BRB No. 04-0839 BLA

LLOYD LEWIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 06/27/2005
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Jeffrey S. Goldberg (Howard M. Radzely, 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, HALL and BOGGS, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order (03-BLA-5319) of Administrative Law Judge Mollie W. Neal (the administrative law judge) denying benefits on a subsequent 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). The administrative law judge credited claimant with seventeen and one-half years of coal mine employment and adjudicated this subsequent claim pursuant to the regulations contained in 20 C.F.R. Part 718.[1] The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge found the evidence insufficient to establish a change in an applicable condition of entitlement pursuant 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Specifically, claimant challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Further, claimant challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits.[2] The Director responds, urging the Board to reject claimant's contention that he failed to provide claimant with a complete and credible pulmonary evaluation.[3]

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[1]Claimant filed his first claim on December 20, 1994. Director's Exhibit 1. On November 15, 1996, Administrative Law Judge Robert L. Hillyard issued a Decision and Order denying benefits based on claimant's failure to establish the existence of pneumoconiosis and total disability. *Id*. The Board affirmed Judge Hillyard's denial of benefits. *Lewis v. Shamrock Coal Co.*, BRB No. 97-0409 BLA (Nov. 17, 1997)(unpub.). Because claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on May 24, 2001. Director's Exhibit 3.

[2]Employer argues that the administrative law judge committed harmless error in failing to consider Dr. Hayes' negative reading of the July 23, 2001 x-ray, Dr. Dahhan's negative reading of the October 31, 2001 x-ray, and Dr. Scott's deposition testimony. Employer's Response Brief at 11-12 n.2.

[3]Since the administrative law judge's length of coal mine employment finding and her findings at 20 C.F.R. §§718.202(a)(2), (a)(3) and 718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

Initially, claimant contends that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Specifically, claimant asserts that the administrative law judge discredited Dr. Hussain's opinion because it was less than well reasoned and documented. As required by Section 413(b) of the Act, 30 U.S.C. §923(b), the Director has a statutory obligation to provide a complete and credible pulmonary evaluation of the miner. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). Claimant selected Dr. Hussain to perform a pulmonary examination on him. Dr. Hussain diagnosed "clinical" pneumoconiosis and opined that claimant suffers from a moderate impairment. Director's Exhibit 17. Dr. Hussain also opined that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id*. The administrative law judge gave less weight to Dr. Hussain's diagnosis of "clinical" pneumoconiosis because it is based only on an x-ray reading and a history of coal dust exposure. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). In addition, the administrative law judge gave less weight to Dr. Hussain's diagnosis of "clinical" pneumoconiosis because Dr. Hussain did not indicate an awareness of claimant's coal mine employment history.[4] *Crosson v. Director, OWCP*, 6 BLR 1-809 (1984). Lastly, the administrative law judge gave less weight to Dr. Hussain's diagnosis of "clinical" pneumoconiosis because Dr. Hussain's diagnosis is based, in part, on a positive x-ray reading that was separately reread as both positive and negative for pneumoconiosis by two dually qualified physicians.[5] *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). However, the administrative law judge did not find Dr. Hussain's opinion devoid of any weight at all with respect to the issue of pneumoconiosis. *See generally Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992). Moreover,

[4]The administrative law judge stated that "Dr. Hussain's report does not reference a specific length of coal mine employment; he cites to 'years of exposure.' " Decision and Order at 11. Therefore, the administrative law judge concluded that "[t]his lack of knowledge renders his opinion less than well reasoned and documented." *Id*.

[5]Dr. Hussain originally read the August 29, 2001 x-ray as positive for pneumoconiosis. Director's Exhibit 17. While Dr. Alexander, a B reader and a Board-certified radiologist, reread the August 29, 2001 x-ray as positive for pneumoconiosis, Director's Exhibit 21, Dr. Scott, also a B reader and a Board-certified radiologist, reread the same x-ray as negative for pneumoconiosis, Director's Exhibit 20.

the administrative law judge credited Dr. Hussain's opinion with respect to the issue of total disability. The Director's obligation to provide claimant with a complete and credible pulmonary evaluation does not require him to provide claimant with the most persuasive medical opinion in the record. *See generally Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). Thus, since the administrative law judge did not find that Dr. Hussain's opinion lacks credibility, we reject claimant's contention that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation.

Next, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Section 725.309 provides that a subsequent claim shall be denied unless claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. The administrative law judge correctly stated, "[i]n the denial of the miner's most recent claim, a claims examiner found that claimant failed to establish the existence of pneumoconiosis and total disability." Decision and Order at 9; *see* Director's Exhibit 1. The administrative law judge therefore concluded that "[her] inquiry begins with an investigation of whether the newly submitted evidence establishes either of these elements of entitlement." Decision and Order at 9.

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Specifically, claimant asserts that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings. The record consists of ten interpretations of five newly submitted x-rays, dated July 23, 2001, August 29, 2001, October 23, 2001, July 9, 2002, and March 12, 2003. Dr. Baker read the July 23, 2001 x-ray as positive for pneumoconiosis, Director's Exhibit 13, while Dr. Wiot, a B reader and a Board-certified radiologist, reread the same x-ray as negative for pneumoconiosis, Employer's Exhibit 1. Dr. Hussain read the August 29, 2001 x-ray as positive for pneumoconiosis. Director's Exhibit 17. Although Dr. Alexander, a B reader and a Board-certified radiologist, reread the August 29, 2001 x-ray as positive for pneumoconiosis, Director's Exhibit 21, Dr. Scott, also a B reader and a Board-certified radiologist, reread the same x-ray as negative for pneumoconiosis,[6] Director's Exhibit 20. The October 23, 2001 x-ray was originally read by

[6]As discussed *supra*, Dr. Hussain originally read the August 29, 2001 x-ray as positive for pneumoconiosis. Director's Exhibit 17. Dr. Scott, however, reread the August 29, 2001 x-ray as negative for pneumoconiosis. Director's Exhibit 20. Further, in a deposition dated July 8, 2003, Dr. Scott testified that he found that the August 29, 2001 x-ray was completely negative and he discussed why another physician would interpret the same x-ray as positive. Employer's Exhibit 3 (Dr. Scott's July 8, 2003 Deposition at 16-17). The administrative law

Dr. Dahhan as negative for pneumoconiosis, but that original reading is not part of the record. Dr. Alexander, a B reader and a Board-certified radiologist, reread the October 23, 2001 x-ray as positive for pneumoconiosis, Claimant's Exhibit 1, while Dr. Poulos, also a B reader and a Board-certified radiologist, reread the same x-ray as negative for pneumoconiosis, Employer's Exhibit 13. Further, Dr. Sundaram, a B reader, read the July 9, 2002 x-ray as positive for pneumoconiosis, Claimant's Exhibit 3, while Dr. Poulos reread the same x-ray as negative for pneumoconiosis, Employer's Exhibit 17. Lastly, Dr. Rosenberg, a B reader, read the March 12, 2003 x-ray as negative for pneumoconiosis. Employer's Exhibit 9. After considering the quantitative and qualitative nature of the conflicting x-ray evidence, the administrative law judge found the x-ray evidence insufficient to establish the existence of pneumoconiosis.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must consider the quantity of the evidence in light of the difference in the qualifications of the readers. *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). In this case, the administrative law judge properly accorded greater weight to the x-ray readings by physicians who are dually qualified as B readers and Board-certified radiologists. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Based on the administrative law judge's reliance on the dual qualifications of the physicians, the administrative law judge applied two methods of weighing the newly submitted x-ray readings. Initially, the administrative law judge weighed together the interpretations of each x-ray to determine whether an x-ray established the existence of pneumoconiosis individually. Next, the administrative law judge weighed together all the readings of the various x-rays to determine whether the x-ray evidence as a whole established the existence of pneumoconiosis. Based on the first method, the administrative law judge found that none of the five newly submitted x-rays established the existence of pneumoconiosis individually. Decision and Order at 9-10. Further, based on the second method, the administrative law judge found that the negative x-ray readings by dually qualified physicians outweighed the positive x-ray readings by similarly qualified physicians. With respect to this second method of weighing the newly submitted x-ray evidence, the administrative law judge stated:

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judge excluded from the record Dr. Scott's July 8, 2003 deposition testimony because she found that employer submitted it to rehabilitate Dr. Scott's negative rereading of the August 29, 2001 x-ray. Decision and Order at 9-10. Section 725.414 provides that where a party has submitted rebuttal evidence, the other party shall be entitled to submit an additional statement from the physician who originally interpreted the x-ray. 20 C.F.R. §725.414(a)(ii) and (3)(ii). In this case, Dr. Scott did not originally interpret the August 29, 2001 x-ray. Thus, the administrative law judge properly excluded Dr. Scott's deposition testimony about this x-ray.

> Upon consideration of the x-ray evidence as a whole, there are five positive readings and five negative readings. Two of the positive readings were by physicians with no special qualifications for interpreting radiographs. Of the most qualified readers, there are two positive readings and four negative readings.

Id. at 10. Thus, since the administrative law judge reasonably considered the quantitative and the qualitative nature of the conflicting x-ray readings, we reject claimant's assertion that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings. *Staton*, 65 F.3d at 59, 19 BLR at 2-280; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87.

Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Claimant also contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R §718.202(a)(4). The administrative law judge considered the opinions of Drs. Baker, Dahhan, Hussain, Sundaram, and Rosenberg. Drs. Baker, Hussain, and Sundaram diagnosed "clinical" pneumoconiosis. In a report dated May 23, 2001, Dr. Baker diagnosed chronic bronchitis based on history. Director's Exhibit 12. In the causation section of this report, Dr. Baker opined that the diagnosed disease is not related to coal dust exposure. *Id*. However, in the same section, Dr. Baker opined that any pulmonary impairment is the result of coal dust exposure. *Id*. Further, Dr. Baker opined that "[i]t is possible that [claimant's] bronchitis is related to the coal dust exposure to some extent." *Id*. In a subsequent report dated July 23, 2001, Dr. Baker diagnosed both coal workers' pneumoconiosis and chronic bronchitis based on history. Director's Exhibit 13. In the causation section of this report, Dr. Baker opined that the diagnosed disease is related to coal dust exposure. *Id*. In addition, Dr. Baker opined that any pulmonary impairment is the result of coal dust exposure. *Id*. Dr. Hussain diagnosed pneumoconiosis. Director's Exhibit 17. Similarly, Dr. Sundaram diagnosed coal workers' pneumoconiosis. Claimant's Exhibit 3. In contrast, Drs. Dahhan and Rosenberg opined that claimant does not suffer from coal workers' pneumoconiosis. Director's Exhibit 15; Employer's Exhibit 9. After considering the conflicting medical opinions, the administrative law judge concluded that the opinions of Drs. Dahhan and Rosenberg outweigh the contrary opinions of Drs. Baker, Hussain and Sundaram because the former are better reasoned and documented.

Claimant asserts that the administrative law judge erred in discounting the diagnoses of "clinical" pneumoconiosis by Drs. Baker and Sundaram. Dr. Baker's diagnosis of "clinical" pneumoconiosis is based, in part, on a positive interpretation of claimant's July 23,

2001 x-ray, while Dr. Sundaram's diagnosis of "clinical" pneumoconiosis is based, in part, on a positive interpretation of claimant's July 9, 2002 x-ray. The administrative law judge properly discounted the diagnoses of "clinical" pneumoconiosis by Drs. Baker and Sundaram because the x-rays they relied upon to support their diagnoses were reread by better qualified physicians as negative for pneumoconiosis.[7] *Winters*, 6 BLR at 1-881 n.4. In addition, the administrative law judge properly discounted Dr. Baker's diagnosis of "clinical" pneumoconiosis because it is based only on an x-ray reading and a history of coal dust exposure. *Cornett*, 227 F.3d at 575-6, 22 BLR at 2-120. Thus, we reject claimant's assertion that the administrative law judge erred in discounting the diagnoses of "clinical" pneumoconiosis by Drs. Baker and Sundaram.

Further, we reject claimant's assertion that the administrative law judge erred in failing to accord greater weight to Dr. Baker's diagnosis of "clinical" pneumoconiosis based upon his status as claimant's treating physician. The Sixth Circuit has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims.[8] *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that the administrative law judge must evaluate treating physicians just as they consider other experts. *Id*. As discussed *supra*, the administrative law judge provided proper reasons for discounting Dr. Baker's diagnosis of "clinical" pneumoconiosis. Consequently, the administrative law judge properly found that Dr. Baker's diagnosis of "clinical" pneumoconiosis is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Decision and Order at 11.

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[7]We hold that any error by the administrative law judge in discounting Dr. Sundaram's diagnosis of "clinical" pneumoconiosis based on an inaccurate smoking history is harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), because the administrative law judge provided an alternate basis for discounting Dr. Sundaram's diagnosis of the disease, *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), namely, she properly discounted Dr. Sundaram's diagnosis of "clinical" pneumoconiosis because the x-ray Dr. Sundaram relied upon to support his diagnosis was reread by a better qualified physician as negative for pneumoconiosis. *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984).

[8]Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. 20 C.F.R. §718.104(d). The United States Court of Appeals for the Sixth Circuit has recognized that this provision codifies judicial precedent and does not work a substantive change in the law. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

However, although the administrative law judge properly discounted Dr. Baker's diagnosis of "clinical" pneumoconiosis, the administrative law judge did not consider whether Dr. Baker diagnosed "legal" pneumoconiosis.[9] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), 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); *see also Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). Thus, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and remand the case for further consideration of the newly submitted medical opinion evidence therein. In addition, the administrative law judge must address the admissibility of Dr. Dahhan's medical report. As discussed *supra*, Dr. Dahhan's original reading of the October 23, 2001 x-ray as negative for pneumoconiosis was not admitted into the record. However, the administrative law judge admitted into the record a medical report prepared by Dr. Dahhan that was based, in part, on Dr. Dahhan's original reading of the October 23, 2001 x-ray. Director's Exhibit 15. Section 725.414(a)(2)(i) provides that "[a]ny chest X-ray interpretations…that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section." 20 C.F.R. §725.414(a)(2)(i).

Claimant additionally contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the reports of Drs. Baker, Dahhan, Hussain, Sundaram, and Rosenberg. In a report dated May 23, 2001, Dr. Baker opined:

> The patient has a Class I impairment with the FEV1 and vital capacity being greater than 80% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Director's Exhibit 12. In a subsequent report dated July 23, 2001, Dr. Baker opined:

> The patient has a Class I impairment with the FEV1 and vital capacity being greater than 80% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.
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[9]'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R §718.201(a)(2).

> The patient has a second impairment based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupation.

Director's Exhibit 13. Dr. Sundaram, in a report dated July 9, 2002, opined that claimant suffers from a moderate impairment. Claimant's Exhibit 3. Dr. Sundaram further 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. *Id*. In a report dated August 29, 2001, Dr. Hussain also opined that claimant suffers from a moderate impairment. Director's Exhibit 17. However, Dr. Hussain opined that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id*. Dr. Dahhan, in a report dated October 25, 2001, opined that claimant does not suffer from a pulmonary impairment or disability. Director's Exhibit 15. Dr. Dahhan further opined that, from a respiratory standpoint, claimant retains the physiological capacity to continue his previous coal mining work or job of comparable physical demand. *Id*. Lastly, in a report dated April 14, 2003, Dr. Rosenberg opined that from a pulmonary perspective, claimant could perform his previous coal mining job or other similar arduous types of labor. Employer's Exhibit 9. The administrative law judge found that the opinions of Drs. Dahhan, Hussain, and Rosenberg outweigh the contrary opinions of Drs. Baker and Sundaram because they are better reasoned and documented.

Claimant asserts that the administrative law judge erred in finding that Dr. Baker's opinion is insufficient to establish total disability.[10] Contrary to claimant's assertion, the administrative law judge properly discounted Dr. Baker's opinion because it is not reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In considering Dr. Baker's opinion, the administrative law judge rationally found that Dr. Baker failed to explain how the pulmonary function studies indicated a Class I respiratory impairment.[11] The administrative law judge specifically stated:

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[10]Claimant asserts that a single medical opinion supportive of a finding of total disability is "sufficient for invoking the presumption of total disability." Claimant's Brief at 9. However, claimant has not identified any presumption of total disability that is applicable in this case, nor does one apply, given the facts and evidence in this Part 718 case.

[11]Because Dr. Baker failed to explain the severity of a Class I impairment or to address whether such an impairment would prevent claimant from performing his usual coal mine employment, Dr. Baker's finding of a Class I impairment is insufficient to support a finding of total disability. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*),

> [Dr. Baker's report] is also indefinite and unclear. He found a class 1 impairment based on pulmonary function study results but explained that this meant the miner's FEV1 and FVC were both greater than 80%. He did not explain how such values could equate to total disability.

Decision and Order at 13. Further, the administrative law judge properly discounted Dr. Baker's opinion because it is not supported by the underlying objective tests.[12] *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985).

Dr. Baker also opined that because persons who develop pneumoconiosis should limit their further exposure to coal dust, it could be implied that claimant was 100% occupationally disabled for work in the coal mining industry. Director's Exhibit 13. Because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989), this second aspect of Dr. Baker's opinion is also insufficient to support a finding of total disability. Thus, we reject claimant's assertion that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability. Furthermore, since Dr. Baker's opinion is insufficient to establish total disability, *Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991), we reject claimant's assertion that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work with Dr. Baker's assessment of claimant's impairment, *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*).

Claimant also asserts that the administrative law judge erred in discounting Dr. Baker's opinion because it is based on a non-qualifying pulmonary function study. Contrary to claimant's assertion, the administrative law judge properly discounted Dr. Baker's opinion because it is not reasoned. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6

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aff'd, 9 BLR 1-104 (1986)(*en banc*).

[12]The administrative law judge stated that "[Dr. Baker's] report is not entitled to probative weight because it is belied by the non-qualifying pulmonary function studies and blood gas studies, including those he administered himself." Decision and Order at 11. In his May 23, 2002 report, Dr. Baker noted normal pulmonary function tests and normal arterial blood gases. Director's Exhibit 12. Further, in his July 23, 2001 report, Dr. Baker noted normal pulmonary function tests. Director's Exhibit 13. The five newly submitted pulmonary function studies of record yielded non-qualifying values and the four newly submitted arterial blood gas studies of record yielded non-qualifying values. Director's Exhibits 12, 13, 15-17; Claimant's Exhibit 3; Employer's Exhibit 9.

BLR at 1-1294. Further, the administrative law judge properly discounted Dr. Baker's opinion because it is not supported by the underlying objective tests. *Minnich*, 9 BLR at 1-90 n.1; *Wetzel*, 8 BLR at 1-141; *Pastva*, 7 BLR at 1-832. Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Baker's opinion because it is based on a non-qualifying pulmonary function study.

Additionally, we hold that, contrary to claimant's suggestion, an administrative law judge is not required to consider claimant's age, education and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine work in this Part 718 case. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). Further, we reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally disabled since pneumoconiosis is a progressive and irreversible disease. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

In addition, claimant asserts that the administrative law judge erred in discounting Dr. Sundaram's opinion. We hold that claimant's assertion has merit. The administrative law judge provided several reasons for discounting Dr. Sundaram's opinion. First, the administrative law judge discounted Dr. Sundaram's opinion because it is based on a non-qualifying pulmonary function study. The administrative law judge specifically stated that "[a]ll the pulmonary function studies, including that administered by Dr. Sundaram, yielded non-qualifying values." Decision and Order at 13. However, an administrative law judge may not discount a medical opinion because it is based on a non-qualifying pulmonary function study. *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller*, 6 BLR at 1-1293-4. Moreover, Dr. Sundaram's opinion is not based solely on a pulmonary function study. In addition to the pulmonary function study, Dr. Sundaram also relied on a physical examination and symptoms in concluding 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.

Second, the administrative law judge discounted Dr. Sundaram's opinion because Dr. Sundaram relied on a pulmonary function study that was invalidated by Dr. Vuskovich. The administrative law judge stated that "[t]o the extent that [the non-qualifying pulmonary function study administered by Dr. Sundaram] illustrated a moderate impairment, Dr. Vuskovich pointed out several errors in the taking of the test that rendered it invalid."[13]

[13]In summarizing the pulmonary function study evidence, the administrative law judge stated that "[t]he [July 9, 2002 pulmonary function study administered by Dr. Sundaram] was invalidated by Dr. Vuskovich because maximum effort was not given throughout the entire

Decision and Order at 13. However, an administrative law judge is required to provide a rationale for preferring the opinion of a consulting physician over that of an administering physician. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Here, the administrative law judge did not provide a reason for according determinative weight to Dr. Vuskovich's opinion that the pulmonary function study is invalid over that of the administering physician.

Lastly, the administrative law judge discounted Dr. Sundaram's opinion because Dr. Rosenberg did not find the same symptoms of wheezing and rhonchi that Dr. Sundaram noted in his report. The administrative law judge stated that "[w]hile Dr. Sundaram may have found rhonchi and wheezes on physical evaluation, in a later examination conducted by Dr. Rosenberg, no rhonchi, rales, or wheezes were found, thereby calling into question one of the bases of Dr. Sundaram's opinion." Decision and Order at 13-14. However, the administrative law judge did not explain why she found that Dr. Rosenberg's characterization of the symptoms of wheezing, rhonchi, and rales entitled his opinion to greater weight than Dr. Sundaram's contrary opinion. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Thus, in view of the aforementioned errors by the administrative law judge in discounting Dr. Sundaram's opinion, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration of the newly submitted medical opinion evidence therein.

Furthermore, we vacate the administrative law judge's finding that the evidence is insufficient to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and remand the case for further consideration of the evidence therein.

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forced expiration maneuver, the maximum expiratory effort was not accomplished for at least five seconds or until time volume tracing plateau was reached, the time-volume curve reflects a cough during the first second, mouthpiece obstruction, and/or glottis closure, the start of the maximum expiratory effort was not satisfactory, and there is excessive variability between the three acceptable curves. (EX 6)." Decision and Order at 4.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur.

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JUDITH S. BOGGS
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring:

I concur in the majority's decision to vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv) as the administrative law judge's weighing of Dr. Sundaram's opinion cannot be affirmed. I write separately, however, because I would also hold that the administrative law judge erred in relying on Dr. Hussain's opinion in support of her finding that total disability was not established. I would instead instruct the administrative law judge, on remand, to consider whether Dr. Hussain's opinion is, in fact, sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Dr. Hussain opined that claimant suffers from a moderate impairment but has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibit 15. In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), the United States Court of Appeals for the Sixth Circuit held that a mild impairment may be totally disabling, depending upon the exertional requirements of claimant's usual coal mine employment. The Sixth Circuit also held that before an administrative law judge may credit a doctor's opinion that claimant is not totally

disabled, the administrative law judge must determine whether the doctor understands the exertional requirements of claimant's usual coal mine employment. *Cornett*, 227 F.3d at 578, 22 BLR at 2-124. In this case, Dr. Hussain indicated no familiarity with the exertional requirements of claimant's last coal mine employment. Dr. Hussain did not complete either the employment history section or the coal mine employment section of his report. Director's Exhibit 17. The coal mine employment section of Dr. Hussain's report refers to claimant's last coal mine employment, job title and description of the job's physical requirements. *Id*. Therefore, Dr. Hussain's opinion that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment does not have any probative value under *Cornett*. However, Dr. Hussain also opined that claimant suffers from a moderate impairment. Director's Exhibit 17. Thus, I would instruct the administrative law judge, on remand, to compare Dr. Hussain's opinion that claimant suffers from a moderate impairment with the exertional requirements of claimant's usual coal mine employment in order to assess whether that impairment renders claimant totally disabled. *Cornett*, 227 F.3d at 578, 22 BLR at 2-124.

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BETTY JEAN HALL
Administrative Appeals Judge