BRB No. 02-0725 BLA

ARTHUR NORRIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 07/23/2003
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 Claim of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer and carrier.

Rita Roppolo (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (94-BLA-1571) of Administrative Law Judge Mollie W. Neal 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 on appeal before the Board for a third time.[2] In the last appeal, the Board affirmed the administrative law judge=s finding that the weight of the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. ''718.202(a)(4), 718.203(b), but vacated her finding of total respiratory disability at 20 C.F.R. '718.204(c)(1), (4) (2000), and remanded this case for the administrative law judge to reconsider the validity of the pulmonary function study evidence of record and the opinion of Dr. Selby that claimant was able to perform his usual coal mine employment, and then to weigh all the contrary and probative evidence against the evidence supportive of a finding of total disability at Section 718.204(c) (2000). As the administrative law judge=s finding of a material change in conditions was based upon her finding that claimant established total disability, the Board also vacated her findings under 20 C.F.R. '725.309 (2000) and instructed the administrative law judge on remand to determine whether Dr. Cohen=s reliance upon evidence from the prior claim rendered his opinion insufficient to establish a material change in conditions in light of the standard articulated by the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, in *Spese v. Peabody Coal Co.*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997), and to reconsider whether the weight of the new evidence establishes a material change in conditions pursuant to *Spese*. The Board also vacated the administrative law judge=s finding that claimant established disability causation at Section 718.204(b) (2000), and instructed the administrative law judge on remand to consider the testimony of Drs. Renn, Selby and Sanjabi, indicating that claimant would have the same degree of disability had he never stepped foot in a mine, which bears on the issue of whether pneumoconiosis was a necessary contributing cause of claimant=s disability pursuant to *Compton v. Inland Steel Co.*, 933 F.2d 477, 15 BLR 2-79 (7th Cir. 1991), and *Hawkins v. Director, OWCP*, 907 F.2d 697, 14 BLR 2-17 (7th Cir. 1990). *Norris v. Peabody Coal Co.*, BRB No. 98-1059 BLR (Jun. 16, 1999)(unpub.)(*Norris II*).

On remand, the administrative law judge found that the weight of the evidence established total disability due to pneumoconiosis pursuant to Section 718.204(b), (c), and a

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[1]The Department of Labor (DOL) 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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The prior procedural history of this case is set forth in *Norris v. Peabody Coal Co.*, BRB No. 96-1079 BLA (May 16, 1997)(unpub.)(*Norris I*), and *Norris v. Peabody Coal Co.*, BRB No. 98-0159 BLA (Jun. 16, 1999)(unpub.)(*Norris II*).

material change in conditions under Section 725.309 (2000). Accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge=s finding of a material change in conditions at Section 725.309 (2000), her findings of total respiratory disability and disability causation at Section 718.204(b), (c), and her failure to address employer=s assertion that intervening case law requires the administrative law judge to reconsider whether the evidence is sufficient to establish legal pneumoconiosis pursuant to Section 718.202(a)(4). Claimant and the Director, Office of Workers= Compensation Programs (the Director), respond, urging affirmance.

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 by 30 U.S.C. '932(a); *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge=s Decision and Order on Second Remand, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there are no reversible errors contained therein. Initially, we find no merit in employer=s argument that intervening case law requires that the administrative law judge reconsider the issue of whether the evidence is sufficient to establish legal pneumoconiosis as defined at 20 C.F.R. '718.201(a)(2). Employer maintains that, pursuant to *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001), the Seventh Circuit requires an administrative law judge to provide a medically defensible rationale for crediting an opinion as reliable and probative evidence, and to ensure that a scientific dispute be resolved on scientific grounds. Employer asserts that in the present case, none of the factors upon which Dr. Cohen based his diagnosis of legal pneumoconiosis provided any scientifically defensible support for Dr. Cohen=s conclusion that claimant has a coal dust related pulmonary obstruction. Employer relies upon the decision of the District of Columbia Circuit Court in *Nat=l Mining Ass=n v. United States Dept. of Labor*, 292 F.3d 849 (D.C.Cir. 2002), *aff=g in part and rev=g in part Nat=l Mining Ass=n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001), which recognized that both the scientific evidence and the applicable regulations support only the premise that obstructive lung disease *may* be caused by mining exposure, but that there is no presumption that all or even most obstructive lung disease is caused by coal dust exposure. Employer thus contends that the administrative law judge=s finding that claimant established the existence of pneumoconiosis at Section

718.202(a)(4) does not accord with controlling legal authority, as employer maintains that Dr. Cohen=s opinion does not constitute substantial evidence and does not overcome the contrary diagnoses by Drs. Renn and Selby, that claimant=s chronic obstructive pulmonary disease was caused by smoking. Employer=s Brief at 17-21; Employer=s Combined Reply Brief at 6-11. Employer=s arguments are without merit.

In *Norris v. Peabody Coal Co.*, BRB No. 96-1079 BLA (May 16, 1997) (unpub.)(*Norris I*), the Board addressed and rejected employer=s assertion that the administrative law judge erred in crediting Dr. Cohen=s opinion because there was no medical or scientific basis for the physician=s conclusion that claimant has a coal dust related pulmonary obstruction. *Norris I*, slip op. at 4. As the administrative law judge properly reviewed the relative qualifications of the physicians and the documentation underlying each medical opinion, the Board held that the administrative law judge acted within her discretion in finding that the opinion of Dr. Cohen, as supported by the opinion of Dr. Khan, was well reasoned and the most persuasive, and that the contrary opinions of Drs. Renn and Selby were entitled to less weight because they were based in part on flawed assumptions, *i.e.*, these physicians minimized claimant=s heavy coal dust exposure and did not diagnose pneumoconiosis in part because claimant=s ventilatory studies did not manifest a restrictive defect, when the Act and regulations permit a diagnosis of pneumoconiosis based on an obstructive impairment without a restrictive component.[3] *Norris I*, slip op. at 3

[3]Employer also asserts that, contrary to the Board=s previous holding, it was reversible error for the administrative law judge to accord less weight to the opinions of Drs. Renn and Selby on the ground that they believed that the obstructive nature of claimant=s impairment militated against a finding of pneumoconiosis. In *Norris II*, the Board acknowledged that in *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995), the Seventh Circuit held that medical opinions which indicate that coal dust exposure does not cause obstructive impairment are not Ahostile to the Act@ or inherently incredible and necessarily less persuasive. *Norris II*, slip op. at 6-7. The Board indicated that employer=s contention would have merit had the administrative law judge discounted the opinions of Drs. Renn and Selby solely on the basis that the opinions were hostile to the Act because the doctors believed that the obstructive nature of claimant=s impairment militated against a finding of pneumoconiosis; however, the Board held that the administrative law judge properly discounted the opinions on the ground that they were based upon a flawed assumption with regard to the level of claimant=s coal dust exposure. *Norris II*, slip op. at 7; *see also Norris I*, slip op. at 3 n. 3. Contrary to employer=s arguments, we believe that the administrative law judge=s credibility determinations with regard to the opinions of Drs. Renn and Selby comport with *Blakley*, in which the Seventh Circuit held that, while a physician=s

n. 3. The Board subsequently affirmed the administrative law judge=s finding that claimant established the existence of pneumoconiosis at Section 718.202(a)(4), additionally holding that the administrative law judge permissibly discounted Dr. Sanjabi=s opinion that claimant did not have pneumoconiosis on the ground that, *inter alia*, the physician was not Board-certified in pulmonary medicine while Drs. Cohen and Khan were. *Norris II*, slip op at 6-7. Although employer argues that Dr. Cohen=s opinion is not well reasoned and should not have been credited, the decision of whether a medical opinion is reasoned rests ultimately with the administrative law judge. As the Seventh Circuit has recognized, there is Aoverwhelming scientific and medical evidence@ supporting Dr. Cohen=s opinion that exposure to coal dust can cause, aggravate, or contribute to obstructive lung diseases, *Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, 895, 22 BLR 2-409, 2-426, 2-427 (7th Cir. 2002), and that it is Arational to give great weight to Dr. Cohen=s views, particularly in light of his remarkable clinical experience and superior knowledge of cutting-edge research.@ *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-266, 2-280, 2-281 (7th Cir. 2001). Since employer has not set forth any valid exception to the law of the case doctrine, we decline to revisit the administrative law judge=s findings at Section 718.202(a)(4). *See Church v. Eastern Associated Coal Corp*, 20 BLR 1-8 (1996); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993).

Employer next challenges the administrative law judge=s finding that the pulmonary function studies of record establish total respiratory disability at Section 718.204(b)(2)(i). Employer maintains that the results of the tests conducted on September 14, 1993, March 3, 1994, and May 11, 1994 are invalid, and that the administrative law judge did not provide proper reasons for either crediting or discounting the conflicting medical opinions regarding the validity of these tests. We disagree, and note that since employer acknowledges that all of the pulmonary function studies produced qualifying results, any single valid test would support the administrative law judge=s finding of total disability at Section 718.204(b)(2)(i).

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expression of a view that is at odds with the Act is not enough by itself to exclude that opinion from consideration, the administrative law judge may, after considering all relevant medical evidence, disregard the medical conclusions of a qualified physician when confronted with countervailing clinical evidence. *Blakley*, 54 F.3d at 1321, 19 BLR at 2-206, 2-207. In the present case, the administrative law judge did not exclude the opinions of Drs. Renn and Selby from consideration or find them hostile to the Act, but rather found that, among the pulmonary specialists, the opinion of Dr. Cohen, that both coal dust exposure and smoking contributed to the development of claimant=s obstructive lung disease, was the most credible and persuasive, and that the contrary opinions of Drs. Renn and Selby were based in part on flawed assumptions regarding the necessity of a restrictive component. Decision and Order at 11.

The Board previously affirmed the administrative law judge=s finding that the test conducted on May 11, 1994, though non-conforming, substantially complied with the applicable quality standards and was valid. *Norris I*, slip op. at 4-5. Additionally, on the current remand, the administrative law judge accurately determined that the pre- and post-bronchodilator results of the test conducted on March 3, 1994, were found to be valid for the interpretation of claimant=s pulmonary function by the pulmonologist who ordered the test, Dr. Selby, as well as by three other pulmonary specialists, Drs. Cohen, Repsher and Renn, and by Dr. Paul, an immunologist, while only Dr. Vest, a pulmonary specialist, and Dr. Long, with no Board-certification, found that the test was invalid. Decision and Order on Second Remand at 5. Although employer correctly maintains that numerical superiority alone is not recognized by the Seventh Circuit as a proper basis for crediting medical opinions, *see Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994), in the present case, the administrative law judge permissibly relied upon a preponderance of opinions by the best qualified physicians that the results of the March 3, 1994 pulmonary function study were valid. Decision and Order on Second Remand at 5; *see Livermore v. Amax Coal Co.*, 297 F.3d 668, 22 BLR 2-399 (7th Cir. 2002). We therefore affirm the administrative law judge=s finding that claimant established total respiratory disability at Section 718.204(b)(2)(i), and we need not address employer=s arguments regarding the validity of the remaining studies.

Employer also challenges the administrative law judge=s finding that the weight of the medical opinions of record establish total respiratory disability at Section 718.204(b)(2)(iv), arguing that the administrative law judge provided invalid reasons for discounting Dr. Selby=s opinion that claimant had the exercise capacity to perform his usual coal mine employment. Employer=s arguments are without merit. The administrative law judge accurately reviewed Dr. Selby=s opinion, that claimant had a Asevere obstructive respiratory impairment@ and Asome limitation of exercise@ but that claimant Awould have the pulmonary or respiratory capacity to perform his last previous coal mine duties as a repairman on top@ because claimant=s blood gas test results showed that claimant still had the Aability to walk, do shooting and similar coal mine activities as he had performed on his last employment in the coal mines,@ Employer=s Exhibit 2. Decision and Order on Second Remand at 5. The administrative law judge acted within her discretion in finding that Dr. Selby=s opinion was not as reliable as Dr. Cohen=s opinion that claimant was disabled from performing the exertional requirements of his last coal mine employment, and was entitled to less weight than the remaining medical opinions of record, which also found that claimant was totally disabled, because Dr. Selby was not familiar with claimant=s usual coal mine duties and their exertional requirements.[4] Decision and Order on Second Remand at 5-6; *see*

[4]The administrative law judge additionally found that it was purely speculative for Dr.

McCune v. Central Appalachian Coal Co., 6 BLR 1-996 (1984). Although employer asserts that Dr. Selby testified that claimant worked as a shooter, belt patrol supply man and repairman, and that the physician indicated that he was familiar with what those jobs entailed, the administrative law judge correctly noted that in his deposition, Dr. Selby admitted that claimant had merely provided his job titles but did not elaborate on the specific duties those jobs involved. Decision and Order on Second Remand at 6; Employer=s Exhibit 47 at 8, 58-59. The administrative law judge=s findings pursuant to Section 718.204(b)(2)(iv) are supported by substantial evidence, consistent with applicable law, and are affirmed. As the administrative law judge then weighed all like and unlike evidence together and reasonably determined that the evidence supportive of a finding of total disability outweighed the contrary and probative evidence, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), we affirm her finding that claimant established total respiratory disability at Section 718.204(b).

Employer next contends that the administrative law judge erred in finding disability causation established at Section 718.204(c), arguing that the opinions of Drs. Cohen and Khan are insufficient to carry claimant=s burden of proof and that the administrative law judge failed to follow the Board=s remand instructions with regard to the opinions of Drs. Renn, Selby and Sanjabi. Employer=s arguments are without merit. Although employer maintains that the opinions of Drs. Sanjabi, Renn and Selby establish that smoking fully accounts for claimant=s disability, the administrative law judge rationally determined that Dr. Sanjabi, who was not a Board-certified pulmonologist, and Drs. Renn and Selby, Board-certified pulmonary specialists, necessarily opined that pneumoconiosis was not a contributing factor to claimant=s disability because they found no evidence of pneumoconiosis. Decision and Order on Second Remand at 7; *see generally Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Trujillo v. Kaiser Steel Corp*, 8 BLR 1-472 (1986). Consequently, the administrative law judge permissibly accorded greater weight to the contrary opinions of pulmonary specialists Dr. Cohen, that coal dust exposure and smoking significantly contributed to claimant=s disability, and Dr. Khan, that claimant=s disability was due to a combination of pneumoconiosis and emphysema, which the administrative law judge found to be well reasoned and consistent with both the contributing cause standard as enunciated by the Seventh Circuit and the amended regulations. Decision and Order on Second Remand at 6-7; *see Compton*, 933 F.2d at 480-483, 15 BLR at 2-83, 2-85; *Hawkins*, 907

Selby to report that claimant had Apossibly@ acquired an asthmatic condition in later years, and that it was Apossible@ that with further aggressive medical treatment of his asthma, claimant might improve his exercise tolerance. Decision and Order on Remand at 6; Employer=s Exhibit 2.

F.2d at 697, 701, 14 BLR at 2-27, 2-31; *Shelton v. Director, OWCP*, 899 F.2d 690, 13 BLR 2-444 (7th Cir. 1990). Notwithstanding the testimony of Drs. Renn and Selby, that claimant would have the same degree of disability had he never stepped foot in a mine, the administrative law judge permissibly found that their opinions were entitled to less weight as they were based on the erroneous assumption that claimant did not have pneumoconiosis, which undermined the physicians= conclusions.[5] *Id.* Consequently, we affirm the administrative law judge=s finding that the weight of the evidence established disability causation at Section 718.204(c).

Lastly, employer contends that the administrative law judge erred in relying upon the opinion of Dr. Cohen to support her finding that claimant established a material change in conditions at Section 725.309 (2000). Employer asserts that this opinion is insufficient to establish a material change in conditions as a matter of law because Dr. Cohen predicated his diagnosis of disabling pneumoconiosis upon all the record evidence without differentiating the old evidence from the new; claimant exhibited the same symptoms and physical manifestations of chronic lung disease as he did when he first filed for benefits; Dr. Cohen did not explicitly find a change in the miner=s condition or state that the miner developed pneumoconiosis or became totally disabled by the disease since the prior denial;[6] and he did not explain how or why the evidence demonstrated that claimant=s pneumoconiosis was one of those rare latent and progressive cases which was not present at the time of the prior

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[5]Employer correctly asserts that the administrative law judge did not address Dr. Sanjabi=s testimony to the same effect; however, a remand is not necessary because the same rationale for discounting the opinions of Drs. Renn and Selby applies to the opinion of Dr. Sanjabi. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6]Employer also notes that in Dr. Cohen=s report, under the heading AHas There Been A Change In the Patient=s Condition,@ the physician stated that claimant had suffered several exacerbations of his lung condition requiring hospital admission in recent years, which was Aindicative of a worsening of his underlying lung disease.@ Claimant=s Exhibit 4 at 15. We find no merit in employer=s assertion that this statement demonstrates that Dr. Cohen believed the miner had pneumoconiosis all along. Further, although employer argues that the only hospital reports in the record referred to by Dr. Cohen predated the first claim for benefits, Dr. Cohen=s report reveals that he reviewed progress notes from May 5, 1987 through August 26, 1994, in which Dr. Lyle diagnosed pneumoconiosis on several occasions and indicated that claimant had been through pulmonary rehabilitation. Claimant=s Exhibit 4 at 5. While these progress notes are not contained in the record herein, Dr. Lyle signed multiple hospitalization reports, which are included in the record, as claimant=s attending physician.

denial in 1990 but manifested itself thereafter.[7] Employer=s arguments are without merit.

In her original Decision and Order, the administrative law judge determined that claimant=s first claim was denied because the evidence did not establish that claimant suffered from pneumoconiosis arising out of coal mine employment or that he was totally disabled by the disease, and that while pulmonary function studies yielded results which met disability standards, the district director found that there was no evidence that the impairment was due to coal mine work, thus in order to establish a material change in conditions, claimant had to establish all elements of entitlement based on evidence submitted since the denial in November 1990. Decision and Order at 4. In her Decision and Order on Remand, pursuant to the Board=s direction to render a factual finding as to whether the new evidence demonstrated that claimant=s condition had deteriorated since the prior denial in accordance with *Freeman United Coal Mining Co. v. Hilliard*, 65 F.3d 667, 19 BLR 2-282 (7th Cir. 1995), and *Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991), the administrative law judge determined that the prior record established no pulmonary or respiratory disability,[8] and found that because the weight of the

[7]Employer contends that the Director has conceded that pneumoconiosis is rarely latent or progressive, citing *Nat=l Mining Ass=n v. United States Dept. of Labor*, 292 F.3d 849 (D.C.Cir. 2002)(NMA), and employer asserts that claimant is therefore required to prove that his pneumoconiosis was a rare case of latent and progressive pneumoconiosis. Employer=s Brief at 16-17; Employer=s Reply Brief at 5-6. We disagree. Because the regulations, the United States Supreme Court and the United States Court of Appeals for the Seventh Circuit have recognized the latent and progressive nature of pneumoconiosis, we reject employer=s argument that NMA, by its terms, invalidates the law developed by the Supreme Court and the circuit court within whose jurisdiction this case arises. *See* 20 C.F.R. '718.201(c); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 22 BLR 2-1, 2-9 (1987), *reh=g denied*, 484 U.S. 1047 (1988); *Old Ben Coal Co. v. Scott*, 144 F.3d 1045, 21 BLR 2-391 (7th Cir. 1998); *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc*), *modifying* 94 F.3d 369 (7th Cir. 1996).

[8]The administrative law judge noted that in the prior denial, the district director found that claimant failed to establish the presence of pneumoconiosis arising out of coal mine employment or total disability due to pneumoconiosis, and the administrative law judge determined that the only medical report of record in the original claim was Dr. Sanjabi=s report dated October 2, 1990, at which time claimant was still engaged in coal mine employment and continued to work until August 1993. The administrative law judge further determined that Dr. Sanjabi diagnosed chronic obstructive pulmonary disease, but did not opine that this condition was disabling. Instead, Dr. Sanjabi indicated that the degree of severity of the impairment was Aas per pt see hx.@ Director=s Exhibit 25. In view of

new medical opinions and pulmonary function studies now established a totally disabling respiratory impairment, claimant had demonstrated a substantial worsening of his condition since the prior denial. Decision and Order on Remand at 3. In the present remand, following the Board=s instructions to address whether Dr. Cohen=s reliance upon evidence from the prior claim rendered his opinion insufficient to establish a material change in conditions in light of *Spese*, the administrative law judge acknowledged that claimant could not satisfy his burden by merely submitting new evidence that addresses his condition at the time of the earlier denial, since that would simply contest the correctness of the previous decision. Decision and Order on Second Remand at 8. The administrative law judge then determined that nothing in Dr. Cohen=s report indicated that the physician was diagnosing other than claimant=s present condition or that he was disputing any previous finding by the district director or other doctors that claimant did not have pneumoconiosis in 1990, but rather, Dr. Cohen used the present tense to conclude in 1995 that claimant suffers from pneumoconiosis which is totally disabling, and he based this opinion upon a review of the work history he obtained from claimant=s 1994 deposition, as well as x-rays, pulmonary function studies, blood gas studies and medical reports, the great majority of which were generated between 1993 and 1995. *Id*.; Claimant=s Exhibit 4. The administrative law judge found that Dr. Cohen=s conclusions were consistent with both the amended regulations and case law, which recognize that pneumoconiosis is latent, progressive and may manifest itself after exposure to coal dust ceases. *See* 20 C.F.R. ' 718.201(c); *Spese*, 117 F.3d at 1010, 21 BLR at 2-129, 2-130; *Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992). Incorporating her previous discussion and weighing of Dr. Cohen=s report with the other medical reports of record, the administrative law judge acted within her discretion in finding that the opinion of Dr. Cohen, as supported by the opinion of Dr. Khan, was the best reasoned and most persuasive medical opinion of record and was sufficient to establish a material change in conditions at Section 725.309 (2000) by establishing that claimant now suffers from pneumoconiosis which did not exist at the time of the prior denial, and that the disease causes claimant to be totally disabled from performing his usual coal mine work. Decision and Order on Second Remand at 8; *see Spese*, 117 F.3d at 1008-1009, 21 BLR at 2-127; *Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991). The administrative law judge=s findings pursuant to Section 725.309 are supported by substantial evidence and are affirmed. Consequently, we affirm the administrative law judge=s award of benefits.

Accordingly, the administrative law judge=s Decision and Order Awarding Benefits on Second Remand is affirmed.

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claimant=s continued employment and Dr. Sanjabi=s report, the administrative law judge reasonably concluded that the prior record established no pulmonary or respiratory disability. Decision and Order on Remand at 3. Moreover, the district director made no affirmative finding that claimant established total respiratory disability. Director=s Exhibit 25.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge