BRB No. 03-0500 BLA

MARVIN PROFFITT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FALCON COAL COMPANY, INCORPORATED	)	DATE ISSUED: 05/26/2004
	)	
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 M. Burke, Administrative Law Judge, United States Department of Labor.

Francesca L. Maggard (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (01-BLA-0170) of Administrative Law Judge Thomas M. Burke 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 time. In the original Decision and Order, the administrative law judge credited claimant with eighteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). The administrative law judge also found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv)[2] and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. In response to employer's appeal, the Board affirmed the administrative law judge's unchallenged length of coal mine employment finding and his findings at 20 C.F.R. §§718.203(b) and 718.204(b)(2)(iv). However, the Board vacated the administrative law judge's findings at 20 C.F.R. §§718.202(a)(1) and 718.204(c), and remanded the case for further consideration of the evidence. The Board instructed the administrative law judge, on remand, to weigh all relevant evidence together at 20 C.F.R. §718.202(a)(1)-(4) in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). *Proffitt v. Falcon Coal Co.*, BRB No. 02-0154 BLA (Aug. 28, 2002)(unpub.).

On remand, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). The administrative law judge also found the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge again awarded benefits.

On appeal, employer challenges the administrative law judge's findings that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Employer also challenges the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.

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

[2]Although the administrative law judge cited 20 C.F.R. §718.204(c)(4) (2000), the revised regulation at 20 C.F.R. §718.204(b)(2)(iv) applies to this claim, which was pending on January 19, 2001.

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).

Initially, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The record consists of nineteen interpretations of six x-rays dated February 2, 2000, June 28, 2000, July 6, 2000, December 12, 2000, January 13, 2001 and May 14, 2001. Seven readings are positive for pneumoconiosis, Director's Exhibits 12, 13, 30, 37; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 6, and twelve readings are negative for pneumoconiosis, Director's Exhibits 31-33; Employer's Exhibits 3-5, 7. The administrative law judge weighed the conflicting x-ray readings and found that the x-rays dated February 2, 2000, July 6, 2000, December 12, 2000 and January 13, 2001 are negative for pneumoconiosis, while the x-rays dated June 28, 2000 and May 14, 2001 are positive for pneumoconiosis. Decision and Order on Remand at 3. Based on his application of the "later evidence" rule, the administrative law judge accorded greater weight to the positive x-ray dated May 14, 2001 than to the contrary x-rays of record.

Employer asserts that the administrative law judge erred in applying the "later evidence" rule in this case because the period of time that separates the x-rays is not significant. In his prior decision, the administrative law judge accorded greater weight to the May 14, 2001 x-ray based on the "later evidence" rule. However, in its August 28, 2002 Decision and Order, the Board vacated the administrative law judge's weighing of the x-ray evidence. *Proffitt v. Falcon Coal Co.*, BRB No. 02-0154 BLA, slip op. at 3 (Aug. 28, 2002)(unpub.). Although the Board noted that, on remand, the administrative law judge *may* properly credit the most recent x-ray of record, the Board instructed the administrative law judge to provide more of an explanation and discussion for finding the May 14, 2001 x-ray more credible than the other x-rays based on the "later evidence" rule since the x-rays are separated by a short period of time. *Id*. at 4. In his decision on remand, the administrative law judge again accorded greater weight to the May 14, 2001 x-ray based on the "later evidence" rule. The administrative law judge provided a discussion of why it was reasonable for him to apply the "later evidence" rule in weighing the x-ray evidence. The administrative law judge specifically stated:

> Although the undersigned does not have years of positive chest x-ray readings upon which to base a finding of the disease, it is evident that the [x-ray] studies demonstrate the development of regulatory

> significant pneumoconiosis in its beginning stages. It is noteworthy that Dr. Gayler, who is a dually-qualified physician, consistently found Category 0/0 pneumoconiosis upon review of the February 2000, July 2000, and December 2000 x-ray studies. By the time of the June 2001[3] [x-ray] study, taken six to 18 months after the prior studies, Dr. Gayler found Category 0/1 pneumoconiosis. Hence, it is logical that opacities were developing at that time, which were sufficient in size and number for him to consider a Category 1 reading. By the time of the May 2001 [x-ray] study, it is reasonable that the opacities had further developed such that Dr. Castle, who is a B-reader, concluded that the [x-ray] study revealed Category 1 pneumoconiosis.

Decision and Order on Remand at 4. Based on Dr. Gayler's readings of the February 2, 2000, July 6, 2000, December 12, 2000 and January 13, 2001 x-rays, the administrative law judge indicated that the changes in the x-ray classifications demonstrated an increase in the development of opacities in support of his application of the "later evidence" rule. However, Dr. Gayler did not provide the most recent positive x-ray reading. Rather, Dr. Gayler provided the January 13, 2001 x-ray that is classified as 0/1, and Dr. Castle provided the May 14, 2001 x-ray that is classified as 1/1. Although Dr. Gayler's December 12, 2000 and January 13, 2001 x-rays demonstrate a change in classification from 0/0 to 0/1 in a period of a month, the change in classification did not actually occur in a month. Dr. Gayler's February 2, 2000 and July 6, 2000 x-rays were classified as 0/0. Consequently, at least eleven months, *i.e.*, the period from February 2000 to January 2001, separated the change in classification from 0/0 to 0/1 in the x-rays provided by Dr. Gayler. A period of four months separated the x-rays relevant to the administrative law judge's application of the "later evidence" rule. Because the x-rays provided by Dr. Gayler did not demonstrate a change in classification within a period of four months, the administrative law judge's discussion of Dr. Gayler's x-ray interpretations does not support his application of the "later evidence" rule in this case. Thus, we hold that the administrative law judge did not provide an adequate explanation for finding the May 14, 2001 x-ray more credible than the other x-rays based on the "later evidence" rule, where the x-rays are separated by a short period of time. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Therefore, we vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), and remand the case for further consideration of the evidence.

[3]The record does not contain a June 2001 x-ray. Rather, the record contains a January 13, 2001 x-ray classified as 0/1 by Dr. Gayler on June 21, 2001. Employer's Exhibit 3.

Next, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the opinions of Drs. Branscomb, Castle, Fino, Forehand and Rasmussen. The administrative law judge correctly stated that "all of the physicians, except for Dr. Branscomb, conclude that [claimant] suffers from coal workers' pneumoconiosis."[4] Decision and Order on Remand at 8; Director's Exhibits 8, 30, 37; Claimant's Exhibit 2; Employer's Exhibits 2, 6. Dr. Branscomb diagnosed chronic obstructive pulmonary disease related to cigarette smoking. Employer's Exhibit 2. Based on his weighing of the conflicting medical opinions, the administrative law judge found that a preponderance of the medical opinion evidence established the existence of pneumoconiosis.

Employer asserts that the administrative law judge erred in discrediting Dr. Branscomb's opinion since, employer argues, the administrative law judge failed to resolve the conflicts in claimant's smoking history. Employer specifically asserts that the administrative law judge did not adequately explain how he found that claimant had an eight to ten pack year smoking history based on claimant's testimony since the smoking histories reported to the physicians could indicate that claimant had as much as a 52 pack year smoking history. The administrative law judge stated, "[b]ased on [c]laimant's credible testimony at the hearing, the undersigned finds that he smoked for a minimum of 8 pack years and no more than 10 pack years." Decision and Order on Remand at 7-8. At the April 3, 2001 hearing, claimant testified that he smoked one-half pack of cigarettes per day from about 1975[5] to approximately 1988. Hearing Transcript at 24-25. In considering the smoking histories reported to the physicians, the administrative law judge stated that "[t]he reported years of smoking vary from 10 to 20." Decision and Order on Remand at 7. However, the administrative law judge correctly stated, "[a]s noted by the Board, all of the physicians agree, and [c]laimant testified, that he smoked only one-half a pack of cigarettes per day." *Id*. The notation of "1/2" in the reports of the physicians indicates one-half, and not one to two. Director's Exhibits 8, 30; Claimant's Exhibit 2; Employer's Exhibits 2, 6. Consequently, the administrative law judge reasonably found that the smoking histories reported to the physicians vary from 5 to 10 pack years. Decision and Order on Remand at 7.

[4]Drs. Castle, Fino, Forehand and Rasmussen opined that claimant suffers from pneumoconiosis, Director's Exhibits 8, 30, 37; Claimant's Exhibit 2; Employer's Exhibits 2, 6, while Dr. Branscomb opined that claimant does not suffer from pneumoconiosis, Employer's Exhibit 2.

[5]The record indicates that claimant was born on August 23, 1948. Hearing Transcript at 8. Claimant testified that he started smoking at about the age of twenty-five. *Id*. at 24.

Since the administrative law judge rationally found that claimant had an eight to ten pack year smoking history based on claimant's testimony, we reject employer's assertion that the administrative law judge erred in failing to resolve the conflicts in claimant's smoking history. The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Furthermore, we reject employer's assertion that the administrative law judge erred in discrediting Dr. Branscomb's opinion. The administrative law judge permissibly discredited Dr. Branscomb's opinion because it is not reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge stated that "Dr. Branscomb offers no persuasive explanation regarding why the miner's chronic obstructive pulmonary disease is caused only by his smoking history." Decision and Order on Remand at 8. Although the administrative law judge notes that Dr. Branscomb states that smoking is the most common cause of chronic obstructive pulmonary disease, he concludes that this statement is not persuasive because it is general and does not focus on claimant's specific condition. *Id*. Moreover, the administrative law judge stated that "[a]lthough Dr. Branscomb makes passing reference to ventilatory and blood gas testing in support of his opinion, he does not explain any correlation between the results of such testing and his diagnoses." *Id*.

The administrative law judge also discredited Dr. Branscomb's opinion because he was not a Board-certified radiologist or B reader. However, radiological qualifications are not relevant credentials in considering medical opinions at 20 C.F.R. §718.202(a)(4). Nonetheless, since the administrative law judge has provided a valid basis for discrediting Dr. Branscomb's opinion, namely, by finding that it is not reasoned, *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294, we hold that the administrative law judge's error in considering the radiological qualifications of Dr. Branscomb in weighing the medical opinions is harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Further, employer asserts that the administrative law judge erred in relying on the opinions of Drs. Castle, Fino, Forehand and Rasmussen because their diagnoses of pneumoconiosis are based solely on the positive x-ray readings. The administrative law judge stated that "Drs. Castle and Fino based their clinical findings of coal workers' pneumoconiosis on chest x-ray interpretations, which remain uncontradicted on this record." Decision and Order on Remand at 8. The administrative law judge also stated that "Drs. Rasmussen and Forehand found the presence of both clinical and legal pneumoconiosis." *Id*. A mere restatement of

an x-ray interpretation is not a reasoned medical opinion. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Contrary to employer's assertion, Dr. Forehand indicated that his diagnosis of pneumoconiosis is based on an x-ray reading and an arterial blood gas study. Director's Exhibit 8. Dr. Forehand's opinion also refers to a smoking history, a coal mine employment history, a physical examination and a pulmonary function study. *Id*. However, Dr. Castle diagnosed "radiographic evidence of simple coal workers' pneumoconiosis." Employer's Exhibit 6. Similarly, although Dr. Fino diagnosed simple coal workers' pneumoconiosis, he indicated that his opinion that claimant suffers from an occupationally acquired pulmonary condition as a result of coal mine dust exposure was based on his chest x-ray reading. Director's Exhibit 30. Dr. Rasmussen's opinion refers to a smoking history, a coal mine employment history, an x-ray, a physical examination and a pulmonary function study. Claimant's Exhibit 2. However, in rendering his diagnosis of coal workers' pneumoconiosis, Dr. Rasmussen noted that claimant has a significant coal mine dust exposure and x-ray changes consistent with the disease. *Id*. Thus, we vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case to the administrative law judge to reconsider the medical reports and determine whether the opinions of Drs. Castle, Fino and Rasmussen are reasoned medical opinions and not mere restatements of x-ray readings. *Worhach*, 17 BLR at 1-110; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields*, 10 BLR at 1-21-22; *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *Fuller*, 6 BLR at 1-1294; *Ogozalek v. Director, OWCP*, 5 BLR 1-309 (1982).

Furthermore, on remand, the administrative law judge must weigh all types of relevant evidence together at 20 C.F.R. §718.202(a)(1)-(4) to determine whether the evidence is sufficient to establish the existence of pneumoconiosis in accordance with *Compton*, if he finds the existence of pneumoconiosis established at either 20 C.F.R. §718.202(a)(1) or (a)(4).

Finally, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Dr. Rasmussen opined that coal dust exposure is a significant factor contributing to claimant's disability. Claimant's Exhibit 2. Similarly, Dr. Forehand opined that coal workers' pneumoconiosis and chronic bronchitis contribute to claimant's disabling respiratory impairment. Director's Exhibit 8. In contrast, Drs. Branscomb and Fino opined that coal dust exposure did not contribute to claimant's disabling respiratory impairment. Director's Exhibit 30; Employer's Exhibits 1, 2. Dr. Castle opined that claimant's disabling respiratory impairment is due to smoking. Employer's Exhibit 6. Based on the opinion of Dr. Rasmussen, the administrative law judge found that "[c]laimant has

established that coal workers' pneumoconiosis had a 'material adverse effect' on his respiratory condition pursuant to 20 C.F.R. §718.204(c)(1) (2001)." Decision and Order on Remand at 11.

Employer asserts that the administrative law judge erred in finding that the qualifications of Dr. Rasmussen are superior to the qualifications of Drs. Castle and Fino. In considering the relative qualifications of the physicians providing opinions on the record in this case, the administrative law judge found that "Dr. Rasmussen's credentials are the 'most impressive' in this claim." *Id*. Dr. Rasmussen is Board-certified in internal medicine, Claimant's Exhibit 2, while Drs. Castle and Fino are Board-certified in internal medicine and pulmonary disease, Director's Exhibit 30; Employer's Exhibit 6. Nonetheless, the administrative law judge found that Dr. Rasmussen's credentials are more impressive than those of Drs. Castle and Fino on the basis of Dr. Rasmussen's expertise in the specific area of black lung disease. Decision and Order on Remand at 11. The administrative law judge noted that, in his prior decision, he stated that "[Dr. Rasmussen] participated on several coal mine health and research advisory committees, including one which developed disability standards for the Federal Black Lung program." *Id*. Further, the administrative law judge noted that [Dr. Rasmussen] also authored many articles relevant to the effects of smoking and occupational exposure." *Id*. The administrative law judge indicated that Dr. Rasmussen's *curriculum vitae* reveals more significant experience and background with coal workers' pneumoconiosis, while the *curricula vitae* of Drs. Castle and Fino do not reveal the same in-depth involvement in black lung. *Id*. As the trier-of-fact, the administrative law judge has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). Because the administrative law judge considered the relative qualifications of the physicians, we hold that it was not inherently unreasonable for the administrative law judge to accord more weight to the qualifications of Dr. Rasmussen based on his concentration in treating black lung over the more general pulmonary specialties of the other physicians. *Lafferty*, 12 BLR at 1-192; *Kuchwara*, 7 BLR at 1-170; *see also Cordero v. Triple A Machine Shop*, 580 F.2d 1331 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, we reject employer's assertion that the administrative law judge erred in finding that the qualifications of Dr. Rasmussen are superior to the qualifications of Drs. Castle and Fino.

In addition, employer asserts that the administrative law judge violated the Administrative Procedure Act in failing to explain how he weighed the conflicting medical opinions. Specifically, employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Fino and Castle. In considering Dr.

Fino's opinion, the administrative law judge noted that statements made by Dr. Fino in this case are similar to statements he made in *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001). The administrative law judge stated that the United States Court of Appeals for the Seventh Circuit concluded that the administrative law judge properly accorded less weight to Dr. Fino's opinion "because it was 'not supported by adequate data or sound analysis.'" Decision and Order on Remand at 10. However, the administrative law judge did not conclude that Dr. Fino's opinion was discredited in this case based on the Seventh Circuit's holding in *Summers*. Rather, the administrative law judge provided an explanation for finding that Dr. Fino's opinion is not reasoned. The administrative law judge specifically stated:

> Similarly, in this case, in the "Discussion" section of his report, Dr. Fino addresses the "flaws" which he found in numerous studies. He never specifically discusses and explains his conclusion that the miner's disabling respiratory impairment is solely due to his history of smoking, in light of his observations of the miner's condition during the examination or the results of the miner's objective testing.

Id. The administrative law judge also found that "Dr. Fino's deposition testimony lends little rationale for his conclusions." *Id*. Thus, since the administrative law judge properly discredited the opinion of Dr. Fino because it is not reasoned, we reject employer's assertion that the administrative law judge erred in discrediting Dr. Fino's opinion. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294.

With regard to Dr. Castle's opinion, the administrative law judge noted that "Dr. Castle stated that his conclusion [that smoking caused the miner's totally disabling respiratory impairment] was supported by the fact that the miner's ventilatory testing revealed a pure obstruction without restriction, gas trapping, and a minimum reduction in diffusing capacity after correction for alveolar volume." Decision and Order on Remand at 10. The administrative law judge stated that "Dr. Castle's opinion [that a pure obstruction without restriction supports his conclusion that smoking caused the disabling respiratory impairment] carries little probative value because there is empirical support that coal workers' pneumoconiosis may cause a purely obstructive defect." *Id*. The administrative law judge also stated that "Dr. Castle failed to explain the irreversible ventilatory study results and why these results are not supportive of a finding of coal workers' pneumoconiosis." *Id*. at 10-11. The administrative law judge noted that "although the blood gas study values improved slightly with exercise, they still yielded values well below that required to be qualifying and were, to a large extent, irreversible." *Id*. at 10. Since the administrative law judge reasonably found that an irreversible, moderate obstructive impairment is consistent with the irreversible

nature of pneumoconiosis, Decision and Order on Remand at 11; *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), it was reasonable for the administrative law judge, within his discretion as fact-finder, to thoroughly consider the objective tests that Dr. Castle relied on and to find that the opinion of Dr. Castle is not persuasive, based on Dr. Castle's failure to explain his opinion that claimant did not suffer from pneumoconiosis in light of the objective tests, *Wojtowicz*, 12 BLR at 1-165. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal, *Anderson*, 12 BLR at 1-113. Thus, since the administrative law judge properly discredited the opinion of Dr. Castle because it is not reasoned, we reject employer's assertion that the administrative law judge erred in discrediting Dr. Castle's opinion. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294.

Employer also asserts that the administrative law judge erred in discrediting Dr. Branscomb's opinion. The administrative law judge discredited the opinion of Dr. Branscomb because Dr. Branscomb's finding that claimant does not suffer from pneumoconiosis is inconsistent with the established finding of pneumoconiosis. Decision and Order on Remand at 9. However, since we herein vacate the administrative law judge's findings that the existence of pneumoconiosis is established at 20 C.F.R. §718.202(a)(1) and (a)(4), we cannot affirm the administrative law judge's discrediting of Dr. Branscomb's opinion on this basis. *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-373 (4th Cir. 2002), *rev'g on other grds*, 14 BLR 1-37 (1990)(*en banc*); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986). On remand, the administrative law judge must reconsider Dr. Branscomb's disability causation opinion.

Employer additionally asserts that Dr. Rasmussen's opinion is not reasoned. In weighing the conflicting medical opinions at 20 C.F.R. §718.204(c), the administrative law judge accorded dispositive weight to Dr. Rasmussen's opinion. However, since we have vacated the administrative law judge's finding that the existence of pneumoconiosis is established at 20 C.F.R. §718.202(a)(4), because the administrative law judge may find that the opinion Dr. Rasmussen is a restatement of a positive x-ray reading, we also vacate the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and remand the case for further consideration of the evidence.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

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

I respectfully dissent from the majority's decision to hold that the administrative law judge failed to provide an adequate explanation for according greater weight to the May 14, 2001 x-ray reading than to the contrary x-ray readings of record based on the "later evidence" rule. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In its August 28, 2002 Decision and Order, the Board indicated that the administrative law judge *may* credit the most recent x-ray of record in this case if he provided a fuller explanation and discussion for finding that x-ray more credible. *Proffitt v. Falcon Coal Co.*, BRB No. 02-0154 BLA, slip op. at 4 (Aug. 28, 2002)(unpub.). As instructed by the Board, on remand, the administrative law judge did provide a fuller explanation and discussion for according greatest weight to the May 14, 2001 x-ray reading based on the "later evidence" rule. The administrative law judge indicated that although the February 2, 2000 and July 6, 2000 x-rays provided by Dr. Gayler were classified as 0/0, Dr. Gayler's December 12, 2000 and January 13, 2001 x-rays demonstrate a change in

classification from 0/0 to 0/1 in a period of a month. A period of four months separates Dr. Gayler's January 13, 2001 x-ray classification of 0/1 from Dr. Castle's May 14, 2001 x-ray classification of 1/0. Since the administrative law judge's discussion of the relevant x-ray evidence showed progression of the disease in a relatively short period of time, I would hold that the administrative law judge properly applied the "later evidence" rule in weighing the x-ray evidence at 20 C.F.R. §718.202(a)(1). Consequently, I would affirm the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

I concur in all other respects in the majority's opinion.

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BETTY JEAN HALL
Administrative Appeals Judge