BRB No. 00-0902 BLA

LUTHER HURLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COMBS AND HURLEY COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:_____
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

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

Barry H. Joyner (Judith E. Kramer, 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (94-BLA-1053) of Administrative Law Judge Clement J. Kichuk 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 claim is before the Board for the third time. Initially,

[1]The Department of Labor amended the regulations implementing the Federal Coal

Administrative Law Judge George P. Morin credited the miner with thirty-six and one-quarter years of coal mine employment and found a material change in conditions established pursuant to 20 C.F.R. §725.309(d) (2000). [1995] Decision and Order at 3, 8. Applying the regulations at 20 C.F.R. Part 718 (2000), Judge Morin found that the miner failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). [1995] Decision and Order at 8-10. Accordingly, benefits were denied.

Thereafter, claimant[2] appealed to the Board. On appeal, the Board affirmed Judge Morin's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(a)(3) (2000). *See Hurley v. Combs and Hurley Coal Co.*, BRB No. 95-1854 BLA (Apr. 30, 1996)(unpub.)(*Hurley I*). However, the Board vacated Judge Morin's finding of a material change in conditions and remanded this case for him to reconsider this issue in accordance with *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). *Id.* Additionally, the Board vacated Judge Morin's finding pursuant to 20 C.F.R. §718.202(a)(4) (2000), and remanded this case for him to reconsider his weighing of the medical opinion evidence at this subsection. *Id.*

On remand, Judge Morin found that claimant established a material change in conditions and the existence of pneumoconiosis arising out of coal mine employment. [1997] Decision and Order at 12-14. Judge Morin also found that claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204 (2000). *Id.* Accordingly, benefits were again denied.

Subsequently, claimant appealed to the Board a second time. On appeal, the Board

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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 is Luther Hurley, the miner, who filed his second claim for benefits on September 4, 1990. Director's Exhibit 1. The miner's first claim for benefits, filed on June 26, 1985, was finally denied on October 31, 1985. Director's Exhibit 35.

affirmed Judge Morin's finding that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000), and thereby was also sufficient to establish a material change in conditions pursuant to Section 725.309(d) (2000) and *Ross*, *supra*. *See Hurley v. Combs and Hurley Coal Co.*, BRB No. 97-0830 BLA (Mar. 13, 1998)(unpub.)(*Hurley II*). The Board additionally affirmed Judge Morin's finding that claimant established the existence of pneumoconiosis on the merits. *Id.* The Board affirmed Judge Morin's findings pursuant to 20 C.F.R. §718.204(c)(2), (c)(3) (2000) as unchallenged. However, the Board vacated Judge Morin's finding that claimant failed to demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1) (2000). Additionally, the Board held that Judge Morin had conflated his Section 718.204(c) (2000) and Section 718.204(b) (2000) findings. *Id.* Therefore, the Board instructed Judge Morin on remand to first reconsider whether claimant has a total respiratory disability and then, if reached, to determine whether claimant's respiratory impairment is due to pneumoconiosis. *Id.*

On second remand, this case was transferred without objection to Administrative Law Judge Clement J. Kichuk [hereinafter, the administrative law judge] because Judge Morin was not available. [1998] Decision and Order at 3. The administrative law judge found that claimant established total respiratory disability pursuant to Section 718.204(c) (2000) based on the pulmonary function studies. [1998] Decision and Order at 8-9. The administrative law judge also found the evidence sufficient to establish that claimant's total disability is due to pneumoconiosis. [1998] Decision and Order at 9-11. Accordingly, benefits were awarded, commencing July 24, 1991.[3] [1998] Decision and Order at 11.

In this appeal currently pending before us, employer contends that the law of the case doctrine is inapplicable to the Board's previous affirmances of Judge Morin's findings at Section 725.309(d) (2000) and Section 718.202(a) (2000) because of intervening changes in the law. Employer's Brief at 16-21. Employer asserts that the administrative law judge erred in his consideration of the pulmonary function study evidence and erred in failing to weigh the contrary probative evidence prior to finding that claimant established total respiratory

[3]In Response to the Motion for Reconsideration filed by the Director, Office of Workers' Compensation Programs, (the Director), the administrative law judge ordered employer to reimburse the Black Lung Disability Trust Fund for payment of benefits made to claimant dating back to September 1990. Order on Director's Motion for Reconsideration at 1-2.

disability. Employer's Brief at 21-23. Finally, employer contends that the administrative law judge erred in his weighing of the medical opinion evidence regarding the cause of the miner's disability. Employer's Brief at 24-27. Claimant has responded, urging affirmance of the administrative law judge's award of benefits. Employer has filed a reply brief. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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 Ass'n 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 the Director, claimant, and employer have responded.[4] Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

[4]The Director in his brief, essentially asserts that the regulations at issue in the lawsuit do not affect the outcome of this case. Director's Brief in Response to the Board's March 9, 2001 Order at 1-4. Claimant asserts, without further elaboration, that "the new regulations do apply to claims pending prior to January 20, 2001 and claims filed after January 20, 2001 and thereafter." Claimant's Brief in Response to the Board's March 9, 2001 Order at 1. Employer contends that the revised Section 725.309 and Section 718.104(d) are not applicable to this claim. Employer's Brief in Response to the Board's March 9, 2001 Order at 2-3. Employer also asserts that the revisions to Section 718.201(a) and Section 718.204 do not affect the outcome of this case. Employer's Brief in Response to the Board's March 9, 2001 Order at 3-4.

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).

Employer first asserts that the Board's decision in *Flynn v. Grundy Mining Co.*, 21 BLR 1-40 (1997) constitutes intervening case law which requires the Board to reconsider its previous affirmance of Judge Morin's finding of a material change in conditions based on his finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Employer's Brief at 16-21. In *Flynn*, the Board held that under the standard enunciated by the United States Court of Appeals for the Sixth Circuit in *Ross*, in order to establish a material change in conditions, the miner must show that his "physical condition has worsened." *Flynn, supra*. The Board remanded the case in *Flynn* because it was unclear "whether the administrative law judge merely disagreed with the previous characterization of the evidence or whether claimant has shown a material change in his condition since the earlier denial." *Id.* More recently, in *Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80 (2000)(*en banc*, with Hall, J. and Nelson, J., concurring and dissenting), the Board clarified its holding in *Flynn*. In *Stewart*, the Board held, in accordance with the standard enunciated by the Sixth Circuit court in *Ross*, that in determining whether the new evidence establishes a material change in conditions, an administrative law judge must analyze whether the new evidence submitted differs qualitatively from evidence submitted with the previously denied claim, or whether it is merely cumulative of, or similar to, the earlier evidence. *See Stewart, supra*. The Board further held that "[i]f the trier-of-fact finds this qualitative difference, it follows that claimant's condition has worsened in accordance with the [Sixth Circuit] court's requirement." *Stewart*, 22 BLR at 1-86.

In the instant case, the miner's first claim was finally denied by the district director because claimant failed to establish that he had pneumoconiosis arising out of coal mine employment or that he was totally disabled due to pneumoconiosis. Director's Exhibit 35. Judge Morin determined that claimant had proven a material change in conditions by stating "I conclude that the weight of the medical opinion evidence, adduced since the prior application was denied, supports a finding that claimant has pneumoconiosis." [1997] Decision and Order at 13. Unlike the administrative law judge in *Flynn*, Judge Morin did not merely disagree with the district director's finding of no pneumoconiosis. Rather, Judge Morin thoroughly considered all the evidence in the record and found that the evidence produced since the prior denial supported a finding of pneumoconiosis at Section 718.202(a)(4) (2000), an element that claimant was unable to prove previously. [1997] Decision and Order at 2-13. Accordingly, contrary to employer's assertions, *Flynn* does not warrant that the Board reconsider its previous affirmance of Judge Morin's findings pursuant

to Section 725.309(d) (2000) and Section 718.202(a)(4) (2000). *See Stewart, supra*; *Flynn, supra*; *Church v. Eastern Associated Coal* Corp., 20 BLR 1-8 (1996); *Coleman v. Ramey Coal* Co., 18 BLR 1-9 (1993); *see also Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(2-1 opinion with Brown, J., dissenting).

Employer's additional assertions regarding Judge Morin's finding that claimant established the existence of pneumoconiosis, Employer's Brief at 20-21, do not show that employer has established a valid exception to the law of the case doctrine, *i.e.*, a change in the underlying fact situation, intervening controlling authority demonstrating that the initial decision was erroneous, or a showing that the Board's initial decision was either clearly erroneous or a manifest injustice. *See Church, supra*; *Coleman, supra*; *see also Williams, supra*. Therefore, because employer has not set forth any valid exception to the law of the case doctrine, we adhere to our previous affirmance of Judge Morin's findings pursuant to Section 725.309(d) (2000)[5] and Section 718.202(a)(4) (2000). *See Church, supra*; *Coleman, supra*; *see also Williams, supra.*

Pursuant to Section 718.204,[6] employer asserts that the administrative law judge erred in his consideration of the pulmonary function study evidence. Employer's Brief at 21-23. When this case was previously before the Board, the Board vacated Judge Morin's finding that claimant failed to demonstrate total respiratory disability based on the pulmonary function study evidence because it was not clear whether Judge Morin had considered all of the pulmonary function studies of record. *See Hurley II, supra*. The Board noted that Judge Morin "properly discounted the pulmonary function studies dated September 18, 1990, December 1, 1984 and August 14, 1984 [sic][7] due to poor cooperation or less than good effort." *Id.*

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[5]The amended regulation regarding duplicate claims, *see* 20 C.F.R. §725.309, applies only to claims filed after January 19, 2001.

[6]In the amended regulations, 20 C.F.R. §718.204 has been renumbered. The former regulation at 20 C.F.R. §718.204(c)(1)-(c)(4) (2000), which discusses the methods for establishing total respiratory disability, is 20 C.F.R. §718.204(b)(2)(i)-(b)(iv) in the amended regulations. The former regulation at 20 C.F.R. §718.204(b) (2000), which discusses total disability due to pneumoconiosis, is 20 C.F.R. §718.204(c) in the amended regulations.

Additionally, no substantive changes have been made to the amended regulation at 20 C.F.R. §718.204(b)(i).

[7]The correct dates of two of the pulmonary function studies the Board cited are December 17, 1984, rather than December 1, 1984, and August 14, 1985, rather than August 14, 1984. Director's Exhibit 35.

In considering the pulmonary function studies on second remand, the administrative law judge first determined claimant's height to be 70 inches based on the average of the different heights listed. [1998] Decision and Order at 5; *see Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). The administrative law judge noted that the record contains ten pulmonary function studies and that the Board upheld Judge Morin's discounting of three of the pulmonary function studies. *See* discussion, *supra*; [1998] Decision and Order at 9. Next, the administrative law judge found the non-qualifying[8] pulmonary function study dated July 30, 1985 and the qualifying pulmonary function study dated December 17, 1993 to be invalid.[9] *Id.*

Of the remaining five studies, the administrative law judge noted that on the October 8, 1990 study the pre-bronchodilator values were qualifying, but improved to non-qualifying after the administration of bronchodilator medication. *Id.* The administrative law judge further noted that the pulmonary function studies dated October 30, 1990 and February 8, 1991 yielded non-qualifying results. *Id.* The administrative law judge accorded greater weight to the remaining two qualifying pulmonary function studies, dated July 24, 1991 and February 1, 1994. Stating that "[p]neumoconiosis is a progressive and irreversible disease," the administrative law judge found that "the two most recent qualifying ventilatory studies represent[ ] the most recent deterioration of the claimant's pulmonary function." [1998] Decision and Order at 9. Therefore, the administrative law judge concluded that claimant established total respiratory disability based on the pulmonary function study evidence. *Id.*

[8]A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values, *i.e.*, Appendix B to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

[9]The administrative law judge stated that on the July 30, 1985 pulmonary function study, Dr. Williams noted that claimant's effort was "fair," Director's Exhibit 35, and that Dr. Broudy stated that because claimant exhibited sub-optimal effort on the December 17, 1993, this study may not be totally valid, Director's Exhibit 37. [1998] Decision and Order at 9.

As employer asserts, the administrative law judge erred in weighing the pulmonary function study evidence.[10] First, the administrative law judge erred in according greater weight to the July 24, 1991 and the February 1, 1994 tests because they are the most recent, stating that "it may be appropriate to accord greater weight to the most recent evidence of record especially where a significant amount of time separates the newer from the older evidence." [1998] Decision and Order at 9. Such a finding is irrational in this case where a significant amount of time does not separate the qualifying tests dated July 24, 1991 and February 1, 1994 from the non-qualifying tests dated February 8, 1991 and December 30, 1990. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Accordingly, we vacate the administrative law judge's Section 718.204(c)(1) (2000) finding and instruct him to reconsider this evidence on remand.[11]

As employer also asserts, the administrative law judge failed to provide reasons why he discredited the non-conforming pulmonary function studies, and the administrative law judge erred in failing to resolve the conflicts between the pre- and post-bronchodilator studies. Employer's Brief at 22-23. Therefore, on remand we instruct the administrative law judge in reconsidering the pulmonary function study evidence in the record, to more fully explain his reasons for finding a pulmonary function study to be non-conforming[12] and to explain his reasons for finding a qualifying pre-bronchodilator study more reliable than a non-qualifying post-bronchodilator study. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into

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[10]Employer asserts that the administrative law judge's reliance on the "progressivity of pneumoconiosis" theory is unsupported by the record. Employer's Brief at 23. Contrary to employer's assertion, claimant need not prove that pneumoconiosis is a progressive disease inasmuch as the United States Supreme Court and the United States Court of Appeals for the Sixth Circuit recognize the progressive nature of pneumoconiosis. *See Mullins Coal Co. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997).

[11]Employer asserts that the administrative law judge erred in finding the December 17, 1993 pulmonary function study to be qualifying. Employer's Brief at 21-22. Dr. Broudy reported an FEV1 of 2.01 and an MVV of 82 with the miner's height being seventy inches and his age being 61 years, Director's Exhibit 37, which qualifies at Appendix B to Part 718. Therefore, contrary to employer's contention, the administrative law judge properly found the December 17, 1993 study to be qualifying. *See Winchester v. Director, OWCP*, 9 BLR 1-177 (1986).

[12]20 C.F.R. §718.103 and Appendix B to Part 718 of the amended regulations apply only to claims filed after January 19, 2001.

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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984); *see also Crapp v. U.S. Steel Corp.*, 6 BLR 1-476 (1983); *Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454 (1983).

Additionally, as employer asserts, in finding total respiratory disability established, the administrative law judge failed to weigh all the relevant evidence, *i.e.*, pulmonary function studies, blood gas studies, and medical opinions, together to determine whether claimant has established total respiratory disability. *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*). Therefore, we instruct him to do so on remand.[13]

[13]We also vacate the administrative law judge's finding regarding the onset date of claimant's disability pursuant to 20 C.F.R. §725.503 (2000), *see* 20 C.F.R. §725.503, inasmuch as the administrative law judge's findings regarding total respiratory disability affect his determination regarding the date of the onset of claimant's disability as well.

Regarding the cause of claimant's disability, the administrative law judge found that claimant has proven that his total respiratory disability was due in part to his pneumoconiosis based on the opinion of Dr. Baker, whose "conclusions are supported by the objective medical evidence of record and correlate with the findings regarding pneumoconiosis and total disability already made in this case." [1998] Decision and Order at 11. The administrative law judge further found that "Dr. Chaney's conclusions lend further support to Dr. Baker's findings"[14] and that Dr. Vaezy's diagnoses "are in complete accord with Dr. Baker's finding." *Id.* For the reasons discussed below, we vacate the administrative law judge's finding regarding the cause of claimant's total respiratory disability.

[14]Contrary to employer's assertion, it was not irrational, *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), for the administrative law judge to "not give dispositive weight to [Dr. Chaney's] opinion as the miner's treating physician," but to find that Dr. Chaney's conclusions support Dr. Baker's opinion. [1998] Decision and Order at 11.

Employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Broudy and Jackson. Employer's Brief at 24-25. While an administrative law judge may discredit a medical opinion in light of the physician's erroneous assumption that claimant did not have pneumoconiosis, which is contrary to the administrative law judge's finding, *see Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986), the administrative law judge, in this case, misapplied this principle with regard to Dr. Broudy's opinion. As employer asserts, Judge Morin found that Dr. Broudy's findings "must be considered a positive diagnosis" of pneumoconiosis. [1997] Decision and Order at 12-12. Therefore, Dr. Broudy's opinion was not based on an erroneous assumption. *See Trujillo, supra*. However, Dr. Jackson did find that claimant does not have coal workers' pneumoconiosis and found that claimant has chronic obstructive pulmonary disease "most probably" due to smoking and a mild impairment due to obstructive airway disease and restrictive disease.[15] Director's Exhibit 35. Therefore, the administrative law judge, on remand, should reconsider Dr. Jackson's findings to determine whether they are based on an erroneous assumption that would permit the administrative law judge to permissibly accord less weight to his opinion on this basis. *See Trujillo*, *supra*; *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *see also Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995).

Additionally, the administrative law judge discredited the opinions of Drs. Wright and O'Neill because these physicians found that claimant retained the pulmonary capacity to perform his usual coal mine employment, a finding which the administrative law judge found to be contrary to his finding of total respiratory disability. [1998] Decision and Order at 10. However, inasmuch as we vacate the administrative law judge's finding regarding total respiratory disability, *see* discussion, *supra*, we also hold that the administrative law judge's discrediting of the opinions of Drs. Wright and O'Neill must be reconsidered because it is based on the administrative law judge's flawed finding of total respiratory disability.

Employer also asserts that the administrative law judge erred in crediting Dr. Baker's opinion. Employer's Brief at 26-27. As noted by the administrative law judge, Judge Morin found that claimant had a smoking history of one pack per day for forty years, [1995] Decision and Order at 3. [1998] Decision and Order at 2 n.2. However, Dr. Baker noted that claimant had a smoking history of one pack per day for thirty years. Director's Exhibit 22. Accordingly, we instruct the administrative law judge to address whether this discrepancy is significant enough to affect the credibility of Dr. Baker's opinion when reconsidering it on

[15]The administrative law judge should also consider that, at his deposition, Dr. Jackson testified that it is unlikely that coal mine employment contributes to the miner's impairment, but it is possible that a portion of his coal mine employment is partially contributory. Director's Exhibit 35, November 6, 1985 Deposition Transcript at 15.

remand. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1983). Additionally, employer asserts that the administrative law judge stated that Dr. Baker examined claimant three times when this physician only examined claimant twice. Employer's Brief at 26. The record contains two examination reports of claimant by Dr. Baker and, as employer notes, Dr. Baker testified at his deposition, Claimant's Exhibit 1 at 13, that he thought he only examined claimant one time. Therefore, we also instruct the administrative law judge on remand to consider this information in addressing the credibility of Dr. Baker's opinion. Should the administrative law judge, on remand, find the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), he must then reconsider whether the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1).[16]

[16]Revised Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

(i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or

(ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

20 C.F.R. §718.204(c)(1) is not among the regulations challenged in a lawsuit pending before the United States District Court for the District of Columbia. *See National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge