BRB No. 08-0584 BLA

F.D.W.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JARISA, INCORPORATED	)	
	)	DATE ISSUED: 05/21/2009
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of William S. Colwell, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

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

Sarah M. Hurley (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (05-BLA-6151) of Administrative Law Judge William S. Colwell awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C.

§901 *et seq.* (the Act). This case involves a subsequent claim filed on July 26, 2004.[1] The administrative law judge found that the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2004 claim on the merits. The administrative law judge credited claimant with thirteen and one-quarter years of coal mine employment,[2] and found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). After finding that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). The

[1] Claimant initially filed a claim for benefits on September 21, 1992. Director's Exhibit 1. In a Decision and Order dated September 2, 1994, Administrative Law Judge Bernard J. Gilday, Jr., denied benefits because he found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Director's Exhibit 1. Pursuant to claimant's appeals, the Board and the United States Court of Appeals for the Sixth Circuit affirmed Judge Gilday's denial of benefits. [*F.D.W.*] *v. Jarisa, Inc.*, BRB No. 95-0111 BLA (July 26, 1995)(unpub.); [*F.D.W.*] *v. Jarisa, Inc.*, No. 95-4036 (6th Cir. Oct. 4, 1996)(unpub.). There is no indication that claimant took any further action in regard to his 1992 claim.

Claimant filed a second claim on May 14, 1999. Director's Exhibit 1. In a Decision and Order dated March 15, 2002, Administrative Law Judge Daniel J. Roketenetz found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Judge Roketenetz, therefore, found that claimant failed to establish a material change in conditions. *Id.* Alternatively, Judge Roketenetz found that, although the evidence established that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b), the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* Judge Roketenetz, therefore, denied benefits. *Id.* Pursuant to claimant's appeal, the Board affirmed Judge Roketenetz's finding that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). [*F.D.W.*] *v. Jarisa, Inc.*, BRB No. 02-0542 BLA (Apr. 24, 2003)(unpub.). The Board, therefore, affirmed Judge Roketenetz's denial of benefits. *Id.* There is no indication that claimant took any further action in regard to his 1999 claim.

[2] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

administrative law judge further found that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that claimant's 2004 claim was not timely filed. Employer also challenges the administrative law judge's findings pursuant to 20 C.F.R. §§725.309, 718.202(a)(1), (4), and 718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, noting, *inter alia*, his support of the administrative law judge's finding that a change in an applicable condition was established pursuant to 20 C.F.R §725.309(d). Employer has filed separate reply briefs, reasserting its previous contentions of error.[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 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 under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Timeliness of the Claim

Employer initially contends that claimant's 2004 claim was untimely filed. Miners' claims for black lung benefits are presumptively timely filed. 20 C.F.R. §725.308(c). To rebut the timeliness presumption, employer must show that the claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

[3] Because no party challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.203(b) and 718.204(b), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer relies upon *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), wherein the United States Court of Appeals for the Sixth Circuit held that:

> The three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to *Sharondale* [*Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)], the clock may only be turned back if the miner returns to the mines after a denial of benefits . . . . Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.

Kirk, 264 F.3d at 608, 22 BLR at 2-298 (footnote omitted).

Employer argues that Dr. Baker's medical reports and deposition testimony in the two prior denied claims constitute repeated medical determinations of total disability due to pneumoconiosis. Employer's Brief at 11-12. Employer, therefore, contends that the administrative law judge erred in failing to consider whether this evidence triggered the three-year statute of limitations.

Employer's reliance upon *Kirk* is now misplaced. Subsequent to the issuance of the administrative law judge's Decision and Order, the Sixth Circuit held that a medical determination of total disability due to pneumoconiosis does not begin the running of the three-year time limit for filing a claim if it was discredited, or found to be outweighed by contrary evidence in a prior adjudication. *Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, --- BLR --- (6th Cir. 2009). In the adjudication of claimant's two prior claims, the administrative law judges found that Dr. Baker's diagnoses of pneumoconiosis were not reasoned or were otherwise not sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Director's Exhibit 1. Consequently, Dr. Baker's previously considered and rejected medical reports could not trigger the running of the three-year time limit for filing this claim. *Hatfield*, 556 F.3d at 483. We, therefore, reject employer's contention that claimant's 2004 claim was untimely filed.[4] 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

[4] In this case, the administrative law judge did not explicitly address the issue of the timeliness of claimant's 2004 claim. However, because the only evidence relied upon by employer cannot commence the running of the three-year time limit as a matter of law,

Section 725.309

Employer next contends that the administrative law judge failed to properly apply the requirements of 20 C.F.R. §725.309. Citing *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), employer argues that the administrative law judge erred in not comparing the evidence in the prior claim to the new evidence in the subsequent claim to ensure that the new evidence differed qualitatively. The Sixth Circuit precedent relied on by employer construed the prior version of Section 725.309, while the current claim was filed after the effective date of the amendments to this regulation. Under the revised version of Section 725.309, claimant no longer has the burden of proving a "material change in conditions;" rather, claimant must show that one of the applicable conditions of entitlement has changed since the prior denial by submitting new evidence developed in connection with the current claim that establishes an element of entitlement upon which the prior denial was based.[5] *See* 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Consequently, we reject employer's contention that the administrative law judge was required to conduct a qualitative comparison of the old and new evidence pursuant to 20 C.F.R. §725.309.

Claimant's prior claim was denied because he did not establish that he suffered from pneumoconiosis. Director's Exhibit 4. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he suffers from pneumoconiosis. 20 C.F.R. §725.309(d).

Section 718.202(a)(1)

Employer argues that the administrative law judge erred in finding that the new x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The new x-ray evidence consists of eight interpretations of four x-rays taken on March 2, 2004, September 2, 2004, October 18, 2004, and November 5, 2004. In considering the new x-ray evidence, the administrative law judge properly noted that physicians who are B readers and/or Board-certified radiologists are better qualified to render x-ray interpretations. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 15. The administrative law judge also properly noted that

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there is no reason to remand this case for the administrative law judge to address this issue.

[5] In amending 20 C.F.R. §725.309, the Department of Labor adopted the standard set forth in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), which does not require a qualitative comparison of the old and new evidence.

greater weight could be accorded to the x-ray interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 16.

Dr. Alexander, a B reader and Board-certified radiologist, interpreted the March 2, 2004 x-ray as positive for pneumoconiosis. Claimant's Exhibit 2. Because there are no other interpretations of this x-ray, the administrative law judge properly found that the March 2, 2004 x-ray was positive for pneumoconiosis. Decision and Order at 16.

Although Dr. Alexander, a B reader and Board-certified radiologist, interpreted the September 2, 2004 x-ray as positive for pneumoconiosis, Claimant's Exhibit 4, Dr. Poulos, an equally qualified physician, interpreted this x-ray as negative for the disease.[6] Employer's Exhibit 4. The administrative law judge, however, noted that Dr. Baker, a B reader, also interpreted the x-ray as positive for pneumoconiosis. Decision and Order at 16; Director's Exhibit 12. Because a preponderance of the physicians qualified as B readers and/or Board-certified radiologists interpreted the September 2, 2004 x-ray as positive for pneumoconiosis, the administrative law judge permissibly found that the x-ray was positive for pneumoconiosis. *Roberts*, 8 BLR at 1-213; Decision and Order at 16.

While Dr. Dahhan, a B reader, interpreted the October 18, 2004 x-ray as negative for pneumoconiosis, Employer's Exhibit 1, and Dr. Fino, a B reader, interpreted the November 5, 2004 x-ray as negative for pneumoconiosis, Employer's Exhibit 2, Dr. Alexander, a dually qualified radiologist, interpreted each of these x-rays as positive for pneumoconiosis. Director's Exhibit 17; Claimant's Exhibit 3. The administrative law judge acted within his discretion in crediting Dr. Alexander's positive interpretations of these x-rays based upon his superior qualifications. 20 C.F.R. §718.202(a)(1); *see Sheckler*, 7 BLR at 1-131; Decision and Order at 16. The administrative law judge, therefore, permissibly found that the October 18, 2004 and November 5, 2004 x-rays were positive for pneumoconiosis. *Id.*

The administrative law judge, therefore, found that all four of the new x-rays were positive for pneumoconiosis. In addition, the administrative law judge accurately noted that four of the five interpretations of these x-rays rendered by dually-qualified physicians were positive for pneumoconiosis. Decision and Order at 16.

Employer contends that the administrative law judge improperly relied on a "head count" to weigh the conflicting x-ray evidence. Employer's Brief at 15. We disagree. In

[6] Dr. Barrett, a B reader and Board-certified radiologist, interpreted the September 2, 2004 for quality purposes only. Director's Exhibit 13.

this case, the administrative law judge properly considered the number of x-ray interpretations, along with the readers' qualifications, the dates of the x-rays, and the actual readings. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White*, 23 BLR at 1-4-5; *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). We, therefore, affirm the administrative law judge's finding that the new x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[7]

Section 718.202(a)(4)

Employer also argues that the administrative law judge erred in finding that the new medical opinion evidence established the existence of pneumoconiosis. A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[8] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The new medical evidence consists of medical reports and depositions from Drs. Baker, Dahhan, and Fino. Dr. Baker opined that claimant suffers from both clinical pneumoconiosis, and legal pneumoconiosis, in the form of chronic bronchitis and chronic obstructive pulmonary disease (COPD) attributable to both coal mine dust exposure and cigarette smoking. Director's Exhibit 12; Claimant's Exhibit 1. Drs. Dahhan and Fino opined that claimant has neither clinical pneumoconiosis nor any lung disease attributable to his coal mine dust exposure. Employer's Exhibits 1-3.

The administrative law judge credited Dr. Baker's opinion, that claimant suffers from clinical pneumoconiosis, over the contrary opinions of Drs. Dahhan and Fino, because he found that Dr. Baker's opinion was more consistent with the x-ray evidence.

[7] Section 718.202(a) provides alternative methods by which a claimant may establish the existence of pneumoconiosis. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). Consequently, the administrative law judge's finding that the new x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) was sufficient alone to establish that one of the applicable conditions of entitlement has changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309(d). Nevertheless, the administrative law judge chose to consider whether the new medical opinion evidence also established pneumoconiosis. Accordingly, we will review those findings.

[8] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

Decision and Order at 18-19. The administrative law judge also credited Dr. Baker's opinion, that claimant suffers from legal pneumoconiosis, over the contrary opinions of Drs. Dahhan and Fino, because he found that Dr. Baker's opinion was better reasoned. *Id.* The administrative law judge, therefore, found that the evidence established the existence of both clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer contends that, because the administrative law judge erred in finding that the new x-ray evidence established the existence of pneumoconiosis, his finding pursuant to 20 C.F.R. §718.202(a)(4) must be vacated. However, in light of our affirmance of the administrative law judge's finding that the new x-ray evidence established the existence of pneumoconiosis, we reject employer's sole contention of error. Consequently, the administrative law judge's finding that the new medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is affirmed.

Employer does not raise any contention of error regarding the administrative law judge's finding that the new medical opinion evidence that was found to be better reasoned, namely, Dr. Baker's opinion, also established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Because it is not challenged on appeal, we affirm the administrative law judge's finding that the new medical opinion evidence established the existence of legal pneumoconiosis, in the form of chronic bronchitis and COPD attributable to coal mine dust exposure and cigarette smoking. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In light of our affirmance of the administrative law judge's findings that the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. 718.202(a)(1), (4), we affirm the administrative law judge's finding that one of the applicable conditions of entitlement has changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309.

The Merits of the Claim

The Existence of Pneumoconiosis

Employer argues that the administrative law judge, in considering the merits of the claim, erred in not considering the previously submitted x-ray evidence.[9] Employer's

[9] Employer notes that numerous negative x-ray interpretations were submitted in connection with the prior claim. Specifically, employer notes that four dually-qualified physicians rendered negative interpretations of the June 1, 1999 x-ray; two dually qualified physicians rendered negative interpretations of the September 1, 1999 x-ray;

Brief at 16. Contrary to employer's contention, the administrative law judge addressed the previously submitted x-ray evidence and permissibly found that it was outweighed by the more recent, positive x-ray evidence.[10] *See Woodward v. Director, OWCP*, 991 F.2d 314, 319, 17 BLR 2-77, 2-84 (6th Cir. 1993). Consequently, the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed.

We also reject employer's contention that the administrative law judge erred in not considering the previously submitted medical opinion evidence. The administrative law judge reasonably relied upon the more recent medical opinions since they more accurately reflect claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Consequently, we affirm the administrative law judge's finding that the medical opinion evidence established the existence of clinical pneumoconiosis and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Total Disability Due to Pneumoconiosis

Employer next argues that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[11] In considering whether the medical opinion evidence

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and two dually qualified physicians rendered negative interpretations of the March 14, 2000 x-ray. *See* Director's Exhibit 1.

[10] Moreover, employer has not explained how the negative interpretations of claimant's 1999 and 2000 x-rays call into question the positive x-rays taken on March 2, 2004, September 2, 2004, October 18, 2004, and November 5, 2004. Because pneumoconiosis is recognized as a latent and progressive disease, the courts have recognized that earlier, negative x-ray evidence for pneumoconiosis does not detract from the probative value of later, positive x-ray evidence. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319, 17 BLR 2-77, 2-84 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

[11] Revised Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

established that claimant's total disability is due to pneumoconiosis, the administrative law judge initially addressed the previously submitted medical opinion evidence. The administrative law judge accorded less weight to the earlier opinions of Drs. Dahhan, Fino, Broudy, Anderson, Kraman, Rosenberg, and Repsher because the physicians did not diagnose either clinical or legal pneumoconiosis. Decision and Order at 23. Regarding the new medical opinion evidence, the administrative law judge accorded less weight to the opinions of Drs. Dahhan and Fino because they "did not adequately explain why they believed that coal dust exposure did not contribute to [c]laimant's impairment." *Id.* The administrative law judge accorded the greatest weight to Dr. Baker's opinion, that claimant's total disability is due to both pneumoconiosis and smoking, because he found that it was "the most logical in light of [c]laimant's combined smoking and coal mine dust exposure histories." *Id.* The administrative law judge, therefore, found that the medical opinion evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Employer argues that the administrative law judge erred in finding that Dr. Baker's opinion supports a finding of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer specifically contends that Dr. Baker's opinion is too equivocal to support a finding that claimant's coal mine dust exposure was a substantially contributing cause of his disability. Employer notes that Dr. Baker, in responding to a hypothetical question asked during his deposition, stated that if claimant had only a twelve year history of coal mine employment, the contribution of his coal mine dust exposure to his impairment would be "20%, maybe." Claimant's Exhibit 1 at 12. Employer, however, neglects to note that Dr. Baker also characterized such a 20% contribution as "significant." *Id.* Therefore, the administrative law judge did not err in regarding Dr. Baker's opinion as an unequivocal diagnosis of total disability due to pneumoconiosis. *See* 20 C.F.R. §718.204(c).

Employer also contends that the administrative law judge erred in his consideration of the opinions of Drs. Dahhan and Fino. Employer notes that these physicians' opinions do not support a finding that claimant's total disability is due to legal pneumoconiosis, because each of these physicians attributed claimant's COPD exclusively to cigarette smoking. The administrative law judge, however, previously

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> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
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> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

found, based upon his weighing of the conflicting medical opinion evidence, that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge specifically found that Dr. Baker's opinion, that claimant's disabling COPD is attributable to both coal mine dust exposure and cigarette smoking, was the "most logical" and, therefore, he credited Dr. Baker's opinion over the contrary opinions of Drs. Dahhan and Fino. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). As previously discussed, employer does not challenge the administrative law judge's finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Consequently, the administrative law judge's finding that the evidence established that claimant's total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c) is affirmed.

Moreover, the administrative law judge credited Dr. Baker's opinion that claimant's clinical pneumoconiosis substantially contributes to his total disability. Dr. Baker opined that claimant's clinical pneumoconiosis contributes fully to his total disability, and has a "material adverse effect" on his pulmonary condition. Director's Exhibit 12 at 10, 14; *see* 20 C.F.R. §718.204(c)(1)(i); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). Employer does not challenge the administrative law judge's reliance upon Dr. Baker's opinion that clinical pneumoconiosis substantially contributes to claimant's total disability. We, therefore, affirm the administrative law judge's finding that the evidence establishes that claimant's total disability is also due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge