BRB No. 10-0587 BLA

EDWARD JONES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOLAR COMPLEX	)	DATE ISSUED: 06/23/2011
	)	
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 of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

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

Jonathan P. Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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:

Solar Complex appeals the Decision and Order (07-BLA-5809) of Administrative Law Judge Robert B. Rae (the administrative law judge) awarding benefits on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Black Lung Benefits

[1] Claimant filed his first claim on June 10, 1975. Director's Exhibit 1. On August 31, 1984, Administrative Law Judge Richard E. Huddleston issued a Decision and Order denying benefits under Parts 727 and 410, as the evidence did not establish that claimant was totally disabled by his respiratory impairment. *Id*. This denial became final because

Act, 30 U.S.C. §§901-944 (2006), *amended by* Public L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] The administrative law judge designated Solar Complex as the responsible operator, credited claimant with 14 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 evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that the x-ray evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). The administrative law judge also found that the pulmonary function study and medical opinion evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv). Further, the administrative law judge found that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, Solar Complex challenges the administrative law judge's designation of it as the responsible operator. Solar Complex also challenges the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). Further, Solar Complex challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that collateral estoppel does not preclude relitigation of the identity of the responsible operator in a subsequent claim because that finding was not necessary to the

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claimant did not pursue the claim any further. Claimant filed his second claim on May 6, 1993. Director's Exhibit 2. The district director denied this claim on October 25, 1993 because claimant failed to establish any of the elements of entitlement. *Id*. Because claimant did not pursue the claim any further, this denial became final. Claimant filed the current claim on December 4, 2003. Director's Exhibit 4.

[2] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. Because the instant claim was filed before January 1, 2005, the recent amendments to the Act do not apply in this case.

prior decision denying benefits.[3] The Director also asserts that he had no incentive to challenge the designation of the responsible operator in the prior claim. Further, the Director asserts that substantial evidence supports the designation of Solar Complex as the responsible operator.[4] Nevertheless, the Director asserts that the case must be remanded for the administrative law judge to specifically explain why he found that the evidence established that Solar Complex was the responsible operator.[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.[6] 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).

In order to establish entitlement to benefits in a 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. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

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[3] In the first claim, the Director, Office of Workers' Compensation Programs (the Director), designated Trent Coal Company (Trent Coal) as the responsible operator. Director's Exhibit 1. In his Decision and Order denying benefits, Judge Huddleston found that Trent Coal waived its right to contest the length of coal mine employment issue. *Id*. In the second claim, the Director again designated Trent Coal as the responsible operator. Director's Exhibit 2.

[4] Citing *Ridings v. C&C Coal Co.*, 6 BLR 1-227 (1983), the Director asserts that the record contains more than enough evidence to find that Shane Dale Enterprises, Flatrock Coal Company, and Solar Complex are the same company for purposes of designating the responsible operator.

[5] Because the administrative law judge findings that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 and that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] The record indicates that claimant was employed in the coal mining industry in Kentucky. Director's Exhibits 1, 2, 5. Accordingly, the law of the United States Court of Appeals for the Sixth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Initially, we will address Solar Complex's contention that the administrative law judge erred in determining that it was properly designated as the responsible operator that was liable for any benefits awarded in this case. The administrative law judge noted that Trent Coal Company (Trent Coal) was originally designated as the responsible operator in the instant claim. The administrative law judge also noted that the district director dismissed Trent Coal, because it was not a potentially liable operator that most recently employed claimant, and identified Solar Complex as the responsible operator. The administrative law judge then stated that the Director found, and the record reflects, that Solar Complex met the five requirements set forth at 20 C.F.R. §725.494(a)-(e) to be named as the responsible operator. Hence, the administrative law judge found that the Director sustained his burden of establishing that Solar Complex was a potentially liable operator in accordance with 20 C.F.R. §725.495(b). Further, after finding that Solar Complex did not sustain its burden of establishing that it was not a potentially liable operator that most recently employed claimant, the administrative law judge stated that "it has failed to show that [c]laimant worked for at least one year for any of the other companies where he worked after he worked for [it]." Decision and Order at 31. The administrative law judge therefore found that Solar Complex was the properly designated responsible operator.

Solar Complex asserts that the Department of Labor (the Department) was precluded from designating it as the responsible operator, based on the doctrine of collateral estoppel, as liability was imposed on Trent Coal in the prior final decisions in this case. Solar Complex therefore argues that it must be dismissed as the responsible operator. We disagree.

To successfully invoke the doctrine of collateral estoppel in this case, Solar Complex must establish the following:

> (1) the issue sought to be precluded is identical to the one previously litigated;
> (2) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;
> (3) determination of the issue must have been necessary to the outcome of the prior determination;
> (4) the prior proceeding must have resulted in a final judgment on the merits; and
> (5) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Collins v. Pond Creek Mining Co., 468 F.3d 213, 218-219, 23 BLR 2-394, 2-403-406 (4th Cir. 2006); *Sedlack v. Braswell Services Group, Inc*., 134 F.3d 219, 224 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co*., 21 BLR 1-134, 1-137 (1999) (*en banc*). A fact

established by stipulation or concession may not be given collateral estoppel effect in a subsequent proceeding because "the issue was not actually litigated." *Justice v. Newport News Shipbuilding & Drydock Co*., 34 BRBS 97, 98 (2000).

The Department named Trent Coal as the responsible operator in the 1975 and 1993 claims. Director's Exhibits 1, 2. Claimant was denied benefits in each of these prior claims. With regard to the instant claim, in a Notice of Claim dated January 29, 2004, the Department identified Trent Coal as a potentially liable operator. Director's Exhibit 15. On May 3, 2004, however, the Department dismissed Trent Coal as the responsible operator. Director's Exhibit 21. In a subsequent Notice of Claim dated May 14, 2004, the Department identified Solar Complex as a potentially liable operator. Director's Exhibit 22. Further, in a Proposed Decision and Order denying benefits dated December 16, 2004, the district director dismissed Trent Coal as a party to this claim and designated Solar Complex as the responsible operator. Director's Exhibit 33. Additionally, in his June 10, 2010 Decision and Order awarding benefits, the administrative law judge found that Solar Complex was the responsible operator. Because the prior denial of benefits would stand, notwithstanding the responsible operator determination, the prior determination that Trent Coal was the properly designated responsible operator in the prior claim was not essential to the denial of the prior proceedings. *Hughes,* 21 BLR at 1-137-38. Consequently, a required element of collateral estoppel was not established. *Collins,* 468 F.3d at 217, 23 BLR at 2-401. We, therefore, reject Solar Complex's assertion that the Department was precluded from designating it as the responsible operator, based on the doctrine of collateral estoppel.[7]

Solar Complex also asserts that it should be dismissed as the responsible operator because its employment of the miner was for less than a calendar year. Specifically, Solar Complex argues that the record does not establish that it was a successor operator to Shane Dale Enterprises and Flatrock Coal Company.[8] Solar Complex additionally

[7] We also reject Solar Complex's assertion that the Department of Labor (the Department) was precluded from designating it as the responsible operator, based on the doctrine of *res judicata*. Contrary to Solar Complex's assertion, the principle of *res judicata* generally has no application in the context of subsequent claims, as such claims relate to the miner's condition and related issues at a different point in time. *See* 20 C.F.R. §725.309(d)(4); *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994); *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996)(*en banc*); *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 450, 21 BLR 2-50, 2-60 (8th Cir. 1997); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 314, 20 BLR 2-76, 2-87 (3d Cir. 1995); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004).

[8] The Director asserts that "[a]lthough portions of [claimant's] testimony support

argues that the administrative law judge's finding that Solar Complex was a successor operator, and therefore the responsible operator, violated the Administrative Procedure Act (APA).

The 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, in finding that Solar Complex was properly designated as the responsible operator, the administrative law judge specifically stated:

> The Director found – and the record reflects – that Solar Complex meets the five conditions necessary to be named as the [r]esponsible [o]perator in 20 C.F.R. §725.494(a)-(e). *See* DX-23 (operator after June 30, 1973); DX-22 at 7 (financially capable of assuming liability); DX-5, DX-7; DX-20; DX-32 ([c]laimant was employed by Solar Complex and its predecessors, Shane-Dale [E]nterprises and Flatrock Coal Company); DX-25 (earnings demonstrate more than one year of employment); DX-5 and DX-6 (exposure to coal dust during employment).

Decision and Order at 30-31. The administrative law judge therefore found that the Director sustained his burden of establishing that Solar Complex was a potentially liable operator in accordance with 20 C.F.R. §725.495(b). However, the administrative law judge did not explain why he found that the evidence regarding the responsible operator issue was credible. Further, the administrative law judge did not explain how the evidence supported his finding that Solar Complex was the properly designated responsible operator, as an aggregate period of one year from different sources is needed for Solar Complex's liability. Consequently, we hold that the administrative law judge did not comply with the requirements of the APA in finding that Solar Complex was the properly designated responsible operator. *Director, OWCP v. Rowe*, 710 F.2d 251, 254, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Wojtowicz*, 12 BLR at 1-165. Thus, we vacate the administrative law judge's determination that Solar Complex was the properly designated responsible operator and remand the case for further consideration of the evidence in accordance with the APA.

Next, we address Solar Complex's contention that the administrative law judge

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this [successor operator] theory (for example, he testified that at times equipment was moved from one mine to another; 2006 Hearing Transcript at 30)[,] on further consideration…the stronger theory is that the various companies were essentially one concern engaged in a common enterprise." Director's Brief at 10-11 n. 6.

erred in finding that the x-ray evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The record consists of twenty-six interpretations of six x-rays from three claims.[9] The administrative law judge stated that the weight of the x-ray evidence in the first claim "clearly" favored a finding that claimant has simple pneumoconiosis. Decision and Order at 25. The administrative law judge also stated that the x-ray evidence in the second claim was in equipoise. *Id*. Further, the administrative law judge stated that the x-ray evidence in the instant claim showed the presence of pneumoconiosis. *Id*. at 26. The administrative law judge therefore found that the x-ray evidence established the existence of clinical pneumoconiosis.

Solar Complex asserts that the administrative law judge erred in failing to provide a valid basis for finding that the preponderance of the x-ray evidence established the existence of pneumoconiosis. Solar Complex argues that the administrative law judge did not attempt to weigh each of the individual films from the first claim. Specifically, Solar Complex argues that "[the administrative law judge] has failed to acknowledge that the last film from the first claim, obtained on June 26, 1981, was read by Dr. Combs, a B-reader, as showing no evidence of pneumoconiosis." Employer's Brief at 24. As noted above, the administrative law judge stated that the weight of the x-ray evidence in the first claim "clearly" favored a finding that claimant has simple pneumoconiosis. Decision and Order at 25. However, the administrative law judge did not specifically address and discuss the x-ray evidence in the first claim. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966 (1984). 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*, 6 BLR at 1-988. In this case, in addition to the positive readings of x-rays dated April 2, 1975, April 16, 1975, May 2, 1975, May 23, 1975, June 6, 1975, June 17, 1975, July 15, 1975, August 18, 1975, May 15, 1979, and June 1, 1981,[10] Dr. Combs, a B reader, read the June 26, 1981 x-ray as negative for pneumoconiosis. Additionally, Dr. Sargent read the August

[9] The 1975 claim consists of fourteen interpretations of eleven x-rays, dated April 2, 1975, April 16, 1975, May 2, 1975, May 23, 1975, June 6, 1975, June 17, 1975, July 15, 1975, August 18, 1975, May 15, 1979, June 1, 1981, and June 26, 1981. The 1993 claim consists of three interpretations of a June 15, 1993 x-ray. The 2003 claim consists of nine interpretations of four x-rays, dated February 10, 2004, August 27, 2004, September 22, 2004, and December 10, 2007.

[10] Drs. Baker and Cole, B readers, read the May 15, 1979 x-ray as positive for pneumoconiosis. The administrative law judge indicated that the credentials of the other radiologists, who read the x-rays as positive for pneumoconiosis, were not listed in the first claim.

18, 1975 x-ray as negative for pneumoconiosis.[11] Thus, because the administrative law judge did not explain how he weighed the conflicting x-ray evidence in the first claim, we hold that the administrative law judge erred in weighing this evidence. *Rowe*, 710 F.2d at 254, 5 BLR at 2-103; *Wojtowicz*, 12 BLR at 1-165.

Solar Complex also asserts that the administrative law judge erred in finding that the interpretations of the June 15, 1993 x-ray were in equipoise. The record in the second claim contains only the June 15, 1993 x-ray. Director's Exhibit 2. While Dr. Vaezy, a B reader, read the June 15, 1993 x-ray as positive for pneumoconiosis, Drs. Barrett and Sargent, B readers and Board-certified radiologists, read this x-ray as negative. In considering the interpretations of the June 15, 1993 x-ray, the administrative law judge stated:

> The x-ray evidence in support of [c]laimant's second claim for benefits appears to be in equipoise, as the DOL exam revealed simple pneumoconiosis and then two equally dually-qualified B Reader/BCR physicians re-read [c]laimant's x-ray, finding in one instance that the x-ray was negative and in the other instance, the presence of diffuse small opacities, 0/1.

Decision and Order at 25. Contrary to the administrative law judge's finding, both of the physicians who are dually-qualified as B readers and Board-certified radiologists read the July 15, 1993 x-ray as negative for pneumoconiosis. Dr. Barrett checked the box marked "Yes" to indicate that the film was completely negative, and Dr. Sargent classified the opacities as 0/1.[12] Thus, because the administrative law judge found that the conflicting interpretations of the July 15, 1993 x-ray were in equipoise, based on his determination that the 0/1 classification by Dr. Sargent, a dually-qualified radiologist, was positive for pneumoconiosis, the administrative law judge mischaracterized the x-ray evidence. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Solar Complex additionally asserts that the administrative law judge erred in weighing the interpretations of the February 10, 2004, August 27, 2004, and September 22, 2004 x-rays in the third claim. Specifically, Solar Complex argues that the administrative law judge erred in failing to explain why he found that the preponderance

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[11] The administrative law judge noted that Dr. Sargent's credentials were not listed in the first claim.

[12] Section 718.102(b) provides that a chest x-ray classified under the ILO classification system as Category 0, including sub-categories 0/-, 0/0, and 0/1, does not constitute evidence of pneumoconiosis.

of the interpretations of the x-rays in the third claim was positive for pneumoconiosis. Solar Complex maintains that the interpretations of the x-rays in the third claim were in equipoise. We disagree.

Contrary to Solar Complex's assertion, the administrative law judge properly found that the August 27, 2004 and September 22, 2004 x-rays were positive for pneumoconiosis, based on the superior qualifications of Dr. Alexander.[13] *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). In addition, the administrative law judge reasonably found that, while the qualifications of Drs. Halbert and Miller were equivalent, "the reading of Dr. Baker, a highly experienced B Reader, tips the scale in favor of finding that [the February 10, 2004 x-ray] showed pneumoconiosis."[14] Decision and Order at 26; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Thus, we reject employer's assertion that the administrative law judge erred in weighing the interpretations of the February 10, 2004, August 27, 2004, and September 22, 2004 x-rays.

Solar Complex further asserts that the administrative law judge erred in giving less weight to the interpretations of the December 10, 2007 x-ray, based on the quality of the film. Drs. Alexander and Shipley, dually-qualified radiologists, interpreted the December 10, 2007 x-ray. Dr. Alexander noted a film quality of 2 and read the x-ray as positive for pneumoconiosis. Claimant's Exhibit 1. Dr. Shipley noted a film quality of 3 and read the x-ray as negative for pneumoconiosis. Employer's Exhibit 4. The administrative law judge found that the readings of the December 10, 2007 x-ray by Drs. Alexander and Shipley were in equipoise. The administrative law judge also found that the December 10, 2007 x-ray was entitled to less weight because "both physicians [Drs. Alexander and Shipley] noted that the film quality was markedly reduced – marking it at 2 and 3, respectively." Decision and Order at 26. Contrary to the administrative law judge's finding, the readings of the December 10, 2007 x-ray by Drs. Alexander and Shipley

[13] Dr. Alexander, who is dually-qualified as a B reader and Board-certified radiologist, read the August 27, 2004 x-ray as positive for pneumoconiosis, Director's Exhibit 41, while Dr. Dahhan, a B reader, read this x-ray as negative, Employer's Exhibit 1. Similarly, Dr. Alexander, a dually-qualified radiologist, read the September 22, 2004 x-ray as positive for pneumoconiosis, Director's Exhibit 41, while Dr. Broudy, a B reader, read this x-ray as negative, Employer's Exhibit 2.

[14] Dr. Baker, a B reader, and Dr. Miller, a dually-qualified radiologist, read the February 10, 2004 x-ray as positive for pneumoconiosis, Director's Exhibit 13; Claimant's Exhibit 2, while Dr. Halbert, a dually-qualified radiologist, read this x-ray as negative, Employer's Exhibit 3.

were acceptable as evidence because they were of suitable quality.[15] 20 C.F.R. §718.102(a). While Drs. Alexander and Shipley noted film qualities of 2 and 3, respectively, for the December 10, 2007 x-ray, they did not classify this x-ray as unreadable. *Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984). Thus, the administrative law judge erred in failing to provide an adequate explanation for discounting the readings of the December 10, 2007 x-ray by Drs. Alexander and Shipley, based on their assessment of the film quality.

In addition, Solar Complex asserts that the administrative law judge erred in failing to identify any x-ray evidence from claimant's treatment records that were classified in accordance with the requirements set forth at 20 C.F.R. §718.102(b). In weighing the x-ray evidence at Section 718.202(a)(1), the administrative law judge noted that the x-ray reading in claimant's 2007 treatment records showed the presence of simple pneumoconiosis. Decision and Order at 26. Section 718.102(b) provides that a chest x-ray must be classified according to the ILO classification system to establish the existence of pneumoconiosis. Because the administrative law judge did not explain why he found that the x-ray reading in claimant's treatment records established the existence of pneumoconiosis in accordance with the requirements set forth at 20 C.F.R. §718.102(b), we hold that the administrative law judge erred in relying on such x-ray evidence to establish the existence of pneumoconiosis.

In view of the foregoing, we vacate the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), and remand the case for further consideration of the x-ray evidence in accordance with the APA. In addition, because disability causation at 20 C.F.R. §718.204(c) may rest on a finding of legal pneumoconiosis, the administrative law judge should consider whether the medical opinion evidence is sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *see also Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-227 (2002)(*en banc*).

Further, because we herein vacate the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), we also vacate the administrative law judge's finding that claimant's clinical pneumoconiosis arose out of coal dust exposure at 20 C.F.R. §718.203(b). Nevertheless, if the administrative law judge finds that the x-ray evidence establishes the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), he may reinstate his

[15] Section 718.102(a) requires only that a chest x-ray be of suitable quality, rather than optimal quality, for proper classification of the presence or absence of pneumoconiosis. *See* 20 C.F.R. §718.102(a); *Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984).

finding that claimant's clinical pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b).

Finally, Solar Complex contends that the administrative law judge erred in finding that the evidence established total disability due to legal pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge considered the reports of Drs. Baker, Broudy, and Dahhan. In a report dated February 10, 2004, Dr. Baker opined that claimant's coal workers' pneumoconiosis and chronic bronchitis related to coal dust exposure "fully" contributed to his respiratory impairment. Director's Exhibits 13, 41. In a subsequent report dated September 7, 2004, however, Dr. Baker stated, "[i]f [claimant's] smoking history is accurate, and he has at least 25 years of coal dust exposure, I would feel his coal dust exposure has caused a significant portion of his symptoms and would substantially contribute and aggravate any pulmonary condition." Director's Exhibit 28. Similarly, in a report dated April 12, 2007, Dr. Baker stated, "[i]f [claimant's] history is accurate and he does have approximately 27 to 28 years of underground coal dust exposure and a 7-pack year history, then the coal dust exposure would be the primary cause of his pulmonary complaints."[16] Director's Exhibit 41. In reports dated September 22, 2004 and April 30, 2007, Dr. Broudy opined that claimant does not have coal workers' pneumoconiosis, claimant's chronic bronchitis was related to cigarette smoking, rather than coal dust exposure, and claimant's respiratory impairment was largely caused by cigarette smoking, and not coal dust exposure. Director's Exhibits 31, 41; Employer's Exhibits 2, 6. In a report dated September 7, 2004, Dr. Dahhan opined that claimant does not have coal workers' pneumoconiosis, claimant has chronic bronchitis by history, and claimant's pulmonary disability was caused by his smoking habit, and not coal dust exposure. Director's Exhibits 30, 41; Employer's Exhibit 1. In a report dated May 4, 2007, Dr. Dahhan opined that claimant does not have coal workers' pneumoconiosis and claimant's mild obstructive ventilatory impairment was not caused by coal dust exposure. Employer's Exhibit 5.

The administrative law judge gave less weight to the disability causation opinions of Drs. Broudy and Dahhan because they opined that claimant did not suffer from pneumoconiosis. Decision and Order at 28. Further, the administrative law judge found that Dr. Baker's disability causation opinion was well-reasoned and substantially documented, based on the record as a whole. *Id*. at 30. Hence, the administrative law judge found that claimant's total respiratory disability was caused, in substantial part, by his coal mine employment. *Id*.

Because we herein vacate the administrative law judge's finding that the x-ray

[16] During a July 24, 2006 deposition, Dr. Baker did not render an opinion regarding the issue of disability causation. Director's Exhibit 41.

evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), we 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) and remand the case for further consideration of all the evidence in accordance with the APA.[17] On remand, the administrative law judge, within his discretion, may reopen the record for claimant to admit an additional report into the record, subject to the evidentiary limitations set forth at 20 C.F.R. §725.414, as Dr. Baker's disability causation opinion was based on inaccurate histories of cigarette smoking and coal dust exposure.[18] *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989).

If reached, on remand, the administrative law judge must consider the evidence in accordance with the disability causation standard set forth at 20 C.F.R. §718.204(c).[19]

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[17] While the administrative law judge found that the evidence established that claimant has clinical pneumoconiosis, he did not make a finding on the issue of whether claimant's totally disabling respiratory impairment was due to clinical pneumoconiosis. Thus, if reached on remand, the administrative law judge must do so.

[18] As discussed *supra*, the administrative law judge credited claimant with 14 years of coal mine employment. Decision and Order at 5. However, Dr. Baker relied on a history of 27 to 28 years coal dust exposure. Director's Exhibits 13, 28, 41. In addition, Dr. Baker relied on a history of six to seven years of cigarette smoking. *Id*. However, in considering the cigarette smoking history that claimant reported to Dr. Baker, the administrative law judge stated that "the record evidences that [c]laimant very likely has a smoking history – or at the very least, history of smoke exposure – that is drastically in excess of what he has reported." Decision and Order at 29. On remand, the administrative law judge must make an explicit finding on claimant's smoking history.

[19] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> > (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> >
> > (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to

Peabody Coal Co. v. Smith, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). The administrative law judge must specifically consider whether clinical or legal pneumoconiosis contributed to the miner's totally disabling respiratory impairment at 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded 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

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coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).