BRB No. 08-0586 BLA

W.M.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED: 06/25/2009
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (K & L Gates LLP), Washington, D.C., for employer.

Barry H. Joyner (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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:

Employer appeals the Decision and Order on Remand (2004-BLA-6327) of Administrative Law Judge Daniel A. Sarno, Jr., awarding benefits with respect to a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case has been before the Board several times. In its most recent Decision and Order, the Board vacated the administrative law judge's determination that the applications for benefits that claimant

filed on April 9, 2002 and April 17, 2003, merged with the claim he filed on March 22, 1996.[1] *W.M. v. Whitaker Coal Corp.*, BRB Nos. 07-0300 BLA and 07-0300 BLA-A, slip op. at 6-7 (Dec. 31, 2007) (unpub.). The Board held that claimant's April 9, 2002 application was properly withdrawn and instructed the administrative law judge to treat the April 17, 2003 filing as a subsequent claim and to consider whether it was timely filed pursuant to 20 C.F.R. §725.308. *Id.* at 7. The Board also instructed the administrative law judge to apply the evidentiary limitations set forth in 20 C.F.R. §725.414 to the evidence submitted subsequent to the denial of the claim filed on March 22, 1996. *Id*. at 8.

On remand, the administrative law judge admitted the evidence designated by the parties on their evidence summary forms and determined that the subsequent claim filed on April 17, 2003 was timely under Section 725.308. The administrative law judge further found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), as the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). With respect to the merits of entitlement, the administrative law judge incorporated the findings from his prior Decision and Order by reference and determined that claimant established the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis under 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

Employer argues on appeal that the administrative law judge erred in admitting the medical report of Dr. Simpao and in according diminished weight to the medical opinions of Drs. Dahhan and Broudy because they were based, in part, upon inadmissible evidence. Employer also contends that the administrative law judge did not properly weigh the evidence relevant to Sections 718.202(a)(1), (4), and 718.204(b)(2)(iv), (c). Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation (the Director), has filed a limited response, in which he urges the Board to reject employer's allegation of error regarding the admission of Dr. Simpao's report.[2]

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[1] The complete procedural history of this case is set forth in the Board's most recent Decision and Order. *W.M. v. Whitaker Coal Corp.*, BRB Nos. 07-0300 BLA and 07-0300 BLA-A, slip op. at 1-4 (Dec. 31, 2007) (unpub.).

[2] We affirm the administrative law judge's determination that claimant's April 17, 2003 claim was timely filed pursuant to 20 C.F.R. §725.308, as the parties have not challenged it on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); 2008 Decision and Order at 5.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[3] 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).

Evidentiary Issues

As we first address employer's arguments concerning the administrative law judge's evidentiary rulings, we must review the relevant procedural history. When claimant filed a second application for benefits on April 9, 2002, the district director treated it as an initial claim and arranged for claimant to be examined by Dr. Simpao on June 17, 2002. Director's Exhibits 1-193, 9A. The district director subsequently issued a letter dated March 24, 2003, in which claimant was advised that the district director's prior order granting claimant's request to withdraw his 1996 claim had been issued in error and, therefore, was vacated. Director's Exhibit 1-11. The district director also informed claimant that his April 9, 2002 application would be treated as a request for modification of the denial of his 1996 claim, unless claimant indicated in writing that he did not wish to seek modification. *Id*. By letter dated April 14, 2003, claimant notified the district director that his April 9, 2002 application should not be treated as an appeal or modification request. Director's Exhibit 1-4. Claimant then filed a claim on April 17, 2003, which was treated as a subsequent claim. Director's Exhibit 3.

The administrative law judge first considered Dr. Simpao's medical report in his Decision and Order Awarding Living Miner's Benefits issued on December 4, 2006. The administrative law judge determined that Dr. Simpao's positive reading of the x-ray dated June 17, 2002, when considered in conjunction with positive interpretations of subsequent x-rays, was sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1). 2006 Decision and Order at 9; Director's Exhibit 9A. The administrative law judge further relied, in part, upon Dr. Simpao's opinion to find that claimant established the existence of pneumoconiosis at Section 718.202(a)(4) and total disability due to pneumoconiosis at Section 718.204(b)(2)(iv), (c). 2006 Decision and Order at 11, 14-16. Employer argued in its appeal of the award of benefits that the administrative law judge erred in considering Dr. Simpao's report, as it was developed in conjunction with claimant's withdrawn modification request. The Board vacated the award of benefits and remanded the case to the administrative law judge with instructions

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

to determine whether Dr. Simpao's report was admissible in light of the evidentiary limitations set forth in Section 725.414. *W.M.*, BRB Nos. 07-0300 BLA and 07-0300 BLA-A, slip op. at 8.

On remand, the administrative law judge found that Dr. Simpao's report was admissible because it was designated by claimant on his evidence summary form and it did not exceed the evidentiary limitations at Section 725.414(a)(2)(i). 2008 Decision and Order at 6. Employer contends that the district director had no authority to procure Dr. Simpao's report because claimant's April 9, 2002 filing was treated as a request for modification, rather than an initial claim, and was later withdrawn. Employer further maintains, therefore, that Dr. Simpao's report could not be admitted into the record. In response, the Director contends that the district director acted properly in arranging for claimant to be examined by Dr. Simpao. According to the Director, because the March 4, 2002 order granting claimant's request to withdraw his 1996 claim was still in effect when claimant filed his second application for benefits on April 9, 2002, the district director properly treated this filing as an initial claim. The Director maintains that pursuant to the requirement that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation," 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406, the district director had the authority to obtain Dr. Simpao's report. The Director further asserts that the fact that claimant's April 9, 2002 claim became a withdrawn request for modification did not negate the district director's authority at that time to arrange an additional pulmonary evaluation to address any unresolved medical questions or to correct flaws in the pulmonary evaluation provided in conjunction with the denied claim. Director's Letter Brief at 3, *citing* 20 C.F.R. §725.407(a) (1999); *Cline v. Director, OWCP***,** 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1990).

After review of the record and consideration of the arguments presented by the parties on appeal, we hold that the administrative law judge properly admitted Dr. Simpao's report into the record. Claimant requested withdrawal of the application for benefits filed on March 22, 1996, while his appeal of Administrative Law Judge Rudolf L. Jansen's Decision and Order denying benefits was pending before the Board. Director's Exhibit 1-215. On January 11, 2002, the Board remanded the case to the district director for consideration of claimant's request. [*W.M.*] *v. Whitaker Coal Corp.*, BRB No. 01-0704 BLA (unpub. Order) (Jan. 11, 2002); Director's Exhibit 1-212. At that time, the accepted interpretation of 20 C.F.R. §725.306 allowed a claimant to withdraw a claim at any time prior to a denial of benefits becoming final.[4] Based upon this

[4] In *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002) (*en banc*), which was issued on August 30, 2002, the Board held that the provisions of 20 C.F.R. §725.306 are applicable only up until such time as a decision on the merits issued by an

understanding, the district director issued an order dated March 4, 2002, granting claimant's withdrawal request. Director's Exhibit 1-202. When claimant filed a second application for benefits on April 9, 2002, the district director, in accordance with Section 725.306(b), treated the 1996 claim as if it had never been filed and processed the April 9, 2002 application as an initial claim. Director's Exhibit 1-193. The district director then arranged to have claimant examined by Dr. Simpao on June 17, 2002, as required by Section 725.406. The district director's action was within his authority, therefore, as it was understood at the time Dr. Simpao's report was procured.

When considering claimant's subsequent claim, filed on April 17, 2003, the administrative law judge recognized that the evidence submitted with claimant's April 9, 2002 filing was not automatically admissible, but had to be designated by the parties in accordance with the evidentiary limitations set forth in Section 725.414. Notice of Hearing and Order dated October 7, 2005. On his evidence summary form, claimant designated Dr. Simpao's medical report as part of his affirmative case pursuant to Section 725.414(a)(2)(i). Employer designated the medical reports of Drs. Dahhan and Broudy as part of its affirmative case pursuant to Section 725.414(a)(3)(i) and designated a negative rereading of an x-ray by Dr. Wheeler in rebuttal of Dr. Simpao's positive x-ray interpretation pursuant to Section 725.414(a)(3)(ii).

The regulation at 20 C.F.R. §725.455(b) states that in deciding whether to admit evidence in an administrative proceeding, an administrative law judge is not bound by common law or statutory rules of evidence. Instead, a less stringent standard is applicable to evidence submitted in administrative hearings under the pertinent provisions of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(a), as incorporated into the Act (APA) by 30 U.S.C. §932(a) by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Subject to the constraints of 20 C.F.R. §§725.414 and 725.456, the administrative law judge is required to admit timely developed evidence. While relevancy is the critical issue in the admission of evidence under the APA, there is a preference for the admission of evidence, even where relevancy is questionable, with discretion given to the trier-of-fact to determine the weight to be assigned the evidence. *See Pavesi v. Director, OWCP*, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987). In light of these principles and the circumstances of this case, we hold that the

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adjudication officer (*e.g.*, the district director, an administrative law judge) becomes effective, *see* 20 C.F.R. §§725.419, 725.479, 725.502, at which time, there no longer exists an appropriate adjudication officer authorized to approve a withdrawal request under 20 C.F.R. §725.306. *Clevenger*, 22 BLR at 1-199-200; *accord Lester v. Peabody Coal Co.*, 22 BLR 1-183, 1-190-191 (2002) (*en banc*).

administrative law judge acted within the broad discretion granted to him in resolving procedural issues in determining that Dr. Simpao's report constituted relevant evidence that should be admitted into the record. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). Accordingly, we affirm the administrative law judge's admission of Dr. Simpao's report.

Employer also argues that the administrative law judge erred in according diminished weight to the opinions of Drs. Dahhan and Broudy on the ground that they relied, in part, upon inadmissible evidence to conclude that claimant does not have pneumoconiosis and is not totally disabled by the disease. Employer asserts that the evidence to which the administrative law judge referred was from claimant's 1996 claim, which was admissible pursuant to Section 725.309(d)(1).[5] Employer's contention has merit.

In Dr. Dahhan's report, submitted in conjunction with claimant's 2003 subsequent claim, he discussed his examination of claimant on March 27, 2003 and stated that he had reviewed the report of his 1999 examination of claimant, Dr. Baker's medical report concerning his May 7, 1996 examination of claimant, readings of chest x-rays dated March 22, 1993, October 13, 1998 and December 17, 1999, and pulmonary function studies and blood gas studies obtained on October 13, 1998. Director's Exhibit 10. The administrative law judge determined that the evidence identified by Dr. Dahhan was inadmissible and indicated "[w]hile not electing to exclude Dr. Dahhan's medical report in its entirety, I do assign it less weight because it was based in part on inadmissible evidence." 2008 Decision and Order at 8. The administrative law judge's finding indicates that he was unaware that Section 725.309(d)(1) provides for the admission of the evidence from claimant's 1996 claim in claimant's 2003 claim and, therefore, this evidence could properly form the basis of a physician's opinion. Because it is clear from Dr. Dahhan's recitation that the evidence that he relied on was from claimant's prior claim, we reverse the administrative law judge's determination that the opinion of Dr. Dahhan was entitled to diminished weight because it was based upon inadmissible evidence. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting); *aff'd on recon.*, 24 BLR 1-13 (2007) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting). In light of this disposition, we

[5] Under 20 C.F.R. §725.309(d)(1), "[a]ny evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim." 20 C.F.R. §725.309(d)(1).

remand this case to the administrative law judge for reconsideration of Dr. Dahhan's opinion pursuant to Section 718.202(a)(4). *See* discussion *infra* at 16.

In Dr. Broudy's opinion, he set forth the results of his examination of claimant on November 24, 2003, and noted that he had reviewed the evidence appended to the letter in which employer's counsel requested his opinion, but unlike Dr. Dahhan, he did not specifically identify this evidence. Director's Exhibit 13. The administrative law judge stated "[w]hile Dr. Broudy does not list each individual piece of medical evidence he relied on, as Dr. Dahhan had, he does state that most of the x-ray evidence he relied upon [was] negative readings from eight to ten years ago, *clearly evidence that was not properly in the record*." *Id*. (emphasis supplied). Because the administrative law judge's finding is inconsistent with Section 725.309(d)(1), we vacate his decision to accord diminished weight to Dr. Broudy's opinion. On remand, the administrative law judge must exercise his role as fact-finder and determine whether the evidence that Dr. Broudy reviewed was actually part of the record in the 1996 claim. If the administrative law judge concludes that the evidence that Dr. Broudy relied upon was not part of the record in the 1996 claim, he must then consider whether to exclude Dr. Broudy's opinion, redact the objectionable content, ask him to submit a new report, or factor in his reliance upon the inadmissible evidence when weighing his opinion on the merits of entitlement. *Harris*, 23 BLR at 1-108. However, as the administrative law judge noted when rendering his findings with respect to the opinions of Drs. Dahhan and Broudy, exclusion is a disfavored option. 2008 Decision and Order at 8, *citing Keener*, 23 BLR at 1-232.

The Subsequent Claim

We will now address employer's allegations of error regarding the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d) by establishing that he now suffers from pneumoconiosis. Upon reconsidering this issue on remand, the administrative law judge incorporated by reference his prior findings at Section 718.202(a). 2008 Decision and Order at 9. In his 2006 Decision and Order, the administrative law judge considered six readings of four x-rays at Section 718.202(a)(1). Dr. Simpao, who possesses no special radiological qualifications, interpreted the film obtained on June 17, 2002, as positive for pneumoconiosis with opacities in a profusion of 2/3. Director's Exhibit 9a. Dr. Simpao further noted that the film was Quality 1. *Id*. Dr. Wheeler, a Board-certified radiologist and B reader, indicated that this film was Quality 3 and was negative for pneumoconiosis. Director's Exhibit 11. Dr. Barrett, a Board-certified radiologist and B reader, reviewed the June 17, 2002 x-ray for quality purposes only and determined that it was Quality 1. Director's Exhibit 9a. Dr. Dahhan, a B reader, interpreted the x-ray dated March 27, 2003, as negative for pneumoconiosis. Director's Exhibit 10. With respect to the film obtained on June 30, 2003, Dr. Patel, a Board-certified radiologist and B reader, interpreted the film as positive for pneumoconiosis, with opacities in a profusion of 1/2,

while Dr. Scott, a Board-certified radiologist and B reader, read it as negative for the disease. Director's Exhibits 8, 12. Dr. Broudy, a B reader, interpreted the x-ray dated November 24, 2003, as positive for pneumoconiosis, with opacities in a profusion of 1/1. Director's Exhibit 13.

Regarding the x-ray obtained on June 17, 2002, the administrative law judge acknowledged that Dr. Wheeler's radiological qualifications were superior to Dr. Simpao's and stated:

> Normally, this difference in qualifications would be enough to more [than] totally offset Dr. Simpao's positive reading, but given the totality of the record, I will simply afford Dr. Simpao's reading slightly less weight. Dr. Wheeler has rated the film quality as grade 3, giving a reason as moderate underexposure and scapulae on lung periphery. Whereas, Dr. Simpao rated the same film as 1 and Dr. Barrett did a reread of the same film for quality only and rated the film as grade 1. Dr. Barrett has both B [and Board-certified radiologist] qualifications. A rating of grade 1 is more consistent and hence I will not weigh Dr. Wheeler's negative rebuttal as strongly as I may have otherwise.

2006 Decision and Order at 9. With respect to the newly submitted x-ray evidence as a whole, the administrative law judge indicated:

> I find the strong indication of [coal workers' pneumoconiosis] demonstrated by Dr. Simpao's 2/3 reading taken in conjunction with the two additional positive readings enough to meet [c]laimant's burden. It is acknowledged that Dr. Simpao lacks the B or [Board-certified radiologist] qualifications for an x-ray reader, but it is also acknowledged that Dr. Simpao's name was chosen from a list of doctors supplied by the [Department of Labor]. Therefore, taken in its entirety, there is ample x-ray evidence in the record for the [c]laimant to meet his burden of showing, by a preponderance of the evidence, that he has pneumoconiosis.

Id. (citations omitted). The administrative law judge relied upon this finding to determine that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d). *Id*.

Employer contends that the administrative law judge erred in relying upon the difference in quality readings to credit Dr. Simpao's positive reading of the June 17, 2002 x-ray over Dr. Wheeler's negative reading of the film. Employer also asserts that the administrative law judge erred in giving more weight to Dr. Simpao's x-ray reading because he was on a list of doctors authorized by the Department of Labor (DOL) to perform examinations. In addition, employer contends that it was irrational for the

administrative law judge to give less weight to Dr. Simpao's positive x-ray interpretation because he has no special radiological qualifications, but then find that his reading is entitled to more weight based on film quality and the high profusion of opacities that he detected. Employer maintains that the administrative law judge should have considered the significance of the fact that Dr. Simpao was the only physician of record to interpret an x-ray as 2/3. Employer further argues that the administrative law judge should have addressed Dr. Armstrong's statement that the June 17, 2002 x-ray "could be associated with occupational disease," as it supports a determination that the x-ray evidence of pneumoconiosis is uncertain. Employer's Brief at 17; Director's Exhibit 9.

Employer's contentions have merit, in part. With respect to the administrative law judge's decision to accord more weight to Dr. Simpao's positive interpretation of the June 17, 2002 film, as long as an x-ray has been deemed readable, variations in film quality do not provide a basis for resolving a conflict between interpretations of the film for the presence or absence of pneumoconiosis. *See Preston v. Director, OWCP*, 6 BLR 1-1229 (1984); *Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984). The administrative law judge's reliance upon the fact that DOL has authorized Dr. Simpao to perform pulmonary evaluations was also not proper, as there is no evidence supporting the administrative law judge's determination that DOL's designation of Dr. Simpao establishes that he had expertise comparable to a B reader or a Board-certified radiologist. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). In addition, because the administrative law judge did not explain his decision to accord less weight to Dr. Simpao's x-ray interpretation because he has no special radiological qualifications, but more weight because he read the film as 2/3, his finding does not comply with the 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), 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Accordingly, we vacate the administrative law judge's finding that the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and remand the case to the administrative law judge for reconsideration of this evidence. With respect to employer's contention that the administrative law judge should have discussed the significance of Dr. Simpao's 2/3 reading of the June 17, 2002 x-ray and Dr. Armstrong's statement regarding this film, which does not conform to the quality standards set forth in 20 C.F.R. §718.102, we note that the administrative law judge may address these factors on remand, but is not required to do so. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216 (1984).

In his 2006 Decision and Order, the administrative law judge considered the medical opinions of Drs. Rasmussen, Chaney, Simpao, Dahhan and Broudy under Section 718.202(a)(4) and determined that the opinions of Drs. Rasmussen and Simpao were sufficient to establish the existence of pneumoconiosis. 2006 Decision and Order at

11-13. The administrative law judge did not alter this finding in his 2008 Decision and Order, as the only changes that had occurred since his prior finding were that the amended regulations applied and he had determined that the opinions of Drs. Dahhan and Broudy were entitled to diminished weight because they relied, in part, upon inadmissible evidence. 2008 Decision and Order at 9.

As an initial matter, we note that we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(4), as we have reversed his determination that Dr. Dahhan's opinion was entitled to diminished weight because he relied upon inadmissible evidence, and we have vacated his similar finding with respect to Dr. Broudy's opinion. The administrative law judge must reconsider the opinions of Drs. Dahhan and Broudy on remand at Section 718.202(a)(4) in light of our holdings. In addition, because the physicians whose opinions the administrative law judge credited at Section 718.202(a)(4) based their diagnoses of pneumoconiosis on positive x-ray evidence, the administrative law judge must reconsider these opinions at Section 718.202(a)(4) in light of his finding on remand at Section 718.202(a)(1).

We must also address the arguments that employer has raised in the present appeal regarding the administrative law judge's weighing of the newly submitted medical opinions under Section 718.202(a)(4). Employer alleges that the administrative law judge erred in referring to the opinions of Drs. Dahhan and Broudy, that claimant is not totally disabled from performing his usual coal mine employment, when assessing their probative value on the issue of the existence of pneumoconiosis. This contention has merit.

When the issue at Section 718.202(a)(4) concerns the existence of legal pneumoconiosis, i.e., "any chronic lung disease or impairment and its sequelae arising out of coal mine employment," it is appropriate for an administrative law judge to assess the credibility of a physician's opinion regarding the presence of an impairment and its source. 20 C.F.R. §718.201. The degree of the impairment, however, is not relevant to this inquiry. In the present case, when weighing the medical opinion evidence at Section 718.202(a)(4), the administrative law judge determined that the opinions of Drs. Dahhan and Broudy, that claimant does not have pneumoconiosis or any other dust-related lung disease, were not well-reasoned and were internally inconsistent, in part, because both physicians indicated that claimant was able to perform his usual coal mine employment, a conclusion that the administrative law judge described as "implausible, based on what is otherwise consistently in the record as to [c]laimant's physical capacity and respiratory function[.]" 2006 Decision and Order at 12. As employer notes, the existence of pneumoconiosis and the presence of a totally disabling respiratory or pulmonary impairment are two separate elements of entitlement, which should be addressed separately. Thus, the administrative law judge must reconsider the opinions of Drs. Dahhan and Broudy on remand, identify with specificity all evidence relevant to his

weighing of their opinions, and set forth the rationale underlying his findings. *See Wojtowicz*, 12 BLR at 1-165.

Based upon our holdings vacating the administrative law judge's findings under Section 718.202(a)(1), (4), we also vacate the administrative law judge's determination that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d). The administrative law judge must reconsider this issue on remand in light of the instructions set forth above.

The Merits of Entitlement

The administrative law judge initially indicated that in his 2006 Decision and Order, he had "assigned heightened weight to the new evidence in the record." 2008 Decision and Order at 8. The administrative law judge then incorporated by reference his consideration of the merits of entitlement with respect to the issues of total disability pursuant to Section 718.204(b)(2) and total disability due to pneumoconiosis pursuant to Section 718.204(c). *Id*. at 9.

Regarding his finding that claimant established total disability at Section 718.204(b)(2)(iv), employer argues that the administrative law judge erred in determining that the opinions of Drs. Rasmussen, Simpao and Chaney were sufficient to establish total disability. The administrative law judge considered the exertional requirements of claimant's usual coal mine work and found:

> Claimant appeared credible and testified at the hearing that he last worked as a coal miner in April 1995. He described his job duties as operating a continuous miner. This consisted of having to move and hang cable regularly; the cable was often over fifty pounds in weight. Based on this record, it is determined that [c]laimant performed heavy labor.

2006 Decision and Order at 15. The administrative law judge then addressed the medical opinions of Drs. Rasmussen, Simpao, Chaney, Broudy and Dahhan.

Dr. Rasmussen examined claimant on June 30, 2003, and reported that claimant had last worked as a general inside laborer, which required "considerable heavy, and some very heavy, manual labor." Director's Exhibit 8. Dr. Rasmussen characterized the results of claimant's pulmonary function study and blood gas study, both of which were nonqualifying, as "normal" and stated that claimant "is not able to perform very heavy manual labor" due to his "at least minimal loss of lung function." *Id*. Dr. Rasmussen further stated: "The patient had an early anaerobic threshold indicating that he is not able to perform continued manual labor beyond very light exercise. The cause of his early anaerobic threshold is not clearly established." *Id*.

On Form CM-988, Dr. Simpao indicated that claimant last worked as a continuous miner operator. Director's Exhibit 9a. Dr. Simpao noted that claimant's pulmonary function study, which was nonqualifying, produced normal vital capacity and flow volume curves, but that a reduction in the FEV1/FVC ratio and the midflow volumes supported a diagnosis of small airway disease. *Id*. Dr. Simpao stated that claimant's blood gas study, which did not produce qualifying values, revealed a ventilatory perfusion mismatch. *Id*. Dr. Simpao concluded that claimant had a "moderate" impairment. *Id*. On an addendum to Form CM-988, Dr. Simpao checked the "NO" box in response to a question concerning whether claimant had the respiratory capacity to perform the work of a miner. *Id*. In the space provided for his rationale, Dr. Simpao wrote: "Objective findings on the chest x-ray, arterial blood gas, EKG and pulmonary function test[s] along with physical findings and symptomatology." *Id*.

Dr. Chaney, who became claimant's treating physician in 1997, responded to a questionnaire supplied by claimant's counsel and checked boxes indicating that claimant has a pulmonary impairment and does not retain the respiratory capacity to perform coal mine work. Director's Exhibit 1-64. The record also contains treatment notes from Dr. Chaney, which cover the period from January 1997 to March 2002. Director's Exhibit 1-74-143.

Dr. Dahhan examined claimant on March 27, 2003 and reported that "all of his mining work was underground operating a continuous miner." Director's Exhibit 10. Based upon his examination of claimant and a review of medical records from the prior claim, Dr. Dahhan indicated that the pulmonary function studies demonstrated "normal respiratory mechanics when [claimant] produced valid studies." Director's Exhibit 10. Dr. Dahhan also stated that claimant's blood gas studies were normal. *Id*. Dr. Dahhan indicated that claimant declined to perform an exercise study during the examination because "he was not feeling very well and he had heart problems." *Id*. Based upon the summary of the objective studies that he reviewed, Dr. Dahhan concluded that claimant retained the respiratory capacity to perform his previous coal mine job. *Id*.

Dr. Broudy examined claimant on November 24, 2003 and reviewed unspecified medical records. Director's Exhibit 13; Employer's Exhibit 1. Dr. Broudy obtained a pulmonary function study and a blood gas study, both of which produced nonqualifying values. *Id*. Dr. Broudy indicated that claimant told him that he worked in the mines as an "underground repairman" and was sometimes required to lift as much as sixty pounds. *Id*. Dr. Broudy reported that the pulmonary function study showed mild obstruction, while the blood gas study was normal, except for borderline elevation of carboxyhemoglobin, which was consistent with continued exposure to smoke. *Id*. Dr. Broudy stated "I do believe that [claimant] retains the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor." *Id*.

The administrative law judge considered the medical opinions pursuant to Section 718.204(b)(2)(iv) and determined that the opinions of Drs. Rasmussen and Simpao were well-reasoned, well-documented, and internally consistent. 2006 Decision and Order at 10, 11. With respect to Dr. Chaney's opinion, when summarizing the evidence relevant to the existence of pneumoconiosis, the administrative law judge acknowledged Dr. Chaney's status as claimant's treating physician and his determination that claimant is totally disabled. *Id*. at 11. The administrative law judge declined to accord Dr. Chaney's opinion any additional weight, however, as Dr. Chaney's qualifications and the documentation underlying his diagnosis of pneumoconiosis were not in the record. *Id*. at 11. As previously indicated, the administrative law judge found that the opinions of Drs. Dahhan and Broudy, that claimant is not totally disabled, were not well-documented, well-reasoned or internally consistent. *Id*. at 12 The administrative law judge determined that the opinions of Drs. Rasmussen and Simpao were entitled to more weight than the opinions of Drs. Broudy and Dahhan and noted that Dr. Chaney, claimant's treating physician, had found claimant to be totally disabled. *Id*. The administrative law judge concluded that "claimant has proven by a preponderance of the medical opinion evidence that he is totally disabled." *Id*.

Employer contends that the administrative law judge erred in failing to adequately explain why the opinions of Drs. Rasmussen and Simpao were documented and reasoned on the issue of total disability. Employer also alleges that the administrative law judge erred in discrediting the opinions of Drs. Dahhan and Broudy and in finding that claimant's usual coal mine work required heavy labor. Lastly, employer maintains that the administrative law judge erred in determining that Dr. Chaney's opinion supported a finding of total disability without addressing the admissibility of his opinion and whether the physician provided a reasoned and documented diagnosis of a totally disabling respiratory impairment.

These allegations of error have merit, in part. With respect to the exertional requirements of claimant's usual coal mine job as a continuous miner operator, the determination of the nature of a claimant's usual coal mine work and its physical requirements is committed to the discretion of the administrative law judge, in his role as fact-finder. *See Heavilin v. Consolidation Coal Co.*, 6 BLR 1-1209, 1-1213 (1984). In this case, the administrative law judge acted within his discretion in determining that claimant's testimony established that he was required to lift fifty pound cables on a regular basis and that such activity qualified as heavy labor. *Id*. at 1-1213; 2006 Decision and Order at 15. Thus, we affirm the administrative law judge's finding, as it is supported by substantial evidence.

Regarding the administrative law judge's decision to credit Dr. Simpao's diagnosis of a totally disabling respiratory impairment, we hold that the administrative law judge's finding was rational and supported by substantial evidence. The

administrative law judge properly determined that Dr. Simpao's diagnosis was reasoned and documented, as Dr. Simpao identified the reduced FEV1/FVC ratio and midflow volumes on claimant's pulmonary function study and the ventilatory perfusion mismatch on claimant's blood gas study in support of his conclusion. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); 2006 Decision and Order at 11; Director's Exhibit 9a.

Employer is correct, however, in arguing that the administrative law judge did not set forth the rationale for his determination that Dr. Rasmussen's diagnosis of a totally disabling respiratory impairment is documented and reasoned. This rationale cannot be discerned from Dr. Rasmussen's opinion, in light of the absence of an explanation of his diagnosis and his characterization of claimant's objective studies as "normal" and claimant's loss of lung function as "at least minimal." Director's Exhibit 8. Although it would have been improper for the administrative law judge to discredit Dr. Rasmussen's diagnosis of total disability solely because it was based upon nonqualifying objective studies, *see Smith v. Director, OWCP*, 8 BLR 1-258 (1985); *Estep v. Director, OWCP*, 7 BLR 1-904 (1985), the administrative law judge did not explain his determination that Dr. Rasmussen's opinion was reasoned and documented, *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sykes v. Itmann Coal Co.*, 7 BLR 1-820 (1985).

Moreover, the administrative law judge did not address the ambiguity present in Dr. Rasmussen's opinion as evidenced by his statement that "the cause of [claimant's] early anaerobic threshold is not clearly established." Director's Exhibit 8. The administrative law judge did not consider whether, in light of this statement, Dr. Rasmussen clearly diagnosed a respiratory or pulmonary impairment, as opposed to a non-respiratory or non-pulmonary condition that affected the results of the exercise stress test that Dr. Rasmussen administered.[6] Because the presence of a non-respiratory or non-pulmonary condition is not relevant to establishing total disability under Section 718.204(b)(2)(iv), we vacate the administrative law judge's determination that Dr. Rasmussen's opinion on the issue of total disability is reasoned and documented. 20 C.F.R. §718.204(b)(2); *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Beatty v. Danri Corp.*, 16 BLR 1-11 (1991), *aff'd*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995). The administrative law judge must reconsider Dr.

[6] Dr. Rasmussen noted that claimant had experienced a heart attack in 2000 and that the EKG he obtained during his examination of claimant "revealed sinus bradycardia, poor R-wave progression with low amplitude R-1, possibly consistent with prior myocardial infarction or right ventricular hypertrophy and non-specific ST-T wave changes." Director's Exhibit 8.

Rasmussen's opinion pursuant to Section 718.204(b)(2)(iv) if he reaches the issue of total disability on remand.

We also must vacate the administrative law judge's determination that Dr. Chaney's opinion supported a finding of total disability at Section 718.204(b)(2)(iv). Employer is correct in asserting that because claimant did not designate Dr. Chaney's opinion as affirmative or rebuttal evidence on his evidence summary form, it is not clear that Dr. Chaney's report constitutes admissible evidence relevant to Section 718.204(b)(2)(iv). In addition, the administrative law judge did not provide an adequate explanation for his finding that Dr. Chaney's diagnosis of a totally disabling respiratory impairment, which consisted of him checking a box on a form indicating that claimant does not have the respiratory capacity to perform his usual coal mine work or comparable work, was reasoned and documented. *Trumbo*, 17 BLR at 1-88; *Sykes*, 7 BLR at 1-824. Furthermore, the administrative law judge did not resolve the conflict between his crediting of Dr. Chaney's opinion at Section 718.204(b)(2)(iv) and his determination, at Section 718.202(a)(4), that Dr. Chaney's diagnosis of pneumoconiosis was entitled to diminished weight because his qualifications and the documentation underlying his opinion were not of record. 2006 Decision and Order at 11; *see Wojtowicz*, 12 BLR 1-165. We cannot affirm, therefore, the administrative law judge's crediting of Dr. Chaney's opinion pursuant to Section 718.204(b)(2)(iv). On remand, if the administrative law judge reaches the issue of total disability, he must first consider whether Dr. Chaney's report and treatment records are admissible under Section 725.414(a)(2). If these documents are admissible, the administrative law judge must reconsider whether Dr. Chaney's diagnosis of a totally disabling respiratory impairment is reasoned and documented under Section 718.204(b)(2)(iv).

Regarding the administrative law judge's discrediting of the opinions of Drs. Dahhan and Broudy, employer is correct in arguing that the administrative law judge did not provide an adequate rationale for his determination that these opinions were not well-reasoned, well-documented, or internally consistent. With respect to Dr. Dahhan's opinion, that claimant is capable of performing his usual coal mine employment, the administrative law judge stated that Dr. Dahhan noted "that [c]laimant did not have the physical wherewithal to perform the mild exercise associated with an arterial blood gas study, and suffers from dyspnea on the exertion of climbing a half-flight of stairs[.]" 2006 Decision and Order at 12. The administrative law judge further indicated, "Dr. Dahhan . . . diagnosed the [c]laimant with [chronic obstructive pulmonary disease], chronic bronchitis and emphysema." *Id*. The administrative law judge concluded "[i]t seems implausible, based on what is otherwise consistently in the record as to [c]laimant's physical capacity and respiratory function, that he could regularly lift over fifty pounds and operate equipment for an eight-hour day in an underground coal mine." The administrative law judge reiterated this conclusion upon considering Dr. Broudy's opinion. *Id*.

Contrary to the administrative law judge's finding, however, Dr. Dahhan did not determine that claimant was not able perform the exercise blood gas study or that claimant experienced dyspnea when climbing stairs. Rather, Dr. Dahhan noted that claimant declined to perform the exercise study because he was not feeling well and had a heart condition and that claimant "claim[ed] dyspnea on exertion[,] such as 1/2 flight of stairs." Director's Exhibit 10. Dr. Dahhan also did not diagnose chronic obstructive pulmonary disease, chronic bronchitis, or emphysema. He merely indicated that claimant's medical records included diagnoses of these conditions. *Id.* With respect to the administrative law judge's conclusion that the opinions of both Drs. Dahhan and Broudy were implausible, the administrative law judge did not identify the evidence that is "consistently in the record as to [c]laimant's physical capacity and respiratory function." 2006 Decision and Order at 12. Because the administrative law judge did not accurately characterize Dr. Dahhan's opinion and did not set forth the evidence in support of his finding that the opinions of Drs. Dahhan and Broudy were implausible, we must vacate his finding that these opinions are entitled to diminished weight. *See Abshire v. D & L Coal Co.*, 22 BLR 1-202, 1-214-15 (2002); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). The administrative law judge must reconsider these opinions on remand if he reaches the issue of total disability.

We also vacate the administrative law judge's finding that claimant established total disability due to pneumoconiosis under Section 718.204(c), as the administrative law judge relied upon findings that we have vacated at Sections 718.202(a)(1), (4) and 718.204(b)(2)(iv). If the administrative law judge reaches this element of entitlement on remand, he must reconsider whether claimant has established that pneumoconiosis is a contributing cause of his total disability pursuant to Section 718.204(c). 20 C.F.R. §718.204(c); *see Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).

Conclusion

In summary, we affirm the administrative law judge's admission of Dr. Simpao's medical report dated June 17, 2002, but reverse his decision to accord diminished weight to Dr. Dahhan's opinion on the ground that he relied upon inadmissible evidence. We vacate the administrative law judge's finding that Dr. Broudy's opinion was entitled to diminished weight because he relied upon inadmissible evidence. On remand, the administrative law judge must determine whether the evidence that Dr. Broudy relied upon was not part of the record in the prior claim. In addition, the administrative law judge must determine whether Dr. Chaney's report and treatment records are admissible under Section 725.414(a)(2).

With respect to the administrative law judge's consideration of the newly submitted evidence, we vacate the administrative law judge's findings that the existence

of pneumoconiosis was established pursuant to Sections 718.202(a)(1), (4). We also vacate, therefore, the administrative law judge's determination that claimant established a change in an applicable condition of entitlement under Section 725.309(d). Regarding the administrative law judge's consideration of the merits of entitlement, we vacate his findings at Sections 718.204(b)(2)(iv) and (c).

On remand, after resolving the evidentiary issues, the administrative law judge must reconsider the relevant x-ray and medical opinion evidence to determine whether it is sufficient to establish one of the elements of entitlement previously adjudicated against claimant pursuant to Section 725.309(d). If the administrative law judge determines on remand that claimant has demonstrated the required change in condition, he must address the merits of entitlement based upon a consideration of all of the evidence of record.[7] *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). In rendering his findings on remand, the administrative law judge must comply with the APA, which requires him to identify the evidence that he is weighing and to set forth his findings in detail, including the underlying rationale, with respect to all issues of fact or law. *See Wojtowicz*, 12 BLR at 1-165.

[7] Employer has alleged that the administrative law judge erred in neglecting to weigh the evidence submitted with the prior claim when considering the merits of entitlement. As indicated previously, the administrative law judge stated that he determined in his 2006 Decision and Order that the newer evidence was entitled to "heightened weight." 2008 Decision and Order at 8. Although an administrative law judge may permissibly find that the newer evidence is more probative, *see Parsons v. Wolf Creel Collieries*, 23 BLR 1-29 (2004); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004), in accordance with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(a), as incorporated into the Act by 30 U.S.C. §932(a) by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), the administrative law judge should provide a rationale for this determination. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1982). In addition, the administrative law judge should address whether there is any merit in employer's assertion that when viewed as a whole, the evidence of record establishes a consistent split between x-ray readings and medical opinions that support a finding of entitlement and those that do not.

Accordingly, the administrative law judge's Decision and Order on Remand is reversed in part, affirmed in part and vacated in part and this case is remanded to the administrative law judge for further consideration consistent with this opinion.[8]

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[8] The attorney fee petition that claimant's counsel filed on June 2, 2008, which contained his request of a fee for services performed before the Board in conjunction with the prior appeal, remains pending. We will not address the fee petition at this stage in the proceedings, as the extent of counsel's success in prosecuting the claim has yet to be determined. 20 C.F.R. §802.203; *see Sosbee v. Director, OWCP*, 17 BLR 1-136 (1993) (*en banc*) (Brown, J., concurring); *Markovich v. Bethlehem Steel Corp.*, 11 BLR 1-105 (1987).