BRB No. 05-0677 BLA

THOMAS GREGORY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
T & E COAL COMPANY	)	
	)	
and	)	
	)	
BITUMINOUS CASUALTY COMPANY	)	DATE ISSUED: 05/25/2006
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand -- Awarding Benefits and Order on Motion for Reconsideration of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Barry J. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand -- Awarding Benefits and the Order on Motion for Reconsideration (04-BLA-0491) of Administrative Law Judge

Joseph E. Kane on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] This case is before the Board for the third time. The procedural history of this case is contained in the Board's most recent decision. *Gregory v. T & E Coal Co.*, BRB No. 01-0505 BLA (Apr. 5, 2002) (unpub.). In that decision, the Board vacated the administrative law judge's finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000), a determination which served as the basis for his material change in conditions finding under 20 C.F.R. §725.309 (2000), because the administrative law judge had erred in his analysis and weighing of the newly submitted pulmonary function study, blood gas study, and medical opinion evidence overall. Specifically, the Board held that the administrative law judge erred in failing to explain his crediting of Dr. Burki's invalidation of two pulmonary function studies over the opinions of the physicians who actually administered the tests; erred in failing to explain how he determined that the pulmonary function study dated July 16, 1999 was a qualifying test; and erred in failing to weigh all relevant probative evidence supportive of total disability against the contrary, probative evidence in order to determine whether total respiratory disability was established by a preponderance of the evidence in accordance with *Rafferty v. Jones & Lauglin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*). Because the Board vacated the administrative law judge's determination that the newly submitted evidence was sufficient to establish total respiratory disability, an element previously adjudicated against claimant in the prior denial, the Board also vacated the administrative law judge's finding that claimant demonstrated a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). With

[1] Claimant, Thomas Gregory, filed his first application for benefits on September 26, 1972; this claim was denied on April 10, 1981 and administratively closed thereafter. Director's Exhibit 32. Claimant's second application, filed on October 28, 1985, was denied by Administrative Law Judge Steven E. Halpern on August 21, 1992 and affirmed by the Board on June 27, 1994. *Gregory v. T & E Coal Co.*, BRB No. 92-2521 BLA (Jun. 27, 1994) (unpub.); Director's Exhibit 32. Claimant filed a third application on September 20, 1995 but chose not to appeal the denial on that claim that was issued by Administrative Law Judge Paul H. Teitler on August 22, 1997. Director's Exhibit 32. Subsequently, claimant filed a fourth application on May 10, 1999, which is pending herein on appeal. Director's Exhibit 1.

[2] We note that because claimant filed his application for benefits on May 10, 1999, which is prior to January 19, 2001, the effective date for application of the newly amended regulations regarding "subsequent claims," the regulations set forth in Section 725.309 (2000) are applicable to the instant case and the instant claim is properly construed as a "duplicate claim." 20 C.F.R. §§725.309 (2000), 725.309 (2002); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

respect to the merits of entitlement, the Board vacated the administrative law judge's determination that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Specifically, the Board held that the administrative law judge erred in finding that the x-ray evidence was in equipoise based on his failure to independently weigh all of the x-ray evidence, old and new, to determine whether the record as a whole established the existence of pneumoconiosis and he erred in failing to provide an explanation for according dispositive weight to the opinions of Drs. Baker and Vora, who were claimant's treating physicians. Similarly, the Board vacated the administrative law judge's finding that claimant established total disability due to pneumoconiosis and instructed the administrative law judge that on remand, he must weigh the opinion of Dr. Baker against the contrary opinions of Drs. Dahhan and Fino and any other previously submitted, relevant evidence in order to determine whether pneumoconiosis is "a substantially contributing cause" of claimant's total disability. Accordingly, the Board vacated the administrative law judge's finding that claimant was entitled to benefits and remanded the case for further consideration. *Gregory v. T & E Coal Co.*, BRB No. 01-0505 BLA (Apr. 5, 2002) (unpub.).

In accordance with the Board's remand instructions, the administrative law judge reweighed the evidence relevant to the existence of pneumoconiosis and found that the x-ray evidence was negative for the existence of pneumoconiosis pursuant to Section 718.202(a)(1), that there was no autopsy evidence[3] of record pursuant to Section 718.202(a)(2), and that none of the presumptions set forth in Section 718.202(a)(3) was applicable. Pursuant to Section 718.202(a)(4), the administrative law judge reviewed the previously submitted and newly submitted medical opinions of record and, because he found that the opinions of Drs. Baker and Vora diagnosing pneumoconiosis were well reasoned and well documented and entitled to dispositive weight, he found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b). Addressing the issue of total respiratory disability, the administrative law judge found that the pulmonary function study and medical opinion evidence was sufficient to demonstrate that claimant suffered from a totally disabling respiratory impairment and that, after weighing all the relevant evidence together, both like and unlike in accordance with *Rafferty* and *Shedlock*, determined that claimant affirmatively established total respiratory disability by a preponderance of the evidence and a material change in conditions pursuant

[3] The administrative law judge stated that on August 6, 2003, the Office of Administrative Law Judges had received notice of claimant's death, which occurred on July 4, 2003. Based on claimant's demise and the fact that new medical evidence was developed since his last Decision and Order in the instant case, the administrative law judge admitted the new medical evidence into the record, noting that employer did not object to its submission. Decision and Order on Remand at 4.

to Section 725.309. Lastly, in finding that claimant established that his total respiratory disability was due to pneumoconiosis, the administrative law judge attributed greater weight to the opinion of Dr. Baker inasmuch as Dr. Baker provided a more recent opinion than the other evidence given the progressive nature of pneumoconiosis, treated the miner for his respiratory condition since 1985, supported his opinion with diagnostic studies and tests contained in the record, and relied upon consistent physical examinations of the miner that occurred once every eight weeks from 2001 until the miner's death in 2003. Hence, based on his finding that claimant established all requisite elements of entitlement in this Part 718 case, the administrative law judge, accordingly, awarded benefits commencing as of May 1, 1999.

Employer, subsequently, filed a Motion for Reconsideration, contending that the administrative law judge did not provide a proper analysis concerning the material change in conditions determination and did not afford its medical opinions appropriate weight. After reviewing employer's Motion for Reconsideration, the regulatory standard for the adjudication of subsequent claims set forth in Section 725.309(d), and the procedural history of the case at bar, the administrative law judge agreed with employer that he "did not clearly apply the Regulatory standards" in this subsequent claim in the prior Decision and Order; therefore, the administrative law judge noted that where the previous determinations conflict with those on reconsideration, his determinations on reconsideration shall take precedence over the prior findings. Order on Motion for Reconsideration at 1. In evaluating whether claimant established a material change in conditions, the administrative law judge reconsidered only the newly submitted medical evidence to determine whether it was sufficient to demonstrate that one of the applicable elements of entitlement had changed since the prior denial, *i.e.*, total respiratory disability or disability causation. On reconsideration, the administrative law judge determined that the newly submitted pulmonary function studies and the newly submitted physicians' opinions were sufficient to demonstrate total disability, and concluded, therefore, that claimant established a material change in conditions under Section 725.309. Addressing the merits of entitlement, the administrative law judge relied on a prior finding that claimant established the existence of pneumoconiosis rendered by Administrative Law Judge Steven E. Halpern on the basis that the Board had affirmed this determination. *See Gregory v. T & E Coal Co.*, BRB No. 92-2521 BLA (Jun. 27, 1994) (unpub.); Director's Exhibit 32. In addition, the administrative law judge determined that the evidence of record was sufficient to affirmatively establish total respiratory disability due to pneumoconiosis under Section 718.204(c), and accordingly, found claimant entitled to benefits.

On appeal, employer argues that the administrative law judge erred in finding that the newly submitted evidence was sufficient to establish total respiratory disability pursuant to Section 718.204(b) and that therefore, claimant satisfied his burden of establishing a material change in conditions pursuant to Section 725.309. Employer

argues that the administrative law judge erred in his assessment of the newly submitted pulmonary function studies, in his analysis of the newly submitted physicians' opinions, and in his weighing of the contrary, probative evidence in accordance with *Rafferty* and *Shedlock*. Additionally, employer contends that the administrative law judge erred in relying on Judge Halpern's prior determination that the existence of pneumoconiosis was established and erred in finding that claimant established disability causation. Due to claimant's death, his counsel filed a notice of withdrawal, hence, there is no response filed on the behalf of claimant.[4] The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a limited response letter in this appeal, disagreeing with employer and asserting that the administrative law judge's reliance on the pulmonary function study and medical opinion evidence was rational, and thus, substantial evidence supports his total disability determination. However, the Director agrees with employer that the administrative law judge erred in relying on the prior finding of pneumoconiosis rendered by Judge Halpern because it was based on the now-overruled true doubt rule. Accordingly, the Director requests that the case be remanded to the administrative law judge for further consideration.

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 the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In challenging the administrative law judge's total respiratory disability determination pursuant to Section 718.204(b)(2)(i), employer argues that the administrative law judge erred by misinterpreting the Board's remand instructions as a mandatory directive rather than a discretionary request because the Board stated that the administrative law judge "may extrapolate" the Part 718, Appendix B table values in order to determine qualifying values for pulmonary function studies performed by claimant, who was older than 71 years of age at the time of the tests. Employer argues further that, in extrapolating the values, the administrative law judge failed to explain how he concluded which values were qualifying or non-qualifying because he merely

[4] In light of claimant's death on July 4, 2003, his wife's death on February 3, 2004, and claimant's counsel's withdrawal from the case, employer requests the Board to dismiss the case for lack of a proper party to pursue the case. While the Board is vested with the authority to dismiss a party's appeal, *see e.g.* 20 C.F.R. §802.402, the Board is not authorized to dismiss a claim on the merits. Hence, we must deny employer's request. Nevertheless, the administrative law judge should determine on remand whether there is a proper party to pursue this claim since both claimant and his wife are now deceased.

cited the Board's decisions in *Fraley v. Peter Cave Coal Mining Co.*, BRB No. 99-1279 BLA (Nov. 24, 2000) (unpub.); *Hubbell v. Peabody Coal Co.*, BRB No. 95-2233 BLA (Dec. 20, 1996) (unpub.),[5] and did not explain his method of extrapolation.[6] In addition, employer asserts that the administrative law judge referred to an incorrect height for claimant since claimant was 67 inches tall and the administrative law judge used 67.3 inches as the reference point. Lastly, employer contends that the administrative law judge did not explain his inconsistent conclusions with respect to the August 26, 2002 test where he initially found that it was "close to qualifying" but, on reconsideration declared that this test was qualifying.[7]

First, employer's argument that the administrative law judge misinterpreted the Board's remand instructions with respect to his extrapolation of the pulmonary function study values is unmeritorious. In its previous Decision and Order, the Board stated, "Rather than applying the values applicable to a 71 year old miner, the administrative law judge *may* extrapolate values for a miner who is older than 71 years of age at the time of the test, explaining his rationale for such extrapolation" when vacating the administrative law judge's Section 718.204(b)(2)(i) finding. *Gregory*, slip op. at 4 [emphasis added]. A review of the discussion concerning this issue in context reveals that it is clear that the basis of the Board's holding to vacate the administrative law judge's finding was not only because he failed to explain how he had determined that the pulmonary function study

[5] In *Hubbell v. Peabody Coal Co.*, BRB No. 95-2233 BLA (Dec. 20, 1996) (unpub.), the Board held that the regulations do not prohibit an administrative law judge from finding appropriate pulmonary function study table values for miners older than 71 years of age by extrapolating the existing table values set forth in Part 718, Appendix B as long as the administrative law judge explains the process for such extrapolation. *Hubbell*, slip op. at 7 n.7; *Fraley v. Peter Cave Coal Mining Co.*, BRB No. 99-1279 BLA, slip op. at 6-7 (Nov. 24, 2000) (unpub.); *see Shertzer v. McNally-Pittsburgh Manufacturing Co.*, BRB No. 05-0289 BLR, slip op. at 5 (Sep. 21, 2005) (unpub.).

[6] In a footnote, employer renews its objection to the Board's prior ruling, arguing that for a miner who is beyond the age of 71, there are no qualifying values for any of the maneuvers performed on pulmonary function studies. It is employer's position that a person of that age would be incapable of working and that a miner would only have a qualifying test because of some condition other than the type of disease the tests were designed to detect. Hence, employer asserts that in this case, claimant's pulmonary function studies do not reflect a respiratory disease but rather his advanced age.

[7] The Director contends that, as the administrative law judge found and employer does not contest, claimant's pulmonary function studies, regardless of whether they were qualifying, demonstrated a pulmonary impairment.

dated July 16, 1999 was qualifying but also, because it appeared that he had applied the values applicable to a 71 year old miner despite the fact that claimant was 78 years old at the time of the July 16, 1999 test, *Gregory*, slip op. at 4-5. The administrative law judge recognized this, and therefore extrapolated the pulmonary function study table values. There was no error in his decision to extrapolate the pulmonary function study values. Secondly, a review of the administrative law judge's Decision and Order on Remand in its entirety reveals that, contrary to employer's contention, the administrative law judge clearly explained his extrapolation process. While employer is correct that in the text of his decision under his discussion and analysis of the pulmonary function study values, the administrative law judge merely cited *Hubbell* and *Fraley*, in a footnote under his summary of the pulmonary function study evidence, the administrative law judge provided a clear explanation for the method he utilized in his extrapolation process.[8] Decision and Order on Remand at 5 n.1.[9] In addition, we reject employer's argument that the administrative law judge referred to an incorrect height for claimant when assessing the values of the pulmonary function studies since there were a variety of heights recorded for claimant ranging from 67 inches to 69.5 inches tall. It is well established that where there are substantial differences in the recorded heights among the studies, such as here, the administrative law judge must make a factual finding to determine claimant's actual height and use the actual height to determine whether the reported values are qualifying. *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 114, 19 BLR

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[8] Specifically, the administrative law judge stated:

> Moreover, the pulmonary function table values presented at Appendix B, 20 C.F.R. Part 718, show values for miners up to 71 years of age. For testing administered to the Miner when he was older than 71 years, I will reference the values listed for a miner 71 years of age and extrapolate from that point. For example, the qualifying FEV_1 value for [a] 71-year old miner 67.3" tall is 1.66; the qualifying FVC value is 2.16 and the qualifying MVV is 67. Based on the variation of the FEV_1 curves over changes in age for younger miners, I find that the qualifying values for this Miner range from 1.54 at age 78 to 1.51 at age 80 and 1.49 at age 81; for FVC curves, I find the qualifying values for this Miner are 2.04 at age 78, 2.00 for 80 and 1.99 at age 81; for MVV curves, I find the qualifying values for this Miner are 63 at age 78, 62 at age 80 and 61 at age 81.

Decision and Order on Remand at 5 n.1.

[9] Likewise, on reconsideration, the administrative law judge stated that the extrapolated values were set forth in his October 31, 2003 Decision and Order. Order on Motion for Reconsideration at 3.

2-70, 2-80-81 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). Because the record contains several pulmonary function studies with conflicting height measurements for claimant, the administrative law judge, within a proper exercise of his discretion, found that claimant's height was 67.2 inches for purposes of evaluating the pulmonary function studies and thus, properly relied on the table values for a miner measuring 67.3 inches tall. *See Protopappas*, 6 BLR at 1-223; Decision and Order on Remand at 5 n.1. We, similarly, reject employer's contention that the administrative law judge did not explain his inconsistent conclusions with respect to the August 26, 2002 test where he initially had found that it was "close to qualifying," but on reconsideration declared that this test was qualifying. The administrative law judge did not abdicate any responsibility to "explain" this inconsistency as he stated that his findings on reconsideration "shall take precedence over those in [his] prior Decisions." Order on Motion for Reconsideration at 2. Because employer has not otherwise challenged the administrative law judge's weighing of the newly submitted pulmonary function studies, we, accordingly, affirm the administrative law judge's weighing of the newly submitted pulmonary function studies and his determination that the pulmonary function study evidence was sufficient to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(i) as this determination is rational, supported by substantial evidence, and contains no reversible error. *See Winchester v. Director, OWCP*, 9 BLR 1-177, 1-178 (1986); *Burich v. Jones and Laughlin Steel Corp.*, 6 BLR 1-1189, 1-1191 (1984).

Relevant to Section 718.204(b)(2)(iv), employer asserts that the administrative law judge erred by relying on the opinions of Drs. Baker and Fino that claimant is totally disabled since neither physician indicated any knowledge of the exertional requirements of claimant's usual coal mine work when rendering their disability assessments. Employer additionally asserts that claimant's usual coal mine job did not require either heavy or moderate physical exertion, consistent the Judge Halpern's finding contained in his 1992 Decision and Order that claimant's usual coal mine work required only minimal physical demands, and avers that this is relevant in assessing whether a mild or moderate impairment exhibited on the pulmonary function studies was disabling. Moreover, employer argues that, even while Dr. Dahhan, like Drs. Baker and Fino, did not indicate a familiarity with the exertional requirements of claimant's usual coal mine employment, Dr. Dahhan did not diagnose a totally disabling respiratory impairment. The Director disagrees with employer, arguing that while Drs. Baker and Fino disagreed as to the etiology of the impairment, both Drs. Baker and Fino agreed that the impairment was sufficient to prevent claimant from performing his last coal mine employment. Asserting that Judge Halpern's assessment is not binding on this administrative law judge, the Director contends that claimant's last job running an end loader entailed manual labor requiring him to carry fifty pounds as far as 100 feet, and that this information was sufficient to permit the administrative law judge, as the finder-of-fact, to conclude that claimant was unable to perform his last coal mine employment.

Contrary to employer's argument, however, a review of the physicians' reports reveals that the doctors were, in fact, familiar with the precise nature of claimant's usual coal mine work. In his September 29, 1999 report, Dr. Dahhan stated that claimant "worked for 30 years underground operating a cutting machine, loader and continuous miner" and worked ten years outside operating a loader, dozer and drill. Director's Exhibit 16. In his April 5, 2000 report, Dr. Fino referred to his earlier findings contained in his May 27, 1997 report wherein he stated that claimant's coal mine employment career spanned a total of forty years, with his underground work consisting of loading and operating various machinery and his above ground work consisting of operating a loader, drill, and a bull dozer. Director's Exhibit 32-77. In the instant case, the administrative law judge properly found that Drs. Fino, Dahhan, and Baker recognized that claimant's coal mine employment career spanned a total of forty years with his underground work consisting of loading and operating various machinery and his above ground work consisting of operating a loader, drill, and a bull dozer. Director's Exhibits 16, 32 at 77. Consequently, because these duties, which the administrative law judge found were discussed several times in the evidence of record, have a precise meaning in the context of coal mining, the administrative law judge rationally concluded that Drs. Fino, Dahhan, and Baker were not only cognizant of the nature of claimant's usual coal mine employment duties but also took the exertional requirements into consideration when rendering their respective opinions that claimant's respiratory impairment precluded him from performing his last coal mine work. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 2-552 (6th Cir. 2002) (physician who finds total disability need not convey precise knowledge of exertional requirements of miner's job); *Cross Mountain Coal Inc. v. Ward*, 93 F.3d 211, 219, 20 BLR 2-360, 2-374 (6th Cir. 1996). We, therefore, affirm the administrative law judge's crediting of the opinions of Drs. Fino, Dahhan, and Baker that claimant's respiratory impairment precluded him from performing his regular coal mine work and the administrative law judge's resultant determination that claimant demonstrated total disability pursuant to Section 718.204(b)(2)(iv) as these determinations are rational and supported by substantial evidence. *See Cornett v. Benham Coal Co., Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27, 1-29 (1991) (*en banc*); *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989); Order on Motion for Reconsideration at 5; Decision and Order on Remand at 14; Director's Exhibits 6, 16; Claimant's Exhibit 1; Employer's Exhibit 1.[10]

[10] Employer is incorrect in stating that Dr. Dahhan did not diagnose a totally disabling respiratory impairment. The record reflects that in his September 29, 1999 report, Dr. Dahhan opined that claimant "does not retain the physiological capacity to continue his previous coal mining work or [a] job of comparable physical demand

Next, employer argues that the administrative law judge failed to follow the Board's remand instruction to weigh all of the relevant evidence, like and unlike, prior to determining whether the newly submitted evidence established total disability. Employer contends further that the administrative law judge's conclusory statement that claimant established total disability fails to comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

A review of the administrative law judge's total disability analysis reveals that his assessment was in direct compliance with the provisions of the APA because the administrative law judge conducted a full and proper weighing of the conflicting pulmonary function study, arterial blood gas study, and medical opinion evidence and clearly delineated his credibility determinations in accordance with the Board's remand instructions. Accordingly, the administrative law judge weighed all the relevant evidence together and found that the newly submitted qualifying pulmonary function studies and all three of the newly submitted physicians' opinions demonstrating that claimant was totally disabled outweighed the non-qualifying arterial blood gas study results and the lack of evidence of cor pulmonale, which established neither the presence nor absence of total disability. The administrative law judge permissibly found further that the narrative medical opinions of Drs. Fino, Dahhan, and Baker were more persuasive than the contrary evidence and, therefore, were entitled to dispositive weight because the physicians relied on multiple sources of data, namely, physical examinations, objective tests, claimant's symptomotology, and medical and employment histories, before rendering their opinions that claimant was totally disabled. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983) (determination as to whether physician's report is sufficiently reasoned and documented is credibility matter for administrative law judge); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order on Remand at 14. The administrative law judge reiterated this conclusion when addressing the issue of total disability on reconsideration. Order on Motion for Reconsideration at 5. Contrary to employer's argument, therefore, the administrative law judge not only complied with the Board's remand instructions, but also rendered adequate findings of fact on this issue accompanied by a more than ample rationale in accordance with the APA. Because the administrative law judge's determination to accord determinative weight to the most recent pulmonary function studies and medical opinions is rational and because his finding, that claimant was totally disabled, is supported by substantial evidence, we affirm his determination that claimant affirmatively established total respiratory disability

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because of his airway obstruction," an opinion which is sufficient to demonstrate total disability. Director's Exhibit 16.

by a preponderance of the evidence pursuant to Section 718.204(b), and as such, also established a material change in conditions pursuant to Section 725.309. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

Next, we turn to the administrative law judge's determinations with respect to the merits of entitlement and employer's challenge of the administrative law judge's finding concerning the existence of pneumoconiosis pursuant to Section 718.202(a). Employer contends that the administrative law judge erred in relying on the Board's affirmance of Judge Halpern's finding contained in his 1992 Decision and Order that claimant established the existence of pneumoconiosis because, in so finding, Judge Halpern relied on the now-invalidated true doubt rule. The Director agrees with employer that the administrative law judge's determination cannot be affirmed not only because Judge Halpern's prior pneumoconiosis finding was based on the now-discredited true doubt rule but also, because employer has consistently contested the issue of pneumoconiosis and did not concede its existence in any of the claimant's previously filed claims. The contentions of employer and the Director have merit.

As employer and the Director contend, Judge Halpern's finding of pneumoconiosis contained in his 1992 decision was based on his application of the true doubt rule because he found that the x-ray evidence was in equipoise, and consequently, resolved the doubt in claimant's favor to find the presence of the disease. Director's Exhibit 32 at 188. Subsequently, however, the United States Supreme Court overruled the true doubt rule as violative of the Administrative Procedure Act, and accordingly, held that claimants have the burden of establishing all requisite elements of entitlement under Part 718 by a preponderance of the evidence. *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). Therefore, the administrative law judge's reliance on Judge Halpern's prior pneumoconiosis determination, as based on the now-invalidated true doubt rule, cannot stand and we must vacate the administrative law judge's finding that pneumoconiosis was established pursuant to Section 718.202(a). Order on Motion for Reconsideration at 5. We note further that the administrative law judge is not bound by prior findings rendered by other administrative law judges and is required to conduct a *de novo* review of the record by independently evaluating all the evidence of record and autonomously resolving all relevant issues of fact and law. *See Schegan v. Waste Management & Processors, Inc.*, 18 BLR 1-41 (1994); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988). Consequently, we remand the case for the administrative law judge to address the issue of whether claimant established the existence of pneumoconiosis pursuant to Section 718.202(a).

Employer contends further that the administrative law judge inappropriately applied the "hostility to the Act" doctrine as a basis to discredit the opinions of the physicians who did not diagnose pneumoconiosis as this determination is not supported by applicable case law. Asserting that these physicians did not render an opinion that is hostile to the Act, *i.e.*, they did not opine that coal workers' pneumoconiosis can never be progressive or that simple pneumoconiosis can never be totally disabling, employer contends that the administrative law judge erred in finding hostility based on the tenet that pneumoconiosis is a progressive disease since, in the case *sub judice*, most of the recent x-rays interpretations were negative for the presence of pneumoconiosis. Employer, likewise, avers that the administrative law judge's reliance on the progressivity of pneumoconiosis doctrine was misplaced because nothing in the statute or case law cited by the administrative law judge supports a presumption that pneumoconiosis is a progressive and latent disease in the absence of further dust exposure. Employer's Brief in Support of Petition for Review at 22 n.7.

Contrary to employer's contention, however, the Sixth Circuit court has consistently characterized pneumoconiosis as a disease that may arise or progress in the absence of continued exposure to coal dust and the court has rejected an employer's argument that a miner cannot develop pneumoconiosis arising out of coal mine employment after a period of years during which he was not employed as a coal miner. *See Peabody Coal Co. v. Odom*, 342 F.3d 486, 491, 22 BLR 2-612, 2-621 (6th Cir. 2003); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989); *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986). In addition, the court stated that the United States Supreme Court has also recognized the progressive nature of pneumoconiosis. *Odom*, 342 F.3d at 491, 22 BLR at 2-621, *citing Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). Consequently, it is well established that a physician's opinion rendering a conclusion based on a premise that is antithetical to the statutory and regulatory scheme of the Act may be discounted by the administrative law judge as "hostile to the Act" or "premised on a legally untenable presumption." *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 210, 22 BLR 2-467, 2-479 (3d Cir. 2002); *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997) (*en banc*) (noting that progressivity is inherent in the duplicate claims regulation itself); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719, 18 BLR 2-16, 2-24 (4th Cir. 1993).

The administrative law judge found that Drs. Dahhan and Fino each rendered opinions that were hostile to the Act, and that their opinions were, therefore, entitled to little probative weight. The administrative law judge found that, because Dr. Dahhan stated in his September 29, 1999 report that claimant's last coal dust exposure in 1985 was a sufficient duration of absence to cause cessation of any industrial bronchitis

claimant may have had, and Dr. Fino stated, "industrial bronchitis resolves itself within six months of leaving the mines," both physicians believed in part that pneumoconiosis and any ensuing disability will no longer manifest itself upon cessation to coal dust exposure.[11] Decision and Order on Remand at 9-10; Director's Exhibits 16; 32 at 70; Employer's Exhibit 1. The Sixth Circuit has specifically rejected the contention that a person cannot develop pneumoconiosis from exposure to coal dust after a period of years during which he was not employed as a miner. *Odom*, 342 F.3d at 491, 22 BLR at 2-621; *see also Kramer*, 305 F.3d at 209, 22 BLR at 2-478; *Ross*, 42 F.3d at 993, 19 BLR at 2-10; *see* 65 Fed. Reg. 79970 (Dec. 20, 2000) (Comments to revised regulations reflect that, after reviewing all scientific and medical literature documenting the latent and progressive nature of pneumoconiosis, Department of Labor rejected Dr. Fino's opinion that pneumoconiosis does not progress after exposure ceases). It is not clear, however, whether the administrative law judge was aware that under Sixth Circuit teaching, in order to reject a medical opinion as hostile to the Act, the administrative law judge must determine: that the physician's opinion is inconsistent with congressional intent; that it is absolute, *e.g.* forecloses all possibility that simple pneumoconiosis can be disabling; and that the physician's predisposed belief forms the primary basis for his conclusion. *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72-73 (6th Cir. 1987). On remand, the administrative law judge must reconsider the physicians' statements applying the Sixth Circuit standard.

Finally, we address employer's challenges to the administrative law judge's finding of disability causation pursuant to Section 718.204(c). Employer asserts that, in determining whether claimant established total disability due to pneumoconiosis, the administrative law judge erred by mechanically discounting the opinions of physicians who did not diagnose pneumoconiosis because he found that pneumoconiosis was established. Specifically, employer argues that, even if it was proper for the administrative law judge to reject a medical opinion concerning disability causation because that physician did not diagnose pneumoconiosis, the administrative law judge impermissibly discounted Dr. Fino's opinion on this basis because Dr. Fino assumed *arguendo* that pneumoconiosis was present when rendering his disability causation conclusion. We disagree.

The Sixth Circuit court has held that the administrative law judge may treat the conclusion of a physician as "less significant," and thus, worthy of little probative weight, on the issue of disability causation when that physician failed to find the existence of

[11] In a report dated May 27, 1997, Dr. Fino opined that the hypoxemia claimant exhibited during more recent evaluations was unrelated to coal mine dust inhalation because "it should have been present at or about the time this man left the mines which was in the middle 1980s." Director's Exhibit 32 at 82.

pneumoconiosis. *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *see Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Furthermore, even where the physician assumes that the miner has pneumoconiosis, this assumption results in a "superficial hypothetical" that is insufficient to reconcile the physician's opinion with the administrative law judge's ultimate conclusion that pneumoconiosis is present. *Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004) ("Common sense suggests that it is usually exceedingly difficult for a doctor to properly assess the contribution, if any, of pneumoconiosis to a miner's [disability] if he/she does not believe it was present."); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002). Therefore, because a physician's opinion that claimant did not have coal workers' pneumoconiosis may deprive his observations of probative value in a case where the existence of pneumoconiosis was established, the administrative law judge should consider this factor when assessing the medical opinion evidence if the administrative law judge finds the existence of pneumoconiosis established on remand.

Lastly, employer generally argues that the administrative law judge categorically rejected the early evidence contained in the record in direct contravention to the holding pronounced in *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), that prohibits an administrative law judge from mechanically applying greater weight to the most recent evidence. Employer's contention is unmeritorious. In this case, the administrative law judge did not abdicate his responsibility to determine the reliability of the evidence by relying on its chronology but rather, he conducted a qualitative assessment of all the medical opinions and engaged in a proper evidentiary analysis of the evidence both on remand and on reconsideration. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (*en banc*) (McGranery, J., concurring and dissenting); *Workman v. Eastern Assoc. Coal Corp.*, 23 BLR 1-22 (2004) (*en banc*); Order on Motion for Reconsideration at 6-7; Decision and Order on Remand at 17. Hence, we reject employer's argument. Nevertheless, because we must vacate the administrative law judge's determination that claimant established the existence of pneumoconiosis under Section 718.202(a), we must also vacate his disability causation determination pursuant to Section 718.204(c).

Based on the foregoing, therefore, we remand the case for the administrative law judge to conduct a full and comparative weighing of all relevant evidence in order to determine whether the evidence of record as a whole is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), and if reached, whether pneumoconiosis arose out of claimant's coal mine employment pursuant to Section 718.203(b) and whether pneumoconiosis was a substantially contributing cause of

claimant's totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c). *See* 20 C.F.R. §§718.202(a), 718.203(b), 718.204(c).

Accordingly, the Decision and Order on Remand and the Order on Motion for Reconsideration of the administrative law judge are vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge