BRB No. 10-0283 BLA

JAMES V. ASHBY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEXTET MINING CORPORATION	)	
	)	DATE ISSUED: 01/26/2011
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

John C. Morton and Keith A. Utley (Morton Law LLC), Henderson, Kentucky, for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Award of Benefits (07-BLA-5220) of Administrative Law Judge Daniel F. Solomon rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30

U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case, involving a subsequent claim filed on February 27, 2006,[1] is before the Board for the second time.

In the initial Decision and Order, the administrative law judge accepted the stipulation of the parties that claimant worked in qualifying coal mine employment for thirty-three years.[2] The administrative law judge found that the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that claimant had established a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found that the evidence established that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's findings that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(1), (4), and his finding that one of the applicable conditions of entitlement had changed since the denial of claimant's prior claim, pursuant to Section 725.309. The Board also vacated the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and his finding that claimant's disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *J.V.A.* [*Ashby*] *v. Sextet Mining Corp.*, BRB No. 08-0434 BLA (Mar. 24, 2009)(unpub.).

On remand, the administrative law judge found the existence of pneumoconiosis established pursuant to Section 718.202(a) and that, since the denial of his prior claim, there was a change in one of the applicable conditions of entitlement. The administrative law judge also found that the evidence established total disability due to pneumoconiosis pursuant to Section 718.204(b), (c). Accordingly, the administrative law judge again awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant established the existence of clinical and legal pneumoconiosis, and total disability due to pneumoconiosis. Claimant responds, urging affirmance of the

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[1] Claimant filed his first claim on July 5, 2000, which was denied by the district director on October 17, 2000 because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed a second claim on August 18, 2003. That claim was denied by the district director on May 18, 2004, for failure to establish any element of entitlement. Director's Exhibit 2.

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 5.

administrative law judge's award of benefits, and noting that benefits should also be awarded based on Section 1556 of Public Law 111-148. The Director, Office of Workers' Compensation Programs (the Director), responds, stating that, if the Board does not affirm the award of benefits, the case must be remanded for consideration pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

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 establish entitlement to benefits under the Act, clamant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The applicable conditions of entitlement "shall be limited to those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). As claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment, claimant must submit new evidence establishing the existence of pneumoconiosis or total disability in order to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3).

Clinical Pneumoconiosis

Employer asserts that the administrative law judge erred in his weighing of the new x-ray evidence pursuant to Section 718.202(a)(1).[3] Specifically, employer asserts

[3] The new x-ray evidence consists of five substantive interpretations of three x-rays, dated March 21, 2006, March 1, 2007, and April 12, 2007. The March 21, 2006 x-ray was interpreted by Dr. Westerfield, a B reader, as negative for pneumoconiosis with a film quality of "1." Director's Exhibit 13. Dr. Barrett, who is a Board-certified radiologist and B reader, read this x-ray for quality only, which he rated as "1." Director's Exhibit 14. The March 1, 2007 x-ray was read by Dr. Selby, a B reader, as negative for pneumoconiosis with a film quality of "2." Employer's Exhibit 1. The April 12, 2007 x-ray was interpreted by Dr. Baker, a B reader, as positive for pneumoconiosis with a film quality of "1;" by Dr. Rasmussen, a B reader, as positive for pneumoconiosis

that it was irrational for the administrative law judge to reject Dr. Rasmussen's reading of the April 12, 2007 x-ray, but find Dr. Baker's interpretation of this film dispositive based on their different quality ratings. In addition, employer challenges the administrative law judge's dismissal of Dr. Selby's interpretation of the March 1, 2007 x-ray, based on his finding that the rating of "2" for quality was less than optimal.

In the Board's prior Decision and Order, it vacated the administrative law judge's weighing of the x-ray evidence, noting that the administrative law judge erred in discrediting Dr. Selby's uncontradicted negative interpretation of the March 1, 2007 x-ray on the ground that it was "under exposed," despite the physician's rating of the quality of the x-ray as "2." The Board instructed the administrative law judge, on remand, to reconsider the March 1, 2007 x-ray with the April 12, 2007 x-ray.[4] *Id.* at 5.

On remand, the administrative law judge noted that of the three x-ray readings he considered, "there are only two whose diagnostic quality is not in substantial question," i.e., the only substantive reading of the March 21, 2006 x-ray, Dr. Westerfield's negative interpretation, and the uncontradicted negative reading of the March 1, 2007 x-ray by Dr. Selby. Decision and Order on Remand at 3. The administrative law judge stated:

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with a film quality of "3;" and by Dr. Selby, as negative for pneumoconiosis with a film quality of "2." Claimant's Exhibits 1, 4; Employer's Exhibit 4.

[4] The Board held that the administrative law judge rationally accorded greater weight to the 2007 x-rays than the March 21, 2006 x-ray, based on their recency. *J.V.A.* [*Ashby*] *v. Sextet Mining Corp.*, BRB No. 08-0434 BLA (Mar. 24, 2009)(unpub.), slip op. at 4. The Board also held that the administrative law judge properly determined that Dr. Selby's opinion, discounting the credibility of Dr. Baker's positive reading of the April 12, 2007 x-ray, was based on Dr. Selby's review of a CT scan that was not designated as "other evidence" pursuant to 20 C.F.R. §718.107(a). Further, the Board rejected:

> employer's argument that the administrative law judge abused his discretion in finding "suspect" Dr. Selby's negative interpretation of the April 12, 2007 x-ray based upon his May 22, 2007 report questioning the validity of Dr. Baker's positive reading when he, Dr. Selby, had not read the x-ray and did not do so until more than four months later, whereupon he provided a negative interpretation.

Ashby, slip op at 5. The Board noted that the administrative law judge considered that "the 'argumentative' report followed by the anticipated negative interpretation, undermined the credibility of that interpretation," *Id*. and the Board affirmed the administrative law judge's credibility determination.

> [A]fter a review of all of the evidence, I accept that the preponderance of the evidence shows that there is positive x-ray evidence. Dr. Selby had not actually reviewed the April 12, 2007 x-ray at the time of his report; Dr. Selby relied, in part, on a negative CT scan that was not contained in the evidence of record to discredit positive readings of the April 12, 2007 x-ray; Dr. Selby's opinion that category 1 pneumoconiosis can be falsely diagnosed as a positive reading on a chest x-ray of a smoker with a significant smoking history was "premature" and "argumentative" since, at that time, he had not reviewed the April 12, 2007 x-ray; and, after finally reviewing the x-ray, Dr. Selby observed that the quality of the film had "poor contrast and artifacts". Decision and Order at 8.
>
> I note Dr. Wethersfield's reading but I find that it is not as probative because it was from more than a year earlier than the most recent evidence. I find that Drs. Selby and Rasmussen's readings are not dispositive because both assert that their reading was based on a less than optimal x-ray.
>
> I accept Dr. Baker's reading as accurate. He is also a B reader, as competent to make a determination as anyone else in this record. I accept that he read an optimal x-ray.

Decision and Order on Remand at 3. Therefore, the administrative law judge found that claimant established the existence of pneumoconiosis by x-ray evidence. 20 C.F.R. §718.202(a)(1).

We agree with employer that the administrative law judge erred in evaluating the x-ray evidence based, in large part, on the variations in the film quality identified by the interpreting physicians. Variations in film quality do not provide a basis for resolving a conflict between interpretations of the x-ray for the presence or absence of pneumoconiosis. *See Preston v. Director, OWCP*, 6 BLR 1-1229 (1984); *Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984). Moreover, although each physician provided an opinion on the quality of the x-ray he reviewed, none found any x-ray unreadable, and each physician provided a definite classification as either positive or negative for pneumoconiosis. *Wetherill v. Director, OWCP*, 812 F.2d 376, 382, 9 BLR 2-239, 2-247 (7th Cir. 1987); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987); *Lambert v. Itmann Coal Co.*, 6 BLR 1-256, 1-258 (1983) (holding that where a physician has read the film for the existence of pneumoconiosis, the Board must conclude that the physician found it to be of suitable quality). Therefore, we vacate the administrative law judge's findings pursuant to 718.202(a)(1). On remand, the administrative law judge must weigh

the new x-ray evidence without reliance on the relative interpretations regarding film quality.

Legal Pneumoconiosis

Employer asserts that the administrative law judge erred in finding that the new medical opinion evidence established the existence of legal pneumoconiosis.[5] Specifically, employer asserts that, rather than reconciling Dr. Baker's understatement of claimant's smoking history with the physician's conclusions, as instructed by the Board, the administrative law judge did not address this point, but merely noted that Dr. Baker's opinion is supported by treatises.[6] Employer contends that the administrative law judge's statement that Dr. Selby did not consider the effects of thirty-three years of coal dust

[5] "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). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[6] Dr. Baker examined claimant and diagnosed coal workers' pneumoconiosis due to coal dust exposure, and chronic obstructive pulmonary disease and chronic bronchitis, both due to coal dust exposure and cigarette smoking. Dr. Baker also diagnosed ischemic heart disease due to "ASHD." Claimant's Exhibit 1. Dr. Baker noted that claimant smoked one-half to one pack per day for twenty-five years, which the physician characterized as a "less than 25-pack year history of smoking," and had a thirty-seven and one-half year history of coal dust exposure. Dr. Baker stated:

> Both of these conditions can cause chronic bronchitis and are suppose to be nearly equal in the production of pulmonary symptoms with one year of coal dust exposure equaling one-pack year of smoking. As his history of coal dust exposure is greater, it is felt his condition is significantly related to and substantially aggravated by coal dust from his coal mine employment.

Claimant's Exhibit 1. He also stated that claimant's COPD, mild resting arterial hypoxemia, and chronic bronchitis were all "significantly contributed to or substantially aggravated by dust exposure from his coal mine employment but there also has probably been a substantial contribution from his cigarette smoking as well; though probably not as severe as his coal dust exposure." *Id*. In his deposition, Dr. Baker stated that the predominant cause of claimant's COPD was his coal dust exposure. Claimant's Exhibit 1 at 19. He explained that it was possible that claimant's COPD and pneumoconiosis were the cause of claimant's heart condition. *Id.* at 34-35.

exposure is not an accurate assessment of that medical opinion.[7] Employer also asserts that the administrative law judge erred in discounting Dr. Selby's opinion, based on the improvement in claimant's pulmonary function values. In addition, employer argues that the administrative law judge failed to note the inconsistency between Dr. Simpao's statement that claimant's breathing was progressively worsening and claimant's improving pulmonary function study values.[8]

In its prior Decision and Order, the Board noted that Dr. Baker recorded claimant's smoking history as one-half to one pack per day for twenty-five years; Dr. Simpao reported claimant's smoking history as one and one-half packs per day for forty-one years; and Dr. Selby noted that claimant's smoking history was one and one-half packs per day for twenty-seven years. *Ashby*, slip op. at 6. The Board stated that it was unable to determine whether the administrative law judge, in finding legal pneumoconiosis established, had considered the divergent cigarette smoking histories relied upon by the physicians, which could affect the credibility of the physicians' opinions concerning the cause of claimant's lung disease. Therefore, the Board vacated

[7] Dr. Selby examined claimant and reviewed claimant's medical records. He noted that claimant had a thirty-seven year history of coal mine employment and that claimant smoked one and one-half packs of cigarettes for twenty-seven years, which Dr. Selby calculated was a thirty-five to forty pack-year history of smoking. He opined that claimant had an obstructive lung disease from his forty pack-year history of cigarette smoking. He stated that claimant did not suffer from coal workers' pneumoconiosis or any respiratory or pulmonary abnormality, disease, or defect resulting from his coal mine employment. Employer's Exhibit 1. Dr. Selby subsequently reviewed additional medical records and opined that claimant did not have coal workers' pneumoconiosis, but had obstructive lung disease due to his cigarette smoking. He stated that any shortness of breath claimant suffered was due to numerous other medical conditions unrelated to coal mine dust exposure. Employer's Exhibits 2, 3.

[8] Dr. Simpao examined claimant and noted a thirty-seven and one-half year history of coal mine employment, and that claimant smoked one and one-half packs of cigarettes per day from 1952-1993. Dr. Simpao diagnosed coal workers' pneumoconiosis due to coal mine dust exposure and ASHD due to a non-occupational factor. Dr. Simpao indicated that claimant's coal dust exposure was "the significant contributing factor in his pulmonary impairment," but noted that claimant's history of smoking and heart disease are both "aggravating factors in his pulmonary impairment." Director's Exhibit 13. In his deposition, Dr. Simpao was asked if claimant was totally disabled from doing his usual coal mine employment because of his pulmonary condition related to pneumoconiosis, to which he answered "I think it's significant." Claimant's Exhibit 2 at 18. He also agreed that claimant's sixty pack-year smoking history could have caused a lung condition that would produce all of the symptoms claimant suffered. *Id.* at 21.

the administrative law judge's findings pursuant to Section 718.202(a)(4), and remanded the case with instructions to the administrative law judge to determine the length of claimant's smoking history and to reevaluate the medical opinions in light of that finding. *Ashby*, slip op. at 6-7.

On remand, the administrative law judge found that Dr. Simpao's diagnosis of legal pneumoconiosis was a well documented and reasoned opinion. The administrative law judge found that Dr. Selby's opinion, that claimant has no respiratory disease or impairment related to his coal mine employment, was less rational than Dr. Simpao's contrary opinion, because Dr. Selby failed to address the impact of the thirty-three years of coal mine employment. The administrative law judge found that Dr. Baker's diagnosis of legal pneumoconiosis was supported by medical studies and articles. Decision and Order on Remand at 5. The administrative law judge also found that the "physical facts better lend themselves to a conclusion that there had been aggravation of other respiratory conditions (*i.e.* the effects of smoking) by exposure to breathing materials found in mining." *Id.* at 6. The administrative law judge further found that Dr. Baker's rationale better reflected the record and substantiated the opinion of Drs. Simpao, who found that claimant "has all the symptoms" of legal pneumoconiosis. *Id*. The administrative law judge noted that Dr. Selby found reversibility, but the administrative law judge stated that "there was not much reversibility" and the administrative law judge noted that "[t]he reversibility argument was discounted in promulgating the new regulations." *Id*. at 7. The administrative law judge concluded his analysis, stating:

> I find that Dr. Simpao rendered a reasoned medical report that identifies the existence of legal pneumoconiosis in this record. I again find that if Dr. Selby's diagnosis is "industrial bronchitis," he has described legal pneumoconiosis. Both Dr. Simpao's and Baker's opinions are based on the examinations and observations and laboratory findings that I find are well documented. I note Employer's argument that as Dr. Simpao is not a board certified pulmonary specialist, he is not well qualified. I note Dr. Simpao's experience and find that based on his reasoning, he is more rational as to diagnosis.

Decision and Order at 7.[9] Therefore, the administrative law judge credited Dr. Simpao's opinion regarding causation at Section 718.202(a)(4), and the administrative law judge

[9] We note that Dr. Selby did not diagnose industrial bronchitis. Rather, Dr. Selby stated "It should be noted that industrial bronchitis such as what could be produced in a coal mine, should almost always go away within a month or two after leaving coal mine employment." Employer's Exhibit 2.

found that claimant's thirty-three years of coal mine employment "in part caused the pneumoconiosis." *Id.*

As employer asserts, the administrative law judge did not comply with the Board's instructions on remand. The Board instructed the administrative law judge to determine the extent of claimant's smoking history, and to then reconsider the medical opinions, noting that the variations in smoking histories considered by the physicians "could affect the relative credibility of opinions concerning whether claimant suffered from legal pneumoconiosis or from a cigarette smoke-induced obstructive lung disease exclusively." *Ashby*, slip op. at 7. On remand, the administrative law judge did not make a finding regarding the extent of claimant's cigarette smoking. Rather, the administrative law judge commented that "reference was made to my statement about a 25 year smoking history that was significant. I note that this is not the same as a pack year history and as set forth above, I note that Drs. Selby and Simpao both found the same values." Decision and Order on Remand at 4. While the administrative law judge was correct that the number of years claimant smoked is not the same as the extent of claimant's smoking, he did not make a finding as to the extent of claimant's smoking, as instructed by the Board. Moreover, he erred in stating that "Drs. Selby and Simpao found the same values." Instead, Dr. Selby considered claimant's smoking history to be one and one-half packs per day for twenty-seven years, which he calculated to be a thirty-five to forty pack-year history of smoking, Employer's Exhibit 1, while Dr. Simpao considered claimant's smoking history to be one and one-half packs per day for forty-one years, which he calculated to be about a sixty pack-year smoking history. Decision and Order on Remand at 4, *see* Director's Exhibit 13; Claimant's Exhibit 2; Employer's Exhibit 1; *Ashby*, slip op. at 6. Because the administrative law judge has not complied with the Board's previous instructions to determine the extent of claimant's smoking history and consider the impact of any differences in the length considered by the physicians in determining the credibility of their opinions, we must vacate his findings pursuant to Section 718.202(a)(4). The administrative law judge must follow the instructions provided by the Board. *Briggs v. Pa. R.R.*, 334 U.S. 304 (1948); *Muscar v. Director, OWCP*, 18 BLR 1-7 (1993).

Employer also asserts that the administrative law judge erred in discounting Dr. Selby's opinion. Specifically, employer contends that the administrative law judge erred in discrediting Dr. Selby's opinion because of his comments regarding the reversibility of claimant's pulmonary function study values. Employer further maintains that the administrative law judge's statement, that Dr. Selby did not consider the impact of claimant's thirty-three years of coal mine employment, is not accurate.

We agree with employer that the administrative law judge mischaracterized Dr. Selby's comments regarding reversibility. Contrary to the administrative law judge's statement, that Dr. Selby "found reversibility," Decision and Order on Remand at 7, Dr.

Selby's comments addressed the "improvement" in claimant's FEV1 and FVC results from the pulmonary function study that was conducted on March 1, 2007 to the pulmonary function study conducted on July 23, 2007, not whether claimant's impairment reversed with a bronchodilator. Employer's Exhibit 3. Moreover, the administrative law judge's finding that "there was not much reversibility, even in Dr. Selby's testing," constituted an improper interpretation of the medical data by the administrative law judge. *Marcum*, 11 BLR at 1-24.

Employer also asserts that the administrative law judge's finding that Dr. Selby failed to address the effect of thirty-three years of coal mine employment is an inaccurate characterization of his opinion. We agree. The record reflects that Dr. Selby considered that claimant had between thirty-three and thirty-seven years of coal mine employment in rendering his opinion, and he opined that claimant's symptoms were not related to his coal mine employment or coal dust inhalation. Employer's Exhibits 1, 2.

However, we reject employer's assertion that the administrative law judge's finding that Dr. Simpao's statement that claimant's breathing troubles had progressively worsened, is unreasoned because it is inconsistent with the improvements in claimant's pulmonary function study values from March 21, 2006 to July 23, 2007. The physicians must interpret the medical data, and the administrative law judge may not second-guess the medical experts, or assess the medical evidence independently. *See Marcum*, 11 BLR at 1-24.

As some of employer's arguments have merit, we vacate the administrative law judge's finding that the existence of legal pneumoconiosis is established pursuant to Section 718.202(a)(4). In view of our holdings regarding the administrative law judge's findings at Section 718.202(a)(1) and (a)(4), we also vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis under Section 718.202(a), and that one of the applicable conditions of entitlement has changed since the denial of claimant's prior claim pursuant to Section 725.309.

Total Disability

Employer challenges the administrative law judge's finding that claimant is totally disabled. Specifically, employer argues that the administrative law judge erred in finding Dr. Selby's opinion equivocal regarding the existence of a totally disabling pulmonary impairment. Employer also argues that the administrative law judge did not apply the same standard to the opinions of Drs. Simpao and Baker as he applied to that of Dr. Selby. Further, employer contends that the administrative law judge's finding is not rational, since neither Dr. Simpao nor Dr. Baker mentioned claimant's extreme obesity or heart failure, in contrast to Dr. Selby. In addition, employer asserts that Dr. Simpao's opinion is not well-reasoned, as he did not provide any explanation for his opinion.

Employer contends that Dr. Selby's credentials are superior to those of Drs. Simpao and Baker, and he asserts that the administrative law judge appears to discount Dr. Selby's "vast experience as a practitioner."[10]

On remand, the administrative law judge noted that Dr. Selby opined that claimant was disabled due to non-respiratory conditions, and that he had a cigarette smoke-induced lung disease. The administrative law judge stated "I find that I can not separate these opinions and that his opinion as to respiratory capacity is equivocal." Decision and Order on Remand at 9. The administrative law judge found that the opinions of Drs. Simpao and Baker support a finding of total disability.[11] *Id.*

Dr. Simpao diagnosed a severe loss of lung function and stated that claimant did not retain the pulmonary capacity to perform his last regular coal mine employment. Director's Exhibit 13; Claimant's Exhibit 2. Dr. Baker opined that claimant did not have the respiratory capacity to perform the work of a coal miner, and referred to pulmonary function study results, which he stated showed a Class III impairment of the whole person. He also noted a "Class III pulmonary impairment." Claimant's Exhibit 1. Dr. Selby did not diagnose a respiratory or pulmonary impairment. Rather, he referred to claimant's shortness of breath, which he stated was "multifactorial. . . and is most likely related to cardiac disease first and foremost as well as extreme obesity, deconditioning, probable untreated asthma, obstructive sleep apnea, cigarette smoking causing obstructive lung disease, post CABG chest and possible prior lung infections." Employer's Exhibit 2.

We vacate the administrative law judge's evaluation of the medical opinion evidence at Section 718.204(b)(2)(iv). The administrative law judge's comment that Dr. Selby's opinion regarding claimant's respiratory capacity is equivocal, *see* Decision and Order on Remand at 9, is inconsistent with the Board's prior determination that Dr. Selby provided an "unequivocal opinion that claimant was disabled due to *non-respiratory* conditions." *Ashby*, slip op. at 8.

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[10] There is no merit in employer's assertion that the administrative law judge found that Dr. Simpao's experience outweighed Dr. Selby's credentials. The administrative law judge did not address the relative credentials of the physicians in evaluating the medical opinions pursuant to Section 718.204(b)(iv). *See* Decision and Order on Remand at 9.

[11] We affirm the administrative law judge's finding that total disability is demonstrated pursuant to 20 C.F.R. §718.204(b)(2)(i), and that total disability is not demonstrated pursuant to 20 C.F.R. §718.204(b)(2)(ii) or (iii), as these findings are not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In considering the remaining medical opinions, the administrative law judge merely stated that claimant proved total disability through the opinions of Drs. Simpao and Baker, and he found that Dr. Simpao's opinion was more rational than Dr. Selby's opinion, noting that the fact that claimant was non-ambulatory and required oxygen justified reliance on Dr. Simpao's opinion. While the administrative law judge, as fact finder, must decide whether a report is sufficiently documented and reasoned, *see Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983), in this case, the administrative law judge failed to set forth the rationale for his determination, to provide an adequate discussion of the probative value of each physician's disability assessment, including his qualifications, and to fully analyze the conflicting medical opinion evidence under Section 718.204(b)(iv). *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Therefore, because the administrative law judge's conclusory determination lacks sufficient explanation for crediting the opinions of Drs. Simpao and Baker, we vacate his findings pursuant to Section 718.204(b)(2)(iv). On remand, the administrative law judge must reassess the medical opinion evidence and determine whether it establishes total respiratory disability pursuant to Section 718.204(b)(2)(iv). The administrative law judge must clearly set forth his factual and legal conclusions and he must subject all medical opinions to similar scrutiny. *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999). In light of the foregoing, we also vacate the administrative law judge's determination that claimant established disability causation pursuant to Section 718.204(c).

Impact of the Recent Amendments

After the issuance of the administrative law judge's Decision and Order, amendments to the Act, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010, were enacted by Section 1556 of Public Law No. 111-148. The amendments, *inter alia*, revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption of total disability due to pneumoconiosis in cases where the miner has established fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4).

By Order dated April 29, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148. The Director has responded, maintaining that if the administrative law judge's award of benefits is not affirmed, the case must be remanded for the administrative law judge to consider whether claimant is entitled to the rebuttable presumption of total disability due to pneumoconiosis set forth in the amended version of Section 411(c)(4) of the Act. Neither claimant, nor employer, has responded to this Order.

Based upon the Director's statement, and our review, we conclude that Section 1556 potentially affects this case. Because this case was filed after January 1, 2005, and claimant was credited with thirty-three years of coal mine employment, the administrative law judge must consider whether claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). In addition, if the administrative law judge determines that claimant has invoked the presumption, he must determine whether employer has established rebuttal. On remand, the administrative law judge must allow for the submission of additional evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lemar*, 904 F. 2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). The submission of any additional evidence must be in compliance with the evidentiary limitations set forth in 20 C.F.R. §725.414.

In conclusion, we vacate the administrative law judge's award of benefits. On remand, the administrative law judge must first consider the new evidence to determine whether claimant has established a change in one of the applicable conditions of entitlement pursuant to Section 725.309. If the administrative law judge finds that claimant has established a change in an applicable condition of entitlement, the administrative law judge must then consider whether claimant has established entitlement to benefits. In so doing, the administrative law judge should determine whether Section 411(c)(4) applies to this case.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge