BRB No. 05-0614 BLA

WILLIAM O. DEMPSEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEWELL COAL COMPANY	)	DATE ISSUED: 03/31/2006
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand-Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Mary Z. Natkin (Washington and Lee University School of Law, Legal Practice Clinic), Lexington, Virginia, for claimant.

Douglas A. Smoot, Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand-Awarding Benefits (2002-BLA-5357) of Administrative Law Judge Daniel L. Leland 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 has previously been before the

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

Board, and the complete procedural history of this case is contained in the Board's prior Decision and Order. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). In a Decision and Order-Awarding Benefits issued on May 30, 2003, the administrative law judge credited claimant with twenty-three years of coal mine employment[2] and found that the subsequent claim was timely filed. The administrative law judge found that the medical evidence developed since the prior denial of benefits established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore found that claimant demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Reviewing the entire record, the administrative law judge found that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), that the CT scan evidence was in equipoise and did not establish the existence of pneumoconiosis, but that the weight of the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Weighing the chest x-rays and medical opinions together, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The administrative law judge further found that claimant was totally disabled and that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits as of February 1, 2001, the month in which the subsequent claim was filed.

On appeal, the Board initially addressed the numerous procedural and evidentiary issues pertaining to the administrative law judge's application of the revised regulations. With respect to the major aspects of the administrative law judge's procedural and evidentiary rulings, the Board initially affirmed the administrative law judge's finding that this subsequent claim was timely filed. In addition, the Board upheld the validity of the revised regulation at 20 C.F.R. §725.414, and the administrative law judge's application of Section 725.414 to limit the evidentiary submissions in this claim. The Board also affirmed the administrative law judge's exclusion, from the record, of the December 1977 pulmonary function and blood gas studies as in excess of the evidentiary limitations, and outside of the exceptions to the limitations provided for hospitalization or treatment records or prior federal claim evidence, and further affirmed the administrative law judge's finding that employer failed to establish good cause for exceeding the evidentiary limits of Section 725.414. Finally, the Board affirmed the administrative law judge's determination that claimant established that he was totally disabled, and therefore, established a change in an applicable condition of entitlement pursuant to 20

[2] The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

C.F.R. §725.309(d).[3] The Board vacated, however, the administrative law judge's ruling as to the CT scan readings, holding that the administrative law judge erred in finding that "the evidentiary limitations of §725.414 apply equally to CT scans," and instructed him to reconsider their admissibility within his own discretion under APA Section 556(d), in accordance with *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997), and, if necessary, to reconsider whether the CT scans support a finding of the existence of pneumoconiosis. The Board also held that some of the records submitted by employer constituted treatment records for a respiratory or pulmonary or related disease under Section 725.414(a)(4) and were incorrectly excluded by the administrative law judge merely because they contained pulmonary function and blood gas studies which the administrative law judge believed exceeded the evidentiary limits of Section 725.414. The Board instructed the administrative law judge to analyze each set of records and make a specific determination as to the admissibility of the reports contained therein under Section 725.414(a)(4).

With respect to the merits of entitlement, again the administrative law judge's findings were affirmed in part and vacated in part. Specifically, regarding the existence of pneumoconiosis, the Board affirmed the administrative law judge's finding that a preponderance of the x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The Board vacated, however, the administrative law judge's finding that the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), because the administrative law judge erroneously discredited the opinion of Dr. Renn since "a majority" of the pulmonary function studies and arterial blood gas tests that Dr. Renn relied upon were excluded from the record because they exceeded the evidentiary limitations of the new regulations. The Board instructed the administrative law judge to reweigh the opinion of Dr. Renn, to specifically consider Dr. Renn's criticism of the opinions of Drs. Cohen and Gaziano, and to discuss the impact of the physicians' comparative credentials on his weighing of the evidence. In addition, because the Board vacated the administrative law judge's finding that the existence of

[3] Additionally, the Board found that the administrative law judge did not abuse his discretion in: ruling on claimant's motions to exclude and ordering employer to identify which items of evidence it would rely on as its affirmative case pursuant to Section 725.414(a)(3)(i); refusing to permit employer to withdraw Dr. Bellotte's medical report at the hearing and substitute Dr. Crisalli's report; deciding not to retain the large number of excluded exhibits with the record; finding that good cause excused claimant's submission of evidence less than twenty days before the hearing pursuant to Section 725.456(b)(3); excluding employer's proffered re-reading of an August 13, 2001 x-ray submitted by the Director, because employer had already reached the limit of its permitted rebuttal of the Director's August 13, 2001 x-ray; allowing employer to substitute Dr. Wiot's reading of an October 1, 2002 x-ray for that of Dr. Bellotte; permitting employer to select which two of its three medical reports employer would submit as its affirmative case; and, finally, admitting Dr. Renn's deposition testimony.

pneumoconiosis was established, the Board also vacated the administrative law judge's disability causation finding and instructed him to reweigh the medical opinions after he had reassessed the existence of pneumoconiosis. Finally, the Board vacated the administrative law judge's onset determination and instructed the administrative law judge that, if benefits were awarded on remand, he must address the relevant evidence and make specific findings, if possible, regarding the date of onset. The Board noted that if such analysis did not establish the month of onset, then benefits would be payable beginning with the month during which the claim was filed.[4] 20 C.F.R. §725.503(b).

On remand, in an Order dated October 29, 2004, the administrative law judge reconsidered the admissibility pursuant to Section 725.414, of the interpretations of the October 31, 2002 CT scan by Drs. Spitz, Shipley, Wheeler and Scott, proffered by employer and previously excluded from the record. Employer's Exhibits 17, 18, 27, 28; Administrative Law Judge's Order dated October 29, 2004. The administrative law judge found that, because all four of employer's additional interpretations are negative readings by physicians who are dually qualified as B readers and Board-certified radiologists, as are the two CT scan interpretations previously proffered by employer and admitted into the record, to admit all four additional readings would constitute "unduly repetitious evidence." Administrative Law Judge's Order dated October 29, 2004 at 2-3. However, in light of his prior finding that the CT scan evidence of record was in equipoise, the administrative law judge determined that the admission of one of the additional CT scan interpretations would not be unduly repetitious but would help to resolve the conflict among the physicians whose opinions are already in the record. Administrative Law Judge's Order dated October 29, 2004 at 3. The administrative law judge concluded that because Dr. Spitz's CT scan interpretation, Employers Exhibit 17, was the first one submitted, it would be admitted into the record. Administrative Law Judge's Order dated October 29, 2004.

Subsequently, in a Decision and Order on Remand dated March 23, 2005, the administrative law judge initially reconsidered the numerous hospital records and treatment notes submitted by employer, excluding those which he determined did not document any treatment or evaluation for a respiratory or pulmonary disease, as set forth at 20 C.F.R. §725.414. Considering the merits of entitlement, in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative reconsidered the medical opinion evidence in accordance with the Board's specific instructions. The administrative law judge accorded

[4] In addition, in reviewing the administrative law judge's evaluation of the merits of entitlement, the Board held that the administrative law judge did not abuse his discretion in declining to consider Dr. Bellotte's opinion regarding the existence of pneumoconiosis, when he found the opinion "inextricably tied" to an inadmissible x-ray reading and further affirmed the administrative law judge's crediting of the opinions of Drs. Cohen, Gaziano, Rasmussen, and Wantz as reasoned.

greater weight to the opinions of Drs. Cohen, Gaziano, Rasmussen, and Dr. Wantz, who diagnosed the existence of pneumoconiosis, than to the contrary opinions of Drs. Alexander, Scatarige, Spitz, Wiot, Brown and Renn, or to the West Virginia Occupational Pneumoconiosis Board (WVOPB) determination letter. Weighing the chest x-rays and medical opinions together, s*ee Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment. Reconsidering the issue of disability causation pursuant to Section 718.204(c), again in light of the Board's specific instructions, the administrative law judge accorded greatest weight to the opinions of Drs. Cohen and Rasmussen, that pneumoconiosis was a substantially contributing cause of claimant's total disability, and accorded little weight to the contrary opinion of Dr. Renn. Accordingly, the administrative law judge awarded benefits beginning February 1, 2001.

On appeal, employer contends that the administrative law judge abused his discretion in excluding from the record the CT scan interpretations of Drs. Shipley, Wheeler and Scott, as well as a November 13, 2000 exercise stress test and a November 14, 2000 nuclear stress test, which had been proffered by employer as hospital treatment notes. Employer further asserts that the administrative law judge erred in his analysis of the medical opinion evidence pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. Employer submitted a reply to claimant's response. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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 a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer initially asserts that the administrative law judge abused his discretion and violated employer's due process rights by excluding from the record the CT scan interpretations of Drs. Shipley, Wheeler and Scott as "unduly repetitious" evidence, and

in refusing to allow employer to rely on the CT interpretation of its choice.[5] Employer does not state which interpretation it would have chosen, or explain how the administrative law judge's selection of Dr. Spitz's interpretation was detrimental to its position. Employer's Brief at 7-11. We hold that, under the facts of this case, any error that the administrative law judge may have committed pertaining to the admission on remand of the CT scan evidence was harmless, as it did not affect the administrative law judge's finding that the CT scan evidence of record is insufficient to establish the existence of pneumoconiosis. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-276 (1984). In addition, as neither party challenges the administrative law judge's weighing of the CT scan evidence, or his determination that the CT scans do not establish the existence of pneumoconiosis, these finding are hereby affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer next contends that the administrative law judge erred by excluding the results of a November 13, 2000 exercise stress test and a November 14, 2000 nuclear stress test administered at Summersville Memorial Hospital and proffered by employer as hospital treatment records under Section 725.414(a)(4). Employer's Brief at 12; Director's Exhibits 37, 38. We disagree.

Section 725.414(a)(4) provides that "notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for . . . or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). The provision does not define what constitutes a record of a miner's hospitalization or treatment for a respiratory or pulmonary or related disease. On remand, as instructed by the Board, the administrative law judge reconsidered all of the hospital and treatment records proffered by the parties and permissibly concluded, *inter alia*, that the results of the November 13, 2000 exercise stress test and November 14, 2000 nuclear stress test are not admissible pursuant to Section 725.414(a)(4) because there is no indication in the record that they were

[5] On January 27, 2006, subsequent to the issuance of the administrative law judge's rulings on remand in this case, the Board clarified its position regarding the admissibility of CT scan evidence under the revised regulations. In *Webber*, the Board held that 20 C.F.R. §718.107, allowing for the admission of "[o]ther medical evidence," such as CT scans, is reasonably interpreted to allow for the submission, as part of a party's affirmative case, of one reading of each separate test or procedure undergone by claimant. *Webber v. Peabody Coal Co.*, BLR 1- , BRB No. 05-0335 BLA (Jan. 27, 2006)(*en banc*)(Boggs, J., concurring). In addition, the Board held that each party may choose which set of results, for each test or procedure, to submit in order to best support his position. Thus, under *Webber*, employer would be permitted to submit one interpretation of its choosing of the October 31, 2002 CT scan, not three interpretations, as the administrative law judge allowed here.

performed to evaluate or treat claimant for a respiratory or pulmonary condition. Director's Exhibits 37, 38; Decision and Order on Remand at 4. As a review of these records supports the administrative law judge's findings, we hold that the administrative law judge acted within his discretion in determining that the results of the November 13, 2000 exercise stress test and November 14, 2000 nuclear stress test administered at Summersville Memorial Hospital are not admissible under Section 725.414(a)(4). *See Clark*, 12 BLR at 1-153.

Regarding the merits of entitlement, employer asserts that pursuant to Section 718.202(a)(4), the administrative law judge erred in giving less weight to Dr. Renn's opinion because it was based partly on evidence excluded under Section 725.414. Employer's Brief at 14. Employer specifically contends that in doing so, the administrative law judge selectively analyzed the medical evidence of record because he did not similarly discredit the opinions of Drs. Cohen and Rasmussen, who also reviewed evidence excluded under Section 725.414. Employer's Brief at 14. We disagree.

Section 725.414 provides that "[a]ny chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). In considering Dr. Renn's opinion on remand, the administrative law judge noted that while many of the previously excluded test results which Dr. Renn reviewed had subsequently been admitted into the record pursuant to the Board's remand order, Dr. Renn's opinion was still based in part on evidence outside the record. Employer's Exhibits 9, 32; Decision and Order on Remand at 5. Specifically, the administrative law judge found that in addition to Dr. Renn's own interpretations of chest x-rays dated May 22, 1989 and October 1, 2002, which had been previously excluded as in excess of the evidentiary limitations at Section 725.414, twelve of the sixteen additional x-ray interpretations that Dr. Renn reviewed were either not contained in the record or were excluded from the record because they exceeded the evidentiary limitations. Employer's Exhibits 9, 32; Decision and Order at 5, 6. The administrative law judge determined, as was within his discretion, that Dr. Renn's opinion as to the existence of pneumoconiosis was primarily based on inadmissible evidence, and, therefore, was entitled to less weight. Decision and Order at 5, 6. A review of Dr. Renn's medical opinions and deposition testimony supports the administrative law judge's conclusion. In a report dated November 15, 2002, Dr. Renn summarized his own interpretations of chest x-rays dated May 22, 1989 and October 1, 2002, which had been excluded from the record, and acknowledged that interpretations of x-rays dated January 4, 1989, January 17, 1989, May 26, 1989, March 15, 1994, April 21, 1995, February 10, 1997, December 8, 1998, October 25, 1999, April 24, 2001, July 19, 2001 and August 13, 2001, which had also been excluded from the record, constituted part of the "additional database upon which I have formed my opinion." Employer's Exhibit 9. In his deposition dated January 24, 2003, Dr. Renn further acknowledged that, in addition to his own x-ray readings, he had reviewed a series

of x-rays dating from 1989 through 1996. Employer's Exhibit 32 at pp. 26, 49. Dr. Renn stated that he found it helpful and significant to have a series of x-rays to review, and that his opinion, that claimant suffers from idiopathic pulmonary fibrosis and not pneumoconiosis, was supported by the radiographic pattern he observed. Employer's Exhibit 32 at pp. 26, 27, 49, 64.

By contrast, in his report dated February 5, 2003, Dr. Cohen specifically stated that his opinion, that claimant has coal workers' pneumoconiosis, was based on claimant's twenty-five year history of coal dust exposure,[6] claimant's lack of smoking history, his symptoms of chronic lung disease, the pulmonary function testing results which demonstrated a mild obstructive defect and a progressively worsening diffusion impairment, the resting and exercise blood gas studies showing significant gas exchange abnormalities, and, lastly, the significant chest x-ray evidence of pneumoconiosis. Claimant's Exhibit 6. In addition, Dr. Cohen explained that even assuming the chest radiographic evidence was negative for the existence of pneumoconiosis, this would still not change his opinion that claimant has clinical and physiological evidence of pneumoconiosis. Claimant's Exhibit 6. Thus, the administrative law judge's conclusion, that while Dr. Cohen had also reviewed a chest x-ray and CT scan interpretation which had been excluded from the record, unlike Dr. Renn, Dr. Cohen's diagnosis of pneumoconiosis was primarily based on admissible, not inadmissible, evidence, is also supported by substantial evidence. *See Compton*, 211 F.3d at 211; *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Grizzle v. Pickands Mather & Co./Chisolm Mines*, 994 F.2d 1093, 1096 (4th Cir. 1993); *Clark*, 12 BLR at 1-153; Decision and Order at 6-7.

In considering Dr. Rasmussen's opinion on remand, the administrative law judge properly noted that Dr. Rasmussen's report summarized the physician's own interpretation of the August 13, 2001 chest x-ray, which is not included in the record. Decision and Order on Remand at 6-7. The administrative law judge further correctly noted, however, that Dr. Rasmussen testified that it was his policy to rely on Dr. Patel's dually qualified interpretation of an x-ray as the basis for his opinion unless he is explicitly asked to use his own interpretation. Claimant's Exhibit 8, at 19; Decision and Order on Remand at 6-7. Thus, the administrative law judge reasonably exercised his discretion to conclude that Dr. Rasmussen had relied on Dr. Patel's admissible interpretation of the August 13, 2001 chest x-ray in determining that claimant suffered from pneumoconiosis, and had not relied on inadmissible x-ray evidence. *See Compton*, 211 F.3d at 211; *Mays*, 176 F.3d at 753, 21 BLR at 2-587; *Grizzle*, 994 F.2d at 1096; *Clark*, 12 BLR at 1-153.

[6] The administrative law judge credited claimant with twenty-three years of coal mine employment.

Therefore, we reject employer's assertion that the administrative law judge selectively analyzed the medical opinion evidence pursuant to Section 718.202(a)(4) and hold that he acted within his discretion in according little weight to Dr. Renn's opinion because it was based primarily on inadmissible evidence, and, in crediting the opinions of Drs. Cohen and Rasmussen, whose opinions, by contrast, were not primarily based on the inadmissible evidence they reviewed. *See Harris v. Old Ben Coal Co.*, BRB No. 04-0812 BLA (Jan. 27, 2006)(*en banc*)(McGranery and Hall, J.J., concurring and dissenting). As the administrative law judge provided a valid reason for according little weight to the opinion of Dr. Renn, we need not address employer's additional assertion that the administrative law judge erred in alternatively finding Dr. Renn's opinion unreasoned. *Kozele v. Rochester & Pittsburgh Coal Co*, 6 BLR 1-378 (1983).

Finally, pursuant to Section 718.204(c), employer challenges the administrative law judge's determination to accord less weight to the disability causation opinion of Dr. Renn because he did not diagnose pneumoconiosis. Employer specifically asserts that while Dr. Renn did not diagnose coal workers' pneumoconiosis, because Dr. Renn "found symptoms consistent with legal pneumoconiosis," the physician's opinion is not in direct contradiction to the administrative law judge's own finding of pneumoconiosis. Therefore, employer concludes that the administrative law judge erred in finding, pursuant to *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002) and *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), that Dr. Renn's opinion could not be credited at Section 718.204(c). Employer's Brief at 20-22. We disagree.

Contrary to employer's arguments, while Dr. Renn diagnosed a totally disabling respiratory impairment, he specifically opined that the changes shown on claimant's x-rays and CT scans represent diffuse idiopathic pulmonary fibrosis, and are not the result of coal mine dust inhalation. Employer's Exhibit 32 at 15-16, 40-41, 56. Dr. Renn further explicitly stated that the results of claimant's physical examination and testing did not present the clinical picture of a coal mine dust induced disease, and concluded that his condition was "not the result of coal workers' pneumoconiosis, either medical or legal." Employer's Exhibit 32 at 27, 40-41, 56. Therefore, as Dr. Renn specifically stated that claimant's x-ray changes do not represent pneumoconiosis, and that he does not suffer from legal or medical pneumoconiosis, or present any symptoms related to coal dust exposure, Dr. Renn's opinion is in direct contradiction to the administrative law judge's finding that claimant suffers from pneumoconiosis arising out of his coal mine employment. *Scott*, 289 F.3d at 269, 22 BLR at 2-384; *Toler*, 43 F.3d at 116, 19 BLR at 2-83. Thus, we hold that the administrative law judge properly declined to credit Dr. Renn's opinion at Section 718.204(c).

It is the province of the administrative law judge to evaluate the physicians' opinions, *Compton*, 211 F.3d at 211; *Grizzle v. Pickands Mather & Co./Chisolm Mines*, 994 F.2d 1093, 1096 (4th Cir. 1993), and the Board will not substitute its inferences for

those of the administrative law judge. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). Because the administrative law judge re-examined the medical evidence in accordance with the Board's remand order, and because employer raises no additional arguments to with respect to those findings, except those addressed and rejected herein, s*ee Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983), we affirm the administrative law judge's finding that claimant established 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.

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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ROY P. SMITH
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The majority has held that the administrative law judge's accordance of greater weight to the opinion of Dr. Cohen than to Dr. Renn, because unlike Dr. Renn, Dr. Cohen's diagnosis of pneumoconiosis was primarily based on admissible, not inadmissible, evidence, was within the administrative law judge's discretion and supported by substantial evidence. I disagree.

The evidentiary limitations of Section 725.414 were intended to level the playing field between operators and claimants and to ensure fairer and more equitable evaluations of black lung claims. 20 C.F.R. §725.414; 64 Fed. Reg. 54972 (Oct 8, 1999); 65 Fed Reg. 79992 (Dec. 20, 2000). The regulations further guard against the consideration of excess medical evidence by providing that medical reports be based only on admissible evidence. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). As the regulations are silent concerning how an administrative law judge should evaluate a medical report which contains

references to evidence that has been excluded under the limitations, the Board has held that the disposition of this issue is a matter within the discretion of the administrative law judge. *See Harris v. Old Ben Coal Co.*, BRB No. 04-0812 BLA (Jan. 27, 2006)(*en banc*)(McGranery and Hall, J.J., concurring and dissenting); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-66-67 (2004)(*en banc*). In exercising this discretion, however, the administrative law judge must reconcile his obligations under Section 725.414(a)(2)(i), (a)(3)(i), with his statutory obligation to consider all of the relevant and material evidence bearing upon the existence of pneumoconiosis. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439, 21 BLR 2-269, 2-272 (4th Cir. 1997). Because the administrative law judge focused on the number of inadmissible exhibits Drs. Renn and Cohen had each reviewed, without considering what effect, if any, the inadmissible evidence had on the physicians' opinions, I would hold that the administrative law judge failed to sufficiently analyze the medical opinion evidence or explain his conclusion that Dr. Cohen's opinion is entitled to greater weight than that of Dr. Renn. *See Akers*, 131 F.3d at 439, 442, 21 BLR at 2-272, 2-276; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order on Remand at 5, 6.

In addition, I would hold that the administrative law judge mischaracterized Dr. Renn's conclusion, that the changes on claimant's x-rays do not represent pneumoconiosis because the upper lung zones are clear, as being contrary to the x-ray evidence of record because "every physician that noted the location of the opacities on their x-ray interpretations found opacities in all six lung zones." Decision and Order on Remand at 5. As employer correctly asserts, contrary to the administrative law judge's finding, Dr. Gaziano, who interpreted a February 10, 1989 x-ray as positive for pneumoconiosis, indicated the presence of opacities only in the lower four zones. Director's Exhibit 1. Similarly, Dr. Wiot interpreted x-rays dated October 1, 2002 and October 25, 2002 as negative for pneumoconiosis, and stated that he based his conclusion in part on the fact that the lower lung zones contained markings but the upper lung zones were totally clear. Employer's Exhibits 12, 13. Finally, Dr. Wheeler interpreted an August 13, 2001 x-ray as negative for pneumoconiosis, noting, albeit less definitively than Gaziano and Wiot, "minimal increased lower lung markings." Employer's Exhibit 2.

As the administrative law judge's failure to properly evaluate Dr. Renn's opinion affected his weighing of the medical opinion evidence both with respect to the existence of pneumoconiosis, and with respect to the issue of total disability causation, I would vacate the administrative law judge's analysis of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); Decision and Order on Remand at 6-8. On remand, I would instruct the administrative law judge to reconsider the medical opinions of Drs. Renn and Cohen in light of Section 725.414(a)(2)(i), (a)(3)(i), and determine whether either physician actually relied upon, rather than merely reviewed, evidence which is not in the record. If he determines an opinion has relied on evidence outside of the record, I would instruct the administrative

law judge to consider whether to redact the objectionable content, ask the physician to submit new reports, factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which their opinion is entitled, or, as a last resort, exclude the report from the record. *See Harris v. Old Ben Coal Co.*, BRB No. 04-0812 BLA (Jan. 27, 2006)(*en banc*)(McGranery and Hall, J.J., concurring and dissenting). Then, I would instruct the administrative law judge to reweigh all of the medical opinion evidence of record and determine whether it supports a finding of the existence of pneumoconiosis at Section 718.202(a)(4).

Finally, pursuant to Section 718.204(c), because I would vacate the administrative law judge's finding that the existence of pneumoconiosis was established, I would also vacate his disability causation finding, as well as his onset of disability determination. If, on remand, the administrative law judge finds the existence of pneumoconiosis established, I would instruct him to reweigh the medical evidence relevant to the issue of disability causation in accordance with the holdings of the United States Court of Appeals for the Fourth Circuit, and, if benefits were awarded on remand, to consider the relevant evidence and make specific findings regarding the date of onset. 20 C.F.R. §725.503(b).

I concur in all other respects with the majority opinion.

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JUDITH S. BOGGS
Administrative Appeals Judge