BRB No. 00-0851 BLA

JOHN HENRY ELLISON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CAMKER COAL CORPORATION	)	DATE ISSUED:
	)	
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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Mark E. Solomons (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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 and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (94 -BLA-0880) of Administrative Law Judge Thomas M. Burke awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] This case is before the Board for the third time.[2] On remand, at issue

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed a claim on December 20, 1990, Director's Exhibit 1. In a Decision and Order issued on November 7, 1995, Administrative Law Judge Edith Barnett found 10.6 years of coal mine employment established, found that Carolina Wren Coal Partnership was the responsible operator liable for the payment of benefits and awarded benefits in this claim pursuant to 20 C.F.R. Part 718. In relevant part, while Judge Barnett found that the preponderance of the x-ray evidence suggested that claimant suffered from pneumoconiosis, Judge Barnett found that, when weighed in conjunction with the CT scan evidence of record, the existence of pneumoconiosis was not established by a preponderance of the relevant evidence pursuant to 20 C.F.R. §718.202(a)(1).

Employer appealed and Carolina Wren Coal Partnership cross-appealed, and the Board initially remanded the case for reconsideration of the responsible operator issue and the length of claimant's coal mine employment. *Ellison v. Camker Coal Corp.*, BRB Nos. 96-0444 BLA and 96-044 BLA-A (Feb. 21, 1997)(unpub.). While the Board affirmed Judge Barnett's determination that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) as unchallenged, the Board vacated Judge Barnett's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4). Next, while the Board affirmed Judge Barnett's findings that total disability was not demonstrated pursuant to Section 718.204(c)(1) and (3)(2000), as revised at 20 C.F.R. §718.204(b)(2)(i), (iii), but was demonstrated pursuant to Section 718.204(c)(2)(2000), as revised at 20 C.F.R. §718.204(b)(2)(ii), the Board vacated Judge Barnett's finding that total disability was demonstrated by the medical opinion evidence pursuant to Section 718.204(c)(4)(2000), as revised at 20 C.F.R. §718.204(b)(2)(iv), and remanded the case for the administrative law judge to weigh all relevant evidence together, both like and unlike, pursuant to Section 718.204(c)(2000), as revised at 20 C.F.R. §718.204(b)(2), and, if necessary, to consider whether total disability due to pneumoconiosis was established pursuant to Section 718.204(b)(2000), as revised at 20 C.F.R. §718.204(c).

On remand, the case was reassigned, without objection, to the administrative law judge. In a Decision and Order On Remand issued on June 22, 1998, the administrative law

herein, the administrative law judge found the existence of pneumoconiosis established by the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), total disability established by the medical opinion evidence, in conjunction with the blood gas study evidence, pursuant to 20 C.F.R. §718.204(c)(2000) , as revised at 20 C.F.R. §718.204(b)(2), and total disability due to pneumoconiosis established by the relevant medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2000), as revised at 20 C.F.R. §718.204(c). Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established at Section 718.202(a)(4), total disability at Section 718.204(c) (2000), as revised at 20 C.F.R. §718.204(b)(2), and total disability due to pneumoconiosis established pursuant to Section 718.204(b) (2000), as revised at 20 C.F.R. §718.204(c). Employer also contends that the

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judge determined that employer, Camker Coal Corporation, was the responsible operator capable of assuming liability, found 9.75 years of coal mine employment established and awarded benefits under Part 718.

Employer appealed and the Board initially affirmed the administrative law judge's finding that employer was the properly designated responsible operator. *Ellison v. Camker Coal Co.*, BRB No. 98-1345 BLA (Aug. 13, 1999)(unpub.). However, the Board vacated the administrative law judge's findings pursuant to Section 718.202(a)(4) and Section 718.204(b)(2000), as revised at 20 C.F.R. §718.204(c), and remanded the case for reconsideration. Finally, the Board vacated the administrative law judge's finding that total disability was demonstrated by the medical opinion evidence pursuant to Section 718.204(c)(4)(2000), as revised at 20 C.F.R. §718.204(b)(2)(iv), and remanded the case for reconsideration and a weighing of all relevant evidence, both like and unlike, pursuant to Section 718.204(c)(2000), as revised at 20 C.F.R. §718.204(b)(2).

Board erred in previously affirming the administrative law judge's finding that employer is the responsible operator liable for the payment of benefits in this case. Claimant responds, urging that the administrative law judge's Decision and Order awarding benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, also responds, contending that, because the administrative law judge found the existence of pneumoconiosis, as more broadly defined by the Act and regulations, *see* 30 U.S.C. §902(b); 20 C.F.R. §718.201, established pursuant to Section 718.202(a)(4), the administrative law judge did not err in not specifically considering whether pneumoconiosis arising out of coal mine employment was established pursuant to Section 718.203. The Director also urges the Board to reaffirm the administrative law judge's finding that employer is the responsible operator liable for the payment of benefits in this case.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which all parties have responded, contending that the regulations at issue in the lawsuit will not affect the outcome of the case.

At issue in this case is the determination of the responsible operator pursuant to 20 C.F.R. §§725.491-725.495 (2000), but not pursuant to the revised, and/or challenged, regulations at 20 C.F.R. §§725.491-725.495, which are applicable only to claims filed after January, 19, 2000, *see* 20 C.F.R. §725.2(c). In addition, the revised regulations and/or criteria for establishing and/or defining total disability pursuant to 20 C.F.R. §718.204 have not changed in any material way to affect the outcome of the case. Finally, in regard to establishing the existence of pneumoconiosis pursuant to the revised regulations at 20 C.F.R. §718.202 and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), formerly 20 C.F.R. §718.204(b)(2000) , although the revised definition of pneumoconiosis under 20 C.F.R. §718.201 has been challenged in the lawsuit, we hold that, based on the briefs submitted by the parties, and the Board's review, the disposition of this case before the Board is not impacted by the challenged regulations.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer reiterates the same contentions that it advanced in its previous appeal to demonstrate that the administrative law judge erred in finding that employer is the properly designated responsible operator in this case. The Board addressed employer's contentions in its previous Decision and Order, affirming the administrative law judge's finding that employer is the properly designated responsible operator in this case, *see Ellison*, BRB No. 98-1345 BLA at 4, and employer does not support its argument with reference to any relevant case law issued since the Board's previous Decision and Order. Thus, inasmuch as the Board's previous holding stands as law of the case on this issue, and no exception to that doctrine has been demonstrated by employer herein, *see Arizona v. California*, 460 U.S. 605, 618 (1983); *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 203 F.3d 291, 304 (4th Cir. 2000); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990), we reject employer's contention in this regard.[3]

In regard to the administrative law judge's findings on the merits, in order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id*. Pursuant to Section 718.204, the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that, based on the statutory language at 30 U.S.C. §923(b), all relevant evidence is to be considered together rather than separately within each discrete subsection of 20 C.F.R. §718.202(a)(1)-(4) in determining whether claimant has met his burden of establishing the existence of pneumoconiosis by a preponderance of the evidence, *see Island*

[3] The law of the case doctrine is a discretionary rule of practice, based on the policy that when an issue is litigated and decided, that decision should be the end of the matter. Thus, it is the practice of courts generally to refuse to reopen in a later action what has been previously decided in the same case, *see Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 203 F.3d 291, 304 (4th Cir. 2000); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Creek Coal Co. v. Compton, 211 F.3d 203, BLR (4th Cir. 2000). Consequently, in light of the change in law enunciated in *Compton*, we vacate Judge Barnett's original finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1) and the administrative law judge's subsequent finding that the existence of pneumoconiosis was established by the medical opinion evidence pursuant to Section 718.202(a)(4) and remand the case for reconsideration of all relevant evidence under Section 718.202(a) in accordance with the standard enunciated in *Compton*, *supra*. In the interest of judicial economy on remand, we will address employer's specific contentions regarding the administrative law judge's findings under Section 718.202(a)(4).

The administrative law judge considered all of the relevant medical opinion evidence of record pursuant to Section 718.202(a)(4). Drs. Endres-Bercher, Zaldivar, Fino, Hippensteel, and Tuteur found no evidence of pneumoconiosis. While Drs. Endres-Bercher, and Zaldivar both examined claimant and reviewed the evidence of record, *see* Director's Exhibit 41, 62; Employer's Exhibit 1, 66, 68, Drs. Fino, Hippensteel and Tuteur only reviewed the evidence of record, *see* Director's Exhibit 49, 50, 51; Employer's Exhibits 62, 66, 69-70. In contrast, Drs. Rasmussen, Qazi, Ranavaya, and Vasudevan all examined claimant and diagnosed pneumoconiosis, *see* Director's Exhibit 12, 58, 59, 62; Claimant's Exhibit 20. The administrative law judge found the opinions of the physicians of record who diagnosed pneumoconiosis were consistent with the objective studies and physical examination findings of record, and ultimately credited Dr. Rasmussen's opinion as based on pertinent medical records, supported by a comprehensive and reasoned report, as well as the opinions of Drs. Qazi and Ranavaya. Decision and Order at 12-13.[4]

The administrative law judge gave less weight to the contrary opinions of Drs. Endres-Bercher and Zaldivar, as he found that their examinations were not as comprehensive as Dr. Rasmussen's, who based his diagnosis of pneumoconiosis on the pattern of impairment indicated by claimant's normal pulmonary function study results showing no obstructive impairment, in conjunction with claimant's blood gas study results during exercise which revealed significant impairment, *see* Claimant's Exhibit 2. The administrative law judge noted that the pulmonary function study relied on by Dr. Endres-Bercher was non-conforming[5] and, like the pulmonary function study relied on by Dr. Zaldivar, was not

[4] Contrary to employer's contention, the administrative law judge also considered Dr. Guberman's opinion, Director's Exhibit 26, but properly noted that Dr. Guberman did not evaluate claimant for or provide an opinion on coal workers' pneumoconiosis, *see* Decision and Order at 5.

[5] Contrary to employer's contention, the administrative law judge found that the pulmonary function study administered by Dr. Endres-Bercher was non-conforming because it failed to state the level of claimant's comprehension and cooperation, *see* Decision and

administered post-bronchodilator and the administrative law judge also noted that the blood gas study relied on by Dr. Endres-Bercher was administered only at rest and that Dr. Zaldivar did not administer a blood gas study at all. In addition, the administrative law judge noted that Dr. Tuteur did not review Dr. Rasmussen's blood gas study results.[6]

Order at 5.

[6] Employer contends that Dr. Rasmussen based his diagnosis of pneumoconiosis on claimant's coal mine employment history and blood gas study results which were invalid. Employer asserts that the employment history does not provide evidence of pneumoconiosis,

and blood gas study results are non-specific as to the cause of the impairment. Contrary to employer's contentions, Dr. Rasmussen did not rely simply on claimant's coal mine employment history in making his diagnosis, but, as he explained, considered it in conjunction with the pattern of impairment revealed by both claimant's pulmonary function study and blood gas study results, and he also attributed claimant's impairment, in part, to smoking. Moreover, while Dr. Zaldivar found Dr. Rasmussen's blood gas study results "somewhat" false and wondered whether they were inaccurate, *see* Employer's Exhibit 1, Drs. Zaldivar and Fino did not specifically invalidate Dr. Rasmussen's blood gas study, but only the blood gas study provided by Dr. Vasudevan, *see* Director's Exhibit 49; Employer's Exhibit 1.

Employer further contends that the opinions of Drs. Qazi and Ranavaya do not support Dr. Rasmussen's opinion, because the former are based on positive x-rays, unlike Dr. Rasmussen's, and because the positive x-rays relied upon are contrary to the administrative law judge's finding under Section 718.202(a)(1). Contrary to employer's contentions, Dr. Qazi stated that his diagnosis was also based on claimant's history, examination, pulmonary function study and blood gas study results, Director's Exhibit 59, and Dr. Ranavaya stated that he concurred with Dr. Rasmussen's opinion. Moreover, an administrative law judge may not discredit a medical opinion merely because it relies, in part, on a positive x-ray that conflicts with the weight of the x-ray evidence, *see Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *see also Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). In any event, although Judge Barnett found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1), after weighing the CT scan evidence, *see Compton*, *supra*, she nevertheless found that the preponderance of the x-ray evidence suggested that claimant suffered from pneumoconiosis. 1995 Decision and Order at 16.

While the administrative law judge recognized the excellent qualifications of Drs. Fino, Tuteur and Hippensteel, the administrative law judge credited Dr. Rasmussen's opinion over their contrary opinions, in part, because only Dr. Rasmussen examined claimant and the administrative law judge noted that Dr. Rasmussen has an extensive background in coal workers' pneumoconiosis. The administrative law judge also found that the opinions of Drs. Fino, Tuteur and Hippensteel did not provide any agreement or consensus contrary to Dr. Rasmussen's opinion as to the cause of claimant's impairment. While Dr. Fino attributed claimant's blood gas study results to old tuberculosis, Employer's Exhibits 62, 70, Dr. Hippensteel found that claimant's blood gas study results were not due to pneumoconiosis and/or were not pulmonary related, but he stated that he could not ascribe the cause of the results from the record, Director's Exhibits 49, 51; Employer's Exhibits 66, 69. Similarly, while Dr. Tuteur recognized that claimant suffered from exercise intolerance, which he found was not pulmonary related, he stated that the specific cause was unexplained, Director's Exhibit 50.[7]

Employer contends that, contrary to the administrative law judge's finding, the physical examination findings of record were not consistent and that the objective test results of record were conflicting. In addition, employer contends that the administrative law judge selectively analyzed the opinions of those physicians who did not diagnose pneumoconiosis, noting, for example, that the regulations do not require post-bronchodilator pulmonary function study and/or exercise blood gas study tests be performed. Finally, employer contends that the administrative law judge did not provide any rationale for his conclusory findings and crediting of Dr. Rasmussen's opinion.

Contrary to employer's contentions, it is for the administrative law judge, as the trier-of-fact, to determine whether an opinion is documented and reasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and an administrative law judge may give less weight to opinions of physicians which are supported by limited medical data and may give more weight to a physician's opinion which is supported by extensive documentation, *see Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984), and a more thorough examination and/or review of the evidence of record, *see Hall v.*

[7] Thus, contrary to employer's contention, the administrative law judge did not discredit the opinions of Drs. Fino, Tuteur and Hippensteel *solely* because they did not examine claimant under Section 718.202(a)(4), *see Compton*, *supra*; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Director, OWCP, 8 BLR 1-193 (1985). However, as employer contends, Drs. Endres-Bercher and Zaldivar did review Dr. Rasmussen's blood gas study results. Moreover, the administrative law judge did not adequately explain how Dr. Rasmussen's extensive background in coal workers' pneumoconiosis, despite the fact that he is not board-certified in pulmonary diseases, compares to the qualifications of Drs. Fino, Tuteur and Hippensteel, who all are board-certified in pulmonary diseases. Thus, the administrative law judge should reconsider all of the relevant evidence under Section 718.202(a) on remand, *see Compton*, *supra*, and more fully explain the specific bases for his decision, the weight assigned to the evidence and the relationship he finds between the evidence and his legal and factual conclusions, *see Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984), and assess the quality of the physicians' reasoning and documentation in support of their conclusions as to whether or not claimant suffered from pneumoconiosis as defined at 20 C.F.R. §718.201, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Moreover, as employer contends, if the administrative law judge finds the existence of pneumoconiosis established pursuant to Section 718.202(a) on remand, he should then consider whether pneumoconiosis arising out of coal mine employment is established pursuant to 20 C.F.R. §718.203, *see Trent*, *supra*; *Perry*, *supra*, which the administrative law judge did not consider.

Next, employer contends that the administrative law judge erred in finding total disability established by the medical opinion evidence, in conjunction with the blood gas study evidence, pursuant to Section 718.204(c)(2000), as revised at 20 C.F.R. §718.204(b)(2). In weighing the relevant evidence pursuant to Section 718.204(c)(2000), as revised at 20 C.F.R. §718.204(b)(2), the administrative law judge noted that all of the pulmonary function study evidence of record was non-qualifying under Section 718.204(c)(1), as revised at 20 C.F.R. §718.204(b)(2)(i), but noted that the two blood gas studies of record which were administered after exercise were qualifying under Section 718.204(c)(2)(2000), as revised at 20 C.F.R. §718.204(b)(2)(ii).[8] Decision and Order at 13-15. The administrative law judge credited the opinion of Dr. Rasmussen, as thoroughly reasoned and documented, and as supported by the opinions of Drs. Qazi and Ranavaya, all of whom, the administrative law judge noted, had examined claimant and found that he was totally disabled due to pneumoconiosis. In regard to the contrary opinions of record from

[8] For pulmonary function studies and blood gas studies developed and/or conducted prior to January 19, 2001, *see* 20 C.F.R. §718.101(b), a "qualifying" study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718 (2000), Appendix B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1)-(2)(2000).

Drs. Endres-Bercher, Zaldivar, Fino, Hippensteel and Tuteur, who all found that claimant was not totally disabled from a respiratory or pulmonary standpoint, the administrative law judge again noted that Drs. Fino, Hippensteel and Tuteur had not examined claimant. The administrative law judge also again noted that the pulmonary function study relied on by Dr. Endres-Bercher was non-conforming and that the blood gas study he relied on was administered only at rest. The administrative law judge stated that, except for Drs. Tuteur and Zaldivar, all the physicians of record found that claimant suffered from an exercise impairment; the administrative law judge gave dispositive weight to those physicians who found that it was totally disabling, noting that the blood gas studies of record which were administered after exercise were qualifying.

Employer contends that the administrative law judge erred in relying, in part, on the fact that the exercise blood gas study results of record were qualifying and, therefore, erred in giving less weight to the opinion of Dr. Endres-Bercher because he had not administered a blood gas study after exercise. As employer contends, the administrative law judge did not consider and/or weigh the fact that the qualifying results of the blood gas study administered after exercise by Dr. Vasudevan, *see* Director's Exhibit 13, were found to be invalid by Drs. Zaldivar and Fino *see* Director's Exhibit 49; Employer's Exhibit 1. In addition, while Dr. Endres-Bercher did not administer a exercise blood gas study, he did review claimant's exercise blood gas study results. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Moreover, the administrative law judge did not explain the reason he attached significance to the fact that the non-qualifying pulmonary function study relied on by Dr. Endres-Bercher was non-conforming under Section 718.204(c), in light of the fact all of the other pulmonary function study evidence of record was non-qualifying under Section 718.204(c)(1), *see Tenney*, *supra*.[9] Finally, as employer contends, the administrative law judge apparently credited the opinions of Drs. Qazi and Ranavaya, and discredited the opinion of Dr. Tuteur, under Section 718.204(c) solely based on whether or not the doctor had examined claimant, *see Compton*, *supra*; *Akers*, *supra*. Consequently, the administrative law judge did not resolve the conflicts discussed *supra* in the medical evidence, *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989), and/or did not adequately explain the bases for his resolutions

[9] In any event, the quality standards at 20 C.F.R. §718.103 (2000), applicable to pulmonary function study and blood gas study evidence developed prior to January 19, 2001, *see* 20 C.F.R. §718.101, are not mandatory and an otherwise reliable and probative study which fails to conform to those standards may not be precluded from consideration by the administrative law judge under Section 718.204 on that basis alone, *see Orek v. Director, OWCP*, 10 BLR 1-51 (1987)(Levin, J., concurring); *see also Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988).

of the conflicts in the evidence: crediting medical opinions finding claimant totally disabled from a respiratory or pulmonary standpoint and the qualifying blood gas study results administered after exercise, rather than the contrary medical opinion and pulmonary function study evidence, finding that claimant's impairment was not totally disabling, *see Hicks*, *supra*; *Akers*, *supra*; *Underwood*, *supra*; *Tenney*, *supra*. Thus, the administrative law judge's finding that total disability was established is vacated and the case is remanded for the administrative law judge to reconsider and weigh all of the relevant evidence together, like and unlike, *see* 20 C.F.R. §718.204(b)(2), formerly 20 C.F.R. §718.204(c)(2000); *Budash*, *supra*; *Fields*, *supra*; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock*, *supra*; *but see generally Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797 (1984); (because pulmonary function studies and blood gas studies measure different types of impairments, a medical opinion of no respiratory or pulmonary impairment based only on a pulmonary function study does not necessarily rule out the existence of a respiratory or pulmonary impairment); *see also Estep v. Director, OWCP*, 7 BLR 1-904 (1985); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Employer also contends that the administrative law judge erred in finding total disability due to pneumoconiosis established, *see* 20 C.F.R. §718.204(c), formerly 20 C.F.R. §718.204(b)(2000). The administrative law judge again credited the opinion of Dr. Rasmussen, as well as the opinions of Drs. Qazi and Ranavaya, that claimant was totally disabled due to his pneumoconiosis. Decision and Order at 15. The administrative law judge found that Dr. Endres-Bercher's contrary opinion, that claimant's respiratory impairment was caused by smoking, offered no explanation for his conclusion, whereas Dr. Rasmussen had explained that smoking was not the cause of claimant's impairment because he did not have any obstructive impairment and that the only factor in claimant's history which could account for claimant's exercise impairment was his coal mine employment.[10] The administrative law judge further found that Dr. Zaldivar provided no opinion on etiology because he found no respiratory impairment. Thus, the administrative law judge found total disability due to pneumoconiosis established by a preponderance of the evidence.

As employer contends, in crediting the opinions of Drs. Rasmussen, Qazi and

[10]Although employer contends that the opinion of Dr. Endres-Bercher is adequately explained, documented and reasoned, the administrative law judge's finding that Dr. Rasmussen provided a better or more comprehensive explanation as to whether smoking caused claimant's impairment is supported by substantial evidence and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Ranavaya and finding total disability due to pneumoconiosis established, the administrative law judge did not resolve some of the conflicts in the medical evidence between the credited opinions and the contrary medical opinions from Drs. Fino, Tuteur and/or Hippensteel , *see Lafferty*, *supra*; *Fagg*, *supra*, and/or did not adequately explain the bases for his resolution of those conflicts, *see Hicks*, *supra*; *Akers*, *supra*; *Underwood*, *supra*; *Tenney*, *supra*. Moreover, inasmuch as the administrative law judge relied on his findings that total disability was established and that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4), both of which have been vacated, when he determined that total disability due to pneumoconiosis was established, we vacate the administrative law judge's finding that total disability due to pneumoconiosis was established and remand the case for reconsideration of the relevant evidence in accordance with the applicable standard, *see* 20 C.F.R. §718.204(c)(1), formerly 20 C.F.R. §718.204(b).

Finally, employer contends that the administrative law judge's decisions in this case, and his reiterated findings, demonstrate the administrative law judge's intransigence and/or bias against employer. Thus, employer urges the Board to remand the case to a new administrative law judge to take an unprejudiced look at the evidence. However, charges of bias or prejudice by the administrative law judge are not to be made lightly and must be supported by concrete evidence, *see Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992); *see also Marcus v. Director, OWCP*, 548 F.2d 1044, 1050 (D.C. Cir. 1976); *Zamora v. C. F. & I. Steel Corp.*, 7 BLR 1-568 (1984). Inasmuch as employer has failed to present any specific evidence of bias by the administrative law judge, we reject employer's contentions and deny employer's request that the case be remanded to a new administrative law judge, *see Cochran*, *supra*; *Marcus*, *supra*; *Zamora*, *supra*.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge