BRB No. 05-0764 BLA

CARNZZLE LANE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
K & M COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN BUSINESS AND PERSONAL MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 06/08/2006
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky, Incorporated), Barbourville, Kentucky, for claimant.

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

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-5434) of Administrative Law Judge Joseph E. Kane 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] The administrative law judge credited claimant with four years of coal mine employment, and noted that the instant claim is a subsequent claim. The administrative law judge considered the newly submitted evidence and determined that it did not establish a change in one of the applicable conditions of entitlement. Therefore, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred by admitting evidence in violation of the twenty-day rule, and urges that the opinions of Drs. West and Branscomb should be excluded. Claimant challenges the administrative law judge's finding that the medical opinion evidence does not establish the existence of pneumoconiosis, and the administrative law judge's findings that claimant has not established total disability due to pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits. Employer also maintains that the administrative law judge's rulings on the admission of evidence were proper. The Director, Office of Workers' Compensation Programs (the Director), responds solely to claimant's challenge to the administrative law judge's admission of evidence. The Director urges the Board to reject claimant's challenge to the administrative law judge's ruling regarding the admission of evidence.

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

As a preliminary matter, we consider claimant's challenge to the administrative law judge's ruling regarding the admission of evidence. The administrative law judge

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

addressed claimant's objection, raised at the hearing, to the admission of Employer's Exhibits 1 and 2, because claimant had not received these exhibits twenty days before the hearing. The administrative law judge noted the language in 20 C.F.R. §725.456(b)(2),[2] and overruled claimant's objections, finding that the evidence in question had been mailed more than twenty days before the hearing. Decision and Order at 5.

On appeal, claimant asserts that the administrative law judge's admission of Employer's Exhibits 1 and 2 violates case law, as well as the intent of 20 C.F.R. §725.456(b)(2). Claimant asserts that in order to comply with the regulation, copies of the evidence should have been received by him at least twenty days before the hearing. Employer responds, arguing that the administrative law judge's ruling on this issue does not constitute an abuse of discretion. The Director also disagrees with claimant's challenge and asserts that the administrative law judge's ruling was proper. The Director notes that courts must give substantial deference to an agency's interpretation of its own regulations, and he argues that "the plain language of the regulation supports the Director's contention that 'sent' means 'sent,' and not 'received.'" Director's Letter at 2.

An agency's interpretation of its own regulations is entitled to deference, and must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (2004); *see Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Cadle v. Director, OWCP*, 19 BLR 1-55, 1-62 (1994). We defer to the Director's interpretation of the word "sent," as it appears in Section 725.456(b), as this interpretation is consistent with the plain language of the regulation and is not plainly erroneous or inconsistent with the regulation. Moreover, the case law cited by claimant is inapposite. Therefore, we affirm the administrative law judge's finding that Section 725.456(b) requires only that the evidence be mailed twenty days before the hearing in order to comply with the twenty-day rule. Consequently, we affirm the administrative law judge's inclusion of the evidence in question and reject claimant's allegation of error in this regard.

We now turn to the merits of this case. As noted above, the instant case involves a subsequent claim. *See* 20 C.F.R. §725.309. The prior claim was denied based on claimant's failure to establish the existence of pneumoconiosis, pneumoconiosis arising

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[2] 20 C.F.R. §725.456(b)(2) states that "evidence which was not submitted to the district director, may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least 20 days before a hearing is held in connection with the claim." 20 C.F.R. §725.456(b)(2).

out of coal mine employment, or total disability due to pneumoconiosis.[3] Director's Exhibit 1.

Claimant argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis,[4] *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to Section 718.202(a)(4).

Claimant asserts that the administrative law judge's rationale for discrediting the diagnoses of pneumoconiosis provided by Drs. Baker and Vaezy in this case, *i.e.*, because they were based only on claimant's work history and x-ray reading, was rejected in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Moreover, claimant contends that it was error for the administrative law judge to rely on the opinions of Drs. Dahhan and Branscomb.[5] Claimant argues that Dr. Dahhan's opinion is not well-reasoned and that Dr. Branscomb's opinion must be given less weight because the physician never examined claimant. Claimant further asserts that Dr. Branscomb

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[3] The administrative law judge's finding of four years of coal mine employment, his findings that pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(1)-(3), and his findings that total disability is not demonstrated pursuant to 20 C.F.R. §718.204(b)(2)(i)-(ii), are not challenged on appeal. Therefore these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] "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).

[5] The newly submitted evidence includes the following medical opinions: Dr. Branscomb reviewed claimant's records and diagnosed mild asthma that was not caused by coal mine dust. Employer's Exhibit 2. Dr. Baker examined claimant and diagnosed coal workers' pneumoconiosis, noting a positive x-ray interpretation and claimant's history of coal dust exposure, and he opined that claimant has a lung disease caused by coal mine employment. Director's Exhibits 9, 32; Claimant's Exhibit 1. Dr. Stargel diagnosed "black lung" and opined that claimant has a chronic lung disease arising out of coal mine employment. Director's Exhibit 29; Claimant's Exhibit 2. Dr. Dahhan examined claimant and reviewed his medical records. Dr. Dahhan stated that there were insufficient objective findings to justify a diagnosis of coal workers' pneumoconiosis. Director's Exhibit 21. Dr. Vaezy examined claimant and diagnosed coal workers' pneumoconiosis by history and x-ray. Claimant's Exhibit 3.

"does not really apply" the definition of legal pneumoconiosis to his opinion, and claimant argues that Dr. Branscomb:

> egregiously overstates any inconsistency of the medical histories involved in Dr. Baker's, Dr. Dahhan's, and Dr. Stargel's reports, and does not specify the so-called inconsistencies, and he egregiously overstates any inconsistency in the information provided by [claimant] to his treating physicians and to the examining physician, which indicates that Dr. Branscomb's actual purpose was not to provide an objective, reasoned assessment of [claimant's] respiratory condition but was to create a report for the sole purpose of defeating [claimant's] Black Lung claim.

Claimant's Brief at 8-9.[6]

We first consider claimant's assertion that the administrative law judge erred in discounting the diagnoses of clinical pneumoconiosis by Drs. Baker and Vaezy because these physicians' diagnoses are based solely upon x-ray readings and coal mine employment histories. Dr. Baker diagnosed coal workers' pneumoconiosis based on a 1/0 x-ray interpretation and claimant's coal dust exposure. Director's Exhibits 9, 32. Dr. Baker's report reflects that he examined claimant and obtained an x-ray, a pulmonary function study, a blood gas study and an EKG. Dr. Vaezy examined claimant and obtained an x-ray, a pulmonary function study and a blood gas study, and he diagnosed coal workers' pneumoconiosis by history and positive x-ray. Claimant's Exhibit 3. The administrative law judge noted that both Drs. Baker and Veazy administered objective testing. He stated that both physicians:

> listed that they expressly relied on the Claimant's positive x-ray and coal dust exposure for their clinical determinations of pneumoconiosis. Moreover, they failed to state how results from their other objective testing might have impacted their diagnoses of pneumoconiosis. As they do not indicate any other reasons for their diagnosis of pneumoconiosis beyond the x-ray and exposure history, I find their reports with respect to the diagnoses of clinical pneumoconiosis neither well-reasoned nor well-documented.

Decision and Order at 9.

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[6] Claimant does not challenge the administrative law judge's finding that Dr. Stargel's diagnosis of clinical pneumoconiosis is not well-reasoned or well-documented. Because this finding is not challenged on appeal, it is affirmed. *Skrack*, 6 BLR 1-710.

In *Cornett*, the United States Court of Appeals for the Sixth Circuit held that substantial evidence did not support the administrative law judge's finding that two medical opinions diagnosing coal workers' pneumoconiosis were merely restatements of positive x-ray interpretations. *Cornett*, *supra*. In contrast, the record in the instant case reflects that the diagnoses of clinical pneumoconiosis provided by Drs. Baker and Vaezy are based exclusively on abnormal chest x-rays and claimant's coal dust exposure. We hold that the administrative law judge permissibly discounted them pursuant to Section 718.202(a)(4). *Cornett*, *supra*; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). We therefore reject claimant's assertion that the administrative law judge erred in discounting the opinions of Drs. Baker and Veazy regarding clinical pneumoconiosis. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Because we affirm the administrative law judge's finding that the opinions of the physicians who diagnosed clinical pneumoconiosis are not well-reasoned or well-documented, we further affirm the administrative law judge's finding that claimant has not established clinical pneumoconiosis pursuant to Section 718.202(a)(4).

The administrative law judge next considered the issue of legal pneumoconiosis. The administrative law judge noted that Drs. Dahhan, Stargel, Vaezy and Branscomb each diagnosed asthma. However, since none of these physicians opined that claimant's asthma was due to coal mine employment, the administrative law judge found that these opinions do not support a finding of legal pneumoconiosis. The administrative law judge also noted Dr. Dahhan's diagnosis of an obstructive ventilatory defect, but determined that this diagnosis does not constitute legal pneumoconiosis because the physician did not state that it was a chronic condition, or that it arose out of coal mine employment. The administrative law judge also found that Dr. Stargel's diagnosis of an obstructive airway disease does not qualify as a diagnosis of legal pneumoconiosis, because the physician did not identify the disease as chronic. Decision and Order at 9-10. The administrative law judge discussed Dr. Baker's diagnosis of chronic bronchitis due to claimant's coal dust exposure. The administrative law judge found that Dr. Baker's diagnosis of legal pneumoconiosis is neither well-reasoned nor well-documented, as the physician relied solely on claimant's report of symptoms to diagnose chronic bronchitis, and he failed to cite any objective medical testing or data supportive of his diagnosis. In addition, the administrative law judge noted that Dr. Baker did not refer to any prior diagnoses of bronchitis that would indicate that this condition was chronic. However, the administrative law judge found that Dr. Baker's diagnosis of chronic obstructive airway disease due to coal dust exposure, is a well-reasoned and well-documented diagnosis of legal pneumoconiosis. The administrative law judge concluded his analysis of legal pneumoconiosis by relying on the opinions of Drs. Dahhan and Branscomb, over the opinion of Dr. Baker, noting that the preponderance of the well-reasoned and well-documented evidence does not establish the existence of legal pneumoconiosis. Decision and Order at 10.

The administrative law judge has not provided any explanation as to why he found the opinions of Drs. Dahhan and Branscomb well-documented and well-reasoned. Thus, we vacate the administrative law judge's reliance upon these opinions. *See* Administrative Procedure Act (APA), 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). Consequently, we also vacate the administrative law judge's finding regarding legal pneumoconiosis pursuant to Section 718.202(a)(4). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). On remand, the administrative law judge must explain the basis for his finding that a medical opinion is reasoned and documented, or not well-reasoned and well-documented, in order to comply with the requirements of the APA.

However, we reject claimant's suggestion that the administrative law judge should have relied on the opinions of claimant's treating physicians, over the opinions of Dr. Dahhan, who examined claimant once, and consulting physician, Dr. Branscomb. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that there is no requirement that a treating physician's opinion be given deference. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *see also* 20 C.F.R. §718.104.

In addition, we hold that claimant's challenge to the administrative law judge's reliance on Dr. Branscomb's opinion, on the basis that he did not apply the definition of legal pneumoconiosis to his opinion, lacks merit. As discussed, *supra*, "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 comments to the revised regulations state:

> The statute defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. §902(b). This broad definition encompasses not only coal workers' pneumoconiosis as that disease is contemplated by the medical community, but also any other chronic lung disease demonstrably related to coal mine employment but not typically denominated as pneumoconiosis in medical circles. Thus, the Department is making a legal distinction, rather than a medical one, by employing the phrase "legal pneumoconiosis" in order to properly implement Congress' intent.

65 Fed. Reg. 79937-79938 (Dec. 20, 2000). Thus, physicians are not required to consider whether a diagnosis is sufficient to satisfy the definition of "legal" pneumoconiosis. Rather, it is the administrative law judge, as the fact-finder, who must make that determination.

We also reject claimant's allegation of bias on the part of Dr. Branscomb. The Board has held that the identity of the party who hires the medical expert does not, by itself, demonstrate partiality on the part of the physician, *see Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). Since claimant does not point to any specific instance of partiality, and because no bias on the part of Dr. Branscomb is evident in this case, we reject claimant's assertion. *See generally Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Stanford v. Director, OWCP*, 7 BLR 1-541 (1984); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984); *but see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997)(holding that an administrative law judge should consider whether an opinion is, to any degree, the product of bias in favor of the party retaining the expert and paying the fee).

In light of the foregoing, we vacate the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

We next turn to claimant's arguments regarding the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b). Claimant challenges the administrative law judge's finding that the newly submitted pulmonary function study evidence does not demonstrate total disability pursuant to Section 718.204(b)(2)(i). Claimant asserts that the medical opinion evidence and the pulmonary function study evidence support a finding of total disability.

The administrative law judge found the newly submitted pulmonary function study evidence insufficient to establish total disability pursuant to Section 718.204(b)(2)(i).[7] The administrative law judge stated:

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[7] The newly submitted evidence contains the results of five pulmonary function studies. The March 12, 1999 pulmonary function study yielded non-qualifying results. Director's Exhibit 29; Claimant's Exhibit 2. The July 15, 2002 pulmonary function study yielded non-qualifying values on the pre-bronchodilator test and qualifying values on the post-bronchodilator test. Director's Exhibit 29. The results of the July 24, 2002 pulmonary function study were qualifying, and this study was validated by Dr. Burki. Director's Exhibit 9. Dr. Branscomb opined that this is "not a good spirogram." Employer's Exhibit 2. The pulmonary function study administered on May 8, 2003 yielded qualifying values on the pre-bronchodilator test, but non-qualifying values on the post-bronchodilator test. Director's Exhibit 21. Dr. Branscomb opined that the MVV results of this study are invalid. Employer's Exhibit 2. The results of the September 17, 2003 pulmonary function study were non-qualifying. Claimant's Exhibit 3.

> The record consists of five newly submitted pulmonary function studies. The study performed on July 24, 2002 was validated by Dr. Burki. The study dated September 17, 2003 is non-qualifying per section 718.103(b), as it does not include three tracings. The studies dated July 15, 2002 and July 24, 2002 produced qualifying results. However, the studies dated March 12, 1999 and May 8, 2003 produced non-qualifying results. Thus, I find the pulmonary function study evidence of record fails, by a preponderance of the evidence, to establish total disability under subsection (b)(2)(i).

Decision and Order at 11.

Claimant maintains that the March 12, 1999 pulmonary function study is so unclear and confusing that it is unreadable, and also contends that because this test was administered five years before the hearing, it should be assigned no weight. A review of the record does not reveal any confusion or lack of clarity about the report of the March 12, 1999 pulmonary function study. Claimant's Exhibit 3. Moreover, claimant does not specify what is confusing about the report of this study, nor did the administrative law judge describe any confusion in interpreting it. We therefore reject claimant's assertion. We also reject claimant's assertion that the administrative law judge referred to a pulmonary function study that is not contained in the record. A review of the record reveals, contrary to claimant's assertion, that it does contain a pulmonary function study administered on July 15, 2002. *See* Director's Exhibit 29.

Claimant also challenges the administrative law judge's evaluation of the pulmonary function study administered on September 17, 2003. The administrative law judge found this study to be "non-qualifying per Section 718.103(b), as it does not include three tracings." Decision and Order at 11. A "qualifying" pulmonary function 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 B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b). Contrary to the administrative law judge's statement, a pulmonary function study that does not satisfy the requirements of Section 718.103 is not *non-qualifying*. Rather, a pulmonary function study that does not satisfy the requirements of Section 718.103 is a *non-conforming* study. 20 C.F.R. §718.101. The Board has held that the quality standards found in Section 718.103 are not mandatory, and that "pulmonary function studies which fail to conform to [the quality standards set forth at Section 718.103] may not be precluded from consideration on this basis alone." *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27, 1-29 (1988). In addition, while missing tracings would make the pulmonary function study non-conforming, the missing tracings do not render the results unreliable. *See generally Crapp v. United States Steel*

Corp., 6 BLR 1-476 (1983). We therefore reject claimant's assertion that the results of this test should be ignored because it is non-conforming.[8]

Claimant, referring to the values yielded on the pre-bronchodilator test, also argues that the administrative law judge erred in finding the May 8, 2003 pulmonary function study to be non-qualifying. The results of the May 8, 2003 test were qualifying on the pre-bronchodilator test and non-qualifying on the post-bronchodilator test. Director's Exhibit 21. Similarly, the administrative law judge identified the July 15, 2002 pulmonary function study as qualifying. However, this study yielded non-qualifying values on the pre-bronchodilator test, and qualifying values after the administration of the bronchodilator. Director's Exhibit 29. Because the administrative law judge has not explained how he determined whether these tests yielded qualifying or non-qualifying values, we vacate the administrative law judge's evaluation of the pulmonary function study evidence at Section 718.204(b)(2)(i). *See Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454, 1-459 (1983). On remand, the administrative law judge must explain his findings. *See Wojtowicz, supra*. In addition, the administrative law judge is instructed to consider Dr. Branscomb's comments regarding the validity of the May 8, 2003 and the July 24, 2002 pulmonary function studies.[9] *See* Employer's Exhibit 2. Finally, claimant asserts that the pulmonary function study administered in 1999, five years before the hearing, must be accorded no weight. In *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988), the Sixth Circuit held that the relevant issue is claimant's condition at the time of the hearing. *Cooley*, 845 F.2d 622, 11 BLR 2-147. On remand, the administrative law judge must consider the probative value of this pulmonary function study, based on the date it was administered. *Id.*

In view of our holdings regarding the administrative law judge's findings pursuant to Section 718.204(b)(2)(i), we also vacate the administrative law judge's findings at Section 718.202(b)(2)(iv), as well as at Section 718.204(b)(2) overall. On remand, the administrative law judge must consider what impact his reevaluation of the pulmonary function study evidence has on his analysis of the medical opinions. The administrative

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[8] While the administrative law judge's basis for finding this test to be non-qualifying is erroneous, the values yielded on this test are, in fact, non-qualifying. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[9] The opinion of a consulting physician addressing the reliability of a pulmonary function study may constitute substantial evidence in the determination of whether the pulmonary function study establishes total disability. The administrative law judge must provide a rationale for preferring the opinion of a consulting physician over that of the physician who administered the test. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985).

law judge must then weigh the contrary probative evidence, like and unlike, to determine whether it establishes total disability pursuant to Section 718.204(b)(2). *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987).

Claimant also asserts that it was error for the administrative law judge to rely on Dr. Branscomb's opinion in finding that disability causation is not established at 20 C.F.R. §718.204(c). Claimant contends that because Dr. Branscomb did not diagnose pneumoconiosis, his opinion regarding disability causation is entitled to little weight. In view of our decision to vacate and remand this case for further consideration of the findings at Section 718.202(a) and 718.204(b)(2), we also vacate the administrative law judge's disability causation finding. On remand, if the administrative law judge finds the existence of pneumoconiosis established pursuant to Section 718.202(a), he must consider the Sixth Circuit's discussion in *Skukan*, which instructs the administrative law judge "to treat as less significant those physicians' conclusions about causation when they find no pneumoconiosis." *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995).

In light of the foregoing, we also vacate the administrative law judge's finding that claimant has not established a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge