BRB No. 07-0824 BLA

V.C.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARMAN MINING CORPORATION	)	DATE ISSUED: 07/14/2008
	)	
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 Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (05-BLA-5166) of Administrative Law Judge Larry S. Merck (the administrative law judge) 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). This case involves a request for modification of a subsequent claim. The pertinent procedural history of this case is as follows: Claimant filed his first claim on March 2, 1983. Director's Exhibit 1. It was finally denied by Administrative Law Judge Robert A.

Giannasi on September 11, 1987, because claimant failed to establish the existence of pneumoconiosis and that he was totally disabled by the disease. *Id*. Claimant filed his second claim on October 18, 1990. Director's Exhibit 2. It was finally denied by the district director on July 16, 1991, because the evidence did not show that claimant was totally disabled by pneumoconiosis. *Id*. Claimant filed his third claim on June 3, 1994. Director's Exhibit 3. It was finally denied by the district director on November 10, 1994, because the evidence did not show that claimant was totally disabled by pneumoconiosis. *Id*. Claimant filed his fourth claim on April 8, 1997. Director's Exhibit 4. It was finally denied by the district director on August 6, 1997, because the evidence did not show that claimant was totally disabled by pneumoconiosis. *Id*. Claimant filed this claim on December 14, 2001. Director's Exhibit 5. It was denied by the district director on July 8, 2003, because the evidence did not show that claimant had pneumoconiosis, that the disease was caused by his coal mine work, and that he was totally disabled by the disease. Director's Exhibit 25.

Claimant filed this request for modification on August 20, 2003. Director's Exhibit 27. In a Decision and Order dated June 5, 2007, the administrative law judge credited claimant with more than thirty-seven years of coal mine employment,[1] and adjudicated this subsequent claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the medical evidence developed since the prior denial of benefits established total disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge also found that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in failing to properly consider claimant's request for modification at 20 C.F.R. §725.310. Employer also challenges the administrative law judge's finding that the new evidence established total disability at 20 C.F.R. §718.204(b)(2)(ii), (iv). Further, employer challenges the administrative law judge's finding that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4). Lastly, employer challenges the administrative law judge's finding that the evidence established total disability due to

[1] The record indicates that claimant was last employed in the coal mine industry in Virginia. Director's Exhibits 1-4, 6, 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

pneumoconiosis at 20 C.F.R. §718.204(c). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.[2]

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

MODIFICATION

Employer initially contends that "[the administrative law judge] erred in failing to consider the claimant's request for modification as a request for modification…."[3] Employer's Brief at 13. We disagree. Contrary to employer's assertion, the administrative law judge acknowledged that this case involved a request for modification of a subsequent claim, because claimant filed the request for modification within one year of the district director's prior denial of benefits. Decision and Order at 7. The administrative law judge also noted that the district director denied claimant's prior claim, on the grounds that the evidence did not establish total disability or total disability due to pneumoconiosis. *Id*. Further, the administrative law judge indicated that because the case had not progressed beyond the district director level, he had to determine whether the evidence submitted since the district director's 1997 denial of benefits established a change in an applicable condition of entitlement at 20 C.F.R. §725.309,

[2] Because the administrative law judge's finding that claimant established more than thirty-seven years of coal mine employment is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Employer also asserts that the administrative law judge should have considered claimant's lack of diligence in submitting relevant medical evidence. Specifically, employer argues that claimant waited more than four months after Dr. Rasmussen completed his report, and more than thirty days after the district director denied benefits to him, before he submitted Dr. Rasmussen's report into the record. The pertinent regulation provides that the district director may reconsider the terms of an award or denial of benefits on a request for modification at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim. 20 C.F.R. §725.310. Because claimant submitted medical evidence before one year after the last denial of benefits in the instant claim, we reject employer's assertion that claimant was not diligent in submitting evidence in support of his request for modification at 20 C.F.R. §725.310.

rather than whether the evidence established a basis for modification at 20 C.F.R. §725.310. *Id*. at 7-8. The administrative law judge specifically stated:

> Accordingly, I shall determine whether the evidence submitted since the previous denial became final in 1997 is sufficient to establish a change in one of the applicable conditions of entitlement adjudicated against [c]laimant in his previous claim. If there is a change in a condition, then I must review the entire record to determine whether [c]laimant is entitled to benefits under the Act.

Decision and Order at 8.

The Board has held that in considering whether a claimant has established a change in conditions at 20 C.F.R. §725.310, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

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). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2); *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

As noted above, the prior claim was denied by the district director on August 6, 1997, because the evidence did not show that claimant was totally disabled by pneumoconiosis. Director's Exhibit 4. The subsequent claim was denied by the district director on July 8, 2003, because the evidence did not show that claimant had pneumoconiosis, that the disease was caused by his coal mine work, and that he was totally disabled by the disease. Director's Exhibit 25. Because claimant filed a request for modification of the district director's denial of benefits in the subsequent claim, the issue properly before the administrative law judge was whether the medical evidence developed since the denial of benefits in the prior claim (*i.e.*, the evidence developed since the district director's August 6, 1997 denial of benefits) established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and, thereby, established a

change in conditions at 20 C.F.R. §725.310.[4] 20 C.F.R. §725.309(d)(2), (3); 20 C.F.R. §725.310; *see also Hess v. Director, OWCP*, 21 BLR 1-141 (1998).

Here, the administrative law judge did not render a specific finding with regard to whether the new evidence established a change in conditions or a mistake in a determination of fact at 20 C.F.R. §725.310. Nonetheless, the administrative law judge found that the evidence developed since the district director's August 6, 1997 denial of benefits in the prior claim established total disability at 20 C.F.R. §718.204(b). The administrative law judge therefore found that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Because the administrative law judge applied the correct standard for determining whether the evidence established modification in this case involving a request for modification of a subsequent claim, *see* 20 C.F.R. §§725.309 and 725.310, we reject employer's assertion that "[the administrative law judge] erred in failing to consider the claimant's request for modification as a request for modification…." Employer's Brief at 13.

Section 718.204(b)(2)(ii)

Employer next contends that the administrative law judge erred in finding that the new arterial blood gas study evidence established total disability at 20 C.F.R. §718.204(b)(2)(ii).[5] Specifically, employer asserts that the administrative law judge erred in failing to consider that while Drs. Hippensteel and Tuteur explained that the blood gas study results were due to claimant's heart problems, Drs. Ranavaya and Rasmussen did not comment on the source of the impairment that was disclosed on the studies. Employer maintains that the administrative law judge should have resolved the conflict in the medical opinion evidence regarding whether the new blood gas studies disclosed a primary respiratory disease. We disagree. Contrary to employer's assertion, medical opinions are not relevant evidence at 20 C.F.R. §718.204(b)(2)(ii). *Compare* 20 C.F.R. §718.204(b)(2)(ii) *with* 20 C.F.R. §718.204(b)(2)(iv). Thus, we reject employer's assertion that the administrative law judge erred in failing to consider the conflicting medical opinion evidence regarding the source of the impairment that was disclosed on the arterial blood gas studies. Further, because all of the new studies yielded qualifying[6]

[4] The administrative law judge did not render a finding with regard to whether the evidence established a mistake in a determination of fact at 20 C.F.R. §725.310.

[5] The record contains three arterial blood gas studies dated August 5, 2002, August 20, 2003, and April 1, 2003. Director's Exhibits 13, 24, 27.

[6] A "qualifying" arterial blood gas 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, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

values, Director's Exhibits 13, 24, 27, we affirm the administrative law judge's finding that the new arterial blood gas study evidence established total disability at 20 C.F.R. §718.204(b)(2)(ii).

Section 718.204(b)(2)(iv)

Employer further contends that the administrative law judge erred in finding that the new medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv). We agree. The administrative law judge considered the medical records from Tri-State Clinic by Dr. Patel, as well as the reports of Drs. Fino, Tuteur, Ranavaya, Rasmussen, and Hippensteel. Dr. Fino opined that claimant has a disabling impairment in oxygen transfer. Director's Exhibit 38. Dr. Tuteur opined that claimant was disabled from returning to work in the coal mine industry or work requiring similar effort. Employer's Exhibit 1. Dr. Ranavaya opined that claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibit 13. Similarly, Dr. Rasmussen opined that claimant does not retain the pulmonary capacity to perform his last regular coal mine job. Director's Exhibit 27. By contrast, Dr. Hippensteel opined that "[claimant] has only suffered mild pulmonary impairment from a pulmonary basis that would not keep him from returning to his job in the mines." Director's Exhibit 24.

The administrative law judge gave no weight to the medical records from Tri-State Clinic by Dr. Patel, on the ground that "[t]hey contain no opinions as to total disability, nor do they include any pulmonary function or arterial blood gas tests." Decision and Order at 14. The administrative law judge also gave less weight to Dr. Fino's disability opinion "[b]ecause Dr. Fino did not expressly state whether [c]laimant was totally disabled from performing his prior coal mine work." *Id*. at 11. In addition, the administrative law judge determined that the opinions of Drs. Tuteur, Ranavaya, Rasmussen, and Hippensteel were well-reasoned and well-documented. *Id*. at 10-14. Nonetheless, based on only the opinions of Drs. Tuteur, Ranavaya, and Rasmussen, the administrative law judge concluded that the new medical opinion evidence established total disability. *Id*. at 14.

Employer argues that the administrative law judge erred in failing to explain why he discredited Dr. Hippensteel's disability opinion.[7] As noted above, the administrative

[7] Employer further asserts that the administrative law judge erred in failing to consider that, unlike the opinions of Drs. Ranavaya and Rasmussen, Dr. Tuteur opined that claimant's respiratory disability was cardiac in origin. Contrary to employer's assertion, medical evidence regarding the cause of a disabling respiratory or pulmonary impairment is not relevant medical evidence at 20 C.F.R. §718.204(b)(2)(iv). *Compare* 20 C.F.R. §718.204(b)(2)(iv) *with* 20 C.F.R. §718.204(c). Thus, we reject employer's

law judge determined that the disability opinions of Drs. Tuteur, Ranavaya, Rasmussen, and Hippensteel were well-reasoned and well-documented. However, the administrative law judge relied on only the disability opinions of Drs. Tuteur, Ranavaya, and Rasmussen in finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Inasmuch as the administrative law judge failed to explain why he did not rely on Dr. Hippensteel's disability opinion, *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987), we vacate the administrative law judge's finding that the new medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv). On remand, the administrative law judge must reweigh all the new medical opinion evidence in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

On remand, the administrative law judge must additionally weigh together all of the new evidence at 20 C.F.R. §718.204(b)(2)(i)-(iv) in accordance with the APA. *See 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), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Section 725.309

Further, because we vacate the administrative law judge's finding that the new evidence established total disability at 20 C.F.R. §718.204(b), we also vacate the administrative law judge's finding that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and, thereby, established a change in conditions at 20 C.F.R. §725.310.

MERITS

In view of our disposition of the case at 20 C.F.R. §§725.309 and 725.310, we vacate the administrative law judge's finding that claimant was entitled to benefits on the merits. Nevertheless, for the sake of judicial economy, we address employer's specific assertions regarding the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

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assertion that the administrative law judge erred in failing to consider that Dr. Tuteur opined that claimant's disability was cardiac in origin.

Section 718.202(a)(1)

Employer contends that the administrative law judge erred in finding that the x-ray evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The administrative law judge considered the five interpretations by Drs. DePonte, Fino, Hippensteel, Patel, and Ranavaya of x-rays dated August 5, 2002, August 20, 2002, February 8, 2003, April 1, 2003, and December 4, 2003. The administrative law judge stated that "[u]ltimately, three of the five x-rays were interpreted as positive for pneumoconiosis by highly qualified physicians." Decision and Order at 17. Hence, the administrative law judge concluded that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Employer argues that the administrative law judge erred in considering Dr. Fino's positive reading, 1/1, of an x-ray dated December 4, 2003, because it was not submitted into the record. Claimant's evidence summary form on modification listed Dr. Patel's reading of the April 1, 2003 x-ray, Dr. Fino's reading of the December 3, 2004 x-ray, and Dr. DePonte's readings of x-rays dated February 8, 2003 and June 5, 2006 in support of his affirmative case. Claimant's Exhibit 1. However, claimant's evidence summary form also indicated that the three readings by Drs. Fino and DePonte were withdrawn. *Id*. Further, at the June 28, 2006 hearing, claimant indicated that he was submitting only Dr. Patel's positive reading, 2/2, of the April 1, 2003 x-ray in support of his affirmative case. Hearing Transcript at 8. The pertinent regulation provides that each party, in a modification proceeding, shall be entitled to submit no more than one additional chest x-ray interpretation in support of its affirmative case, along with such rebuttal evidence and additional statements that are authorized at 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). 20 C.F.R. §725.310(b). Thus, the administrative law judge should have only admitted Dr. Patel's positive x-ray reading into the record in support of claimant's affirmative case on modification. Claimant's Exhibit 1. Because the administrative law judge did not explain why he admitted Dr. Fino's positive reading of the December 4, 2003 x-ray into the record, *Wojtowicz*, 12 BLR at 1-165, we hold that the administrative law judge erred in considering Dr. Fino's positive x-ray reading at 20 C.F.R. §718.202(a)(1). On remand, the administrative law judge must reconsider the admissibility of the x-ray evidence that was submitted by the parties on modification in accordance with the evidentiary limitations set forth in 20 C.F.R. §725.310(b). Further, if reached, the administrative law judge must reconsider whether the x-ray evidence of record establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Section 718.202(a)(4)

Employer also contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the medical records from Tri-

State Clinic by Dr. Patel, as well as the reports of Drs. Fino, Hippensteel, Ranavaya, Rasmussen, and Tuteur. In medical records from Tri-State Clinic, Dr. Patel diagnosed coal workers' pneumoconiosis and chronic obstructive lung disease. Claimant's Exhibit 2. With regard to the medical reports, Dr. Fino diagnosed simple coal workers' pneumoconiosis. Director's Exhibit 38. Similarly, Dr. Rasmussen diagnosed coal workers' pneumoconiosis. Director's Exhibit 27. Dr. Ranavaya diagnosed pneumoconiosis. Director's Exhibit 13. By contrast, Dr. Hippensteel opined that claimant does not have coal workers' pneumoconiosis. Director's Exhibit 24. Additionally, Dr. Tuteur opined that "[claimant] does not have coal workers' pneumoconiosis of either the clinical or legal variety…." Employer's Exhibit 1.

The administrative law judge found that the Tri-State medical records by Dr. Patel were not documented, because Dr. Patel did not list the objective medical evidence that he relied on to render his diagnoses. Decision and Order at 21. In addition, the administrative law judge found that Dr. Ranavaya's diagnosis of clinical pneumoconiosis was not reasoned and documented, "[a]s he does not indicate any other reasons for his diagnosis of pneumoconiosis beyond the x-ray and exposure history." *Id*. at 20. The administrative law judge also found that Dr. Tuteur's opinion was not well-reasoned, because "Dr. Tuteur's opinion regarding pneumoconiosis is vague and equivocal and not supported by the medical evidence of record." *Id*. at 22. Further, the administrative law judge gave less weight to Dr. Hippensteel's opinion, because "I find that Dr. Hippensteel's opinion regarding pneumoconiosis is not supported by the medical evidence that he reviewed in forming his opinion." *Id*. However, the administrative law judge found that the opinions of Drs. Fino and Rasmussen, that claimant has coal workers' pneumoconiosis, were well-reasoned and well-documented. *Id*. at 20, 21, 23. The administrative law judge therefore concluded that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Employer argues that the administrative law judge erred in considering Dr. Fino's opinion because it had been withdrawn from the record. Claimant's evidence summary form listed Dr. Rasmussen's April 1, 2003 report and Dr. Fino's December 4, 2003 report in support of his affirmative case. Claimant's Exhibit 1. As discussed *supra*, Dr. Fino's x-ray reading was withdrawn from the record. *Id*. However, claimant's evidence summary form does not indicate that Dr. Fino's report was withdrawn. *Id*. Although employer objected to the admissibility of Dr. Fino's report at the hearing, Hearing Transcript at 9, the administrative law judge admitted it into the record. *Id*. at 10. The pertinent regulation provides that each party, in a modification proceeding, shall be entitled to submit no more than one additional medical report in support of its affirmative case, along with such rebuttal evidence and additional statements that are authorized at 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). 20 C.F.R. §725.310(b). In this case, the administrative law judge did not explain why he admitted both Dr. Rasmussen's opinion and Dr. Fino's opinion into the record on modification in support of claimant's

affirmative case. *Wojtowicz*, 12 BLR at 1-165. Consequently, we hold that the administrative law judge erred in considering evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.310(b) for cases on modification. On remand, the administrative law judge must reconsider the admissibility of the medical opinion evidence that was submitted by the parties on modification in accordance with the evidentiary limitations set forth in 20 C.F.R. §725.310(b).

Employer also argues that the administrative law judge erred in discrediting Dr. Tuteur's opinion. Dr. Tuteur diagnosed cigarette smoke-induced chronic obstructive pulmonary disease manifested by chronic bronchitis. Employer's Exhibit 1. Dr. Tuteur also opined that claimant does not have coal workers' pneumoconiosis. *Id*. The administrative law judge determined that Dr. Tuteur's opinion was not reasoned, on the grounds that it was vague, equivocal, and not supported by the medical evidence of record. The administrative law judge specifically stated:

> Dr. Tuteur stated that [c]laimant "does not have coal workers' pneumoconiosis of either the clinical or legal variety…" *Id*. However, Dr. Tuteur further opined that [c]laimant "may in fact have radiographically significant coal workers' pneumoconiosis, yet…it would be of insufficient severity and profusion to produce any clinical changes." *Id*. He also noted a respiratory and pulmonary impairment that was not in any way related to, aggravated by, or caused by the inhalation of coal dust or coal workers' pneumoconiosis. Although there is only a one percent risk, Dr. Tuteur does not state that coal dust exposure could have caused [c]laimant's respiratory condition.

Decision and Order at 21.

In his report, Dr. Tuteur explained why he diagnosed a mild cigarette smoke-induced chronic obstructive pulmonary disease manifested by chronic bronchitis. Dr. Tuteur specifically stated:

> It is recognized that the inhalation of coal mine dust may produce a clinical picture identical to the chronic bronchitis experienced by [claimant]. This coal mine dust produces such a picture in less than 1% of coal miners (Lapp, Morgan, Zaldivar, 1994). In contrast, [a] person with a smoking history such as [claimant] develop[s] clinical chronic obstructive pulmonary disease approximately 20% of the time. Thus, in [claimant], with reasonable medical certainty, his chronic bronchitis associated with only an at worse mild obstructive abnormality is due to the chronic inhalation of tobacco smoke, not coal mine dust.

Employer's Exhibit 1.

Dr. Tuteur also explained why he opined that claimant did not have coal workers' pneumoconiosis. Specifically, Dr. Tuteur stated:

> With respect to the specific questions addressed in [a] letter dated May 25, 2006, it is with reasonable medical certainty that [claimant] does not have coal workers' pneumoconiosis of either the clinical or legal variety of sufficient severity and profusion to produce clinical symptoms, physical examination abnormalities, or impairment of pulmonary function. He may in fact have radiographically significant coal workers' pneumoconiosis, yet as indicated above, it would be of insufficient severity and profusion to produce clinically important changes.

Id.

Because Dr. Tuteur unequivocally opined that claimant does not have coal workers' pneumoconiosis or any other chronic lung disease related to coal dust exposure, *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 23 BLR 2-374, 2-386 (4th Cir. 2006) (recognizing that a doctor's refusal to express a diagnosis in categorical terms is candor, not equivocation); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999) (holding that it was reasonable for an administrative law judge to read a doctor's words as simply acknowledging uncertainty inherent in medical opinions, while nevertheless offering a positive opinion about the cause of the miner's death), we hold that the administrative law judge mischaracterized Dr. Tuteur's opinion. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Moreover, the administrative law judge erred in failing to explain why he found that Dr. Tuteur's opinion was not supported by the medical opinion evidence of record. *Wojtowicz*, 12 BLR at 1-165.

Employer additionally argues that the administrative law judge erred in discrediting Dr. Hippensteel's opinion regarding the existence of pneumoconiosis. Dr. Hippensteel opined that claimant does not have coal worker's pneumoconiosis. Director's Exhibit 24; Employer's Exhibit 2. The administrative law judge noted that Dr. Hippensteel relied on his negative x-ray reading and on his review of other x-ray readings in concluding that claimant does not have coal workers' pneumoconiosis. The administrative law judge then stated:

> However, the newly submitted x-ray evidence, which I have granted more probative weight than the older evidence from [c]laimant's previous claims, establishes that [c]laimant has pneumoconiosis. (DX 13, 24, 27, 38). In fact, other than the interpretation by Dr. Hippensteel, all of the probative x-ray interpretations considered in this claim show that [c]laimant has

> pneumoconiosis. Accordingly, I find that Dr. Hippensteel's opinion regarding pneumoconiosis is not supported by the medical evidence that he reviewed in forming his opinion; and therefore, I grant less weight to his opinion as to pneumoconiosis.

Decision and Order at 22.

Because an administrative law judge may accord less weight to a physician's opinion that was based on an x-ray reading that is outweighed by the x-ray evidence of record, *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), we reject employer's assertion that the administrative law judge erred in discrediting Dr. Hippensteel's opinion regarding the existence of pneumoconiosis. On remand, the administrative law judge must reconsider whether the medical opinion evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), if reached.

Further, on remand, the administrative law judge must weigh all of the evidence together at 20 C.F.R. §718.202(a)(1)-(4) in accordance with the APA, if reached. *Compton*, 211 F.3d at 211, 22 BLR at 2-174.

Section 718.204(c)

Employer finally contends that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge considered the opinions of Drs. Hippensteel, Tuteur, and Rasmussen. Dr. Hippensteel opined that claimant's cardiac problems, not lung problems, have been the cause of the worsening of his gas exchange and breathing symptoms. Director's Exhibit 24. Dr. Tuteur opined that claimant's respiratory impairment was caused by cardiac disease, not the inhalation of coal mine dust or coal workers' pneumoconiosis. Employer's Exhibit 1. By contrast, Dr. Rasmussen opined that claimant's total disability was caused by coal dust exposure. Director's Exhibit 27.

The administrative law judge gave less weight to the disability causation opinions of Drs. Hippensteel and Tuteur, because they did not diagnose pneumoconiosis. Decision and Order at 24. However, the administrative law judge found that Dr. Rasmussen's opinion was well-reasoned and well-documented, "because he considered all of the possible contributing causes of [c]laimant's totally disabling pulmonary impairment in forming his opinion." *Id*. The administrative law judge therefore found that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *Id*.

Employer argues that the administrative law judge erred in discrediting the disability causation opinions of Drs. Hippensteel and Tuteur. Specifically, employer asserts that because Drs. Tuteur and Hippensteel assumed the existence of

pneumoconiosis, but nevertheless concluded that it was not the source of claimant's disability, their opinions were not based on an erroneous finding that was contrary to the administrative law judge's conclusion that the evidence established the existence of pneumoconiosis. Contrary to employer's assertion, Drs. Hippensteel and Tuteur did not opine that even if they assumed the existence of pneumoconiosis, coal dust exposure was not the source of claimant's disability. *Compton*, 211 F.3d at 214, 22 BLR at 2-180. Rather, Dr. Hippensteel explained that "[e]ven if it were stipulated that coal workers' pneumoconiosis were present in [claimant], then it could still be stated that he has only suffered mild pulmonary impairment from a pulmonary basis that would not keep him from returning to his job in the mines." Director's Exhibit 24. Further, Dr. Tuteur explained that "had [claimant] never worked in the coal mine industry, this clinical history and this database would be no different than depicted" and "[h]is clinical course would be unchanged." Employer's Exhibit 1.

In *Mays*, 176 F.3d at 761, 21 BLR at 2-601, *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), and *Hobbs v. Clinchfield Coal Co. [Hobbs II]*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that physicians' opinions, that claimant does not have clinical pneumoconiosis, do not necessarily contradict an administrative law judge's finding that claimant has legal pneumoconiosis. In *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002), and *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), however, the Fourth Circuit held that opinions in which a physician finds, contrary to an administrative law judge's determination, that the miner has neither legal nor clinical pneumoconiosis, cannot be credited unless the administrative law judge identifies "specific and persuasive reasons for concluding that the doctor's judgment" on causation "does not rest upon her disagreement with the [administrative law judge's] finding . . . ." *Scott*, 289 F.3d at 269, 22 BLR at 2-384, quoting *Toler*, 43 F.3d at 116, 19 BLR at 2-83.

As discussed *supra*, if reached on remand, the administrative law judge must reconsider whether the evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Nonetheless, in the present case, the administrative law judge found that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4). However, Drs. Hippensteel and Tuteur not only ruled out the existence of coal workers' pneumoconiosis, but they also stated that claimant does not suffer from any respiratory impairment that could be related to coal dust exposure. Employer's Exhibits 1, 2. Consequently, we reject employer's assertion that the administrative law judge erred in discrediting the disability causation opinions of Drs. Hippensteel and Tuteur. *Scott*, 289 F.3d at 269, 22 BLR at 2-384; *Toler*, 43 F.3d at 116, 19 BLR at 2-83. On remand, the administrative law judge must reconsider whether the evidence establishes total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), if reached.

CONCLUSION

In sum, we vacate the administrative law judge's finding that the new evidence established total disability at 20 C.F.R. §718.204(b). In addition, we vacate the administrative law judge's finding that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Furthermore, we vacate the administrative law judge's finding that claimant established entitlement to benefits on the merits, and remand the case to the administrative law judge to reconsider whether the evidence establishes a basis for modification at 20 C.F.R. §725.310.

On remand, the administrative law judge should address whether the new evidence (*i.e.*, the evidence developed since the district director's August 6, 1997 denial of benefits in the prior claim) is sufficient to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, thereby establishing a change in conditions at 20 C.F.R. §725.310.[8] 20 C.F.R. §725.309(d)(2), (3); 20 C.F.R. §725.310; *see also Hess*, 21 BLR at 1-143. If the administrative law judge, on remand, finds that claimant has established a basis for modification at 20 C.F.R. §725.310, then he must consider the case on the merits, based on a weighing of all the evidence of record.

[8] If the new evidence does not establish a change in conditions, then the administrative law judge should consider whether there was a mistake in a determination of fact at 20 C.F.R. §725.310.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge