudy documented." Decision and Order at 9 (emphasis added). The majority asserts that Dr. Broudy acknowledged the blood gas study results but nevertheless opined that claimant was not disabled by moderate hypoxemia. The administrative law judge's valid point is that Dr. Broudy ignored the significance of the test results, that Dr. Broudy nowhere explained his opinion that notwithstanding moderate hypoxemia, claimant

would be able to perform arduous manual labor. Thus, the administrative law judge did not err in rejecting Dr. Broudy's disability opinion.

Similarly devoid of merit is employer's argument that the administrative law judge erred in finding causation established pursuant to 20 C.F.R. §718.204(c). In support of this argument, employer relies principally upon the opinions of Drs. Rosenberg and Repsher, despite the fact that Dr. Rosenberg's opinion was properly excluded from the record and Dr. Repsher's opinion was not offered as a medical opinion but as a physician's assessment to rebut the Department sponsored blood gas study.

On the Evidence Summary form, under the heading "For rebuttal of Department-sponsored blood gas study *only*" (emphasis added), employer identified Dr. Repsher's report and deposition, Director's Exhibit 31, Depo Director's Exhibit 31, the date of the report, "06/02/03" (the correct date is 06/03/02). Employer did not indicate a date for the deposition. In the comments section employer stated: "Though results show moderate arterial hypoxemia this in [sic] most likely due to mixed arterial/venous or is a laboratory error." Employer's comment reflects the doctor's statement on the second page of this report. Director's Exhibit 31 at 36. Obviously, employer introduced Dr. Repsher's report to discredit the qualifying blood gas study of 9/06/01. The administrative law judge rejected Dr. Repsher's invalidation report because claimant's studies had similar results on three separate dates. Decision and Order at 10-11. On appeal, employer does not acknowledge that it relied on Dr. Repsher's finding of laboratory error to obtain consideration of Dr. Repsher's opinion as rebuttal evidence, nor that the report was admitted solely for the limited purpose of rebutting the Department sponsored blood gas study. Instead, employer argues that the administrative law judge should not have focused on what the doctor said in his report, despite the fact that employer indicated on the evidence summary form that it was relying upon that statement in the report to rebut the blood gas study results.

Now, employer argues that the administrative law judge should have focused on Dr. Repsher's deposition testimony, conceding that the blood gas study evidence showed moderate hypoxemia which can have many causes, and opining that in claimant's case the cause was obesity. Employer's Brief at 17-18. Thus, employer argues that the administrative law judge did not properly consider Dr. Repsher's opinion that obesity caused claimant's moderate hypoxemia. Employer ignores completely the fact that Dr. Repsher's opinion came in only under Section 725.414(a)(3)(ii) which provides: "The responsible operator shall be entitled to submit, in rebuttal of the case presented by the claimant, no more than one physician's interpretation of each . . . arterial blood gas study . . . ." Employer has the audacity to contend the administrative law judge erred in considering Dr. Repsher's report as an assessment of one study, instead of considering it as a medical opinion on causation. Employer's argument demonstrates astonishing disingenuousness and a flagrant disregard for the regulatory limitations on evidence. The

regulations explain that a "medical report shall consist of a physician's written assessment of the miner's respiratory or pulmonary condition." 20 C.F.R. §725.414(a)(1). Because employer relies upon Dr. Repsher's deposition testimony to establish that the miner's hypoxemia is not caused by a respiratory impairment but obesity, employer is using it as a medical report under Section 725.414(a)(1). Since employer had designated Dr. Broudy's two reports as the two permitted by the regulations pursuant to 20 C.F.R. §725.414(a)(3)(i), Dr. Repsher's opinion on claimant's respiratory condition was inadmissible. Hence, the administrative law judge was precluded from considering Dr. Repsher's analysis of the miner's condition. Employer's argument that the administrative law judge erred in considering it as "rebuttal of the Department-sponsored-blood gas study only" insults the Board's intelligence. Furthermore, Dr. Repsher's deposition testimony in no way rebuts the September 2001 blood gas study; on the contrary, the premise of his statement is that all the studies and their results are valid.

In sum, the administrative law judge did not err in not discussing Dr. Repsher's deposition testimony both because it did not rebut the blood gas study, the only basis for its admission, and this deposition testimony was inadmissible because employer had not designated Dr. Repsher's opinion as a medical report pursuant to Section 725.414(a).

Finally, employer argues that the administrative law judge did not fully consider the opinions of Drs. Wiot and Broudy. Employer, however, does not indicate the relevance of Dr. Wiot's report, nor does employer acknowledge that it was not admitted as a medical report (Brief for Employer at 18). Employer asserts, without explanation or citation to the record, that the administrative law judge did not adequately discuss Dr. Broudy's opinion regarding the "significance of the claimant's healed tuberculosis and excessive weight and its relationship with the pulmonary and blood gas testing." Employer's Brief at 18. Employer does not identify a statement regarding the significance of claimant's healed tuberculosis which the administrative law judge overlooked. The administrative law judge stated:

> Dr. Broudy speculated that claimant's hypoxemia "could be due to tuberculosis." Dr. Broudy's opinion is unpersuasive. Dr. Broudy stated that blood gas levels usually return to normal levels after the tuberculosis is treated. He did not explain why claimant's levels had not so returned. Furthermore, Dr. Broudy noted in his opinion that claimant probably suffered from a tuberculosis infection, not active tuberculosis. The difference, as explained by Dr. Broudy, is that with tuberculosis infection, an individual "may not have developed an impairment." Thus, Dr. Broudy, by his own opinion, undercuts the likelihood that claimant's low blood gases were caused by his history of tuberculosis.

Decision and Order at 10. Even more baffling is employer's assertion that the administrative law judge did not adequately discuss Dr. Broudy's opinion on the significance of claimant's excessive weight. Review of the record failed to uncover such an opinion. Again, employer does not identify a particular statement, or even cite to the record where it might be found.

Review of the record shows that substantial evidence supports the administrative law judge's decision that claimant has proven that he is totally disabled due to pneumoconiosis. I believe that the majority has not given the administrative law judge's decision the deference which is due. The Sixth Circuit has declared that assessment of a medical report is "essentially a credibility matter" for the administrative law judge to resolve and it is beyond the court's (and the Board's) "limited scope of review" to assign a different weight or meaning to the medical

opinion. *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330-31 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). The administrative law judge properly credited Dr. Broudy's positive x-ray interpretation and Dr. Baker's findings that claimant's hypoxemia was caused by his coal dust exposure, working underground for twenty-four years. And, as the Director argued, it was entirely reasonable for the administrative law judge to find that moderate hypoxemia would render a roof bolter totally disabled.

Accordingly, I would affirm the administrative law judge's decision awarding benefits.

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REGINA C. McGRANERY
Administrative Appeals Judge