BRB No. 07-0725 BLA

J.C.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED: 05/21/2008
	)	
and	)	
	)	
SUN COAL COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (05-BLA-0030) of Administrative Law Judge Ralph A. Romano (the administrative law judge) awarding benefits on a duplicate 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] The administrative law judge credited claimant with sixteen years of coal mine employment based on the parties' stipulation,[2] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Although the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), he found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b). The administrative law judge also found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge ordered benefits to commence as of April 1, 1986, the beginning of the month that claimant filed the duplicate claim.

On appeal, employer contends that liability for the payment of benefits in this case should be transferred to the Black Lung Disability Trust Fund (Trust Fund). Employer also contends that the administrative law judge should have excluded Dr. Hussain's opinion from the record. In addition, employer contends that the administrative law judge misapplied the standard for establishing a material change in conditions at 20 C.F.R. §725.309 (2000). Further, employer challenges the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer additionally challenges the administrative law judge's finding that the evidence established total disability at 20 C.F.R. §718.204(b)(2)(iii) and (iv). Lastly, employer challenges the administrative law judge's determination that April 1, 1986 was the onset date of total disability due to pneumoconiosis. Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, arguing that there is no merit to employer's assertions that the doctrine of laches applied

[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] The record indicates that claimant was last employed in the coal mine industry in Kentucky. Director's Exhibits 63, 65, 67. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

to the case, that liability for the payment of benefits must be transferred to the Trust Fund, and that the most recent pulmonary evaluation that was sponsored by the Department of Labor (DOL) must be excluded from the record. Employer filed a brief in reply to the Director's response brief, reiterating its prior contentions regarding the liability for the payment of benefits.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

PROCEDURAL HISTORY

The pertinent procedural history of this case is as follows: Claimant filed his first claim on June 27, 1973. Director's Exhibit 1. It was finally denied by the district director[4] on August 27, 1980 because the evidence did not establish the existence of pneumoconiosis arising out of coal mine employment or total disability due to pneumoconiosis. *Id*.

Claimant filed his second claim on April 22, 1986. Director's Exhibit 2. The district director denied the claim on September 11, 1986 because the evidence did not establish the existence of pneumoconiosis arising out of coal mine employment or total disability due to pneumoconiosis. Director's Exhibit 46. By letter dated September 12, 1986, claimant appealed the denial. Director's Exhibit 47. The district director denied the claim on April 18, 1988 because the evidence did not show a material change in conditions. Director's Exhibit 53. By letter dated May 3, 1988, claimant requested a hearing. Director's Exhibit 55. The district director denied the claim on July 20, 1988

[3] Because the administrative law judge's findings that the evidence did not establish either the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3) or total disability at 20 C.F.R. §718.204(b)(2)(i), (ii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

[4] The district director was formerly known as the deputy commissioner.

because the evidence did not establish a material change in conditions. Director's Exhibit 59. By letter dated July 27, 1988, claimant requested that the district director hold the case in abeyance pending the disposition of the Board's decision in *Lukman v. Director, OWCP*, 11 BLR 1-71 (1988), by the United States Court of Appeals for the Tenth Circuit. Director's Exhibit 60. On August 8, 1988, the district director granted claimant's request to hold the case in abeyance pending the Tenth Circuit's decision in *Lukman*. Director's Exhibit 61.

Claimant filed his third claim on February 20, 2001. Director's Exhibit 62. On December 19, 2002, the district director denied benefits because the evidence did not show the existence of pneumoconiosis and a totally disabling respiratory impairment. Director's Exhibit 88. On August 11, 2003, however, the district director stated that claimant's 2001 application should have been treated as a request to bring the case out of abeyance and to reconsider all available evidence. Director's Exhibit 96. The district director, therefore, reconsidered the evidence and found that it did not establish total disability due to pneumoconiosis arising out of coal mine employment. *Id*. Following the district director's transfer of the case to the Office of Administrative Law Judges (OALJs), the administrative law judge held a hearing on May 23, 2006, and issued a Decision and Order awarding benefits on May 2, 2007.

LIABILITY

Initially, we will address employer's contentions regarding the liability for the payment of benefits in this case. Relying on *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000), *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), and *Venicassa v. Consolidation Coal Co.*, 137 F.3d 197, 21 BLR 2-277 (3d Cir. 1998), employer argues that liability for the payment of benefits should be transferred to the Trust Fund. Specifically, employer asserts that the doctrine of laches should be applied to the case, based on either claimant's failure to reactivate his claim or the district director's failure to transmit the claim to the OALJs for a hearing after the Tenth Circuit issued its decision in *Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990).[5] The Director argues that the facts of the instant case are distinguishable from those of *Holdman*, *Lockhart*, and *Venicassa*.

[5] In *Costello v. United States*, 365 U.S. 265 (1961), the United States Supreme Court held that "[the defense of laches] requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello*, 365 U.S. at 282.

In *Holdman*, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that liability for the payment of benefits should be transferred to the Trust Fund because the DOL had failed to safeguard the record, resulting in employer not having access to certain evidence. In this case, there is no indication that the DOL failed to safeguard the record. Moreover, there is no indication that claimant had access to any evidence not made available to employer.

In *Lockhart*,[6] the United States Court of Appeals for the Fourth Circuit held that the DOL's inexcusable delay in notifying employer of its potential liability deprived it of the opportunity to mount a meaningful defense. The Fourth Circuit, therefore, held that benefits were to be paid from the Trust Fund. In this case, the DOL provided timely notification to employer of its potential liability.

In *Venicassa*, the United States Court of Appeals for the Third Circuit held that the Director's failure to make a timely designation of the proper responsible operator should not have jeopardized an award of benefits that had been made to the claimant. The Third Circuit, therefore, affirmed an earlier administrative law judge's designation of the Trust Fund as liable for the claimant's award of benefits. Again, in this case, the Director timely designated employer as the proper responsible operator.

In the instant case, as noted above, employer received timely notice of claimant's duplicate claim on May 1, 1986.[7] Director's Exhibit 42. Employer also received timely notice of claimant's most recent application for benefits, which the district director subsequently construed as a request to bring the case out of abeyance. Director's Exhibit 67. We, therefore, agree with the Director that, unlike cases where an employer was

---

[6] In *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999), the United States Court of Appeals for the Fourth Circuit noted that *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), established a straight forward test for determining whether an employer has been denied due process by the government's delay in notification of potential liability: did the government deprive the employer of "a fair opportunity to mount a meaningful defense to the proposed deprivation of its property." *Borda*, 171 F.3d at 183, 21 BLR at 2-559-560 (citation omitted). The Fourth Circuit emphasized that it "is not the mere fact of the government's delay that violates due process, but rather the prejudice resulting from such delay." *Borda*, 171 F.3d at 183, 21 BLR at 2-560. In this case, there was no government delay in notifying employer of its potential liability.

[7] A Notice of Claim was sent to Ray Coal Company. Director's Exhibit 42. By letter dated March 1, 2001, the district director noted that Whitaker Coal Corporation (*i.e.*, employer) was formerly Ray Coal Company. Director's Exhibit 66.

precluded from mounting a meaningful defense of the proposed deprivation of its property by delays in the adjudication of black lung claims, employer was not precluded from developing evidence to defend against the claim in this case or from taking action to lift the order that held the case in abeyance. Consequently, under the facts of this case, we hold that the DOL did not deprive employer of a fair opportunity to mount a meaningful defense. We, therefore, decline to transfer liability for the payment of benefits in this case to the Trust Fund.

EVIDENTIARY RECORD

Next, we address employer's contention that because the DOL erroneously provided claimant with a new pulmonary evaluation by Dr. Hussain, the administrative law judge erred in considering Dr. Hussain's opinion. Employer maintains that Dr. Hussain's report should be excluded from the record.

As noted above, the DOL initially treated claimant's February 20, 2001 application as a new claim. Consequently, Dr. Hussain conducted an examination and full range of testing on May 16, 2001 in accordance with the Director's statutory obligation to provide claimant with a complete pulmonary evaluation. Director's Exhibit 73. Although the district director subsequently concluded that claimant's February 20, 2001 application should have been treated as a request to bring the case out of abeyance, the district director did not exclude Dr. Hussain's opinion from the record. Director's Exhibit 96. Rather, the district director denied benefits based on its consideration of the evidence, and transferred the case to the OALJs. *Id*. In his Decision and Order, the administrative law judge considered Dr. Hussain's opinion with regard to the issues of pneumoconiosis, total disability, and total disability due to pneumoconiosis.

Given the broad discretion conferred on administrative law judges in resolving procedural and evidentiary questions, *Jordan v. Director, OWCP*, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989), the administrative law judge acted within his discretion in considering Dr. Hussain's opinion. Employer offered no indication of how it was harmed by the admission of the report of Dr. Hussain. We, therefore, agree with the Director that, in this case, employer was provided with a reasonable opportunity to develop rebuttal evidence. Employer, in fact, took advantage of its opportunity to have Dr. Hussain's findings on examination and objective testing reviewed by Drs. Broudy and Fino. Employer's Exhibits 2, 4. Thus, because the administrative law judge acted within his discretion, we reject employer's assertion that the administrative law judge erred in considering Dr. Hussain's opinion. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*) (recognizing that an administrative law judge has broad discretion in handling procedural matters), *vac'd and remanded on other grounds, Sewell Coal Corp. v. Director, OWCP* [*Dempsey*], F.3d , 2008 WL 1795592 (4th Cir. 2008).

MATERIAL CHANGE IN CONDITIONS
Section 725.309 (2000)

Employer additionally contends that because the administrative law judge erred in failing to weigh together all the medical evidence submitted with the duplicate claim, substantial evidence does not support the administrative law judge's finding that claimant established a material change in conditions at 20 C.F.R. §725.309 (2000). Specifically, employer argues that the administrative law judge failed to offer a valid reason for giving less weight to the older evidence that was submitted with the duplicate claim. We disagree.

After acknowledging that the instant claim was a duplicate claim, the administrative law judge stated that "according to [Section] 725.309(d) this claim must be denied on the basis of the prior denial unless there has been a material change in condition." Decision and Order at 4. The administrative law judge also stated that "[i]f [claimant] is successful in establishing a material change, then all the record evidence must be reviewed to determine whether he is entitled to benefits." *Id*. at 5. Nonetheless, the administrative law judge did not render a finding with regard to whether claimant established a material change in conditions at 20 C.F.R. §725.309 (2000). Rather, the administrative law judge stated that he considered all the evidence of record in finding that the evidence established entitlement to benefits. The administrative law judge specifically stated:

> Although I have reviewed all of the evidence of record, I find that some of its wholesale persuasive value is severely diminished due to its age. The record contains medical evidence, dated October 9, 1985 through March 31, 1987, which was submitted in connection with the 1986 claim. (DX 7-DX 47). The evidence submitted in connection with the application filed on 2001 contains a report dated December 8, 1998. (DX 77). That report contains the oldest affirmative case medical evidence received after the case was taken out of abeyance. As such, the old record evidence is 11 years older, at best, than the new record evidence.

Decision and Order at 5.

Contrary to employer's assertion that the administrative law judge rendered a flawed material change in conditions finding at 20 C.F.R. §725.309 (2000), the administrative law judge considered entitlement to benefits on the merits.[8] The

[8] However, as discussed, *infra* at 21, the administrative law judge, on remand, must determine at the outset whether the new evidence establishes a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).

administrative law judge reasonably found that "the age difference between the old record evidence and the new record evidence is quite significant and severely compromises the reliability and persuasiveness of the old record evidence." Decision and Order at 5; *see generally Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). Consequently, we reject employer's assertion that the administrative law judge failed to offer a valid reason for giving less weight to the older evidence that was submitted with the duplicate claim.

EXISTENCE OF PNEUMOCONIOSIS
Section 718.202(a)(4)

Turning to the merits, employer contends that the administrative law judge erred in finding that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the reports of Drs. Hussain, Baker, Dahhan, Broudy, and Fino, and the opinions of the doctors who saw claimant at Marymount Hospital.

Dr. Hussain diagnosed pneumoconiosis and chronic obstructive pulmonary disease (COPD) related to dust exposure. Director's Exhibit 73. Dr. Baker diagnosed coal workers' pneumoconiosis, mild restrictive ventilatory defect, and chronic bronchitis. Director's Exhibits 74, 76. Dr. Baker also opined that claimant's disease was the result of coal dust exposure. *Id*. By contrast, Dr. Dahhan opined that claimant does not have coal workers' pneumoconiosis, and that his mild ventilatory impairment was related to obesity and cigarette induced bronchitis. Director's Exhibit 79. Similarly, Dr. Broudy opined that claimant does not have coal workers' pneumoconiosis or any chronic lung disease related to coal dust exposure. Employer's Exhibits 1-3. Dr. Fino opined that claimant does not have coal workers' pneumoconiosis. Employer's Exhibits 4, 5. Lastly, the physicians who saw claimant at Marymount Hospital diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease. Director's Exhibit 87.

The administrative law judge gave little weight to the opinions of Drs. Broudy and Fino on the issue of pneumoconiosis because they were in conflict with the regulations, providing that pneumoconiosis is latent and progressive. Decision and Order at 11. The administrative law judge gave greater weight to the opinions of Drs. Hussain and Baker than to Dr. Dahhan's contrary opinion, as better reasoned because the doctors explained how the evidence they developed and reviewed supported their conclusions. *Id*. at 12. The administrative law judge also gave great weight to the opinions of the doctors who saw claimant at Marymount Hospital because they were well-reasoned and well-documented, *i.e.*, they were based on relevant objective testing, physical examination, and medical, smoking and occupational histories. The administrative law judge also gave their opinions great weight because they were "treating physicians." *Id*. at 13. Hence,

the administrative law judge found that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*.

Drs. Hussain, Baker, and Dahhan

Employer argues that substantial evidence does not support the administrative law judge's conclusion that the opinions of Drs. Hussain and Baker were more complete and thorough than the contrary opinions of record.[9] The administrative law judge gave greater weight to the opinions of Drs. Hussain and Baker than to Dr. Dahhan's contrary opinion because they were better reasoned. The administrative law judge stated:

> Both Drs. Hussain and Baker had the opportunity to examine [c]laimant and review medical records. I find their reasoning and explanations in support of their conclusions more complete and thorough than that of Dr. Dahhan's. They better explained how the evidence they developed and reviewed supported their conclusions….By contrast, Dr. Dahhan finds no pneumoconiosis without fully explaining what his opinion is based on. His report renders conclusions with no supporting rationale, which results in his reports being less than well-reasoned.

Decision and Order at 12.

Contrary to the administrative law judge's findings, Dr. Hussain did not provide a basis for his diagnosis of pneumoconiosis and COPD related to dust exposure and smoking. Director's Exhibit 73; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Dr. Baker's diagnosis of pneumoconiosis was based on a positive x-ray and coal dust exposure.[10] Director's Exhibits 74, 76. However, in *Cornett v. Benham*

[9] We reject employer's assertion that the administrative law judge erred in failing to consider the weight of the negative x-ray evidence of record on the credibility of the opinions of Drs. Hussain and Baker. The Board has held that an administrative law judge did not err in crediting the report of a physician that was based in part on a positive x-ray at 20 C.F.R. §718.202(a)(4) even though the weight of the x-ray evidence was negative for pneumoconiosis. *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-89 (1993).

[10] Dr. Baker diagnosed coal workers' pneumoconiosis based on a positive x-ray and a significant history of dust exposure, chronic obstructive airway disease with a mild obstructive ventilatory defect based on pulmonary function testing, and chronic bronchitis based on history. Director's Exhibits 74, 76. Dr. Baker also opined that claimant's disease resulted from coal dust exposure, because "[claimant] has abnormal chest x-ray consistent with pneumoconiosis and a long history of coal dust exposure and no other condition to account for these x-ray changes." *Id*.

Coal, Inc., 227 F.3d 569, 575-6, 22 BLR 2-107, 1-120 (6th Cir. 2000), the Sixth Circuit agreed with an administrative law judge's assertion that a diagnosis of pneumoconiosis that was based on an x-ray and a history of coal dust exposure was not a reasoned medical opinion at 20 C.F.R. §718.202(a)(4).

As noted above, Dr. Dahhan opined that claimant does not have pneumoconiosis. Director's Exhibit 79. Dr. Dahhan explained:

> 1. There is insufficient objective data to justify the diagnosis of coal workers' pneumoconiosis based on the mild obstructive abnormalities on clinical examination of chest, normal blood gas exchange mechanisms, mild reduction in the ventilatory capacity due to other causes and clear chest x-ray with no radiological evidence of pneumoconiosis.
>
> 2. [Claimant] has a mild ventilatory impairment that has resulted from his obesity and his cigarette induced bronchitis.
>
> 3. [Claimant] continues to smoke as demonstrated by his elevated carboxyhemoglobin level during my exam and noted by his treating physicians. His amount of smoking is more than sufficient to cause the development of a mild airway obstruction in a susceptible individual.

Id.

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), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge did not sufficiently explain why the explanations provided by Drs. Hussain and Baker for diagnosing pneumoconiosis were more thorough and complete than Dr. Dahhan's explanation for finding that claimant did not have pneumoconiosis. Decision and Order at 12. Thus, the administrative law judge erred in failing to provide a valid basis for finding that the opinions of Drs. Hussain and Baker outweighed Dr. Dahhan's contrary opinion. *Director, OWCP v. Rowe*, 710 F.2d 251, 254, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Wojtowicz*, 12 BLR at 1-165. Consequently, we vacate the administrative law judge's finding that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for further consideration of the evidence thereunder.

Drs. Broudy and Fino

Employer also argues that substantial evidence does not support the administrative law judge's finding that the opinions of Drs. Broudy and Fino were entitled to little weight. The administrative law judge found that the opinions of Drs. Broudy and Fino were in conflict with the regulations providing that pneumoconiosis was a latent and progressive disease. *See* 20 C.F.R. §718.201. The administrative law judge specifically stated:

> Drs. Broudy and Fino both opined that [c]laimant is not inflicted with pneumoconiosis because he quit coal mine employment twenty years ago and has had normal objective test results since that time. As the regulations provide that pneumoconiosis is latent and progressive, I find their opinions are in conflict with the regulations and are therefore entitled to little weight.

Decision and Order at 12.

As noted above, Drs. Broudy and Fino opined that claimant does not have pneumoconiosis. During a May 16, 2006 deposition, Dr. Broudy opined that claimant has suffered a material change of conditions since the late eighties that was not related to the inhalation of coal mine dust, or hastened by his work in the mining industry. Dr. Broudy stated:

> No. [Claimant] quit work, apparently, in the late eighties at a time when he had virtually normal spirometry, at least on some of his studies. So, that indicates to me that whatever change took place occurred after he left the mines, making it very unlikely medically that it was due to the mining instead of some other cause.

Employer's Exhibit 3 (Dr. Broudy's Deposition at 11).

Dr. Fino also observed that claimant stopped working in his usual coal mine work in rendering his opinion that claimant does not have coal workers' pneumoconiosis. Dr. Fino stated:

> So to summarize, I have a man who stopped working in the mid 1980's, he had normal lung function. He continued to smoke and gain weight. And then what happened is he developed lung function abnormalities that are consistent with smoking and being obese. So I can explain all of his abnormalities as a result of noncoal dust related conditions. So that is why I don't believe that he has coal workers' pneumoconiosis.

Employer's Exhibit 5 (Dr. Fino's Deposition at 10).

In *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987), the Sixth Circuit held that a physician's belief that simple pneumoconiosis is never disabling may constitute grounds for rejecting his opinion as inconsistent with the spirit of the Act. *Adams*, 816 F.2d at 1119, 10 BLR at 2-72. Nonetheless, the court observed that even a physician's belief that simple pneumoconiosis cannot be totally disabling does not automatically exclude from consideration the physician's otherwise probative testimony regarding the existence or severity of a miner's disability. *Id*. Rather, the court held that the physician must foreclose the possibility that simple pneumoconiosis can be totally disabling before his opinion will be considered inconsistent with the spirit of the Act. *Id*.

As employer argues, Drs. Broudy and Fino did not foreclose the possibility that simple pneumoconiosis could develop after a miner leaves his usual coal mine work. Neither Dr. Broudy nor Dr. Fino excluded pneumoconiosis as a latent and progressive disease. Rather, Drs. Broudy and Fino merely considered the fact that claimant had normal lung function when he stopped working as a coal miner. Thus, because the opinions of Drs. Broudy and Fino were not primarily based on a predisposed belief that foreclosed all possibility that pneumoconiosis is latent and progressive, *see generally Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003)(recognizing that pneumoconiosis is a progressive and latent disease that can arise and progress in the absence of continued exposure to coal dust), we hold that the administrative law judge erred in giving little weight to the opinions of Drs. Broudy and Fino on the ground that they were in conflict with the regulations.[11] *Adams*, 816 F.2d at 1119, 10 BLR at 2-72.

Doctors at Marymount Hospital

Employer further argues that the administrative law judge erred in according significant probative value to the opinions of the physicians who saw claimant at Marymount Hospital pursuant to 20 C.F.R. §718.104(d). The administrative law judge stated that physicians who saw claimant at Marymount Hospital stated that claimant was "treated for pneumoconiosis and chronic pulmonary disease on multiple occasions." Decision and Order at 13. The administrative law judge found these opinions to be well-

[11] We also hold that employer's assertion that the administrative law judge erred in discounting Dr. Fino's opinion solely because Dr. Fino did not examine claimant has merit. *Collins v. J & L Steel* (*LTV Steel*), 21 BLR 1-182 (1999). After finding that Dr. Fino's opinion conflicted with the regulations, the administrative law judge stated, "[i]n addition, I note that Dr. Fino did not have the opportunity to examine [c]laimant and solely based his opinion on reviewing his medical records." Decision and Order at 12.

reasoned as they were based on relevant objective testing, physical examination, medical history, smoking history, and occupational history." *Id*. The administrative law judge also found that they were entitled to great weight as they were the opinions of treating physicians at Section 718.104(d). *Id*.

The criteria set forth in 20 C.F.R. §718.104(d)(1)-(4) for consideration of a treating physician's opinion, however, are applicable to medical evidence developed after January 19, 2001, the effective date of the amended regulations. Section 718.104(d) requires the officer adjudicating the claim to "give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). Although the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5). Moreover, the Sixth Circuit has held that in black lung litigation, the opinions of treating physicians are neither presumptively correct nor afforded automatic deference. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002). In *Williams*, the court stated that, rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Williams*, 338 F.3d at 513, 22 BLR at 2-647.

In the instant case, the administrative law judge erroneously applied the regulation at Section 718.104(d) to medical opinion evidence developed before January 19, 2001, the effective date of the amended regulations.[12] *See* 20 C.F.R. §725.2.

Further, as employer asserts, the administrative law judge may have erred in giving great weight to these opinions because they were well-reasoned and well-documented. Although the opinions of these doctors noted pneumoconiosis and black lung by medical history, and coal workers' pneumoconiosis as an admitting diagnosis, Director's Exhibit 87, no physician provided an explanation for his diagnosis of the disease. *Clark*, 12 BLR at 1-155. Without additional explanation by the administrative law judge, it is unclear how he found the opinions of these physicians to be well-reasoned and well-documented medical opinions regarding the issue of pneumoconiosis. *Rowe*,

[12] As employer asserts, because the instant claim was filed in 1986, the administrative law judge erroneously referred to the amended regulation at 20 C.F.R. §725.414(a)(4). The amended regulation at 20 C.F.R. §725.414 applies only to claims filed after January 19, 2001.

710 F.2d at 254, 5 BLR at 2-103. Thus, the administrative law judge erred in failing to adequately explain why he gave great weight to the opinions of the physicians who saw claimant at Marymount Hospital. On remand, the administrative law judge must consider whether these physicians were "treating" physicians and then, whether their opinions are entitled to great weight in accordance with the Sixth Circuit's decision in *Williams*.[13]

TOTAL DISABILITY
Section 718.204(b)(2)(iii)

Employer also contends that substantial evidence does not support the administrative law judge's finding that the evidence established total disability at 20 C.F.R. §718.204(b)(2)(iii). The record contains the opinions of Drs. Mandiwala and Broudy. In a hospital consultation report dated January 23, 2001, Dr. Mandiwala diagnosed cor pulmonale. Director's Exhibit 87. Dr. Mandiwala also observed that "[r]adiologically there was no evidence of congestive heart failure and its (sic) possible that the significant way to (sic) gain and pedal edema may be related to cor pulmonale from established severe chronic obstructive lung disease and possible underlying sleep apnea. *Id*. During a deposition, Dr. Broudy opined that claimant did not have any of the abnormalities consistent with cor pulmonale.[14] Employer's Exhibit 3 (Dr. Broudy's Deposition at 10-11). In his Decision and Order, the administrative law judge stated that "[d]uring [c]laimant's stay at Marymount Hospital on January 18, 2001 through January 25, 2001, [c]laimant was diagnosed with clinical *cor pulmonale* due to severe chronic obstructive lung disease. (DX 87)." Decision and Order at 16. The administrative law judge therefore found that the evidence established total disability at 20 C.F.R. §718.204(b)(2)(iii). However, as employer asserts, there is no medical evidence that claimant has cor pulmonale *with right-sided* congested heart failure, as required by the regulations. *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989). Thus, we vacate the administrative law judge's finding that the evidence established total disability at 20 C.F.R. §718.204(b)(2)(iii), and remand the case for further consideration of the evidence thereunder.

[13] We also hold that employer's assertion that the administrative law judge mischaracterized the opinions of these physicians has merit. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Contrary to the administrative law judge's finding that the opinions reflect that claimant was treated for pneumoconiosis and chronic pulmonary disease on multiple occasions, Decision and Order at 13, the opinions indicate that claimant was treated for heart disease and peripheral vascular disease. Director's Exhibits 77, 87.

[14] Dr. Broudy reviewed Dr. Mandiwala's diagnosis of cor pulmonale. Employer's Exhibit 3 (Dr. Broudy's Deposition at 10-11).

Section 718.204(b)(2)(iv)

Employer further contends that substantial evidence does not support the administrative law judge's finding that the medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the reports of Drs. Hussain, Baker, Broudy, Fino, and Dahhan. Dr. Hussain diagnosed a severe impairment. Director's Exhibit 73. Dr. Baker diagnosed a Class II impairment. Director's Exhibits 74, 76. Dr. Baker also opined that claimant was 100% occupationally disabled for work in the coal mining industry or other similar dusty occupations because persons who develop pneumoconiosis should limit further exposure to the offending agent. *Id*. Dr. Broudy opined that claimant retained the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor because claimant has a marked restriction of ventilatory capacity due to his morbid obesity. Employer's Exhibits 1-3. Dr. Fino opined that claimant has a respiratory impairment due to smoking and obesity. Employer's Exhibits 4, 5. Although Dr. Dahhan diagnosed a mild ventilatory impairment caused by obesity and cigarette induced bronchitis, Dr. Dahhan opined that claimant has no pulmonary disability based on the clinical and physiological parameters of his respiratory system. Director's Exhibit 79.

The administrative law judge gave less weight to Dr. Dahhan's opinion because he found that it was not well-reasoned and well-documented. Decision and Order at 18. The administrative law judge then stated that "[o]f the remaining medical opinion evidence of record, all of the physicians agree that [c]laimant has a severe pulmonary impairment which renders him unable to continue his previous coal mining work or a comparable job." *Id.*

Employer asserts that the administrative law judge's consideration of the medical opinion evidence favorable to claimant was inconsistent with his consideration of the medical opinion evidence favorable to employer. Employer maintains that Dr. Dahhan's opinion was better supported and better explained than the opinions of Drs. Hussain and Baker. In finding that Dr. Dahhan's opinion was not well-reasoned and well-documented, the administrative law judge stated that "[Dr. Dahhan] provided no explanation for his findings and I accord his opinion less weight." Decision and Order at 18. However, as employer argues, the administrative law judge did not consider whether the opinions of Drs. Hussain, Baker, Broudy, and Fino were well-reasoned and well-documented. Because the administrative law judge's consideration of Dr. Dahhan's opinion was inconsistent with his consideration of the opinions of Drs. Hussain, Baker, Broudy, and Fino, we vacate the administrative law judge's finding that the medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration of the evidence thereunder. *Hughes v. Clinchfield Coal Co*., 21 BLR 1-134, 1-139-40 (1999)(*en banc*).

Employer's assertion, that substantial evidence does not support the administrative law judge's finding that all of the physicians other than Dr. Dahhan agree that claimant has a severe pulmonary impairment that renders him unable to continue his previous coal mining work or a comparable job, has merit. The administrative law judge acknowledged that Dr. Dahhan opined that claimant does not have a pulmonary disability. However, as noted above, the administrative law judge stated that "[o]f the remaining medical opinion evidence of record, all of the physicians agree that [c]laimant has a severe pulmonary impairment which renders him unable to continue his previous coal mining work or a comparable job." Decision and Order at 18. Contrary to the administrative law judge's finding, Drs. Hussain and Baker did not opine that claimant has a severe pulmonary impairment that renders him unable to continue his previous coal mining work or a comparable job. *Tackett*, 7 BLR at 1-706. Further, the administrative law judge did not compare the exertional requirements of claimant's usual coal mine work with Dr. Hussain's opinion that claimant has a severe impairment and Dr. Baker's opinion that claimant has a Class II impairment, in determining whether the evidence establishes a totally disabling pulmonary or respiratory impairment. Director's Exhibits 73, 74, 76; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). In addition, because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), Dr. Baker's other opinion, that claimant was 100% occupationally disabled for work in the coal mining industry or other similar dusty occupations because persons who develop pneumoconiosis should limit further exposure to the offending agent, does not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Thus, the administrative law judge mischaracterized the opinions of Drs. Hussain and Baker by finding that they agreed that claimant's severe pulmonary impairment rendered him unable to continue his previous coal mining work or a comparable job. *Tackett*, 7 BLR at 1-706.

Employer further argues that because Drs. Broudy and Fino attributed claimant's disability to obesity, their opinions cannot satisfy claimant's burden of proof to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Dr. Broudy opined that claimant does not retain the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor because claimant has a marked restriction of ventilatory capacity due to his morbid obesity. Employer's Exhibits 1-3. Similarly, Dr. Fino opined that claimant has a disabling respiratory impairment due to smoking and obesity. Employer's Exhibits 4, 5. Thus, because Drs. Broudy and Fino opined that claimant has a disabling respiratory impairment, we reject employer's assertion that the opinions of Drs. Broudy and Fino cannot satisfy claimant's burden of proof to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991).

If reached, on remand, the administrative law judge must weigh together *all* of the contrary probative evidence of disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), like and unlike, to determine whether the evidence establishes total disability at 20 C.F.R. §718.204(b). *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), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

TOTAL DISABILITY DUE TO PNEUMOCONIOSIS
Section 718.204(c)

Employer additionally contends that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge considered the reports of Drs. Hussain, Baker, Dahhan, Broudy, and Fino. Dr. Hussain opined that pneumoconiosis contributed to claimant's impairment. Director's Exhibit 73. Dr. Baker opined that claimant's pulmonary impairment was caused by coal dust exposure. Director's Exhibits 74, 76. By contrast, Dr. Dahhan opined that claimant does not have a disabling pulmonary impairment caused by, contributed to, or aggravated by the inhalation of coal mine dust. Director's Exhibit 79. Dr. Broudy opined that claimant does not have a disabling respiratory impairment arising from coal dust exposure. Employer's Exhibits 1-3. Dr. Fino opined that coal dust exposure did not contribute to claimant's disabling respiratory impairment. Employer's Exhibits 4, 5.

The administrative law judge gave little weight to the opinions of Drs. Dahhan, Broudy, and Fino because he found that they did not explain how coal dust exposure was ruled out as a contributing factor to claimant's pulmonary impairment. Decision and Order at 18. The administrative law judge also found that the opinions of Drs. Dahhan, Broudy, and Fino were compromised by inconsistency. *Id*. In addition, the administrative law judge gave great weight to the opinions of Drs. Hussain and Baker because he found that they were well-reasoned and well-documented. *Id*. Consequently, the administrative law judge found that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

In view of our decision to vacate the administrative law judge's findings that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(b), we also vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and remand the case for further consideration of the evidence thereunder, if reached. Nonetheless, for the sake of judicial economy, we address employer's specific assertions regarding the administrative law judge's findings at 20 C.F.R. §718.204(c).

Drs. Dahhan, Broudy, and Fino

Employer argues that because the administrative law judge required Drs. Dahhan, Broudy, and Fino to rule out coal dust exposure as a factor contributing to claimant's pulmonary impairment, the administrative law judge shifted the burden of proof to employer. The administrative law judge initially stated that Section 718.204 places the burden on claimant to establish total disability due to pneumoconiosis. Decision and Order at 18. The administrative law judge then stated:

> Drs. Dahhan, Broudy, and Fino opined that [c]laimant's disability was due to his smoking history and morbid obesity. I find that their opinions fail to explain how they can completely rule out coal dust exposure as a contributing factor to the [c]laimant's pulmonary impairment when the [c]laimant had a coal mine employment history of at least sixteen years.

Id.

Contrary to the administrative law judge's finding, the "rule out" standard does not apply to Section 718.204(c). *Hutson v. Freeman United Coal Mining*, 12 BLR 1-72 (1988) (*en banc*). Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if his evidence does not establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Thus, to the extent that the administrative law judge required employer's medical experts to rule out coal dust exposure as a contributing factor to claimant's pulmonary impairment, we hold that the administrative law judge erroneously shifted the burden of proof to employer.

Employer also argues that substantial evidence does not support the administrative law judge's finding that the opinions of Drs. Dahhan, Broudy, and Fino were inconsistent. The administrative law judge found that the disability causation opinions of Drs. Dahhan, Broudy, and Fino were compromised by inconsistencies in their opinions. The administrative law judge specifically stated:

> Drs. Dahhan, Broudy, and Fino opined that [c]laimant's disability was due to his smoking history and morbid obesity. I find that their opinions fail to explain how they can completely rule out coal dust exposure as a contributing factor to the [c]laimant's pulmonary impairment when the [c]laimant had a coal mine employment history of at least sixteen years. A persuasive and reasoned explanation is not given as to why the [c]laimant's sixteen years of coal mine employment with significant exposure to coal mine dust, did not contribute significantly to his disability. I find that their

> opinions are not entirely consistent, given their acknowledgement of [c]laimant's impairment and the fact that his coal mine employment could be of sufficient duration to cause pneumoconiosis. Their opinions are compromised by inconsistency and therefore have little probative value.

Decision and Order at 18.

Contrary to the administrative law judge's finding, Dr. Dahhan did not expressly acknowledge that claimant's coal mine employment could be of sufficient duration to cause pneumoconiosis. Director's Exhibit 79. Further, although Drs. Broudy and Fino acknowledged that the duration of claimant's coal dust exposure was sufficient to cause a susceptible individual to develop coal workers' pneumoconiosis, they opined that claimant does not have pneumoconiosis. Employer's Exhibit 3 (Dr. Broudy's Deposition at 8, 10, 14); Employer's Exhibit 5 (Dr. Fino's Deposition at 10, 14). Thus, because the administrative law judge did not adequately explain why he believed that the opinions of Drs. Dahhan, Broudy, and Fino were compromised and inconsistent, *Rowe*, 710 F.2d at 254, 5 BLR at 2-103; *Wojtowicz*, 12 BLR at 1-165, we hold that the administrative law judge erred in failing to provide a valid basis for giving little weight to the disability causation opinions of Drs. Dahhan, Broudy, and Fino.

Drs. Hussain and Baker

Employer additionally argues that substantial evidence does not support the administrative law judge's finding that the disability causation opinions of Drs. Hussain and Baker were entitled to great weight. Dr. Hussain diagnosed "70% pneumoconiosis" as the extent that pneumoconiosis contributes to claimant's impairment. Director's Exhibit 73. Dr. Baker opined that "[i]t is thought that any pulmonary impairment is caused at least in part by coal dust exposure." Director's Exhibits 74, 76. The administrative law judge found that the disability causation opinions of Drs. Hussain and Baker were well-reasoned and well-documented. The administrative law judge further stated, "I find their reasoning to be credible and highly persuasive." Decision and Order at 18. However, as noted above, the APA requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz*, 12 BLR at 1-165. Because the administrative law judge did not adequately explain why he found that the disability causation opinions of Drs. Hussain and Baker were well-reasoned and well-documented, *Rowe*, 710 F.2d at 254, 5 BLR at 2-103; *Wojtowicz*, 12 BLR at 1-165, the administrative law judge erred in failing to provide a valid basis for finding that the disability causation opinions of Drs. Hussain and Baker were entitled to great weight.

On remand, when considering the medical opinion evidence, the administrative law judge should address the comparative credentials of the respective physicians, the

explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

ONSET DATE DETERMINATION

Finally, employer contends that the administrative law judge erred in finding the onset date of disability to be April 1, 1986. Section 725.503 provides that "[w]here the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed." 20 C.F.R. §725.503(b). The administrative law judge stated that "[a]s the evidence does not establish the month of onset, benefits are payable as of April 1, 1986, the month during which the subsequent claim was filed." Decision and Order at 18.

Employer argues that the administrative law judge erred in failing to address medical evidence that established the absence of total disability due to pneumoconiosis prior to the district director's 1988 denial of benefits. Contrary to employer's assertion, the administrative law judge permissibly gave less weight to the older medical evidence that was submitted with the duplicate claim, because he found that "the age difference between the old record evidence and the new record evidence is quite significant and severely compromises the reliability and persuasiveness of the old record evidence." Decision and Order at 5; *see generally Cooley*, 845 F.2d at 624, 11 BLR at 2-149. Moreover, employer fails to point to specific medical evidence that establishes that claimant was not disabled due to pneumoconiosis after April 1, 1986, the date that the administrative law judge ordered benefits to commence. *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989)(holding that where evidence established no disability up to a certain date, an administrative law judge cannot award benefits prior to that date when the precise onset date of disability was unclear from the record). Thus, we reject employer's assertion that the administrative law judge failed to address medical evidence that established the absence of total disability due to pneumoconiosis prior to the district director's 1988 denial of benefits.

Nonetheless, because we vacate the administrative law judge's award of benefits, we also vacate the administrative law judge's determination that the date from which benefits commence was April 1, 1986, and remand the case for further consideration of the evidence thereunder, if reached.

CONCLUSION

In sum, we decline to transfer liability for the payment of benefits to the Trust Fund because the DOL did not deprive employer of a fair opportunity to mount a

meaningful defense. We also reject employer's assertion that the administrative law judge erred in failing to exclude Dr. Hussain's report from the record. Further, we affirm the administrative law judge's findings that the evidence did not establish the existence pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3) and total disability at 20 C.F.R. §718.204(b)(2)(i), (ii). However, we vacate the administrative law judge's findings that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), that the evidence established total disability at 20 C.F.R. §718.204(b)(2)(iii), (iv), and that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). At the outset, however, the administrative law judge must determine whether the new evidence establishes a material change in conditions at 20 C.F.R. §725.309 (2000). If the administrative law judge finds that the new evidence establishes a material change in conditions at 20 C.F.R. §725.309 (2000), then the administrative law judge must consider all the evidence on the merits under 20 C.F.R. Part 718.

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

SO ORDERED.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____

ROY P. SMITH
Administrative Appeals Judge

_____

BETTY JEAN HALL
Administrative Appeals Judge