BRB No. 00-0517 BLA

CHARLES HARRIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY,	)	DATE ISSUED:
	)	
INCORPORATED	)	
	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Phyllis L. Robinson, Manchester, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd), Washington, D.C., for employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order On Remand (97-BLA-0611) of Administrative Law Judge Thomas F. Phalen, Jr., awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] This case is before the Board for the second

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which all parties have responded. Claimant contends that, while the revised regulations are more favorable to claimant, inasmuch as claimant has been awarded benefits under the prior regulations, remanding the case (apparently, for reconsideration under the new regulations) would only delay claimant's award. Employer contends that if the award of benefits is not reversed, a stay is necessary as the revised regulations affect the issues of the existence of pneumoconiosis and causation and, therefore, require a determination as to which standards are to be applied and/or require that employer's physicians to be given the opportunity to address the new standards on remand. The Director, Office of Workers' Compensation Programs (the Director), contends that the revised regulations will not affect the outcome of this case in any material way.

This case involves a motion for modification filed pursuant to 20 C.F.R. §725.310 (2000), but not pursuant to the revised, and challenged, regulation at 20 C.F.R. §725.310, which is only applicable to claims filed after January, 19, 2000, *see* 20 C.F.R. §725.2(c). In addition, as both the Director and employer contend, the revised regulations and/or criteria for establishing and/or defining total disability pursuant to 20 C.F.R. §718.204 have not changed in any material way to affect the outcome of the case.

In regard to establishing the existence of pneumoconiosis pursuant to the revised regulations at 20 C.F.R. §718.202, employer contends that the revised definition of pneumoconiosis under 20 C.F.R. §718.201, which has been challenged in the lawsuit, is a new legal standard that could affect the outcome of the case and, therefore, requires that employer's physicians to be given the opportunity to address this new standard on remand. Employer also contends that the revised causation standard under 20 C.F.R. §718.204(c)(1) is a new legal standard that is not consistent with the case-law of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, regarding the prior causation

time.[2] In his Decision and Order On Remand, at issue herein, the administrative law judge

---

standard at 20 C.F.R. §718.204(b) (2000) and, therefore, could affect the outcome of the case and/or require that employer's physicians to be given the opportunity to address this new standard on remand. While the revised causation standard under Section 718.204(c)(1) has not been challenged in the lawsuit, it does set forth the standard to establish that a miner is totally disabled due to pneumoconiosis "as defined in §718.201," which has been challenged in the lawsuit.

In response, the Director contends that the revised definition of pneumoconiosis under Section 718.201 will not affect the outcome of the case because it is consistent with the case-law of the Sixth Circuit and contends that the revised causation standard under Section 718.204(c)(1) will not affect the outcome of the case because it is consistent with Sixth Circuit case-law regarding the prior causation standard at 20 C.F.R. §718.204(b) (2000).

Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case before the Board is not impacted by the challenged regulations.

[2] Claimant originally filed a claim on January 10, 1994, Director's Exhibit 1. In a Decision and Order issued on April 15, 1996, Administrative Law Judge Rudolf L. Jansen found twenty-eight and one-quarter years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. Part 718, Director's Exhibit 88. Judge Jansen found that the existence of pneumoconiosis was established by the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), but further found that total disability was not established, *see* 20 C.F.R. §718.204(b)(2)(i)-(iv), formerly 20 C.F.R. §718.204(c)(1)-(4) (2000). Accordingly, benefits were denied.

Claimant ultimately filed a timely motion for modification, Director's Exhibit 92. In a Decision and Order issued on July 28, 1998, the administrative law judge found total disability established by the newly submitted pulmonary function study and medical opinion evidence, *see* 20 C.F.R. §718.204(b)(2)(i) and (iv), and therefore found a change in conditions established, *see* 20 C.F.R. §725.310 (2000); *see also* 20 C.F.R. §725.2(c). The administrative law judge then considered all the evidence of record and found that the existence of pneumoconiosis was established by the medical opinion evidence pursuant to Section 718.202(a)(4). Finally, the administrative law judge found total disability due to pneumoconiosis was established by the medical opinion evidence of record, *see* 20 C.F.R. §718.204(c), formerly 20 C.F.R. §718.204(b) (2000). Accordingly, benefits were awarded.

Employer appealed and the Board vacated the administrative law judge's findings that total disability was established by the newly submitted pulmonary function study and medical opinion evidence, *see* 20 C.F.R. §718.204(b)(2)(i) and (iv), and, therefore, that a

found total disability established by the preponderance of the newly submitted pulmonary function study and medical opinion evidence, *see* 20 C.F.R. §718.204(b)(2)(i) and (iv), formerly 20 C.F.R. §718.204(c)(1) and (4)(2000), and therefore found a change in conditions established, *see* 20 C.F.R. §725.310 (2000); *see also* 20 C.F.R. §725.2(c). The administrative law judge then considered all the evidence of record and found that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4) and that total disability due to pneumoconiosis was established by the medical opinion evidence, *see* 20 C.F.R. §718.204(c), formerly 20 C.F.R. §718.204(b)(2000). Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in finding total disability established by the newly submitted pulmonary function study and medical opinion evidence and, therefore, in finding a change in conditions established. In addition, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4) and total disability due to pneumoconiosis established. Claimant responds, urging that the administrative law judge's Decision and Order on Remand awarding benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has not responded to this appeal.

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, are rational, and are consistent with 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310 (2000); *see also* 20 C.F.R. §725.2(c), a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact. In considering whether a claimant has established a change in conditions, an administrative law judge must consider all of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the new evidence is sufficient to establish at least one of the elements of entitlement which defeated entitlement in the prior decision, *see Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The United States Court of

---

change in conditions was established, and remanded the case for the administrative law judge to reconsider all relevant evidence. *Harris v. Shamrock Coal Co., Inc.*, BRB No. 98-1471 BLA (Aug. 12, 1999)(unpub.). The Board also vacated the administrative law judge's findings that the existence of pneumoconiosis was established under Section 718.202(a)(4) and that total disability due to pneumoconiosis was established, *see* 20 C.F.R. §718.204(c), and remanded the case for reconsideration.

Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held, however, that if a claimant merely alleges that the ultimate fact was wrongly decided, the administrative law judge may, if he chooses, accept this contention and modify the final order accordingly (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"), *see Consolidation Coal Corp. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994), *quoting Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26-28 (4th Cir. 1993).

Initially, employer contends that the administrative law judge erred in finding that the newly submitted pulmonary function study evidence demonstrated total disability. Pursuant to Section 718.204, the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

The administrative law judge considered the five newly submitted pulmonary function studies of record, Decision and Order on Remand at 4.[3] The newly submitted pulmonary function studies included three qualifying pulmonary function studies from Dr. Baker dated October, 1995, May, 1997, and August, 1997, Director's Exhibit 97; Claimant's Exhibit 1,[4]

[3] Although employer contends that the administrative law judge failed to consider all of the relevant pulmonary function study evidence of record, including the previously submitted pulmonary function study evidence, the administrative law judge noted that total disability was not established in Judge Jansen's original Decision and Order, Decision and Order On Remand at 3, and properly considered whether the newly submitted pulmonary function study evidence is sufficient to demonstrate total disability, the element of entitlement which defeated entitlement in the prior decision, *see Nataloni, supra*.

[4] Employer's contentions that Dr. Baker's pulmonary function studies are non-qualifying is inaccurate. For pulmonary function studies developed and/or conducted prior to January 19, 2001, *see* 20 C.F.R. §718.101(b), a "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718 (2000), Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1) (2000).

Contrary to employer's contention, the administrative law judge did determine claimant's height when weighing the relevant pulmonary function study evidence. Inasmuch as there were substantial differences in the heights recorded among the relevant pulmonary function studies, the administrative law judge, within his discretion, made a factual

and one pulmonary function study from Dr. Dahhan which yielded a qualifying pre-bronchodilator result and a non-qualifying post-bronchodilator result, which Dr. Dahhan found indicated a moderate, partially reversible, obstructive defect, Director's Exhibit 99. Finally, Dr. Broudy administered an invalid pulmonary function study, Employer's Exhibit 5, which the administrative law judge did not assign great weight.

The administrative law judge found the qualifying October, 1995, and August, 1997, pulmonary function studies from Dr. Baker were valid as they were properly accompanied by tracings and did not indicate poor cooperation or effort and were not invalidated by a reviewing physician. Although the administrative law judge assigned less weight to Dr. Baker's May, 1997, pulmonary function study, as it contained no tracings, *see* Claimant's Exhibit 1, the administrative law judge did not completely discredit its results, as they were consistent with Dr. Baker's other pulmonary function study results. Ultimately, the administrative law judge found that Dr. Baker's qualifying pulmonary function studies and

---

determination that claimant's actual height was 68.3 inches, which he used to determine whether the relevant pulmonary function study results were qualifying, *see* 1998 Decision and Order at 14, n. 8; *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). Thus, as claimant was age 53 at the time of Dr. Baker's May, 1997, pulmonary function study, it yielded a qualifying FEV1 result of 1.56 and a qualifying FVC result of 2.55, *i.e.*, less than the qualifying 2.05 FEV1 and 2.59 FVC values listed at Part 718 (2000), Table B1 of Appendix B. *See* Claimant's Exhibit 1.

In addition, contrary to employer's characterization, Dr. Baker reported that his October, 1995, pulmonary function study yielded a FVC result of 2.97, which represented the largest and/or best of three FVC results produced, which was non-qualifying for claimant, who was age 52 at that time, *see* Director's Exhibit 97; 20 C.F.R Part 718 (2000), Table B1 of Appendix B. However, because Dr. Baker's October, 1995, pulmonary function study yielded a qualifying FEV1 result of 1.62 and, therefore, a qualifying FEV1/FVC ratio less than 55%, Dr. Baker's October, 1995, pulmonary function study is qualifying, *see* 20 C.F.R Part 718 (2000), Table B1 of Appendix B; 20 C.F.R. §718.204(c)(1)(iii)(2000).

Finally, contrary to employer's characterization, Dr. Baker reported that his August, 1997, pulmonary function study yielded a non-qualifying FVC result of 2.99 and a qualifying FEV1 result of 1.54 for claimant, who was age 54 at that time, representing the largest and/or best of three FVC results and three FEV1 results produced, respectively, *see* Claimant's Exhibit 1; 20 C.F.R Part 718 (2000), Table B1 of Appendix B. However, because Dr. Baker's August,1997, pulmonary function study also yielded a qualifying FEV1/FVC ratio less than 55%, Dr. Baker's August, 1997, pulmonary function study is qualifying, *see* 20 C.F.R Part 718 (2000), Table B1 of Appendix B; 20 C.F.R. §718.204(c)(1)(iii)(2000).

Dr. Dahhan's qualifying pre-bronchodilator result outweighed Dr. Dahhan's non-qualifying post-bronchodilator result. The administrative law judge found that, although Dr. Dahhan's non-qualifying post-bronchodilator result demonstrated reversibility, inasmuch as Dr. Dahhan nevertheless opined that the pulmonary function study's results indicated a moderate obstructive defect, his opinion weighed in favor of finding total disability when considered in conjunction with the exertional requirements of claimant's last coal mine work, *see* Hearing Transcript at 23-30, which the administrative law judge found required heavy exertion.

Employer contends that the administrative law judge erred in relying on Dr. Baker's October, 1995, and August, 1997, pulmonary function studies because they did not contain any statement regarding claimant's understanding and cooperation and, therefore, did not comply with the applicable quality standards. Similarly, employer contends that the administrative law judge erred in relying on Dr. Baker's May,1997, pulmonary function study because, as the administrative law judge acknowledged, it did not contain any tracings and, therefore, did not comply with the applicable quality standards.

Contrary to employer contentions, a review of the record does not indicate that employer raised any issue before the administrative law judge as to whether Dr. Baker's October, 1995, and August, 1997 pulmonary function studies meet the applicable quality standards, *see* Employer's May 11, 1998, Post-Hearing Brief at 12. Pulmonary function studies which do not meet the quality standards under Part 718 must be challenged below and such challenges will not be considered for the first time on appeal to the Board, *see Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *Orek v. Director, OWCP*, 10 BLR 1-51 (1987)(Levin, J., concurring).

In any event, the quality standards at 20 C.F.R. §718.103 (2000), applicable to pulmonary function study evidence developed prior to January 19, 2001, *see* 20 C.F.R. §718.101, are not mandatory and pulmonary function studies which fail to conform to those standards may not be precluded from consideration by the administrative law judge under Section 718.204(c)(1) on this basis alone, *see Orek, supra*; *see also Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48 (1990); *Owens, supra; DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988). It is for the administrative law judge, as the fact-finder, to determine whether an objective study that does not conform to the quality standards is nevertheless reliable, *see DeFore, supra; Orek, supra.* The party challenging an objective study because it does not conform to the quality standards must demonstrate how this defect or omission renders the study unreliable and the administrative law judge can then explain the basis for his determination, *see Orek, supra*. In addition, the administrative law judge is not limited to looking at only the four corners of the objective study report in determining its reliability, but may look at other supportive documents in the record in an attempt to cure any defects in the actual report, *id*.

In this case, the administrative law judge acknowledged that Dr. Baker's May, 1997, pulmonary function study contained no tracings, but the administrative law judge did not completely discredit its results as they were consistent with Dr. Baker's other pulmonary function study results. Thus, inasmuch as the administrative law judge explained why he found Dr. Baker's non-conforming May, 1997, pulmonary function study to be nonetheless reliable, *see Orek, supra*, employer's contentions are rejected.

Employer also contends that the administrative law judge did not offer a valid explanation for favoring Dr. Dahhan's qualifying pre-bronchodilator results over his non-qualifying post-bronchodilator results and contends that, ultimately, the administrative law judge did not offer a valid explanation for his weighing of the pulmonary function study evidence. Where the record contains both a pre-bronchodilator and post-bronchodilator result and one qualifies while the other does not, the administrative law judge must weigh the values and explain those results he finds more probative, *see Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454 (1983).

Contrary to employer's contention, the administrative law judge did not interpret the specific test results of Dr. Dahhan's pulmonary function study as supporting a finding of total disability, but rather inferred from Dr. Dahhan's opinion that claimant's pulmonary function study indicated a moderate obstructive defect that his opinion weighed in favor of finding total disability when considered in conjunction with the exertional requirements of claimant's last coal mine work, which the administrative law judge found required heavy exertion. Where the record contains an opinion describing the severity of a miner's impairment, as well as evidence of the exertional requirements of the miner's usual coal mine work, such an opinion may be sufficient to allow the administrative law judge to infer a finding of total disability, by comparing the physician's opinion as to the extent of the impairment to the exertional requirements of the miner's usual coal mine work, *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Parson v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); *see also Aleshire v. Central Coal Corp.*, 8 BLR 1-70 (1985); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1987); *Ridings v. C & C Coal Co.*, 6 BLR 1-227 (1983), and the ultimate finding regarding total disability is a legal determination to be made by the administrative law judge, not the physician, through consideration of the exertional requirements of the miner's usual coal mine work in conjunction with the physician's opinion regarding the miner's impairment, *see Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *see also Aleshire, supra*. Thus, the administrative law judge permissibly inferred that Dr. Dahhan's opinion regarding, and/or interpretation of, claimant's pulmonary function study results supported a finding of total disability, *see generally Keen, supra*.

Moreover, the administrative law judge properly found that Dr. Dahhan's non-qualifying post-bronchodilator results were outweighed by the preponderance of the qualifying results of Dr. Baker's three pulmonary function studies as well as Dr. Dahhan's

qualifying pre-bronchodilator results, *see Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Sheckler v. Director, OWCP*, 7 BLR 1-128 (1984); *see also Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994) *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Consequently, the administrative law judge's finding that total disability was demonstrated by the preponderance of the newly submitted pulmonary function study evidence under Section 718.204(c)(1) is affirmed as supported by substantial evidence.[5]

[5] Although employer also contends that the administrative law judge did not determine whether the newly submitted pulmonary function study evidence specifically demonstrated a "change in conditions," in considering whether a claimant has established a change in conditions, an administrative law judge must determine if the newly submitted evidence is sufficient to establish an element of entitlement which defeated entitlement in the prior decision, *see Nataloni, supra*. Thus, inasmuch as the previously submitted pulmonary function study was found insufficient to demonstrate total disability in Judge Jansen's original Decision and Order, whereas the administrative law judge properly found the newly submitted pulmonary function study evidence demonstrated total disability on modification, the administrative law judge, thereby, found that the newly submitted pulmonary function study evidence supported a finding of total disability, the element of entitlement which defeated entitlement in the prior decision, and, therefore, supported a finding of a change in conditions, *id*.

The administrative law judge also considered the five physicians who provided opinions based on newly submitted evidence and found that the newly submitted medical opinion evidence demonstrated total disability, Decision and Order On Remand at 5-7. Dr. Baker diagnosed a "moderate to moderately severe" obstructive ventilatory defect based on new pulmonary function study results, Director's Exhibits 97, 101; Claimant's Exhibit 1. The administrative law judge found that Dr. Baker's opinion "inferentially" supported a finding of total disability and was entitled to significant weight as he was claimant's treating physician, who had examined claimant on several occasions and, therefore, was "very familiar" with claimant's condition and was able to compare medical reports and diagnostic tests. In addition, Dr. Fino reviewed the new evidence and found that it did not change his prior opinion that, while claimant was totally disabled from a respiratory standpoint, claimant's disability was due solely to smoking, Employer's Exhibits 1-2. Although Dr. Fino further stated that claimant would be as disabled had he never worked in coal mine employment, the administrative law judge found Dr. Fino's statement was unsupported and, therefore, evidence of a bias against claimant that deserved no weight "with respect to that statement," *see* Decision and Order On Remand at 6 n. 5.[6]

On the other hand, Dr. Dahhan found that the results of his newly submitted 1996 examination and objective tests, including a pulmonary function study indicating a moderate obstructive abnormality with reversibility, revealed no materially significant change in claimant's respiratory condition from his originally submitted 1994 examination, when he found that claimant was not totally disabled, Director's Exhibit 99. However, the administrative law judge found that Dr. Dahhan's opinion was not as probative as Dr. Baker's regarding the progression of claimant's condition because Dr. Dahhan's original 1994 examination lacked a valid pulmonary function study, and, therefore, the administrative law judge concluded that Dr. Dahhan was unable to compare claimant's ventilatory capacity from the time of his 1994 examination to the time of his 1996 examination. Finally, Dr. Broudy found that, although the pulmonary function study he administered was invalid, the rest of his examination and objective test results did not indicate that claimant was totally

[6] Although Dr. Sullivan also found that claimant's functional limitations due to his severe pneumoconiosis and moderate chronic obstructive pulmonary disease would prevent claimant from performing his prior work, Director's Exhibit 97, the administrative law judge gave no evidentiary weight to Dr. Sullivan's opinion as he found that it was not documented and reasoned.

disabled, Employer's Exhibit 5. Although, contrary to employer's contention, the administrative law judge found Dr. Broudy's opinion supported by his examination and blood gas study results, he noted that Dr. Broudy had only examined claimant once and had not reviewed all of the medical evidence of record as Dr. Fino had done. Consequently, the administrative law judge gave greater weight to the opinions of Drs. Baker and Fino, as the administrative law judge found them to be more familiar with claimant's condition.

Employer initially contends that Dr. Baker's opinion diagnosing a "moderate to moderately severe" impairment is insufficient to support a finding of total disability. Specifically, employer contends that Dr. Baker did not make any findings of specific limitations that claimant suffered from due to his respiratory impairment for the administrative law judge to compare with claimant's usual coal mine employment duties. Employer also contends that the administrative law judge improperly interpreted the specific test results of Dr. Baker's pulmonary function study as supporting a finding of total disability.

Contrary to employer's contentions, an opinion describing the severity of a miner's impairment or assessing the extent of impairment, such as Dr. Baker's opinion, may be sufficient to allow the administrative law judge to infer a finding of total disability by comparing the physician's opinion to the exertional requirements of the miner's usual coal mine employment, *see McMath, supra*; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); *Hvizdzak, supra*; *Parson, supra*; *see also Aleshire, supra*; *Stanley, supra*; *Ridings, supra*. The administrative law judge did not interpret the specific test results of Dr. Baker's pulmonary function study, but rather permissibly inferred from Dr. Baker's opinion diagnosing a "moderate to moderately severe" impairment, based, in part, on qualifying pulmonary function studies, that his opinion supported a finding of total disability when considered in conjunction with the exertional requirements of claimant's last coal mine employment, that the administrative law judge had found required heavy exertion, Decision and Order On Remand at 4, which is a permissible legal determination to be made by the administrative law judge, *see Hvizdzak, supra*; *see also Aleshire, supra*.

Employer also contends that the administrative law judge erred by acting as a medical expert in discounting the opinion of Dr. Dahhan because the administrative law judge found that Dr. Dahhan was unable to compare pulmonary function study results over time and erred in mechanically discounting Dr. Broudy's because he examined claimant only once. Contrary to employer's contentions, an administrative law judge may give less weight to a physician's opinion, such as Dr. Dahhan's and Dr. Broudy's,[7] which he finds were supported

[7] While employer contends that employers cannot arrange for multiple examinations, Dr. Dahhan did, as employer concedes, examine claimant twice on behalf of employer; once

by limited medical data and may give more weight to physicians' opinions, such as Dr. Baker's and Dr. Fino's, which he finds are supported by extensive documentation, *see Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984), and based on a more thorough examination and/or review of the evidence of record, *see Hall v. Director, OWCP*, 8 BLR 1-193 (1985).

The administrative law judge also did not, as employer contends, rely "exclusively" on Dr. Baker's opinion, but also credited Dr. Fino's opinion that claimant was totally disabled. Any error by the administrative law judge in finding Dr. Fino's statement that claimant would be as disabled had he never worked in coal mine employment was evidence of a biased opinion against claimant, *see Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992), *citing Richardson v. Perales*, 401 U.S. 389 (1971); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984); *see also Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20 (1992); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35 (1991) (*en banc*), was harmless under Section 718.204(c) (2000), *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), for, contrary to employer's contention, the administrative law judge could nevertheless rationally credit Dr. Fino's opinion in regard to disability, while discrediting his statement regarding the cause of claimant's disability, *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *see also Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

---

in conjunction with claimant's original claim and once in conjunction with claimant's subsequent request for modification, *see* Director's Exhibits 49-50, 99.

Thus, inasmuch as it is for the administrative law judge, as the trier-of-fact, to determine whether an opinion is documented and reasoned, *see Clark, supra*; *Fields, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's finding that total disability was demonstrated by the newly submitted medical opinion evidence pursuant to Section 718.204(c)(4)(2000).[8] However, as employer contends, the administrative law judge did not weigh the contrary, newly submitted blood gas study evidence, which the administrative law judge found did not demonstrate total disability in his prior Decision and Order, in conjunction with the newly submitted pulmonary function study and medical opinion evidence in finding total disability established pursuant to Section 718.204(c) (2000), *see Budash, supra*; *Fields, supra*; *Rafferty, supra*; *Shedlock, supra*. Consequently, we vacate the administrative law judge's finding and remand the case for reconsideration of all relevant evidence, like and unlike, *see* 20 C.F.R. §718.204(b)(2), formerly 20 C.F.R. §718.204(c) (2000); *but see generally Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993) (because pulmonary function studies and blood gas studies measure different types of impairments, non-qualifying arterial blood gas results cannot be seen as being a direct offset or "contrary" to qualifying pulmonary function study results); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797 (1984); *see also Estep v. Director, OWCP*, 7 BLR 1-904 (1985); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Employer also contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4). Initially, the administrative law judge noted that Judge Jansen had found that the originally submitted medical opinions established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) in his original Decision and Order. Thus, because the administrative law judge found in his prior Decision and Order on modification that there was no mistake in a

[8] In addition, we again reject employer's contention that the administrative law judge erred in not considering whether the new medical opinion evidence specifically demonstrated a "change in conditions." Inasmuch as the previously submitted medial opinion evidence was found insufficient to demonstrate total disability under Section 718.204(c)(4)(2000) in Judge Jansen's original Decision and Order, whereas the administrative law judge properly found the newly submitted medical opinion evidence demonstrated total disability on modification, the administrative law judge, thereby, found that the newly submitted medical opinion evidence supported a finding of total disability, the element of entitlement which defeated entitlement in the prior decision, and, therefore, supported a finding of a change in conditions, *see Nataloni, supra*.

determination of fact in Judge Jansen's original Decision and Order, and the Board had affirmed the administrative law judge's finding in its previous Decision and Order, the administrative law judge only considered the newly submitted medical opinions on remand pursuant to Section 718.202(a)(4). Decision and Order On Remand at 8-9. Similarly, claimant contends that because Judge Jansen found the existence of pneumoconiosis established pursuant to Section 718.202(a)(4) in the original Decision and Order in this case, the doctrine of collateral estoppel precludes relitigation of the issue and/or any challenge of the finding that the existence of pneumoconiosis was established on modification.

Contrary to claimant's contention, the Sixth Circuit held in *Worrell* that once a request for modification is filed, no matter the grounds stated, if any, the trier of fact has the authority, if not the duty, to reconsider all the evidence for any mistake of fact, *see Worrell*, 27 F.3d at 230, 18 BLR at 2-296; *see also Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-14 - 1-15 (1994)(*en banc*). The Sixth Circuit held that the trier of fact has the authority "simply to rethink a prior finding of fact at any time during the first year after a final order on the claim," noting that "[i]f a claimant merely alleges that the ultimate fact...was wrongly decided, the [trier of fact] may, if he chooses, accept this contention and modify the final order accordingly," *see Worrell*, 27 F.3d at 230, 18 BLR at 2-295-296 ("there is no need for a smoking gun factual error, changed conditions or startling new evidence"). Thus, the administrative law judge was required to reconsider the issue of pneumoconiosis on modification on the ground of a mistake in fact in accordance with the Sixth Circuit's holding in *Worrell*.[9]

[9] In addition, for the purposes of invoking the doctrine of collateral estoppel or issue preclusion, the party against whom estoppel is asserted must have had a full and fair opportunity to litigate the issue in the previous forum, *see Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*); *see also Detroit Police Officers Ass'n v. Young*, 824 F.2d 512, 515 (6th Cir. 1987); *N.L.R.B v. Master Slack and/or Master Trousers*, 773 F.2d 77, 81 (6th Cir. 1985). Although Judge Jansen found the existence of pneumoconiosis established in his original Decision and Order, Judge Jansen ultimately denied benefits, but claimant did not appeal Judge Jansen's Decision and Order and employer, as a party satisfied with the judgement, was not required to appeal Judge Jansen's Decision and Order, *see generally Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987); *see also Hansen v. Director, OWCP*, 984 F.2d 364, 17 BLR 2-48 (10th Cir. 1993). Instead, claimant filed a timely request for modification which served to keep the claim viable and pending, *see Garcia v. Director, OWCP*, 12 BLR 1-24 (1988); *see Madrid v. Coast Marine Construction Co.*, 22 BRBS 148 (1989). Thus, employer never had a full and fair opportunity to litigate and/or appeal the issue of whether the existence of pneumoconiosis was established until employer's appeal of the award of benefits by the administrative law judge on modification, *see Hughes*, *supra*. Consequently, contrary to claimant's contention, the doctrine of collateral estoppel does not

preclude employer from challenging, in employer's current appeal of the administrative law judge's award of benefits on modification, the finding that the existence of pneumoconiosis was established.

In any event, Judge Jansen gave greater weight to the originally submitted opinions of Dr. Vaezy, Director's Exhibit 17-18, and Dr. Baker, Director's Exhibits 15, 61, over the originally submitted contrary opinions, including Dr. Dahhan, Director's Exhibit 49-50, in light of their "superior qualifications" to find the existence of pneumoconiosis established under Section 718.202(a)(4) in his original Decision and Order, *see* 1996 Decision and Order at 10; Director's Exhibit 88. In finding the existence of pneumoconiosis established under Section 718.202(a)(4) in his subsequent 1998 Decision and Order on modification, the administrative law judge concurred with Judge Jansen's finding and also gave greater weight to the opinions of Drs. Vaezy and Baker over the contrary opinions of record, including Dr. Dahhan's, due, in part, to their superior qualifcations, 1998 Decision and Order at 22. However, as employer contended on appeal, while Drs. Vaezy and Baker were both board-certified physicians in internal medicine and pulmonary disease, B-readers and Fellows in the American College of Chest Physicians, inasmuch as Dr. Dahhan shared the same qualifications, *see* Director's Exhibits 49-50, 99, the Board vacated the administrative law judge's finding under Section 718.202(a)(4) as the administrative law judge's evidentiary analysis did not coincide with the relevant evidence of record, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). *Harris*, BRB No. 98-1471 BLA at 6-7.

Moreover, contrary to the administrative law judge's determination that consideration of the originally submitted medical opinion evidence was unnecessary under Section 718.202(a)(4), the administrative law judge is bound to consider the entirety of the evidentiary record, and not merely the newly submitted evidence, in making a determination of a mistake in fact on modification, *see Worrell*, *supra*; *Kingery*, *supra*; *Nataloni*, supra; *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). Consequently, as employer contends, inasmuch as the administrative law judge only considered the newly submitted medical opinions on remand, we vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and remand the case for the administrative law judge to consider all of the relevant medical opinion evidence, both previously and newly submitted, pursuant to Section 718.202(a)(4), *see Worrell*, *supra*; *Kingery*, *supra*; *Nataloni*, *supra*; *Kovac*, *supra*. In addition, the administrative law judge did not consider all of the evidence of record to determine whether pneumoconiosis arising out of coal mine employment was established pursuant to Section 718.203(b), *id*. Thus, if necessary, the administrative law judge should also consider all relevant evidence pursuant to Section 718.203(b) on remand as well. Nevertheless, in order to avoid any possible repetition of error by the administrative law judge on remand, we address employer's contentions regarding the administrative law judge's weighing of the newly submitted medical opinion evidence pursuant to Section 718.202(a)(4).

The administrative law judge credited the opinion of Dr. Baker diagnosing coal workers' pneumoconiosis, Claimant's Exhibit 1, as he had examined and/or treated claimant on several occasions and, therefore, had a better perspective, familiarity and knowledge of the progression of claimant's condition and as his opinion was supported by the objective evidence.[10] The administrative law judge found the contrary opinions of Drs. Fino, Employer's Exhibits 1-2, and Broudy, Employer's Exhibit 5, less persuasive as Dr. Fino had not treated or examined claimant and Dr. Broudy only examined claimant once. The administrative law judge also found that Dr. Fino did not adequately explain why claimant's pulmonary condition was solely related to his smoking and not also to his coal dust exposure. Finally, the administrative law judge also discredited Dr. Dahhan's opinion, who found that

[10] Contrary to employer's contentions that Dr. Baker's opinion is only based on discredited positive x-ray readings and claimant's coal mine employment history, an administrative law judge may not discredit a medical opinion merely because it relies, in part, on a positive x-ray that conflicts with the weight of the x-ray evidence, *see Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *see also Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). Moreover, the administrative law judge noted that Dr. Baker also based his opinion on pulmonary function study results, which Dr. Baker found indicated an impairment that he attributed, in part, to claimant's coal mine employment, *see* Director's Exhibits 15, 61.

claimant's obstructive pulmonary condition was not due to his coal dust exposure or coal workers' pneumoconiosis because claimant's coal dust exposure had ceased for a long enough period for any industrial bronchitis he may have suffered from to have subsided and because his condition showed reversibility, Director's Exhibit 99. The administrative law judge found that Dr. Dahhan's opinion was not in accordance with the regulations, which recognize pneumoconiosis as a "degenerative" disease and do not recognize "restrictive/obstructive classifications."

Employer contends that the administrative law judge erred by mechanically crediting Dr. Baker's opinion as claimant's treating physician and discrediting the opinions of Drs. Fino and Broudy because they had not examined claimant and/or had examined claimant only once, respectively. Dr. Baker is board-certified in pulmonary disease and a B-reader,[11] and, as the administrative law judge noted, he first submitted examination reports with the original record diagnosing coal workers' pneumoconiosis in 1993 and 1995, Director's Exhibits 15, 61, and subsequently began regularly treating claimant in 1997, Claimant's Exhibit 1. In addition, the administrative law judge found his opinion to be corroborated and substantiated by the objective evidence, *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1983); *Fields*, *supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic*, *supra*. Thus, the administrative law judge reasonably found Dr. Baker's opinion entitled to additional weight on the basis that he was more familiar with the miner's condition, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). In addition, an administrative law judge may give less weight to a physician's opinion, such as those of Drs. Fino and Broudy, which he finds to be based on an incomplete picture of the miner's health condition, *see Stark*, *supra*, and/or supported by limited medical data, *see Sabett*, *supra*; *Fuller*, *supra*.

[11] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Moreover, contrary to employer's contention, the administrative law judge also gave less weight to Dr. Fino's opinion because he did not adequately explain his opinion regarding the causative factors for claimant's pulmonary condition. In addition, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has accepted the Department of Labor's view that pneumoconiosis is progressive, *see Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-17 (6th Cir. 1994); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20, 17 BLR 2-77, 2-84-85 (6th Cir. 1993)*; see also Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 314-315, 20 BLR 2-76, 2-88-91 (3d Cir. 1995) (pneumoconiosis is a latent and progressive disease which may not become manifest until long after coal dust exposure ceases).[12] Thus, the administrative law judge permissibly found that Dr. Dahhan's opinion, that claimant's obstructive pulmonary condition was not due to his coal dust exposure because of the length of time since claimant's coal dust exposure had ceased, is not in accord with the definition of pneumoconiosis as more broadly defined by the Act, *see* 30 U.S.C. §902(b); 20 C.F.R. §718.201. In any event, it is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to determine whether an opinion is reasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields*, *supra*; *Lucostic*, *supra*.

[12] The Third Circuit noted in *Swarrow*, *supra*, that the Report of the Surgeon General, the Health Consequences of Smoking: Cancer and Chronic Lung Disease in the Workplace (1985), cited by employer in that case in support of its contentions that simple coal workers' pneumoconiosis does not progress absent further exposure to coal dust, discusses chronic bronchitis caused by coal dust exposure, "but at no point suggests that industrial chronic bronchitis cannot progress in the absence of continuous dust exposure," *see Swarrow*, 72 F.3d at 315, 20 BLR at 2-91.

Finally, the administrative law judge considered all of the relevant medical opinion evidence of record and found total disability due to pneumoconiosis established, *see* 20 C.F.R. §718.204(c), formerly 20 C.F.R. §718.204(b) (2000),[13] crediting the previously submitted opinions of Drs. Baker and Dr. Vaezy, which he found to be supported by the medical evidence and adequately documented, respectively, Decision and Order On Remand at 9-10. Drs. Baker and Vaezy found that claimant's pulmonary impairment and disability were due to his coal mine employment and smoking, Director's Exhibits 15, 18, 61.[14] Dr. Vaezy added that it was difficult to decide the degree of harm caused by claimant's coal mine employment and smoking, but stated that "at least part" of claimant's impairment "should be attributed to" pneumoconiosis, Director's Exhibit 18. While the administrative law judge noted that they "did not explain in detail" how they found that claimant's coal mine employment contributed to claimant's disability in light of claimant's significant smoking history, the administrative law judge found claimant's coal dust exposure history sufficient to justify the diagnosis of coal workers' pneumoconiosis and found that claimant's smoking history does not discredit the "significant" contributing role of claimant's coal dust exposure that Drs. Baker and Vaezy found. The administrative law judge gave "minimal weight" to Dr. Fino's contrary opinion, attributing claimant's disability solely to smoking, as he did not diagnose pneumoconiosis, *see Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Trujillo*, *supra*. The administrative law judge also found the opinions of Drs. Dahhan and Broudy, attributing claimant's pulmonary disease and/or respiratory impairment to smoking, were "not probative" as to the cause of claimant's disability as they did not find that claimant was totally disabled, *see generally Trujillo*, *supra*.[15]

Employer contends that Dr. Baker did not explain his opinion and that Dr. Vaezy's opinion was equivocal as to the degree that claimant's coal dust exposure contributed to

---

[13] Contrary to employer's contention, once a change in conditions was established, the administrative law judge then properly considered all of the relevant evidence of record to determine whether total disability due to pneumoconiosis was established, which was an element of entitlement that was never reached or addressed in Judge Jansen's original Decision and Order, *see Kovac*, *supra*; *see also Nataloni*, *supra*.

[14] Although employer again contends that the administrative law judge did not specifically address claimant's smoking history, the administrative law judge credited both Drs. Baker and Vaezy, who specifically attributed claimant's disability to smoking, as well as coal mine employment.

[15] Although, as employer contends, the administrative law judge did not specifically consider Dr. Lane's previously submitted opinion that claimant's impairment was due to smoking, Director's Exhibit 16, Dr. Lane, similar to Drs. Dahhan and Broudy, also did not find that claimant was totally disabled.

claimant's disability and provided no explanation or medical basis for his conclusions. Thus, employer contends that the administrative law judge acted as a medical expert to ultimately find that claimant's coal dust exposure was a "significant" contributing factor in causing claimant's disability. Nevertheless, the administrative law judge relied on his findings that total disability was established and that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4) in order to discredit the contrary opinions of Drs. Fino, Dahhan and Broudy. However, inasmuch as the administrative law judge's findings that total disability and that the existence of pneumoconiosis were established have been vacated and, as employer properly contends, the administrative law judge erred in finding Dr. Fino's opinion, that claimant would be as disabled had he never worked in coal mine employment, was biased, *see Cochran*, *supra*; *Chancey*, *supra*; *see also Urgolites*, *supra*; *Melnick*, *supra*, we vacate the administrative law judge's finding that total disability due to pneumoconiosis was established and remand the case for reconsideration of the relevant evidence in accordance with the relevant standard, *see* 20 C.F.R. §718.204(c)(1), formerly 20 C.F.R. §718.204(b).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

NANCY S. DOLDER
Administrative Appeals Judge

NELSON, Acting Administrative Appeals Judge, concurring in part and dissenting in part:

I agree with my colleagues that this Decision and Order On Remand awarding benefits must be vacated and remanded for further consideration. However, in addition to the reasons outlined by the majority for remand, I believe that there are additional errors, which, on remand, should be corrected. Moreover, there are applications of law in the majority opinion with which I do not fully concur.

Citing *Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48 (1990), *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988), and *Orek v. Director, OWCP*, 10 BLR 1-51 (1987) (Levin, J., concurring), the majority holds that the quality standards at 20 C.F.R. §718.103 (2000) are not mandatory. I fully agree with this statement to the extent that it relates to the factors numbered one through eight found at Section 718.103(b)(2000). However, with respect to tracings, Section 718.103(b)(2000) provides in pertinent part that:

> All pulmonary function test results submitted in connection with a claim for benefits shall be accompanied by three tracings of each test performed, unless the results of two tracings of the MVV are within 5% of each other, in which case two tracings for that test shall be sufficient … (emphasis added).

20 C.F.R. Section 718.103(b).

With respect to tracings, Section 718.103(b)(2000) appears clear and unequivocal. Yet, the cases cited by the Board do not address this language. *See Gorzalka*, *supra*; *DeFore*, *supra*; *Orek*, *supra*. Consequently, in the instant case, since there has not been a finding that the two tracings of the MVV are within 5% of each other, I would hold that the administrative law judge erred in considering Dr. Baker's May, 1997 pulmonary function test which does not contain the requisite three tracings. *See generally Peabody Coal Co. v. Director, OWCP [Brinkley]*, 972 F.2d 880, 16 BLR 2-219 (7th Cir. 1992).

In addition, I would remand this case in order for the administrative law judge to reconcile the inconsistency in his weighing of Dr. Fino's report. In his discussion of total disability, the administrative law judge observes that Dr. Fino concludes that "… [the miner] would have been as disabled had he never stepped foot in the coal mines." The administrative law judge then concludes that while Dr. Fino's report weighs in favor of total disability, "albeit total disability *due to smoking*," he will give this opinion "no weight" due to Dr. Fino's expression of obvious bias. Nevertheless, in his ultimate weighing of the evidence on the issue of total disability, the administrative law judge assigns the most weight to the opinions of Drs. Baker and Fino. Decision and Order on Remand at 6-7.

The majority reconciles these findings by holding that the administrative law judge permissibly credited Dr. Fino's opinion with regard to disability, as opposed to causation of disability. However, I do not believe that the administrative law judge's intent in weighing Dr. Fino's opinion is manifest within the four corners of this decision. Consequently, I would vacate the weighing of Dr. Fino's report on the issue of total disability and, on remand, instruct the administrative law judge to clarify his analysis of this report.

Likewise, I would not affirm the administrative law judge's weighing of the report of Dr. Baker on the issue of the existence of pneumoconiosis. Dr. Baker's earlier report submitted on modification addressed total disability, but did not explicitly diagnose the existence of pneumoconiosis. Nevertheless, the existence of pneumoconiosis was diagnosed by Dr. Baker in his more recent reports. In crediting Dr. Baker's opinion because he was more familiar with the miner's condition and the objective data, the administrative law judge finds that "regardless of whether Dr. Baker was a 'treating' physician during [the miner's] original claim, he has considerable knowledge about the progression of his condition." The administrative law judge also states "[a] comparison of medical reports and tests over a long period of time <u>may</u> conceivably provide a physician with a better perspective than the pioneer physician," (emphasis added) Decision and Order on Remand at 8.

Employer cites to cases arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit which have held that a fact finder should not mechanistically credit certain evidence, to the exclusion of all other evidence, solely because that doctor personally treated the miner. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323

(4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Although the instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, not the Fourth Circuit, under the facts of this case, the holdings of *Hicks* and *Akers* are nevertheless applicable.

In *Akers*, the Fourth Circuit found that by simply relying upon a doctor's status as a treating physician, the fact finder ignored the qualifications of other physicians of record, the explanation of these other doctors for their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. *See Akers, supra*. And that is precisely what has happened in the instant case. By crediting Dr. Baker simply because of his status as a treating physician, the administrative law judge has not adequately addressed employer's contention that Dr. Baker's report is not well reasoned, nor well explained. Although the Sixth Circuit has held that the opinions of treating physicians are entitled to greater weight than those of non-treating physicians, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), this principle does not extend to opinions by treating physicians which are not well reasoned, undocumented, or otherwise flawed. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). Therefore, on remand, I would instruct the administrative law judge to address employer's contention that Dr. Baker's report is not well reasoned, nor well explained. *See also Freeman United Coal Co. v. Hunter*, 82 F.3d 764, 20 BLR 2-199 (7th Cir. 1996).

Moreover, I would not affirm the administrative law judge's weighing of Dr. Dahhan's report on the issue of the existence of pneumoconiosis. In his report dated July 26, 1996, Dr. Dahhan found that the miner did not have evidence of any restrictive ventilatory defect. However, Dr. Dahhan also concluded that the miner had an obstructive ventilatory abnormality, which in his opinion did not result from the miner's coal dust exposure since the miner had not had any coal dust exposure since 1992, a duration sufficient to cause cessation of any industrial bronchitis that the miner may have had. *See* Director's Exhibit 99. The administrative law judge found that Dr. Dahhan's opinion was not persuasive because there is no restrictive/obstructive classifications codified in the regulations and because the cessation of coal dust exposure is not a probative factor to consider since pneumoconiosis is recognized as a degenerative disease. Decision and Order on Remand - Awarding Benefits, slip op. at 8. My colleagues affirm the administrative law judge's discrediting of Dr. Dahhan's report on the ground that his opinion is "not in accord with the definition of pneumoconiosis as more broadly defined by the Act, *see* 30 U.S.C. §902(b); 20 C.F.R. §718.201."

However, Dr. Dahhan's report is not premised simply on the classification of claimant's impairment as restrictive versus obstructive. Rather, Dr. Dahhan not only opines that claimant does not have any restrictive defect but also provides a rationale for his belief that claimant's obstructive impairment did not result from coal mine employment. In

addition, Dr. Dahhan did not state that pneumoconiosis could never occur after one's exposure to coal dust had ended, instead he opined that in the instant case, the duration of time since claimant's last exposure was "sufficient to cause cessation of any industrial bronchitis that [claimant] may have had." Consequently, since he did not foreclose all possibility that pneumoconiosis could occur after the cessation of coal mine employment, I do not agree that Dr. Dahhan's opinion is inconsistent with the Act. *See Adams v. Peabody Coal Co.*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987); *Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987)(court rejected assertion that an opinion was hostile to the Act where doctor relied upon the results of his own examination and studies rather than any "hostile" opinion); *Stephens v. Bethlehem Mines Corp.*, 8 BLR 1-350 (1985)(a physician's belief that simple pneumoconiosis is never disabling may constitute grounds for rejecting his medical opinion as inconsistent with congressional intent with the spirit of the Act); *Butela v. United States Steel Corp.*, 8 BLR 1-48 (1985)(a physician must foreclose all possibility that simple pneumoconiosis can be totally disabling before his opinion will be considered inconsistent with the Act). Therefore, I would vacate the administrative law judge's weighing of Dr. Dahhan's report and instruct him to reconsider this opinion on remand.

Lastly, while I fully agree with my colleagues that the doctrine of collateral estoppel does not preclude the administrative law judge from reconsidering, on modification, the issue of the existence of pneumoconiosis, I do not join with my colleagues in holding that the administrative law judge "was required" to reconsider the issue of the existence of pneumoconiosis.

In this case, while claimant initially established the existence of pneumoconiosis, the claim was nevertheless denied because claimant failed to establish a totally disabling respiratory impairment.[16] Thereafter claimant sought modification. As my colleagues correctly recognize, *Consolidation Coal Corp. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994) provides the administrative law judge with wide latitude, if not the duty, to reconsider all evidence for any mistake of fact, even when no specific mistake is alleged. In

[16] Claimant initially established the existence of pneumoconiosis, but the claim was denied because he failed to establish a totally disabling respiratory impairment. In addressing the subsequent motion for modification, the administrative law judge found a totally disabling respiratory impairment, and thus a change in conditions. The administrative law judge also reconsidered the existence of pneumoconiosis and again found the existence of the disease. Accordingly, benefits were awarded. On appeal, the Board vacated the findings of pneumoconiosis and total disability. In the most recent decision, the administrative law judge again found the existence of pneumoconiosis and a totally disabling respiratory impairment, and thus again found entitlement to benefits.

this respect, when addressing modification, the fact finder always has the discretion to expand his consideration beyond those issues that would benefit the moving party. *See Worrell*, *supra*. Nevertheless, I do not interpret *Worrell* as compelling the fact finder to reconsider those facts already found in favor of the party seeking modification.

Consequently, while I agree with my colleagues that we cannot affirm this award of benefits, as noted above, I would remand this case for additional findings beyond those outlined by my colleagues.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge