BRB No. 09-0328 BLA

ETHEL ELAINE TOLLIVER (on behalf of and as Widow of MICHAEL LEE TOLLIVER)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 01/29/2010
EASTERN ASSOCIATED COAL CORPORATION	)	
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
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 on Second Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Second Remand (2000-BLA-882) of Administrative Law Judge Alice M. Craft with respect to a miner's duplicate claim filed on May 16, 1995, and a survivor's claim filed on October 15, 1999, 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). This case is before the Board for the third time.[1] In its most recent Decision and Order, the Board considered employer's appeal of an award of benefits and vacated the administrative law judge's findings under 20 C.F.R. §§718.202(a)(4), 718.204(c) and 718.205(c), as well as her determination that the newly submitted evidence established a material change in conditions in the miner's claim pursuant to 20 C.F.R. §725.309(d) (2000).[2] The Board remanded the case to the administrative law judge, with instructions to apply the factors identified by the United States Court of Appeals for the Fourth Circuit in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), to the medical opinions relevant to 20 C.F.R. §718.202(a)(4) and to set forth the bases for her findings.[3] The Board also instructed the administrative law judge to reconsider Dr. Rasmussen's opinion in the context of 20 C.F.R. §718.204(c) and determine whether the physician's opinion was supported by underlying documentation. The Board further instructed the administrative law judge to specifically address the issue of death due to pneumoconiosis because the administrative law judge mechanically accorded superior weight to the opinion of Dr. Sullivan, based on

[1] The miner filed his initial claim for benefits on February 8, 1993, which the district director denied on July 20, 1993. Director's Exhibits 32-1, 32-18. The miner took no further action on this claim, but filed a second claim on May 16, 1995, which is the subject of this appeal. Director's Exhibit 1. A hearing was held before Administrative Law Judge Stuart Levin on July 20, 1999, but the miner died on September 25, 1999, prior to the issuance of a Decision and Order by Judge Levin. Director's Exhibit 62. Claimant, the miner's widow, filed a survivor's claim on October 15, 1999. Director's Exhibit 70. The miner's claim and the survivor's claim were consolidated for decision.

[2] The amended version of 20 C.F.R. §725.309 does not apply in the miner's duplicate claim, as it was pending on January 19, 2001, which was the effective date of the amended regulations. *See* 20 C.F.R. §725.2.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 32.

his status as a treating physician. *Tolliver v. Eastern Associated Coal Corp.*, BRB No. 06-0548 BLA (Mar. 26, 2007)(unpub.).

On remand, the administrative law judge found that the newly submitted x-ray evidence was sufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and, therefore, a material change in conditions in the miner's claim pursuant to 20 C.F.R. §725.309 (2000). Weighing all of the x-ray evidence together, the administrative law judge found that the older x-rays did not conflict with her finding that the newly submitted x-ray evidence established the existence of pneumoconiosis.[4] The administrative law judge further found that the medical opinion evidence established the existence of both clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Weighing all of the relevant evidence together, the administrative law judge found that the miner suffered from both clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge also found that the miner was totally disabled due pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c), and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in both claims.

On appeal, employer argues that the administrative law judge erred in reconsidering whether the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), and thus erred in finding that a material change in conditions was established pursuant to 20 C.F.R. §725.309(d)(2000). In addition, employer contends that the administrative law judge mischaracterized the CT scan evidence and erred in her analysis of the medical opinions at 20 C.F.R. §718.202(a)(4). Employer also maintains that the administrative law judge erred in finding total disability due to pneumoconiosis established at 20 C.F.R. §718.204(c) and asserts that the determination of total disability, unrelated to coal mine employment, in the miner's prior claim precluded consideration of this issue in the present claim. Employer also alleges that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Finally, employer contends that this case, if remanded, deserves a fresh look and that reassignment to a different administrative law judge is necessary. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.

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

[4] Additionally, the administrative law judge noted that the most recent CT scan had been read by a radiologist as being consistent with pneumoconiosis.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Consideration of 20 C.F.R. §718.202(a)(1) on Remand

In her 2006 Decision and Order on Remand, the administrative law judge determined that the newly submitted x-ray evidence was inconclusive. 2006 Decision and Order on Remand at 33. In her most recent Decision and Order, the administrative law judge determined that the seven newly submitted films dated between July 8, 1993 and January 15, 1996, were positive for pneumoconiosis, while the two newly submitted films obtained in 1999, were negative for the disease. Decision and Order on Second Remand at 32-33; Director's Exhibits 12, 14, 26, 42, 46, 48, 75, 77, 78, 85; Employer's Exhibits 3, 8. The administrative law judge explained that, "taking into account the qualifications of the interpreting physicians," she gave greater weight to the positive readings and found the existence of pneumoconiosis established by the newly submitted x-ray evidence. Decision and Order on Second Remand at 33.

Employer argues that because the Board did not disturb the administrative law judge's previous finding, that the newly submitted x-ray evidence was inconclusive and, thus, insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge erred in addressing this issue on remand. In support of its argument, employer notes that the Board only instructed the administrative law judge to reconsider whether claimant could establish a material change in conditions by proving that the miner had legal pneumoconiosis by medical opinion evidence under 20 C.F.R. §718.202(a)(4).

Employer's contentions are without merit. In its prior Decision and Order, the Board did not affirm the administrative law judge's determination that the newly submitted x-ray evidence was inconclusive. Rather, by instructing the administrative law judge to weigh the newly submitted evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) on remand, the Board reopened the issue of whether the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis. *Tolliver*, slip op. at 7. The administrative law judge did not err, therefore, in reconsidering whether the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) on remand, nor was she bound by her prior findings with respect to this evidence. *See Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942, 22 BLR 2-46 (6th Cir. 1999) (An appellate court's mandate forecloses a lower court or an agency from revisiting only those issues that the appellate court actually decided); *Dale v. Wilder Coal Co.*, 8 BLR 1-119 (1985).

The Weighing of the X-Ray Evidence

Upon weighing of the newly submitted x-ray evidence at 20 C.F.R. §718.202(a)(1), the administrative law judge found that the credible x-rays classified for the existence of pneumoconiosis consisted of nine x-rays dated January 14, 1994, March 18, 1994, September 3, 1994, September 16, 1994, June 28, 1995, July 4, 1995, January 15, 1996, March 10, 1999, and September 24, 1999. Decision and Order on Second Remand at 32-33; Director's Exhibits 12, 14, 26, 42, 46, 48, 75, 77, 78, 85; Employer's Exhibits 2, 3, 8. Regarding Dr. Jenkins's interpretation of the film dated January 14, 1994, the administrative law judge stated:

> Dr. Jenkins did not assign an ILO classification but stated that it was unchanged. He had previously interpreted a film dated July 8, 1993, as positive, ILO classification 1/1. There were no negative readings. Therefore, I find this to be a positive film.

Decision and Order on Second Remand at 33. With respect to the x-rays obtained on March 18, 1994, September 3, 1994 and September 16, 1994, the administrative law judge determined that these films were positive, based upon Dr. Renn's uncontradicted interpretations. *Id*. The administrative law judge found that the film dated June 28, 1995, was positive for pneumoconiosis, as the positive readings by dually-qualified radiologists outweighed the negative interpretation by a B reader. *Id*. at 32. The administrative law judge determined that the July 4, 1995 x-ray was positive for pneumoconiosis, based upon Dr. Renn's uncontradicted reading. *Id*. Regarding the film obtained on January 15, 1996, the administrative law judge concluded that it was positive, as the readings made by dually-qualified radiologists were entitled to greater weight than the negative interpretation by a B reader. *Id*. Employer's Exhibit 8. The administrative law judge determined that the x-rays dated March 10, 1999 and September 24, 1999, were negative for pneumoconiosis, based upon the negative interpretations by Dr. Sargent, a dually-qualified radiologist. *Id*.

Upon weighing all of the newly submitted x-rays together, the administrative law judge stated:

> I have found that seven of the films admitted were positive, two were negative, and the remaining films did not disprove the existence of pneumoconiosis. Based on the weight of the positive films, taking into account the qualifications of the interpreting physicians, I find that the positive interpretations are entitled to greater weight than the negative interpretations, and I conclude that the [m]iner has established the existence of pneumoconiosis by virtue of the x[-]ray evidence."

Decision and Order on Second Remand at 33. Upon finding that the newly submitted x-ray evidence established the existence of pneumoconiosis, the administrative law judge determined that claimant demonstrated a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000) in the miner's claim. *Id.* The administrative law judge also concluded that the x-ray evidence of record as a whole was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), explaining:

> The x-rays taken prior to the previous denial were all taken at least six years before the [m]iner's death in 1999, and there were both positive and negative readings of these x-rays. I find that these older x-ray readings do not conflict with my finding that the newly submitted chest x-ray evidence establishes the existence of pneumoconiosis, in light of the progressive nature of the disease.

Id.

Employer argues that because Dr. Jenkins did not provide an ILO classification of the January 14, 1994 x-ray, the administrative law judge erred in treating it as positive for pneumoconiosis. Employer also maintains that the administrative law judge erred in determining that Dr. Jenkins's interpretation of the film dated July 8, 1993 was positive for pneumoconiosis, without addressing the equivocal nature of his reading. Employer further contends that the administrative law judge did not explain why the positive readings outweighed the negative readings performed by equally-qualified readers and did not identify the rationale for her finding that the earlier positive x-rays were more credible than the later negative x-rays.

Employer's contentions have merit, in part. With respect to the administrative law judge's treatment of the x-ray dated January 14, 1994, employer is correct in maintaining that 20 C.F.R. §§718.102(b) and 718.202(a)(1) mandate that a film be classified under the ILO system "to establish the existence of pneumoconiosis." 20 C.F.R. §718.102(b). Thus, Dr. Jenkins's notation that this film was "unchanged," when compared to the film obtained on July 8, 1993, does not accord with the regulatory requirement. Director's Exhibits 48, 78. Moreover, as employer argues, the administrative law judge should have addressed the equivocal nature of Dr. Jenkins's interpretation of the July 8, 1993 x-ray, before treating it as a positive reading for pneumoconiosis.[5] *See U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999).

[5] Employer correctly notes that Dr. Jenkins stated that the ILO classification of the miner's July 8, 1993 x-ray showed multiple small q size nodules with a perfusion of "probably" 1/1. Director's Exhibit 48; Employer's Exhibit 2; *see* Employer's Brief at 21.

Regarding the chronology of the x-ray evidence, when comparing the newly submitted x-ray evidence to the x-ray evidence considered in the prior claim, the administrative law judge acknowledged correctly that the Fourth Circuit has held that, in light of the progressive nature of the disease, more recent x-ray evidence *determined to be positive for pneumoconiosis* can be accorded greater weight. *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). As employer argues, however, when weighing all of the x-ray evidence together, the administrative law judge did not discuss the significance of the fact that she determined that the two most recent films, obtained three years subsequent to the next most recent film, were negative for pneumoconiosis, thereby appearing to contradict the Fourth Circuit's holding. Decision and Order on Second Remand at 32-33; *Adkins*, 958 F.2d at 51, 16 BLR at 2-65.

Accordingly, we vacate the administrative law judge's determination that the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and a material change in conditions at 20 C.F.R. §725.309 (2000). We also vacate the administrative law judge's finding that the x-ray evidence, when considered as a whole, established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1), in both the miner's claim and the survivor's claim. On remand, the newly submitted x-ray evidence must first be reconsidered and only those interpretations that comply with 20 C.F.R. §§718.102(b) and 718.202(a)(1) can be credited. Contrary to employer's contention, the conflict between the various interpretations can be resolved by reference to the quantity and quality of the interpretations *and* the respective qualifications of the readers. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66. If it is determined that the newly submitted x-ray evidence is sufficient to establish the existence of pneumoconiosis on remand, the administrative law judge must determine whether, when considered as a whole, the newly submitted evidence relevant to 20 C.F.R. §718.202(a)(1), (2), (4), supports a finding of pneumoconiosis and, therefore, a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) in the miner's duplicate claim. If the administrative law judge finds that the requirements of 20 C.F.R. §725.309 (2000) have been satisfied, the administrative law judge must then consider, on the merits, the issue of the existence of pneumoconiosis in both claims.[6] If claimant does not establish a material change in conditions in the miner's claim, the miner's claim must be denied. 20 C.F.R. §725.309(d) (2000); *see Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

[6] When addressing Dr. Jenkins's reading of the July 8, 1993 film on remand, its equivocal nature must be considered. Director's Exhibits 48, 78.

The Weighing of the Medical Opinion Evidence

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge credited Dr. Jenkins's diagnosis of pneumoconiosis, based on his status as a treating physician, and noted that his opinion was supported by the miner's coal mine employment history, the objective evidence, including the x-rays and CT scans, and the opinions of Drs. Albin and Rasmussen.[7] Decision and Order on Second Remand at 34-35. In resolving the conflict among the medical opinions regarding the presence of pneumoconiosis, the administrative law judge found that "the extent of Dr. Jenkins'[s] treatment of the [m]iner's pulmonary condition, in conjunction with his expertise as a Board-certified pulmonologist, [directed her] to conclude that Dr. Jenkins'[s] opinion does in fact deserve high deference." Decision and Order on Second Remand at 36. The administrative law judge thus found that the opinion of Dr. Jenkins, in conjunction with, and supported by, the opinions of Drs. Albin and Rasmussen, was better supported by the objective medical evidence and outweighed the contrary opinions of Drs. Renn, Dahhan, Tuteur and Repsher, despite their "specialty" qualifications.[8] *Id*.

[7] The administrative law judge explained that Dr. Jenkins had an in-depth understanding of the miner's condition, having had a long history of treating the miner on a regular basis between November 1992 and July 1999. Decision and Order on Second Remand at 34. The administrative law judge further noted that Dr. Jenkins "explained how his diagnosis was based on his examination of claimant, claimant's coal mine employment history, symptoms, chest x-ray, non-smoking history, and objective study results." *Id*.; *see* Director's Exhibit 28; Claimant's Exhibit 4.

[8] Dr. Jenkins, a Board-certified pulmonologist, diagnosed probable pneumoconiosis by x-ray and a severe restrictive impairment. Director's Exhibits 22, 32-10, 32-11, 48, 78. Dr. Albin, a Board-certified pulmonologist, examined the miner at the request of the Department of Labor (DOL) on March 4, 1993, and diagnosed a moderate to severe restrictive defect due to rheumatoid arthritis or coal dust inhalation. Director's Exhibit 32-12. Dr. Rasmussen, who is Board-certified in internal medicine, examined the miner on June 25, 1995, at the request of DOL, and reviewed additional records. Dr. Rasmussen determined that the miner had coal workers' pneumoconiosis and a totally disabling respiratory impairment to which coal dust exposure was a "possible" major contributing cause. Director's Exhibits 9, 40. Dr. Renn, a Board-certified pulmonologist, examined the miner on January 15, 1996, at employer's request and reviewed the miner's medical records. Drs. Dahhan, Tuteur and Repsher, all of whom are Board-certified pulmonologists, reviewed the miner's medical records at employer's request. These physicians determined that the miner did not have coal workers' pneumoconiosis, or any respiratory or pulmonary impairment related to coal dust exposure. Director's Exhibits 40, 42, 46, 48, 58; Employer's Exhibits 1-3, 8, 11-13.

Employer argues that the administrative law judge "mechanically relied on an impermissible treating doctor preference" in according Dr. Jenkins's opinion "controlling weight." Employer Brief at 23. Employer also asserts that Dr. Jenkins relied solely on his x-ray reading in reaching his diagnosis and failed to provide a definitive and reliable opinion. Employer's allegations of error have merit.

The administrative law judge was instructed on remand to reevaluate the medical opinions of record and accord them appropriate weight based on the quality and persuasiveness of the reasoning, the support provided by the documentation, and the physicians' relative qualifications, including status as a treating physician. *Tolliver*, slip op. at 5-6, *citing Hicks*, 138 F.3d at 532, 536, 21 BLR at 2-335, 2-341; *Akers*, 31 F.3d at 441, 21 BLR at 2-275. Although the administrative law judge acknowledged the factors set forth in 20 C.F.R. §718.104(d), and the Fourth Circuit case law regarding the weighing of medical opinions, she did not adequately identify the evidence supporting her determination that Dr. Jenkins's opinion was reasoned and documented. Decision and Order on Second Remand at 35-36. Moreover, a review of Dr. Jenkins's treatment records does not reveal an explicit and unequivocal diagnosis of pneumoconiosis, either clinical or legal. *See* Director's Exhibits 32-10, 32-11, 48, 78; Employer's Exhibits 2, 10. We vacate, therefore, the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4), and remand this case for reconsideration of the finding that Dr. Jenkins's opinion was sufficient to establish the existence of pneumoconiosis.[9] *See Hicks*, 138 F.3d at 532, 536, 21 BLR at 2-335, 2-341; *Akers*, 31 F.3d at 441, 21 BLR at 2-275.

Employer also alleges that the administrative law judge erred in failing to explain her finding that Dr. Albin's opinion was reasoned and documented and to address the equivocal nature of his opinion. We agree. In evaluating Dr. Albin's opinion, the administrative law judge correctly noted that Dr. Albin recorded occupational, social, family and medical histories and conducted a physical examination, x-ray, blood gas studies and pulmonary function testing. Dr. Albin diagnosed a pulmonary condition resulting in a moderate to severe restrictive impairment, "possibly" related to either rheumatoid arthritis or the inhalation [of coal mine dust]. Director's Exhibit 32-12. The administrative law judge acknowledged the equivocation expressed by Dr. Albin, but did not discuss whether this affected her weighing of the opinion. She stated only that Dr. Albin's statement supported Dr. Jenkins's diagnosis of pneumoconiosis. Decision and Order on Second Remand at 34-35. On remand, Dr. Albin's opinion must be

[9] When addressing Dr. Jenkins's opinion at 20 C.F.R. §718.202(a)(4) on remand, the findings rendered upon consideration of Dr. Jenkins's x-ray interpretations at 20 C.F.R. §718.202(a)(1) must be clearly explained.

reconsidered in light of his equivocal determination. *See Jarrell*, 187 F.3d at 389, 21 BLR at 2-647.

Employer further contends that the administrative law judge erred in failing to explain her finding that Dr. Rasmussen's opinion was reasoned and documented and in failing to address the equivocation in his opinion. The administrative law judge correctly noted that Dr. Rasmussen recorded occupational, social, family and medical histories and conducted a physical examination, x-ray, blood gas studies and pulmonary function testing, and that Dr. Rasmussen diagnosed pneumoconiosis. Decision and Order on Second Remand at 16-17, 34-36. Employer is correct, however, in asserting that the administrative law judge did not set forth the rationale underlying her determination that Dr. Rasmussen's opinion contained a reasoned diagnosis of both clinical and legal pneumoconiosis. On remand, the administrative law judge must provide a rationale regarding whether Dr. Rasmussen's opinion contains a reasoned diagnosis of clinical and/or legal pneumoconiosis and must explicitly address the equivocal nature of Dr. Rasmussen's statement that coal dust exposure was "possibly" a major contributing factor to the miner's pulmonary impairment. *See Jarrell*, 187 F.3d at 389, 21 BLR at 2-647; *Akers*, 31 F.3d at 441, 21 BLR at 2-275.

With respect to the opinions of employer's experts, employer maintains that the administrative law judge erred in discounting Dr. Repsher's opinion because it was inconsistent with the opinions of Drs. Rasmussen, Tuteur, Renn and Dahhan, in that Dr. Repsher did not diagnose rheumatoid arthritis, adult respiratory distress syndrome (ARDS) or a totally disabling respiratory impairment. Employer's Brief at 28; *see* Decision and Order on Second Remand at 34. We disagree. While employer notes accurately that the Board previously indicated that the administrative law judge could not discredit the opinions of Drs. Repsher, Tuteur, Renn and Dahhan merely because they differed somewhat in their conclusions, *Tolliver*, slip op. at 6, employer is incorrect in asserting that the administrative law judge repeated this error on remand. Instead, the administrative law judge acted within her discretion in giving less weight to Dr. Repsher's opinion, because it was inconsistent with the diagnoses of conditions that Drs. Rasmussen, Tuteur, Dahhan and Renn identified as playing a role in causing the miner's disabling pulmonary impairment. *See Jarrell*, 187 F.3d at 389, 21 BLR at 2-647; *Akers*, 31 F.3d at 441, 21 BLR at 2-275.

We find merit, however, in employer's allegation that the administrative law judge mischaracterized the opinions of Drs. Tuteur, Renn and Dahhan when she indicated that their respective opinions, that the miner did not have pneumoconiosis, were "based on the negative biopsy alone." Decision and Order on Second Remand at 35. An open lung biopsy was performed on the miner's right lung on November 30, 1992. Dr. Naeye stated that coal workers' pneumoconiosis was absent in the tissue that was available for examination, but that the tissue sample was too small and thus inadequate to be

completely certain that coal workers' pneumoconiosis was absent. Director's Exhibit 32-7. In discussing the opinions of Drs. Tuteur, Renn and Dahhan, the administrative law judge found that:

> More than one testified that the biopsy evidence overruled their findings on x-ray for diagnosing pneumoconiosis. None, however, addressed the limitations of the biopsy in terms of its location or size, and their arguments fail to address the fact that a negative biopsy standing alone is not legally sufficient to rule out pneumoconiosis. Nor did they have any other basis than the biopsy for rejecting the evidence of the x-rays and CT scans. This [m]iner suffered from multiple, complex medical conditions. Drs. Tuteur, Dahhan and Renn all acknowledged that the [m]iner had multiple conditions[,] which could have contributed to his pulmonary problem, including rheumatoid arthritis and his history of ARDS, but did not offer any persuasive explanations for their exclusion of pneumoconiosis as a factor, except for their reliance on the negative biopsy. . . . This failure to adequately explain why coal dust did not contribute to the [m]iner's respiratory disease or total disability, renders the opinions less well reasoned.

Decision and Order on Second Remand at 35. In contrast to the administrative law judge's finding, however, Drs. Tuteur, Renn and Dahhan rendered their diagnoses while also relying on the radiological evidence and the pattern of the miner's pulmonary function study results. Director's Exhibits 40, 42, 46, 48; Employer's Exhibits 1, 2, 3, 8, 11 13. Because the administrative law judge did not accurately characterize the opinions of Drs. Tuteur, Renn and Dahhan, we vacate her decision to discredit them and instruct that their opinions be reconsidered on remand. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Employer also asserts that the administrative law judge failed to adequately address the various physicians' qualifications, asserting that Drs. Tuteur, Repsher, Renn and Dahhan, pulmonary specialists, have more extensive qualifications than Drs. Albin, Rasmussen and Jenkins. The administrative law judge acknowledged that the evidence in the record established that Drs. Tuteur, Repsher, Renn and Dahhan were Board-certified pulmonologists and took judicial notice of the qualifications of Drs. Jenkins, Albin and Rasmussen. Decision and Order on Second Remand at 14 n. 2, 16, 29. Upon discussing the significance of their respective qualifications, however, the administrative law judge stated, "the context suggests that almost all of the physicians . . . specialize to some extent in evaluating and/or treating patients with lung disease, including pneumoconiosis." *Id*. at 34.

Although an administrative law judge is not required to resolve the conflict among medical opinions by relying solely upon the physicians' qualifications, the Fourth Circuit has made it clear that it is a relevant factor to be considered and if an administrative law judge purports to apply it, he or she must do so in a rational manner. *See Jarrell*, 187 F.3d at 389, 21 BLR at 2-647; *Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Akers*, 31 F.3d at 441, 21 BLR at 2-275. In this case, the administrative law judge did not identify the evidence supporting her determination that the physicians were similarly qualified because they specialized in treating lung disease and/or pneumoconiosis. On remand, therefore, the administrative law judge should consider the physicians' respective qualifications and set forth her determinations in detail, including the underlying rationale. The administrative law judge may consider whether professorships, authoring articles and books, lecturing and memberships in professional associations are credentials that warrant according greater weight to a particular physician's opinion. *See Hicks*, 138 F.3d at 536, 21 BLR at 2-341, *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Dempsey v. Sewell Coal Corp*., 23 BLR 1-47 (2004)(*en banc*).

In light of the foregoing, we vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis on the merits in both the miner's claim and the survivor's claim under 20 C.F.R. §718.202(a)(4), based upon the medical opinion evidence, and her finding that the existence of pneumoconiosis was established, based upon a weighing together of all of the relevant evidence.[10] These issues must be reconsidered on remand in light of the instructions set forth above.

Total Disability and Death Due to Pneumoconiosis

Employer further contends that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) and death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Because we have vacated the administrative law judge's findings regarding the existence of clinical and legal pneumoconiosis, which affected the administrative law judge's findings as to total disability causation and death causation, we must also vacate the administrative law judge's findings under 20 C.F.R. §§718.204(c) and 718.205(c). If reached on remand,

[10] Employer also correctly notes that, in weighing the evidence together at 20 C.F.R. §718.202(a), the administrative law judge did not mention the negative biopsy evidence. Moreover, with regard to the CT scan evidence, employer contends that the administrative law judge mischaracterized the 1996 CT scan reading when she stated that it was "consistent" with pneumoconiosis, while Dr. Williams's reading of the CT scan actually stated that it "could be compatible" with pneumoconiosis "in the appropriate clinical setting." Director's Exhibit 46. On remand, the administrative law judge must explain the basis for her conclusion.

the relevant opinions must be reconsidered and the administrative law judge must make specific findings as to whether each opinion is adequately reasoned and documented, resolve the conflict among the opinions, and set forth the rationale underlying these findings. *See Hicks*, 138 F.3d at 533 n.9, 21 BLR at 2-335 n.9, *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

In the interest of judicial economy, we will also address employer's specific arguments regarding 20 C.F.R. §§718.204(c) and 718.205(c). Employer alleges that the issue of total disability due to pneumoconiosis is barred by collateral estoppel because it was determined in the prior claim that the miner had a totally disabling impairment that was not due to pneumoconiosis. We disagree. The Board has held that *res judicata*, which encompasses the doctrine of collateral estoppel, generally has no application in the context of duplicate claims, "as the purpose of [20 C.F.R. §]725.309 [(2000)] is to provide relief from the principles of *res judicata* to a miner whose physical condition worsens over time." *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-79 (1993). Consequently, the administrative law judge did not err in considering the issue of whether the miner's total disability was due to pneumoconiosis and we reject employer's assertion that claimant is estopped from relitigating the issue of causation.

Pursuant to 20 C.F.R. §718.205(c), employer argues correctly that the administrative law judge ignored the Board's previous instructions to address the documentation of Dr. Sullivan's opinion regarding the cause of the miner's death and explain how his status as a treating physician entitled his opinion to added weight. On remand, the administrative law judge merely adopted her prior finding without addressing the documentation underlying Dr. Sullivan's opinion, and did not provide the rationale for her determination that his opinion was entitled to greater weight because he treated the miner during his final hospitalization. *See Hicks*, 138 F.3d at 536; 21 BLR at 2-341; *Akers*, 131 F.3d at 441, 21 BLR at 2-224; *Tedesco v. Director, OWCP*, 18 BLR 1-104, 1-105 (1994); Decision and Order on Second Remand at 38. Therefore, the issue of death causation must be reconsidered, if it is reached, on remand.

Reassignment to Another Administrative Law Judge

We have also considered employer's request to assign this case to another administrative law judge on remand. Reluctantly, and in view of the administrative law judge's response to the Board's prior remand instructions, we hold that it is in the interest of justice and judicial economy to grant employer's request to remand this case for assignment to a new administrative law judge, for a "fresh look at the evidence" and proper application of the law to the evidence. *See Hicks*, 138 F.3d at 537, 21 BLR at 2-343; *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Accordingly, the Decision and Order Awarding Benefits on Second Remand of the administrative law judge is affirmed in part, vacated in part and the case is remanded for reassignment to a different administrative law judge for further consideration in accordance with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge