BRB No. 08-0666 BLA

C.G.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	DATE ISSUED: 06/18/2009
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

W. Barry Lewis (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (03-BLA-0118) of Administrative Law Judge Thomas F. Phalen, Jr. awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] This case is before the Board for

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

the second time. Pursuant to the last appeal filed by employer,[2] the Board vacated, in part, Administrative Law Judge Paul H. Teitler's October 9, 1997 Decision and Order – Awarding Benefits, affirmed, in part, Administrative Law Judge Daniel J. Roketenetz's July 18, 2001 Decision and Order – Award of Benefits, vacated Judge Roketenetz's August 10, 2005 Decision and Order – Award of Benefits, and remanded the case for further consideration of the evidence. [*C.G.*] *v. Mountain Clay, Inc.*, BRB Nos. 05-0993 BLA and 01-0875 BLA (Nov. 29, 2006)(unpub.).[3] Regarding Judge Teitler's October 9, 1997 Decision and Order awarding benefits, the Board agreed with employer that Judge Teitler did not adequately explain his reasons for finding the opinions of Drs. Baker, Vaezy, Vuskovich, and Wright, that claimant has clinical pneumoconiosis, more persuasive than the contrary opinions of Drs. Dahhan and Fino. Consequently, the Board vacated Judge Teitler's finding that the medical opinion evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000).[4] With respect to Judge Roketenetz's 2001 Decision and Order, the Board affirmed Judge Roketenetz's finding that Liberty Mutual Insurance Company was the responsible carrier. However,

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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. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The full procedural history of this case is set forth in the Board's decision in [*C.G.*] *v. Mountain Clay, Inc.*, BRB Nos. 05-0993 BLA and 01-0875 BLA (Nov. 29, 2006) (unpub.).

[3] By Order dated September 29, 1995, the Board acknowledged receipt of employer's appeal in BRB 05-0993 BLA, which was for Administrative Law Judge Daniel J. Roketenetz's August 10, 2005 Decision and Order – Award of Benefits. [*C.G.*] *v. Mountain Clay, Inc.*, BRB Nos. 05-0993 BLA and 01-0875 BLA (Sept. 29, 2005)(unpub. Order). The Board also granted employer's request for reinstatement of its appeal in BRB No. 01-0875 BLA, which was for both Administrative Law Judge Paul H. Teitler's October 9, 1997 Decision and Order – Awarding Benefits and Judge Roketenetz's July 18, 2001 Decision and Order – Award of Benefits. *Id.* The Board therefore consolidated employer's appeal in BRB No. 05-0993 BLA with its reinstated appeal in BRB No. 01-0875 BLA for decision only. *Id.*

[4] In his October 9, 1997 Decision and Order, Judge Teitler found that "the physician opinion evidence establishes that the [c]laimant has pneumoconiosis, notwithstanding the chest x-ray evidence." 1997 Decision and Order at 9. Judge Teitler therefore found that because "[c]laimant has established that he now has pneumoconiosis, one of the elements of entitlement previously adjudicated against him,…he has proven a material change in condition." *Id.*; *see* 20 C.F.R. §725.309 (2000).

with regard to Judge Roketenetz's 2005 Decision and Order awarding benefits, the Board vacated Judge Roketenetz's findings that the new x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) and remanded the case for further consideration of the evidence.[5] The Board also vacated Judge Roketenetz's finding that the evidence of record established that claimant's total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c), given that Judge Roketenetz's x-ray evidence analysis on remand could affect his weighing of the medical opinion evidence on the issue of disability causation, if reached.

On remand, Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), credited claimant with twenty years of coal mine employment based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R Part 718. The administrative law judge found that the new x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[6] Consequently, because the administrative law judge found that the new evidence established the existence of pneumoconiosis, the element of entitlement previously adjudicated against claimant, the administrative law judge further found that a

[5] The Board noted that, on employer's request for modification of Judge Teitler's award of benefits, Judge Roketenetz never considered the new medical opinion evidence at 20 C.F.R. §718.202(a)(4), which was the actual basis upon which Judge Teitler found the existence of clinical pneumoconiosis established. [*C.G.*], BRB Nos. 05-0993 BLA and 01-0875 BLA, slip op. at 8. The Board indicated that Judge Roketenetz considered the new x-ray evidence at 20 C.F.R. §718.202(a)(1), rather than the new medical opinion evidence at 20 C.F.R. §718.202(a)(4), because he was under the mistaken impression that Judge Teitler found that the new x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) (2000).

[6] "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

"Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

material change in conditions was established pursuant to 20 C.F.R. §725.309 (2000).[7] Turning to the merits, the administrative law judge found that the evidence of record established the existence of both clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203. The administrative law judge also found that the evidence of record established total disability pursuant to 20 C.F.R. §718.204(b) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the new x-ray evidence establishes the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) and, thereby, a material change in conditions at 20 C.F.R. §725.309 (2000). Employer also challenges the administrative law judge's finding that the evidence of record establishes the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer further challenges the administrative law judge's finding that the evidence of record establishes total disability at 20 C.F.R. §718.204(b)(2)(i), (iv). Lastly, employer challenges the administrative law judge's finding that the evidence of record establishes total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.[8]

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.[9] 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).

[7] The revisions to the regulations at 20 C.F.R. §§725.309 and 725.310 apply only to claims filed after January 19, 2001, *see* 20 C.F.R. §725.2, and thus do not apply to this claim.

[8] Because the administrative law judge's findings that the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[9] The record indicates that claimant was employed in the coal mining industry in Kentucky. Director's Exhibits 2, 27. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

20 C.F.R. §718.202(a)(1)

In finding that the new x-ray evidence established clinical pneumoconiosis, the administrative law judge considered the B reader and Board-certified radiologist status of the readers of the x-rays.[10] 20 C.F.R. §718.202(a)(1). In so doing, the administrative law judge gave greater weight to the x-ray readings of the physicians who were dually qualified as B readers and Board-certified radiologists than to the readings of the physicians who were only B readers. The administrative law judge found that the November 6, 1993 x-ray was positive for pneumoconiosis because there were no negative readings of this x-ray. 2008 Decision and Order on Remand at 6. The administrative law judge credited Dr. Wiot's finding that the January 24, 1995 x-ray was unreadable based on Dr. Wiot's "superb" credentials and expertise in the ILO classification system. *Id*. The administrative law judge found that the December 3, 1996 x-ray could neither prove nor disprove the existence of pneumoconiosis because equally qualified physicians read this x-ray as positive and negative for pneumoconiosis. *Id*. Further, the administrative

[10] The administrative law judge stated that "[t]he newly submitted x-ray evidence includes fifteen readings of five new x-rays [dated November 6, 1993, January 24, 1995, December 3, 1996, April 30, 1997, and January 10, 2004]." 2008 Decision and Order on Remand at 6. Dr. Wright, who is neither a B reader nor a Board-certified radiologist, read the November 6, 1993 x-ray as positive for pneumoconiosis. Director's Exhibit 27. Dr. Vaezy, who is a B reader, read the January 24, 1995 x-ray as positive for pneumoconiosis, Director's Exhibit 11, while Dr. Fino, who is a B reader, and Drs. Barrett and Sargent, who are B readers and Board-certified radiologists, read this x-ray as negative for pneumoconiosis, Director's Exhibits 9, 10, 26. In addition, Drs. Shipley and Spitz, who are B readers, and Dr. Wiot, who is a B reader and a Board-certified radiologist, found that the January 24, 1995 x-ray was unreadable. Director's Exhibit 66. Further, while Dr. Vuskovich, who is a B reader, read the December 3, 1996 x-ray as positive for pneumoconiosis, Dr. Dahhan, who is also a B reader, read this x-ray as negative for pneumoconiosis. *Id*. While Dr. Baker, who is a B reader, read the April 30, 1997 x-ray as positive for pneumoconiosis, Director's Exhibit 34, Dr. Jarboe, who is also a B reader, read this x-ray as negative for pneumoconiosis, Employer's Exhibit 1. Additionally, Drs. Shipley and Spitz, who are B readers, found that this x-ray was unreadable. Director's Exhibit 66. Lastly, Dr. Baker, who is a B reader, read the January 10, 2004 x-ray as positive for pneumoconiosis. Claimant's Exhibit 1.

law judge found that the April 30, 1997 x-ray could neither prove nor disprove the existence of pneumoconiosis because equally qualified physicians found that this x-ray was positive for pneumoconiosis, negative for pneumoconiosis, and unreadable. *Id*. Lastly, the administrative law judge found that the January 10, 2004 x-ray was positive for pneumoconiosis because there were no negative readings of this x-ray. *Id*. at 7. Hence, based on his finding of "two positive [films], one unreadable film, and two [films] in equipoise," *id*., the administrative law judge found that the preponderance of the new x-ray evidence established the existence of clinical pneumoconiosis at Section 718.202(a)(1) and thereby established "a material change in condition of the [c]laimant since [the] prior denial of benefits." *Id*.

Employer argues that the administrative law judge erred in considering Dr. Wright's positive reading of the November 6, 1993 x-ray since that evidence had been submitted in support of the prior claim. Contrary to employer's assertion, however, the November 6, 1993 x-ray was not part of the evidence considered when the district director denied benefits on the prior claim on September 1, 1993.[11] The administrative law judge stated that "[s]ubsequent to [Administrative Law Judge Charles W. Campbell's] decision, the [c]laimant introduced a positive x-ray reading of the November 6, 1993 film by Dr. Wright, in connection with his request for modification of the *initial claim*." *Id*. at 9 (emphasis added). A review of the record indicates that Dr. Wright's positive reading of the November 6, 1993 x-ray was filed on November 24, 1993, after the district director's September 1, 1993 denial of claimant's July 15, 1993 request for modification.[12] Director's Exhibit 27 at 230. Consequently, we reject employer's

[11] The pertinent procedural history is as follows: Claimant filed his first claim on January 18, 1974. Director's Exhibit 27. On July 30, 1990, Administrative Law Judge Charles W. Campbell issued a Decision and Order denying benefits, based on claimant's failure to establish the existence of pneumoconiosis. *Id*. The Board affirmed Judge Campbell's denial of benefits. [*C.G.*] *v. Mountain Clay, Inc*., BRB No. 90-2112 BLA (Jan. 13, 1993)(unpub.). Claimant filed his second claim on July 15, 1993, which the Department of Labor construed as a request for modification. Director's Exhibit 27. The district director denied claimant's request for modification on September 1, 1993. Director's Exhibit 27 at 234. The district director found that there was "no major error" and that claimant "submitted no additional evidence" in support of a basis for modification. *Id*. Claimant filed his most recent claim on January 9, 1995. Director's Exhibit 1. The administrative law judge considered claimant's 1995 claim as a duplicate claim and he applied the material change in conditions standard at 20 C.F.R. §725.309 (2000) to the new medical evidence. 2008 Decision and Order on Remand at 4-7.

[12] The administrative law judge stated that "[c]laimant's initial claim was filed in 1974, and the denial in that claim did not become final until 1993." 2008 Decision and Order on Remand at 7 n.7.

assertion that the administrative law judge erred in considering Dr. Wright's positive reading of the November 6, 1993 x-ray on the ground that this x-ray was part of the evidence submitted in the prior denied claim. As the x-ray of November 24, 1993 was filed after the district director's September 1, 1993 denial of claimant's July 15, 1993 request for modification, it constituted a new request for modification at 20 C.F.R. §725.310 (2000), and claimant's original 1974 claim remained viable. *Garcia v. Director, OWCP*, 12 BLR 1-24 (1988). Consequently, the administrative law judge should have considered whether this new evidence, submitted since the September 1, 1993 denial of benefits, established a basis for modification, *i.e.*, a change in conditions or a mistake in a determination of fact at Section 725.310 (2000), instead of treating the subsequent 1995 claim as a duplicate claim and applying the material change in conditions standard at Section 725.309 (2000). Nonetheless, we hold that the administrative law judge's error is harmless because, as discussed, *infra*, the administrative law judge properly found that claimant established pneumoconiosis at 20 C.F.R. §718.202(a) based on the new evidence submitted after the district director's September 1, 1993 denial of benefits on claimant's July 15, 1993 request for modification. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer also argues that the administrative law judge erred in according dispositive weight to Dr. Wiot's finding that the January 24, 1995 x-ray was unreadable.[13] Dr. Vaezy, who is a B reader, read the January 24, 1995 x-ray as positive for pneumoconiosis, while Dr. Fino, who is also a B reader, read the x-ray as negative for pneumoconiosis. Drs. Barrett and Sargent, who are dually qualified as B readers and Board-certified radiologists, read the January 24, 1995 x-ray as negative for pneumoconiosis while Drs. Shipley, Spitz, and Wiot, who are also dually qualified, found that the x-ray was unreadable. In addition to noting that Dr. Wiot is a dually qualified radiologist, the administrative law judge also considered Dr. Wiot's expertise in the ILO classification system, by stating:

> Although the CV for Dr. Wiot appears to be missing from the record, Dr. Dahhan testified at the deposition on October 31, 2000, that Dr. Wiot is one of the "C-Readers," and that C-Readers were those "who designed and basically structured the entire radiological classification of coal workers' pneumoconiosis and other occupational lung disease and set up the ILO system." Dr. Dahhan continued by explaining that Dr. Wiot was the "granddaddy of it all, and he is still very active in teaching other physicians how to read x-rays for pneumoconiosis and [is] still very involved with the

[13] Dr. Wiot found the x-ray unreadable because it was greatly overexposed. Director's Exhibit 66.

> radiological diagnosis of coal dust induced lung disease and other occupational lung problems." (Dahhan Dep. 15).

2008 Decision and Order on Remand at 6 n.6. The administrative law judge gave the greatest weight to Dr. Wiot's finding that the January 24, 1995 x-ray was unreadable "[b]ecause [of] Dr. Wiot's superb credentials and expertise in the ILO classification system and the reading of chest x-rays for pneumoconiosis generally." *Id*. at 6; Director's Exhibit 112 (Dr. Dahhan's October 31, 2000 Deposition at 15). Contrary to employer's assertion, the administrative law judge acted within his discretion in considering that Dr. Wiot assisted in the development of the ILO classification system. *See generally Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006)(*en banc*) (McGranery and Hall, JJ., concurring and dissenting) (holding administrative law judge may rely on a reader's academic qualifications in radiology and his involvement in the B reader program as bases for according greater weight to the readings rendered by that reader); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Ally v. Riley Hall Coal Co*., 6 BLR 1-376 (1983)(recognizing administrative law judge may find that C readers are better qualified than B readers). Consequently, we reject employer's assertion that the administrative law judge erred in according dispositive weight to Dr. Wiot's finding that the January 24, 1995 x-ray was unreadable.

Employer additionally argues that the administrative law judge erred in finding that the readings of the December 3, 2003 x-ray were in equipoise. While Dr. Vuskovich, who is a B reader, read the December 3, 2003 x-ray as positive for pneumoconiosis, Dr. Fino, who is also a B reader, read the x-ray as negative for pneumoconiosis. In *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), the United States Supreme Court held that when evidence is equally balanced, claimant must lose. In the instant case, the administrative law judge found that the readings of the December 3, 2003 x-ray were in equipoise "[b]ecause equally qualified physicians found this x-ray to be negative and positive." 2008 Decision and Order on Remand at 6. Because the administrative law judge properly found that the readings of the December 3, 2003 x-ray were in equipoise, we reject employer's assertion that that x-ray should have been found as negative for pneumoconiosis. *Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12.

Employer further argues that the administrative law judge erred in finding that the readings of the April 30, 1997 x-ray were in equipoise. While Dr. Baker, who is a B reader, read the April 30, 1997 x-ray as positive for pneumoconiosis, Dr. Jarboe, who is also a B reader, read the same x-ray as negative for pneumoconiosis. Further, Drs. Shipley and Spitz, who are B readers, found that the x-ray was unreadable. After considering the conflicting interpretations of the April 30, 1997 x-ray, the administrative law judge stated that "the readings of this x-ray are in equipoise, and that it neither

establishes nor disproves the existence of pneumoconiosis." 2008 Decision and Order on Remand at 6-7. Because the administrative law judge properly found that the readings of the April 30, 1997 x-ray were in equipoise, we reject employer's assertion that this x-ray was negative for pneumoconiosis. *Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12.

In addition, employer argues that the administrative law judge erred in finding that the January 10, 2004 x-ray was positive for pneumoconiosis. Employer maintains that the administrative law judge erred in excluding Dr. Dahhan's negative reading of the January 10, 2004 x-ray from the record. The record contains Dr. Baker's positive reading of this x-ray, which the administrative law judge credited. Claimant's Exhibit 1. The administrative law judge found that there were no negative readings of this x-ray. 2008 Decision and Order on Remand at 7. The record shows, however, that employer filed a motion for leave to submit Dr. Dahhan's April 11, 2005, April 25, 2005, and May 2, 2005 reports into the record, contending that it had established good cause for the untimely submission of this evidence. By Order dated June 24, 2005, Judge Roketenetz denied employer's motion to submit Dr. Dahhan's medical report into the record because it was untimely. Employer filed a motion for reconsideration, arguing that there was good cause for the untimely submission of this evidence. By Order dated July 13, 2005, Judge Roketenetz denied employer's request for reconsideration.

In his August 10, 2005 Decision and Order, Judge Roketenetz noted that, pursuant to his Orders dated June 24, 2005 and July 13, 2005, Dr. Dahhan's report was previously struck from the record as untimely. 2005 Decision and Order at 9 n.4. In response to employer's appeal of Judge Teitler's 1997 Decision and Order and Judge Roketenetz's 2001 and 2005 Decisions and Orders, the Board held that Judge Roketenetz acted within his discretion in determining that employer had failed to satisfy its burden of establishing good cause for the untimely submission of Dr. Dahhan's report, since employer did not file a motion for an extension of time to file submissions within the requisite deadline and Judge Roketenetz had already granted two previous continuances. [*C.G.*], BRB Nos. 05-0993 BLA and 01-0875 BLA, slip op. at 7. The Board's previous disposition of this issue constitutes the law of the case. Employer does not argue that an exception to the law of the case doctrine applies in this case. Thus, because the law of the case doctrine is applicable and no exception has been demonstrated, we will not revisit the issue of whether the administrative law judge abused his discretion in excluding Dr. Dahhan's negative reading of the January 10, 2004 x-ray. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Accordingly, we reject employer's assertion that the administrative law judge erred in finding that the January 10, 2004 x-ray was positive for pneumoconiosis.

In conclusion, therefore, we affirm the administrative law judge's finding that the new x-ray evidence establishes clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), as it

is supported by substantial evidence. We hold, as a matter of law, that the new evidence is sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000), and therefore a basis for modifying the prior denial of benefits. Moreover, because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence of record establishes clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) on the merits.[14]

Because the administrative law judge found that the x-ray evidence established clinical pneumoconiosis at Section 718.202(a)(1) on the merits, we need not address employer's challenge to the administrative law judge's finding that the medical opinion evidence established legal pneumoconiosis at Section 718.202(a)(4). *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985) (recognizing that Section 718.202(a) provides alternative methods by which a claimant may establish the existence of pneumoconiosis). However, because the administrative law judge's finding of disability causation at Section 718.204(c) was based on his finding that the medical opinion evidence established both clinical and legal pneumoconiosis at Section 718.202(a)(4),[15]

[14] At Section 718.202(a)(1), the administrative law judge acted within his discretion as fact-finder in giving no weight to the x-ray evidence that was submitted into the record prior to the district director's September 1, 1993 denial of benefits because of the latent and progressive nature of pneumoconiosis. 2008 Decision and Order on Remand at 9; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Moreover, we note that employer has not contested this finding.

[15] At Section 718.202(a)(4), the administrative law judge considered the reports of Drs. Wright, Baker, Vaezy, Vuskovich, Broudy, Dahhan, Fino, and Jarboe. In a report dated November 11, 1993, Dr. Wright opined that claimant has coal workers' pneumoconiosis. Director's Exhibit 27. In reports dated May 6, 1997 and January 10, 2004, Dr. Baker opined that claimant has coal workers' pneumoconiosis, chronic bronchitis related to coal dust exposure, and chronic obstructive pulmonary disease related to coal dust exposure. Director's Exhibit 34; Claimant's Exhibit 1. In a report dated January 24, 1995, Dr. Vaezy opined that claimant has coal workers' pneumoconiosis and moderate impairment related to coal dust exposure. Director's Exhibit 6. In a report dated December 16, 1996, Dr. Vuskovich opined that claimant has simple coal workers' pneumoconiosis and moderate pulmonary impairment unrelated to his occupation. Director's Exhibit 33. In a report dated February 4, 2000, Dr. Broudy opined that claimant does not have coal workers' pneumoconiosis or any impairment arising from the inhalation of coal mine dust. Director's Exhibit 70. Similarly, in a report dated May 27, 1997, Dr. Dahhan opined that claimant does not have coal workers' pneumoconiosis. Director's Exhibit 66. Further, Dr. Dahhan opined that claimant's respiratory impairment was not related to coal dust exposure. *Id.* In a May 18, 1999 report, Dr. Dahhan reiterated his opinion that claimant does not have pneumoconiosis.

we will address those findings.[16]

20 C.F.R. §718.202(a)(4)

Employer has not challenged the administrative law judge's finding that the medical opinion evidence established clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See* 2008 Decision and Order on Remand at 14. This finding is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). With regard to the issue of legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Vaezy, Baker, Dahhan, Jarboe, Vuskovich, Fino, and Broudy. The administrative law judge gave probative weight to the opinions of Drs. Vaezy, Baker, Dahhan, and Jarboe because he found that they were well-documented and well-reasoned. However, the administrative law judge gave less weight to the opinions of Drs. Vuskovich, Fino, and Broudy because he found that they were not well-documented and well-reasoned. The administrative law judge further found that the opinions of Drs. Vaezy and Baker, that claimant has legal pneumoconiosis, outweighed the contrary opinions of Drs. Dahhan and Jarboe, because the opinions of Drs. Vaezy and Baker were better supported by the objective evidence and claimant's physical symptoms. Consequently, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Employer first argues that the administrative law judge erred in failing to consider Dr. Tuteur's report. As noted above, the administrative law judge found that the opinions of Drs. Vaezy and Baker, that claimant has legal pneumoconiosis, outweighed the contrary opinions of Drs. Dahhan and Jarboe. However, the administrative law judge did not consider Dr. Tuteur's opinion. Employer's Exhibit 2. Dr. Tuteur opined that claimant does not have coal mine dust induced disease. *Id*. While an administrative law judge is not required to accept evidence that he determines is not credible, he nonetheless must address and discuss all of the relevant evidence of record. *McCune v. Central*

Director's Exhibit 77. In reports dated May 28, 1997 and July 8, 1997, Dr. Fino opined that claimant does not have coal workers' pneumoconiosis or any condition related to coal mine dust. Director's Exhibit 66. In a report dated September 10, 2003, Dr. Jarboe opined that claimant does not have coal workers' pneumoconiosis or any occupationally acquired pulmonary disease. Employer's Exhibit 1.

[16] At Section 718.202(a)(4), the administrative law judge gave no weight to the medical opinion evidence that was submitted into the record prior to the district director's September 1, 1993 denial of benefits because of the progressive nature of pneumoconiosis. 2008 Decision and Order on Remand at 15 n.9. Employer does not contest this finding.

Appalachian Coal Co., 6 BLR 1-966, 1-988 (1984). Because the administrative law judge erred in failing to consider Dr. Tuteur's opinion with regard to the issue of legal pneumoconiosis, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *McCune*, 6 BLR at 1-988.

Employer also argues that the administrative law judge erred in finding that the opinions of Drs. Vaezy and Baker were better reasoned than the contrary opinions of Drs. Vuskovich, Broudy, Dahhan, Fino, and Jarboe. Specifically, employer asserts that Drs. Vaezy and Baker failed to explain the bases for their findings that claimant has legal pneumoconiosis. Employer also asserts that Drs. Vaezy and Baker relied on inaccurate coal mine employment and smoking histories. The administrative law judge found that Dr. Vaezy's opinion was well-documented and well-reasoned because it was supported by the objective medical evidence. The administrative law judge also found that Dr. Baker's opinion was well-documented and well-reasoned because it was supported by the objective medical evidence, as well as claimant's medical, employment and smoking histories. In his report, Dr. Vaezy opined that claimant has a moderate respiratory impairment related to coal dust exposure. Noting that claimant's impairment was mostly due to coal dust exposure, Dr. Vaezy observed that claimant was a non-smoker and that he has a history of over twenty years of coal mine employment. In his May 6, 1997 report, Dr. Baker diagnosed chronic bronchitis and chronic obstructive pulmonary disease, and opined that claimant's pulmonary impairment was related to his work environment. Director's Exhibit 34. Dr. Baker explained that "[claimant] is a non-smoker and has a long history of dust exposure, with associated pneumoconiosis" and that "[i]t is felt that any respiratory symptoms are caused, at least in part, by his work environment." *Id*. In his January 10, 2004 report, Dr. Baker diagnosed chronic bronchitis based on history and chronic obstructive pulmonary disease based on pulmonary function studies and he opined that both of these conditions were related to coal dust exposure and cigarette smoking. Claimant's Exhibit 1. Dr. Baker also opined that these conditions fully contributed to claimant's pulmonary impairment. *Id.*

The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, Dr. Baker did not explain why he opined that claimant's chronic lung diseases were related to coal dust exposure. Claimant's Exhibit 1. Further, although Dr. Baker noted, in the May 6, 1997 report, that claimant was a non-smoker, Director's Exhibit 34, the doctor noted, in his January 10, 2004 report, that claimant smoked less than one pack per day for ten years, Claimant's Exhibit 1. The administrative law judge did not address the inconsistencies in the smoking histories in Dr. Baker's May 6, 1997 and January 10, 2004 reports. *See Bobick*

v. Saginaw Mining Co., 13 BLR 1-52 (1988). Further, the administrative law judge did not render a specific finding regarding claimant's smoking history. Thus, on remand, the administrative law judge must reconsider the effects of the smoking histories on the medical opinion evidence. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Employer further argues that the administrative law judge erred in failing to consider Dr. Wright's opinion with regard to the issue of legal pneumoconiosis. Dr. Wright opined that claimant's pulmonary impairment, as reflected on his pulmonary function study, may be related to his effort and obesity. Director's Exhibit 27. As noted above, an administrative law judge must address and discuss all of the relevant evidence of record. *McCune*, 6 BLR at 1-988. Thus, on remand, the administrative law judge must consider Dr. Wright's opinion as it is relevant to the issue of legal pneumoconiosis at Section 718.202(a)(4).

Employer additionally argues that the administrative law judge erred in discounting Dr. Fino's opinion on legal pneumoconiosis. Dr. Fino, based on a view of medical evidence, opined that claimant does not have a condition related to coal mine dust. Director's Exhibit 66. In finding that Dr. Fino's opinion that claimant does not have legal pneumoconiosis was neither well-documented nor well-reasoned, the administrative law judge noted that "Dr. Fino uses the chest x-rays to argue that the lack of radiological evidence of pneumoconiosis proves that the [c]laimant's pulmonary impairment did not arise out of coal mine employment." 2008 Decision and Order on Remand at 11. The administrative law judge concluded that "[u]sing the x-rays, which diagnose clinical pneumoconiosis, to disprove legal pneumoconiosis is inconsistent with the regulations." *Id*. The administrative law judge also noted that Dr. Fino did not address the findings of Drs. Vaezy and Baker regarding claimant's other pulmonary symptomology. *Id*. In addition, the administrative law judge noted that Dr. Fino did not address Dr. Vuskovich's opinion that claimant was totally disabled from a pulmonary impairment and that the pulmonary impairment prevented him from being physically able to successfully perform a pulmonary function study. *Id*. at 11. Further, the administrative law judge noted that while Dr. Fino invalidated Dr. Vuskovich's pulmonary function study, he did not address the physical findings that Dr. Vuskovich reported regarding the study. *Id*. at 12. Hence, the administrative law judge reasonably found that "[Dr. Fino] failed to explain the inconsistencies between his analysis of the PFT that Dr. Vuskovich administered and Dr. Vuskovich's analysis." *Id*.; *see Brinkley*, 14 BLR at 1-149; *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). However, contrary to employer's assertion, the regulations do not preclude the administrative law judge from reviewing an opinion in light of other objective tests, histories, and symptoms in rendering a decision on the issue of legal pneumoconiosis. *See* 20 C.F.R. §§718.201(b) and 718.202(a)(4). Thus, on remand, the administrative law judge must reconsider Dr. Fino's opinion regarding the issue of legal pneumoconiosis with all the relevant medical opinions of record at 20 C.F.R. §718.202(a)(4).

Employer also argues that the administrative law judge erred in discounting the opinions of Drs. Vuskovich and Dahhan. Contrary to employer's assertion, the administrative law judge properly gave less weight to the opinions of Drs. Vuskovich and Dahhan, that claimant's pulmonary impairment was related to pleural effusion as opposed to coal dust exposure, because he found that "[n]either physician explained why the [c]laimant had experienced shortness of breath, hypoxemia, or chronic bronchitis before or long after his chemotherapy." 2008 Decision and Order on Remand at 14-15; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Employer further argues that the administrative law judge erred in discounting Dr. Jarboe's opinion.[17] Dr. Jarboe opined that claimant does not have an occupationally acquired pulmonary disease. Employer's Exhibit 1. In noting the bases for his opinion, Dr. Jarboe observed that "[a]lthough coal workers' pneumoconiosis can be a progressive disease, the fact that [claimant] had normal ventilatory function without significant restriction or obstruction 15 years after leaving the mining industry argue strongly against progression." *Id*. The administrative law judge gave greater weight to the contrary opinions of Drs. Vaezy and Baker than to Dr. Jarboe's opinion, because he found that they were better supported by the objective evidence and claimant's physical symptoms. 2008 Decision and Order on Remand at 14. The administrative law judge specifically stated:

> While I give this conclusion probative weight, I find it less persuasive than the opinions of Drs. Vaezy and Baker for two reasons: (1) pneumoconiosis is a latent and progressive disease, and Dr. Jarboe does not offer any evidence that would suggest that the nonqualifying PFT in 1988 proves that the lung impairment could not be caused by pneumoconiosis, and (2) the next PFT in evidence, conducted by Dr. Wright in 1993, was qualifying and the evidence strongly supports a lung impairment since at least 1993.

Id. at 15.

In light of our decision, *infra*, to vacate the administrative law judge's finding that the pulmonary function study evidence established total disability at 20 C.F.R. §718.204(b)(2)(i), we vacate the administrative law judge's findings that the opinions of Drs. Vaezy and Baker are better supported by the objective evidence than the contrary medical opinions with regard to the issue of legal pneumoconiosis at 20 C.F.R.

[17] In addition, employer argues that the administrative law judge is biased against it. Because employer has not demonstrated any bias or prejudice on the part of the administrative law judge, we reject employer's assertion. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

§718.202(a)(4). Furthermore, on remand, in determining whether claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge must reconsider all of the medical opinion evidence in accordance with the APA.

20 C.F.R. §718.204(b)

Employer next contends that the administrative law judge erred in finding that the pulmonary function study evidence was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i). The administrative law judge considered the pulmonary function studies dated November 6, 1993, January 24, 1995, December 3, 1996, and April 30, 1997.[18] Director's Exhibits 5, 27, 34, 66. The administrative law judge found that the December 3, 1996 study yielded non-qualifying[19] values, while the November 6, 1993, January 24, 1995, and April 30, 1997 studies yielded qualifying values.[20] The

[18] At Section 718.204(b)(2)(i), the administrative law judge gave no weight to the pulmonary function study evidence that was submitted into the record prior to the district director's September 1, 1993 denial of benefits because he found that it was 20 years old or older. 2008 Decision and Order on Remand at 16 n.10. Employer does not contest the administrative law judge's finding regarding the previously submitted pulmonary function study evidence.

[19] 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)(2)(i).

[20] The administrative law judge noted that claimant was 72 years old when the April 30, 1997 pulmonary function study was performed. Claimant's Exhibit 1. In considering this study, the administrative law judge found that "[t]he values produced would be qualifying for a 71 year old male according to the table in Appendix B." 2008 Decision and Order on Remand at 17 n.11. The administrative law judge then found that "[t]here is no value providing for a 72 year old male; however, by extrapolation, these results would be qualifying." *Id*. The Board recently rejected the proposition that an administrative law judge can derive pulmonary function study values for older miners from the existing tables by extrapolation. *K.J.M. v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-46 (2008). Instead, the Board adopted the position of the Director, Office of Workers' Compensation Programs, that pulmonary function studies performed on a miner who is older than 71 years of age must be treated as qualifying if the values produced by the miner would be qualifying for a 71 year old. *K.J.M.*, 24 BLR at 1-47. The Board also held that an administrative law judge should consider medical evidence, that is proffered to show that the qualifying pulmonary function study values for a 71 year old are not indicative of total disability for an older miner, when he or she is making the initial determination as to whether the pulmonary function study evidence supports a finding of

administrative law judge gave no weight to the November 6, 1993 study because it was conducted with poor effort. 2008 Decision and Order on Remand at 17. The administrative law judge concluded that the preponderance of the remaining studies established total disability at Section 718.204(b)(2)(i). However, as argued by employer, the administrative law judge did not consider Dr. Fino's opinion that the April 30, 1997 study was invalid.[21] Dr. Fino stated:

> The spirometry was invalid because of premature termination to exhalation and a lack of reproducibility in the expiratory tracings. There was also a lack of an abrupt onset to exhalation. The values recorded for this spirometry represent at least the minimum lung function that this man could perform and certainly not this man's maximum lung function.

Director's Exhibit 66. Dr. Fino further stated:

> The MVV was invalid. The individual breath volumes were shallow and less than 50% of the forced vital capacity, and the individual breath volumes were also erratic. The breathing frequency was less than 60 breaths per minute. The MVV value underestimates this man's true lung function and should not be used as medical evidence of respiratory impairment.

Id.

In considering the medical opinion evidence at Sections 718.202(a)(4) and 718.204(c), the administrative law judge acknowledged that Dr. Fino invalidated the April 30, 1997 pulmonary function study administered by Dr. Baker. However, the administrative law judge did not explain why he rejected Dr. Fino's opinion concerning the validity of the study. *See Wojtowicz*, 12 BLR at 1-165; *see also Brinkley*, 14 BLR at 1-149; *Siegel*, 8 BLR at 1-157. Rather, the administrative law judge focused on Dr. Fino's invalidation of the pulmonary function studies administered by Drs. Dahhan and Vuskovich.[22] Thus, because the administrative law judge erred in failing to consider Dr.

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total disability at 20 C.F.R. §718.204(b)(2)(i). *Id*. Thus, in this case, the administrative law judge's consideration of the April 30, 1997 pulmonary function study does not accord with the Board's decision in *K.J.M.*

[21] Dr. Fino also indicated that the November 6, 1993, January 24, 1995, and December 3, 1996 pulmonary function studies were invalid. Director's Exhibit 66.

[22] In considering Dr. Fino's opinion at Section 718.202(a)(4), the administrative law judge stated that "[i]n invalidated (sic) the PFT, Dr. Fino did not address the physical

Fino's opinion in validating the April 30, 1997 pulmonary function study administered by Dr. Baker in weighing the conflicting pulmonary function study evidence, *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985), we must vacate the administrative law judge's finding that the pulmonary function study evidence established total disability at 20 C.F.R. §718.204(b)(2)(i). On remand, the administrative law judge must consider all of the relevant evidence at Section 718.204(b)(2)(i).

Employer also contends that the administrative law judge erred in finding that the medical opinion evidence was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). After finding that claimant's usual coal mine employment involved physically demanding labor, the administrative law judge considered the reports of Drs. Jarboe, Dahhan, Baker, Vaezy, Vuskovich, Wright, Fino, and Broudy. Dr. Jarboe opined that claimant has a totally disabling respiratory impairment. Employer's Exhibit 1. Dr. Dahhan opined that, from a respiratory standpoint, claimant does not retain the physiological capacity to return to his previous coal mining job or work of comparable physical demand. Director's Exhibits 66, 77. Similarly, Dr. Baker opined that, from a pulmonary standpoint, claimant was not physically able to do his usual coal mine employment or comparable and gainful work. Director's Exhibit 34; Claimant's Exhibit 1. Drs. Vaezy and Vuskovich opined that claimant has a moderate pulmonary impairment.[23] Director's Exhibits 6, 33. Dr. Wright indicated that claimant has a pulmonary impairment, but he opined that claimant was physically able, from a pulmonary standpoint, to do his usual coal mine employment. Director's Exhibit 27. Nonetheless, Dr. Wright further opined that if claimant's spirometry changes were valid, they would preclude his employment. *Id*. In addition, Dr. Wright opined that claimant could not perform the work of a coal miner based on his heart disease and other infirmities. *Id*. Dr. Fino opined that claimant does not have a respiratory impairment or

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findings the (sic) Dr. Vuskovich reported concerning this PFT." 2008 Decision and Order on Remand at 12. The administrative law judge further stated that "[Dr. Fino] reviewed Dr. Vuskovich's report, but failed to explain the inconsistencies between his analysis of the PFT that Dr. Vuskovich administered and Dr. Vuskovich's analysis." *Id*. In addition, the administrative law judge stated that "[u]nlike Dr. Fino, Dr. Dahhan and Dr. Vuskovich interpreted the [c]laimant's inability to exhale for five seconds to be objective evidence of a pulmonary impairment." *Id*. at 12 n.8.

[23] The administrative law judge stated that "Dr. Vuskovich diagnosed coal workers' pneumoconiosis and found that the [c]laimant was totally disabled from a respiratory impairment." 2008 Decision and Order on Remand at 18. Contrary to the administrative law judge's finding, as noted above, Dr. Vuskovich merely opined that claimant has a moderate pulmonary impairment. Director's Exhibit 33; *see Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

pulmonary disability. Director's Exhibit 66. Lastly, Dr. Broudy opined that claimant does not have a totally disabling respiratory impairment. Director's Exhibit 70.

The administrative law judge gave probative weight to the opinions of Drs. Jarboe, Dahhan, Baker, Vaezy, Vuskovich, and Wright on the issue of total disability because he found that they were well-documented and well-reasoned. In addition, the administrative law judge gave less weight to the opinions of Drs. Fino and Broudy because he found that they were not well-documented and well-reasoned. The administrative law judge therefore, found that the preponderance of the probative medical opinion evidence established total disability at Section 718.204(b)(2)(iv).

Employer argues that the administrative law judge erred in failing to provide a valid basis for discounting Dr. Fino's opinion invalidating the qualifying pulmonary function study dated April 30, 1997. The administrative law judge acknowledged that Dr. Fino found that none of the pulmonary function studies in the record was valid or could be used to establish a pulmonary impairment. Nonetheless, the administrative law judge stated that "[Dr. Fino] did not explain why other physicians found the pulmonary function tests valid, or why other physicians found evidence of a pulmonary impairment." 2008 Decision and Order on Remand at 18-19. As discussed, *supra*, the APA requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz*, 12 BLR at 1-165. In this case, the administrative law judge accepted the validation opinions of the other physicians. *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999) (*en banc*). However, in considering the disability opinions at Section 718.204(b)(2)(iv), the administrative law judge did not consider the reasons noted by Dr. Fino for invalidating the April 30, 1997 pulmonary function study. As discussed *supra*, Dr. Fino explained that this spirometry test was invalid because the values did not represent claimant's maximum lung function, as there was premature termination to exhalation, a lack of reproducibility in the expiratory tracings, and a lack of an abrupt onset to exhalation. Director's Exhibit 66. Dr. Fino also explained that the MVV values were invalid because they underestimated claimant's true lung function, as the individual breath volumes were shallow and erratic. *Id*. Thus, the administrative law judge erred in failing to provide an adequate explanation for rejecting Dr. Fino's invalidation opinion of the April 30, 1997 pulmonary function study. *Wojtowicz*, 12 BLR at 1-165. Consequently, we vacate the administrative law judge's finding that the medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration of all the medical opinion evidence in accordance with the APA.[24]

[24] In a report dated September 8, 2003, Dr. Tuteur opined that claimant does not have any persistent respiratory impairment. Employer's Exhibit 2. In Judge Roketenetz's 2005 Decision and Order, Judge Roketenetz considered Dr. Tuteur's report with regard to the issue of disability. In this case, however, the administrative law judge

20 C.F.R. §718.204(c)

Employer finally contends that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge considered the reports of Drs. Vaezy, Baker, Fino, Vuskovich, Dahhan, Broudy, Jarboe, and Wright on the issue of disability causation. Dr. Vaezy opined that claimant's moderate impairment was mostly due to coal dust exposure, but some of it may be related to ASHD (arteriosclerotic heart disease) and obesity. Director's Exhibits 6, 7. Dr. Baker opined that claimant's pulmonary impairment was caused, in part, by factors like coal dust in his work environment. Claimant's Exhibit 1. Dr. Fino opined that claimant does not have a respiratory impairment or pulmonary disability, irrespective of cause. Director's Exhibit 66. Dr. Vuskovich opined that claimant's moderate pulmonary impairment was not caused by his occupation. Similarly, Dr. Dahhan opined that claimant's respiratory impairment was not caused by, related to, or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis. Director's Exhibits 66, 77. Dr. Broudy opined that claimant does not have any respiratory impairment arising from the inhalation of coal mine dust. Director's Exhibit 70. Dr. Jarboe opined that neither the inhalation of coal dust nor coal workers' pneumoconiosis caused or substantially contributed to claimant's totally disabling respiratory impairment. Employer's Exhibit 1. Dr. Wright opined that the changes seen on claimant's pulmonary function study indicate that the pulmonary impairment may be related to his effort and his obesity. Director's Exhibit 27.

The administrative law judge gave probative weight to the opinions of Drs. Vaezy and Baker because he found that they were supported by the objective evidence. The administrative law judge gave less weight to Dr. Wright's opinion because he found that it was based on a qualifying pulmonary function study that was more than ten years old. Further, the administrative law judge gave less weight to the opinions of Drs. Fino and Broudy because he found that they conflicted with his own findings that pneumoconiosis and total disability were established. The administrative law judge gave less weight to the opinions of Drs. Dahhan and Vuskovich because he found that they were not well-documented or well-reasoned. Lastly, the administrative law judge gave less weight to Dr. Jarboe's opinion because he found that Dr. Jarboe's opinion, that claimant does not have pneumoconiosis, conflicted with his finding that claimant established pneumoconiosis. Hence, based on the opinions of Drs. Vaezy and Baker, the administrative law judge found that the evidence established total disability due to pneumoconiosis at Section 718.204(c).

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did not consider Dr. Tuteur's report at 20 C.F.R. §718.204(b)(2)(iv).

At the outset, we note that because of our decision to vacate the administrative law judge's finding that the medical opinion evidence established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and his finding that the evidence established total disability at 20 C.F.R. §718.204(b)(2)(i), (iv), we must also vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, on remand, if reached, the administrative law judge must reconsider the issue of disability causation in light of his findings at Sections 718.202(a) and 718.204(b). However, for the sake of judicial economy, we will address employer's specific contentions regarding the administrative law judge's disability causation findings.

Employer argues that the administrative law judge erred in failing to consider Dr. Tuteur's opinion on disability causation. Dr. Tuteur opined that claimant's disability was not related to, aggravated by, or caused by coal workers' pneumoconiosis or the inhalation of coal mine dust.[25] Employer's Exhibit 2. The administrative law judge did not consider Dr. Tuteur's opinion at Section 718.204(c). As discussed, *supra*, an administrative law judge must address and discuss all of the relevant evidence of record. *McCune*, 6 BLR at 1-988. Consequently, because the administrative law judge erred in failing to consider Dr. Tuteur's disability causation opinion, we must remand the case for the administrative law judge to consider it.

Employer also argues that the administrative law judge erred in placing a stricter standard on employer's physicians than on claimant's physicians in finding disability causation established. Specifically, employer asserts that the administrative law judge acted irrationally in giving no weight to Dr. Wright's disability causation opinion because it was based, in part, on a November 6, 1993 pulmonary function study showing restrictive and possibly obstructive impairment, while giving probative weight to Dr. Vaezy's disability causation opinion, which was based, in part, on a January 24, 1995 pulmonary function study showing a moderate obstructive impairment. In considering Dr. Wright's disability causation opinion, the administrative law judge stated that Dr. Wright based his opinion on a qualifying pulmonary function study where claimant's level of cooperation was poor. 2008 Decision and Order on Remand at 20. The administrative law judge found, however, that the pulmonary function study "was conducted over ten years ago, two years before the [c]laimant filed the current claim for benefits." *Id*. Hence, based on the fact that pneumoconiosis is a latent and progressive disease, and given the age of the objective testing underlying Dr. Wright's opinion, the

[25] Dr. Tuteur opined that claimant was totally disabled from returning to work because of several health problems not associated with the inhalation of coal mine dust, such as severe and advanced coronary artery disease complicated by obesity, diabetes mellitus, stroke, and occasional elevated blood pressure. Employer's Exhibit 2.

administrative law judge gave less weight to Dr. Wright's disability causation opinion. However, the administrative law judge did not explain why he found Dr. Wright's opinion less reflective of claimant's current physical condition than Dr. Vaezy's opinion. *See Wojtowicz*, 12 BLR at 1-165; *see generally Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). Dr. Wright examined claimant on November 6, 1993, and conducted testing. Dr. Vaezy examined claimant on January 24, 1995, and conducted testing. Consequently, Dr. Wright and Dr. Vaezy examined claimant within one and one-half years of each other. Further, as discussed, *supra*, both opinions were submitted into the record after the district director's September 1, 1993 denial of benefits. Thus, because the administrative law judge failed to sufficiently explain why he rejected Dr. Wright's opinion and credited Dr. Vaezy's opinion, we hold that the administrative law judge erred in giving less weight to Dr. Wright's disability causation opinion. *See Wojtowicz*, 12 BLR at 1-165.

Employer further argues that the administrative law judge erred in failing to provide a valid basis for discounting the opinions of Drs. Vuskovich and Dahhan. Contrary to employer's assertion, however, the administrative law judge properly found that the opinions of Drs. Vuskovich and Dahhan were not well-documented and well-reasoned. *Clark*, 12 BLR at 1-155. In considering Dr. Vuskovich's opinion, the administrative law judge stated:

> [Dr. Vuskovich] concluded that the [c]laimant's pulmonary impairment was caused by pleural effusion secondary to chemotherapy; however, he did not explain why he believed the [c]laimant's pulmonary impairment was due exclusively to the side effects of chemotherapy. Dr. Vuskovich also failed to explain the [c]laimant's pulmonary impairment in the absence of chemotherapy.

2008 Decision and Order on Remand at 21. The administrative law judge noted that while Dr. Dahhan opined, in his May 1997 report, that claimant's respiratory impairment was due to pleural effusion from the side effects of chemotherapy, he subsequently opined, in his June 27, 1997 report, that claimant's pulmonary impairment was due to coronary artery disease, cardiac enlargement, congestive heart failure, and a post-cerebrovascular accident, without mentioning pleural effusion. *Id*. The administrative law judge then stated:

> [Dr. Dahhan] does not offer any explanation as to why his diagnosis of the etiology of the [c]laimant's pulmonary impairment differs in the two reports dated just one month apart. Furthermore, he does not explain why the [c]laimant's pulmonary condition is due exclusively to his heart condition, or why pneumoconiosis is not "a contributing cause of some discernible consequence to his totally disabling respiratory impairment."

Id. Thus, based on their statements, the administrative law judge acted within his discretion in discounting the opinions of Drs. Vuskovich and Dahhan on disability causation. *Clark*, 12 BLR 1-155. Accordingly, we reject employer's assertion that the administrative law judge erred in failing to provide a valid basis for discounting their opinions.

Employer additionally argues that the administrative law judge erred in discounting the opinions of Drs. Fino and Broudy. Dr. Fino opined that claimant does not have coal workers' pneumoconiosis or any condition related to coal dust exposure. Director's Exhibit 66. Dr. Fino also opined that claimant does not have a respiratory impairment or pulmonary disability irrespective of cause. *Id*. Similarly, Dr. Broudy opined that claimant does not have coal workers' pneumoconiosis or any respiratory impairment arising from the inhalation of coal mine dust. The administrative law judge gave less weight to the opinions of Drs. Fino and Broudy because he found that they conflicted with his own findings that claimant has both clinical and legal pneumoconiosis and a totally disabling respiratory impairment. 2008 Decision and Order on Remand at 21, 22. However, because we vacate the administrative law judge's findings that legal pneumoconiosis was established at 20 C.F.R. §718.202(a)(4) and that total disability was established at 20 C.F.R. §718.204(b)(2), we cannot affirm the administrative law judge's discrediting of the disability causation opinions of Drs. Fino and Broudy on this basis. *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-373 (4th Cir. 2002), *rev'g on other grds*, 14 BLR 1-37 (1990)(*en banc*); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994).

Employer also argues that the administrative law judge erred in discounting Dr. Jarboe's opinion. Dr. Jarboe opined that claimant's totally disabling respiratory impairment was not caused by the inhalation of coal dust or coal workers' pneumoconiosis. Employer's Exhibit 1. The administrative law judge gave less weight to Dr. Jarboe's disability causation opinion because he found that it was contrary to his own finding that claimant had both clinical and legal pneumoconiosis. 2008 Decision and Order on Remand at 21. However, as noted above, because we herein vacate the administrative law judge's findings that legal pneumoconiosis was established at 20 C.F.R. §718.202(a)(4), we cannot affirm the administrative law judge's discrediting of Dr. Jarboe's disability causation opinion on this basis. *Trujillo*, 8 BLR at 1-473; *see also Scott*, 289 F.3d at 269, 22 BLR at 2-384; *Toler*, 43 F.3d at 116, 19 BLR at 2-83.

Employer further asserts that Drs. Vaezy and Baker relied on inaccurate coal mine employment histories. Dr. Vaezy noted that claimant worked "20 +" years of coal mine employment. Director's Exhibit 6. In his May 6, 1997 report, Dr. Baker noted that claimant worked 21 years of coal mine employment. Director's Exhibit 34. Further, in

his January 10, 2004 report, Dr. Baker noted that claimant worked "20 +" years of coal mine employment. Claimant's Exhibit 1. The administrative law judge accepted the parties' stipulation to at least 20 years of coal mine employment. Because the administrative law judge reasonably found that "Dr. Vaezy and Dr. Baker…had relatively accurate coal mine employment histories," 2008 Decision and Order on Remand at 15; *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989), we reject employer's assertion that Drs. Vaezy and Baker relied on inaccurate coal mine employment histories.

In addition, employer asserts that Drs. Vaezy and Baker relied on inaccurate smoking histories. Dr. Vaezy noted that claimant smoked one pack of cigarettes every week or every two weeks for approximately one year. Director's Exhibit 6. In the May 6, 1997 report, Dr. Baker noted that claimant is a non-smoker. Director's Exhibit 34. However, in the January 10, 2004 report, Dr. Baker noted that claimant smoked less than one pack per day for ten years. Claimant's Exhibit 1. The administrative law judge acknowledged that Dr. Baker noted that claimant had a ten pack year smoking history. 2008 Decision and Order on Remand at 18. However, the administrative law judge did not address the inconsistencies in the smoking histories in Dr. Baker's May 6, 1997 and January 10, 2004 reports. *See Bobick*, 13 BLR at 1-54. Further, the administrative law judge did not render a specific finding regarding claimant's smoking history. Thus, on remand, the administrative law judge must determine the length of the miner's smoking history and reconsider the effect of the inconsistent smoking histories on the medical opinion evidence regarding disability causation. *Trumbo*, 17 BLR at 1-89.

Furthermore, if reached on remand, the administrative law judge is instructed to consider the onset date of total disability due to pneumoconiosis in light of claimant's viable 1974 claim. *See Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990).

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

SO ORDERED.

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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