BRB No. 08-0434 BLA

J.V.A.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEXTET MINING CORPORATION	)	DATE ISSUED: 03/24/2009
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Keith A. Utley (Morton Law LLC), Henderson, Kentucky, for employer.

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

Employer appeals the Decision and Order Award of Benefits (07-BLA-5220) of Administrative Law Judge Daniel F. Solomon on a subsequent claim[1] 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). The administrative law judge adjudicated this subsequent claim pursuant to 20 C.F.R. Part 718, and credited the parties' stipulation that claimant worked in qualifying coal mine employment for thirty-three years. The

[1] Claimant filed his first claim on July 5, 2000, which was denied by the district director on October 17, 2000 because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed a second claim on August 18, 2003. That claim was denied by the district director on May 18, 2004, for failure to establish any element of entitlement. Director's Exhibit 2. Claimant's third application, filed on February 27, 2006, is pending herein on appeal. Director's Exhibit 4.

administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and therefore, that claimant established that one of the applicable conditions of entitlement had changed since the denial of his prior claim pursuant to 20 C.F.R. §725.309. Next, the administrative law judge found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were awarded, commencing as of February 2006, the month in which the claim was filed.

On appeal, employer challenges the administrative law judge's determinations that claimant established the existence of pneumoconiosis under Section 718.202(a)(1) and (4) and total disability due to pneumoconiosis under Section 718.204. In response, claimant urges affirmance of the administrative law judge's award of benefits. The Director, Office Workers' Compensation Programs, has not filed a response in this appeal. Employer filed a reply to claimant's brief, reaffirming its request that the Board reverse the administrative law judge's Decision and Order awarding benefits.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, rational, and consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.[2] *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Relevant to Section 718.202(a)(1), employer challenges the administrative law judge's determination that the x-ray evidence was sufficient to establish the existence of pneumoconiosis. Specifically, employer argues that the administrative law judge erred in according more weight to the 2007 x-rays than to the 2006 x-ray since they were only separated by one year. Employer also argues that the administrative law judge erred in discrediting the only negative reading of the March 1, 2007 x-ray, by Dr. Selby, based on his notation that the film was "overexposed" when, in fact, Dr. Selby actually found the

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 5.

film "underexposed." Employer contends that the administrative law judge's discrediting of Dr. Selby's negative x-ray reading is inconsistent with his crediting of Dr. Rasmussen's positive reading of a film dated April 12, 2007, since Dr. Rasmussen rated the quality of that film as 3 and Dr. Selby rated the quality of the March 1, 2007 film as 2.[3] Lastly, employer notes that the administrative law judge "saw no significance in the failure of the claimant to offer any rebuttal" of Dr. Selby's negative reading of the March 1, 2007 x-ray, or of Dr. Westerfield's negative reading of the March 21, 2006 x-ray.

The newly submitted x-ray evidence consists of five interpretations of three x-ray films dated March 21, 2006, March 1, 2007, and April 12, 2007. The March 21, 2006 x-ray film was interpreted by Dr. Westerfield, a B reader, as negative for pneumoconiosis. Director's Exhibit 13.[4] The March 1, 2007 x-ray film was read only by Dr. Selby, a B reader, as negative for pneumoconiosis with a film quality of 2. Employer's Exhibit 1. The April 12, 2007 x-ray film was interpreted by Dr. Baker, a B reader, as positive for pneumoconiosis with a film quality of 1; by Dr. Rasmussen, a B reader, as positive for pneumoconiosis with a film quality of 3; and by Dr. Selby, as negative for pneumoconiosis with a film quality of 2. Claimant's Exhibits 1, 4; Employer's Exhibit 4.

In analyzing the x-ray evidence, the administrative law judge initially accorded greater weight to the readings taken of the x-ray films dated March 1, 2007 and April 12, 2007 and accorded less weight to the sole interpretation of the March 21, 2006 x-ray rendered by Dr. Westerfield, on the basis that it was less indicative of claimant's current health since pneumoconiosis is a progressive and irreversible disease and one year separated the x-ray taken in 2006 from the two x-rays taken in 2007. Decision and Order at 7. Next, the administrative law judge found that Dr. Selby, the only physician to interpret the March 1, 2007 x-ray film, read the film as negative for pneumoconiosis and noted that the film was "overexposed." Decision and Order at 7-8; Employer's Exhibit 1. Because Drs. Baker and Rasmussen, who are both B readers, rendered interpretations of the April 12, 2007 film that were similar to each other, the administrative law judge found that their positive readings outweighed the negative reading of Dr. Selby, who had

[3] Section 718.102(a) provides, "A chest roentgenogram (X-ray) shall be of suitable quality for proper classification of pneumoconiosis and shall conform to the standards for administration and interpretation of chest X-rays as described in Appendix A." 20 C.F.R. §718.102(a). When interpreting a chest x-ray, the physician must grade the quality of the film as either 1, 2, 3, or unreadable, with one being the highest in quality and three being the least. The x-ray must be of suitable quality for proper classification of the pneumoconioses. *See Lambert v. Itmann Coal Co.*, 6 BLR 1-256, 1-258 (1983).

[4] Dr. Barrett, who is a Board-certified radiologist and B reader, interpreted only the quality of the March 21, 2006 x-ray and rated it as 1. Director's Exhibit 14.

opined that this film showed "poor contrast." Decision and Order at 8; Claimant's Exhibits 1, 4; Employer's Exhibit 4. Dr. Selby read the April 12, 2007 x-ray on October 5, 2007, more than four months after he prepared a narrative report dated May 22, 2007, discounting the significance of the positive interpretations. The administrative law judge found that Dr. Selby's negative interpretation of the April 12, 2007 x-ray film was "suspect" and "flawed" based on several factors: Dr. Selby had not actually reviewed the April 12, 2007 x-ray at the time of his report; Dr. Selby relied, in part, on a negative CT scan that was not contained in the evidence of record to discredit positive readings of the April 12, 2007 x-ray; Dr. Selby's opinion that category 1 pneumoconiosis can be falsely diagnosed as a positive reading on a chest x-ray of a smoker with a significant smoking history was "premature" and "argumentative" since, at that time, he had not reviewed the April 12, 2007 x-ray; and, after finally reviewing the x-ray, Dr. Selby observed that the quality of the film had "poor contrast and artifacts". Decision and Order at 8. Considering the newly submitted x-ray evidence together, the administrative law judge relied on the positive interpretations of Drs. Baker and Rasmussen of the April 12, 2007 x-ray to find that the x-ray evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1).

Initially, we note that the administrative law judge's attribution of greater weight to the 2007 x-rays as more recent than the 2006 x-ray was rational. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Likewise, the administrative law judge properly determined that Dr. Selby discounted the credibility of the positive readings based, in part, on a CT scan that was not designated as "other evidence" pursuant to Section 718.107(a) with the requisite supporting statement that it was medically acceptable and relevant to refuting claimant's entitlement pursuant to Section 718.107(b). Hence, the CT scan referenced was not properly in evidence despite its attachment to Dr. Selby's report.[5] *See* 20 C.F.R. §718.107(a), (b).

[5] Employer admits that the administrative law judge correctly found that it failed to designate the March 1, 2007 CT report, conducted and interpreted by Dr. Perkins, and on which Dr. Selby relied, as "other evidence" pursuant to Section 718.107. Employer argues that the CT scan report was, nevertheless, "admitted" into the evidentiary record because the CT scan report was included with Dr. Selby's March 1, 2007 report at Employer's Exhibit 1 at 14, and that this inclusion obviated the necessity to submit it independently. 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. §724.414(a)(2)(i), (a)(3)(i) [emphasis added]. Furthermore, a physician's testimony as to the miner's condition is limited to medical evidence that is admissible. 20 C.F.R. §§725.457(d), 725.458. Therefore, it was within the administrative law judge's discretion to determine whether to redact that portion of Dr. Selby's opinion from consideration where Dr. Selby relied on

We similarly reject employer's argument that the administrative law judge abused his discretion in finding "suspect" Dr. Selby's negative interpretation of the April 12, 2007 x-ray based upon his May 22, 2007 report questioning the validity of Dr. Baker's positive reading when he, Dr. Selby, had not read the x-ray and did not do so until more than four months later, whereupon he provided a negative interpretation. The administrative law judge considered that the "argumentative" report followed by the anticipated negative interpretation, undermined the credibility of that interpretation. The Board, like the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, "is required to defer to the ALJ's assessment of the physicians' credibility." *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 2-553 (6th Cir. 2002), *citing Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) ("Lacking the authority to make credibility determinations, we will defer to the ALJ's findings."). Accordingly, employer has failed to demonstrate that the administrative law judge erred in his consideration of the interpretations of the April 12, 2007 x-ray.

Nevertheless, we agree with employer that the administrative law judge erred in determining that the x-ray evidence affirmatively established the existence of pneumoconiosis. With respect to the March 1, 2007 x-ray, employer is correct that the administrative law judge's discrediting of the sole reading of this film by Dr. Selby, on the ground that Dr. Selby found it "underexposed"[6] yet rated its quality as 2, was inconsistent with his crediting of Dr. Rasmussen's positive reading of the April 12, 2007 film because Dr. Rasmussen rated its quality as 3. *See Amax Coal Co. v. Beasley*, 957 F.2d 324, 327, 16 BLR 2-45, 2-48-49 (7th Cir. 1992) (administrative law judges have discretion in weighing medical evidence, but they are not free to disregard uncontradicted medical opinions); *Wetherill v. Director, OWCP*, 812 F.2d 376, 382, 9 BLR 2-239, 2-247 (7th Cir. 1987); *see also Lambert v. Itmann Coal Co.*, 6 BLR 1-256, 1-258 (1983) (where physician has read the film for the existence of pneumoconiosis, the Board must conclude that physician found it of suitable quality). Hence, the case must be remanded for the administrative law judge to reconsider the March 1, 2007 x-ray, together with the April 12, 2007 x-ray. Consequently, we vacate the administrative law judge's finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis as the

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the CT scan report that was not properly admitted into the record. *See generally Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J. concurring), *aff'd on recon.*, 24 BLR 1-1 (2007)(*en banc*).

[6] Employer is correct that, contrary to the administrative law judge's determination that Dr. Selby noted the March 1, 2007 x-ray film was "overexposed," Decision and Order at 7, a review of the ILO form indicates that Dr. Selby rated this film as "underexposed." Employer's Exhibit 1.

administrative law judge erred in his analysis of the x-ray evidence. We, therefore, remand the case to the administrative law judge to reconsider the newly submitted x-ray evidence under Section 718.202(a)(1). *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Next, employer argues that the administrative law judge erred in concluding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Specifically, employer asserts that the administrative law judge erred in finding that claimant established legal pneumoconiosis under Section 718.202(a)(4) and, in so doing, failed to provide an explanation for his reliance on claimant's "patently understated" and "self-serving account" of his cigarette smoking history. Employer's Petition for Review and Brief at 6. Employer avers that, throughout the Decision and Order, the administrative law judge stated that claimant smoked one-half to 1 package of cigarettes per day for twenty-five years, which amounts to a minimum 12 and one-half pack-year history and a maximum 25 pack-year history, a history not supported by the record in this claim. Employer specifically contends that, when examined by Dr. Simpao, claimant reported a smoking history from 1952 to 1993 of one to two packs per day, which would be the equivalent of a minimum of thirty-nine pack-years to a maximum of seventy-eight pack-years.

A review of the record reveals that the three opinions in evidence reflect the following cigarette smoking histories for claimant: Dr. Baker recorded a smoking history of one-half to 1 pack per day for twenty-five years; Dr. Simpao testified that claimant smoked 1 and one-half packs per day for forty-one years, which approximates to a total of sixty-pack years; and Dr. Selby reported a smoking history of 1 and one-half package per day for twenty-seven years. Claimant's Exhibits 1, 2 at 20-21; Employer's Exhibit 2.

Although it is not feasible for an administrative law judge to distinguish between the portion of a diagnosed respiratory disease due to smoking and the portion due to coal mine employment, *Wisniewski v. Director, OWCP*, 929 F. 2d 952, 15 BLR 2-57 (3d Cir. 1991); *Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48, 1-52 (1990), the reliance of a physician on an inaccurate cigarette smoking history may affect the credibility of that physician's medical opinion, *Gouge v. Director, OWCP*, 8 BLR 1-307, 1-308-309 (1985); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985).

In his assessment of the medical opinion evidence under Section 718.202(a)(4), the administrative law judge initially stated, "The Claimant has a smoking history of about 25 years, …was exposed to mining for at least 33 years," and "has a history of heart problems, multiple surgeries, and now sleep apnea." Decision and Order at 9. However, the administrative law judge's decision does not reveal whether he considered

the disparity of opinions among the physicians concerning claimant's smoking history. Because the administrative law judge did not address the divergent cigarette smoking histories relied upon by the physicians, which could affect the relative credibility of their opinions concerning whether claimant suffered from legal pneumoconiosis or from a cigarette smoke-induced obstructive lung disease exclusively, we vacate the administrative law judge's weighing of the medical opinion evidence under Section 718.202(a)(4). On remand, the administrative law judge must render a determination with respect to claimant's cigarette smoking history and then reconsider the medical opinions accordingly. Furthermore, under his discussion of the medical opinions, the administrative law judge reiterated his prior determination that "there is evidence of clinical pneumoconiosis." *Id*. Hence, we cannot discern the extent to which the administrative law judge relied on his flawed analysis of the x-ray evidence in evaluating the medical opinion evidence. Consequently, we vacate the administrative law judge's determination that the medical opinion evidence established the existence of pneumoconiosis under Section 718.202(a)(4), and remand the case for reconsideration of the evidence thereunder. *See Clinchfield Coal Co. v. Harris*, 149 F.3d 307, 21 BLR 2-479 (4th Cir. 1998); *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Inasmuch as we vacate the administrative law judge's determination that the newly submitted x-ray and medical opinion evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4), we must also vacate his resultant findings that claimant established the existence of pneumoconiosis under Section 718.202(a) and that one of the applicable conditions of entitlement has changed since the denial of claimant's prior claim pursuant to Section 725.309.[7]

Employer also asserts that the administrative law judge made several errors in finding that claimant established that he had a totally disabling respiratory impairment at Section 718.204(b)(2)(iv). First, employer argues that the record is devoid of objective evidence demonstrating total respiratory or pulmonary disability in this claim. However, employer argues that the record is replete with evidence demonstrating that if claimant is disabled, any disability is attributable to his non-respiratory health conditions, namely, his obesity, congestive heart failure, arthritis, and diabetes. Consequently, employer avers that the administrative law judge erred in discounting Dr. Selby's opinion under Section 718.204(b)(2)(iv), because claimant's shortness of breath was due to cardiac disease, extreme obesity, sleep apnea, probable asthma, and cigarette smoke-induced

[7] The administrative law judge stated that the district director determined that pneumoconiosis was established in claimant's prior claim filed on August 18, 2003. Decision and Order at 8. However, a review of the Proposed Decision and Order dated May 18, 2004 in that claim reveals that the district director found the evidence insufficient to establish the existence of pneumoconiosis. Director's Exhibit 2 at 4.

obstructive lung disease. More specifically, employer contends that the administrative law judge mischaracterized Dr. Selby's opinion by finding that Dr. Selby admitted that claimant was totally disabled and insinuated that claimant was noncompliant with his treatment or medication.

Employer's contention that the administrative law judge erred in discrediting Dr. Selby's opinion on the basis that this opinion contained a "tacit admission" that claimant was totally disabled has merit. Decision and Order at 14. Assessing the relevant medical opinion evidence, the administrative law judge initially discussed the exertional requirements of claimant's previous coal mine duties as a belt foreman, electrician, mechanic, foreman, coal loader, and shuttle car operator, and then stated:

> Dr. Baker says that the Claimant can no longer withstand further exposure to coal dust. Dr. Simpao stated the same. Dr. Selby maintains that with proper treatment, claimant can be restored to work capacity. I find that this is a tacit admission that at the time that Dr. Selby reviewed the evidence, claimant was unable to work due to a respiratory condition. There is no evidence that this claimant has been non-compliant with physicians' treatment orders or medication.

Decision and Order at 14. In his May 22, 2007 report, Dr. Selby concluded that if claimant's medical problems, which are reversible, were addressed and treated, claimant would possess the respiratory or pulmonary capacity to perform any and all previous coal mine employment duties, including that of belt foreman. Employer's Exhibit 2. This conclusion is not tantamount to either an implicit or "tacit admission" by the physician that claimant was suffering from a totally disabling respiratory or pulmonary impairment. In fact, Dr. Selby's unequivocal opinion that claimant was disabled due to *non-respiratory* conditions is insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv).[8] *See* 20 C.F.R. §718.204(b)(2)(iv); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 20 BLR 2-360 (6th Cir. 1996). Consequently, the administrative law judge improperly characterized Dr. Selby's report. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

[8] In a report dated May 22, 2007, Dr. Selby opined that claimant does not suffer from coal workers' pneumoconiosis. Dr. Selby stated that any shortness of breath claimant experiences is multifactorial and is most likely related to cardiac disease, extreme obesity, deconditioning, probable untreated asthma, obstructive sleep apnea, obstructive lung disease related to cigarette smoking, post CABG chest, and possible prior lung infections. Employer's Exhibit 2.

Further, the administrative law judge's determination that Dr. Selby "predicated much of his contention on the negative x-ray reading and the reading of a [CT] scan that was not offered by Employer" is not supported by substantial evidence inasmuch as, in his March 1, 2007 report, Dr. Selby indicated that he based his opinion on claimant's social and employment histories, physical examination, chest x-ray reading, pulmonary function studies, blood gas studies, and electrocardiogram. Decision and Order at 14; Employer's Exhibit 1. Likewise, Dr. Selby's opinion that claimant suffered from cigarette smoke-induced obstructive lung disease, stated in his May 22, 2007 report, is based on his review of additional medical records and tests. Further, Dr. Selby's October 4, 2007 report, reiterating his opinion, is based on his review of a July 23, 2007 pulmonary function study. Employer's Exhibits 2, 3. Consequently, we agree with employer that the administrative law judge erred in discrediting Dr. Selby's opinion because it was based primarily on x-ray and CT scan evidence.

Employer additionally contests the administrative law judge's determination that the opinions of Drs. Simpao and Baker, that claimant does not retain the respiratory capacity to perform his regular coal mine work, outweigh the opinion of Dr. Selby. Employer contends that the administrative law judge's finding is not rational since neither Dr. Simpao nor Dr. Baker mentioned claimant's extreme obesity or heart failure in contrast to Dr. Selby. In addition, employer asserts that Dr. Simpao's opinion is entitled to diminished weight because Dr. Simpao is not Board-certified in any specialized area of medicine, unlike Drs. Baker and Selby, who are both Board-certified in the subspecialty of pulmonary medicine and are B readers. Finally, employer contends that the reliability of Dr. Baker's opinion is undermined because it is premised on a significantly inaccurate cigarette smoking history.

In addressing the opinions of Drs. Simpao and Baker, the administrative law judge stated only, "I accept that the Claimant has proven total disability through Drs. Simpao's and Baker's medical reports." Decision and Order at 15. The administrative law judge, however, has failed to set forth the rationale for his determination, to provide an adequate discussion of the probative value of each physician's disability assessment, including his qualifications, and to fully analyze the conflicting medical opinion evidence under Section 718.204(b)(2)(iv). *See Director, OWCP v. Congleton*, 743 F.2d 428, 7 BLR 2-12 (6th Cir. 1984). His resolution of this issue, therefore, falls short of the requisite standard and precludes effective review. *See Marx v. Director, OWCP*, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989). Because the administrative law judge's conclusory determination lacks sufficient explanation for his crediting of the opinions of Drs. Simpao and Baker, we vacate the administrative law judge's determination that claimant established total respiratory disability pursuant to Section 718.204(b)(2)(iv), and remand the case for the administrative law judge to clearly set forth his factual findings and legal conclusions. *See Congleton*, 743 F.2d at 429-430, 7 BLR at 2-15-16; *Wojtowicz*, 12 BLR at 1-165; *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986) (administrative law judge must

state why he credits or discredits specific evidence in reaching his findings of fact and conclusions of law). Consequently, we vacate the administrative law judge's determination that the medical opinion evidence established total respiratory disability under Section 718.204(b)(2)(iv), and remand the case for reconsideration of the evidence thereunder. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000); *see generally Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989) (physician's recommendation against further coal dust exposure is not sufficient to establish total respiratory disability); *see also Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-173, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*). On remand, the administrative law judge must reassess the medical opinion evidence and determine whether claimant established total respiratory disability pursuant to Sections 718.204(b)(2)(iv). Based on our decision to vacate the administrative law judge's determination that claimant established total respiratory disability pursuant to Section 718.204(b), we must, similarly, vacate the administrative law judge's determination that claimant established disability causation pursuant to Section 718.204(c).

In conclusion, we vacate the administrative law judge's award of benefits. On remand, the administrative law judge must reconsider whether claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a) and, therefore, whether claimant has established that one of the applicable conditions of entitlement had changed since the denial of his prior claim pursuant to Section 725.309. If the administrative law judge finds pneumoconiosis established pursuant to Section 718.202(a) on remand, he must then consider whether the pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b), and whether claimant has established total disability pursuant to Section 718.204(b)(2)(iv). If the administrative law judge finds the medical opinion evidence sufficient to demonstrate total disability on remand, he must conduct a comparative weighing of all the relevant probative evidence together, both like and unlike, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. 20 C.F.R. §718.204(b); *see Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); *Fields*, 10 BLR at 1-21. If the administrative law judge finds total disability established pursuant to Section 718.204(b) on remand, he must then consider whether the total disability was due to pneumoconiosis pursuant to Section 718.204(c).

Accordingly, the Decision and Order Award of Benefits of the administrative law judge is vacated and the case is remanded for proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge