BRB Nos. 98-1177 BLA and
98-1177 BLA-A

LAWRENCE B. COPLEY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ARCH OF WEST VIRGINIA/	)	DATE ISSUED:
APOGEE COAL COMPANY	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Lawrence B. Copley, Accoville, Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (97-BLA-1389) of Administrative Law Judge Paul H. Teitler on a duplicate claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

[1] Claimant, Lawrence B. Copley, has filed three prior applications for benefits on April 3, 1989, September 2, 1993, and March 13, 1995, all of which were denied and not pursued by claimant. Director's Exhibits 28-30. Claimant's most recent application, filed on August 20, 1996, is the subject of the case *sub judice*. Director's Exhibit 1.

Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Employer cross-appeals the administrative law judge's Decision and Order - Denial of Benefits. The administrative law judge adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718[2] and credited employer's stipulation that claimant established thirty-four years of qualifying coal mine employment. Next, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). Further, without addressing whether the existence of pneumoconiosis was established by medical opinion evidence at 20 C.F.R. §718.202(a)(4), he found that the presumption that pneumoconiosis arose out of coal mine employment set forth at 20 C.F.R. §718.203(b) was not rebutted. Finally, the administrative law judge determined that claimant demonstrated total disability pursuant to 20 C.F.R. §718.204(c)(2) and (c)(4), but failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds to this *pro se* appeal, urging affirmance of the denial. On cross-appeal, employer challenges the administrative law judge's weighing of the medical opinion evidence under 20 C.F.R. §718.204(c)(4) and the administrative law judge's failure to weigh the contrary, probative evidence of total disability under 20 C.F.R. §718.204(c). The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating he will not participate in either appeal.[3]

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[2] Recognizing that this is claimant's fourth application for benefits, the administrative law judge stated, "Since this claim is being considered *de novo*, there is no need to apply [20 C.F.R.] Section 725.309." Decision and Order at 3 n.2.

[3] While we affirm the administrative law judge's finding that the arterial blood gas study evidence is sufficient to demonstrate total disability pursuant to Section 718.204(c)(2) since the most recent blood gas studies are qualifying and four out of the five blood gas

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

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studies of record conducted are qualifying, *see Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 11; Employer's Brief at 7, the administrative law judge must, as employer contends, weigh this evidence against any contrary, probative evidence before making a final determination at Section 718.204(c), *see* discussion, *infra*.

Relevant to Section 718.202(a)(1), the x-ray evidence consists of thirty-seven interpretations of nine x-ray films dating from 1969 to 1997. The interpretations consist of twelve positive readings, twenty-four negative readings and one film found unreadable. Director's Exhibits 13-15, 24, 26, 28-30; Claimant's Exhibit 1; Employer's Exhibits 1, 2, 4, 5, 7-9, 11. All of the positive readings were rendered by physicians who are either Board-certified radiologists or B-readers whereas all of the negative readings were rendered by physicians who are both Board-certified radiologists and B-readers. The administrative law judge erroneously stated that there are "twentythree [sic] negative readings"when the record contains twenty-four and, also incorrectly found that Dr. Spitz read the April 21, 1989 x-ray film as negative when he actually found this film unreadable. Decision and Order at 7, 5 respectively; Employer's Exhibit 8. Nevertheless, we deem these errors harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), because the administrative law judge properly accorded greater weight to the negative x-ray interpretations of the dually-qualified physicians who have superior radiological expertise than the physicians who provided the positive readings. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Therefore, we affirm the administrative law judge's Section 718.202(a)(1) finding because he permissibly found that the probative x-ray evidence is negative for the existence of pneumoconiosis.[4]

[4] The administrative law judge stated, "I credit the higher credentialed physicians whose negative readings have *numerical superiority*." Decision and Order at 7 [emphasis added]. The principle of according greater weight to the "numerical superiority" of given x-ray evidence has been overruled by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). We, nevertheless, affirm the administrative law judge's Section 718.202(a)(1) determination inasmuch as he provided a valid, alternative reason (that these readings were rendered by physicians with superior radiological expertise) for giving the negative x-ray evidence determinative weight. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 n.5 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-

382 n.4 (1983).

Relevant to Section 718.202(a)(2), the administrative law judge properly determined that the existence of pneumoconiosis was not established inasmuch as the record does not contain any biopsy evidence, *see* 20 C.F.R. §718.202 (a)(2), this is a living miner's claim filed after January 1, 1982, and the record is devoid of evidence demonstrating the existence of complicated pneumoconiosis, *see* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305 and 718.306. Decision and Order at 7. A review of the record reveals that there is one CT scan report of claimant's chest, which Dr. Wheeler, a Board-certified radiologist and B-reader, interpreted as illustrating no evidence of silicosis or coal workers' pneumoconiosis. Director's Exhibit 24. Notwithstanding the administrative law judge's consideration of this evidence under Section 718.202(a)(1), he correctly found that it was negative for the existence of pneumoconiosis. *See* 20 C.F.R. §718.304(c); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); Decision and Order at 7. Accordingly, we affirm the administrative law judge's findings that pneumoconiosis is not established pursuant to Sections 718.202(a)(2) and (a)(3).

Relevant to Section 718.202(a)(4) are the opinions of five physicians and the West Virginia Occupational Pneumoconiosis Board. In 1973, the West Virginia Occupational Pneumoconiosis Board found that claimant suffered from advanced occupational pneumoconiosis. Director's Exhibit 30. Dr. Ranavaya conducted four pulmonary evaluations of claimant on behalf of the Department of Labor and, on each occasion, diagnosed pneumoconiosis. Director's Exhibits 12, 28, 29, 30. Dr. Crisalli examined claimant and, although he found evidence of chronic obstructive pulmonary disease, he found that pneumoconiosis is not present. Employer's Exhibits 3, 6, 10. After reviewing relevant medical records, Drs. Fino, Castle, and Jarboe each opined that there is insufficient evidence to diagnose coal workers' pneumoconiosis. Employer's Exhibit 8. The administrative law judge did not make a specific Section 718.202(a)(4) determination. Instead, the administrative law judge stated, "Since physicians have read x-rays as positive for pneumoconiosis and the West Virginia Workers' Compensation Board expressed an opinion that [claimant] has pneumoconiosis, I will defer a discussion of the medical opinion evidence to the question of total disability due to pneumoconiosis." Decision and Order at 8. This was error. Because the existence of pneumoconiosis is a requisite element of entitlement to benefits for cases adjudicated under Part 718, *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), this issue is germane in determining whether a miner's total disability is due to pneumoconiosis. Section 718.202(a) enumerates four distinct methods of establishing the existence of pneumoconiosis, including *inter alia*, x-ray, biopsy, autopsy, or medical opinion evidence. Specifically, Section 718.202(a)(4) provides, in pertinent part, "A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in [Section] 718.201." Section 718.202(a)(4) recognizes a type of disease process separate and distinct from that demonstrated by x-ray, biopsy, and autopsy

evidence. Inasmuch as the administrative law judge is required to review all medical evidence presented in determining the existence of pneumoconiosis, *see Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-9 (3d Cir. 1986), we remand the case for the administrative law judge to determine whether the medical opinion evidence is sufficient to establish pneumoconiosis at Section 718.202(a)(4).

We, likewise, vacate the administrative law judge's Section 718.203(b) determination inasmuch as the existence of pneumoconiosis is a prerequisite to the determination that it arose out of coal mine employment. *See* 20 C.F.R. §718.203(b).

We next address the administrative law judge's analyses under Sections 718.204(c)(1), (3), and (4). Relevant to Section 718.204(c)(1), there are six pulmonary function studies of record, consisting of four non-qualifying and two qualifying studies. Director's Exhibits 11, 28-30; Employer's Exhibit 3. The pulmonary function study conducted on April 21, 1989 yielded qualifying values and was validated by Dr. Zaldivar on June 11, 1989. Director's Exhibit 30. The other qualifying study was conducted on September 13, 1996 and was invalidated by its administering physician, Dr. Ranavaya. Director's Exhibit 11. After examining each pulmonary function study and determining that both qualifying tests were invalidated, the administrative law judge, within a proper exercise of discretion, discounted the invalidated, qualifying pulmonary function studies. *See Winchester v. Director, OWCP*, 9 BLR 1-177, 1-178 (1986); Decision and Order at 10. Inasmuch as the administrative law judge's Section 718.204(c)(1) determination is rational and supported by substantial evidence, we affirm this determination. Similarly, we affirm the administrative law judge's finding that total disability was not demonstrated under Section 718.204(c)(3) inasmuch as the record is devoid of evidence indicating that claimant suffers from cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(c)(3); Decision and Order at 11.

With respect to Section 718.204(b),[5] the relevant medical opinion evidence consists of the opinions of Drs. Ranavaya, Crisalli, Jarboe, Castle, and Fino. Dr. Ranavaya opined that claimant's totally disabling pulmonary impairment is, "to a major extent," due to pneumoconiosis. Director's Exhibits 12, 28-30. Taking a contrary view, Drs. Crisalli, Jarboe, and Castle concluded that claimant's pulmonary disability is due to his cigarette smoking history. Employer's Exhibits 3, 6, 8, 10. Dr. Fino opined that claimant does not have any respiratory disability. Employer's Exhibit 8. We hold that the administrative law judge erroneously discredited Dr. Ranavaya's opinion because Dr. Ranavaya relied upon,

[5] Because the gravamen of employer's appeal involves employer's challenge of the administrative law judge's Section 718.204(c) determination, we will defer discussion of this issue to our disposition of employer's cross-appeal *infra*.

inter alia, single x-ray readings obtained during each of the four examinations he performed and because Dr. Ranavaya did not consider the other x-ray readings of record or the CT scan report. The administrative law judge's finding is contrary to the Board's holding that a physician's report may not be discredited simply because it is based on an x-ray interpretation which the factfinder finds to be outweighed by the other x-ray interpretations of record. *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-47 n.2 (1986); *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *see Adamson v. Director, OWCP*, 7 BLR 1-229, 1-232 (1984) (knowledge of miner's work history, physical examination, and x-ray are sufficient to render medical report documented); Decision and Order at 15. Consequently, we vacate the administrative law judge's rejection of Dr. Ranavaya's opinion and his finding under Section 718.204(b).

With respect to employer's cross-appeal, employer initially contests the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.204(c)(4). Employer asserts that the administrative law judge's assessment of the opinions of Drs. Crisalli, Jarboe and Castle is inaccurate because, while these physicians opined that claimant has some pulmonary impairment, they did not find claimant totally disabled. In this regard, employer contends that the administrative law judge erroneously failed to compare the exertional requirements of claimant's usual coal mine work with each physician's disability assessment.[6] We agree. The administrative law judge summarized each physician's opinion and found the opinions of Drs. Crisalli, Jarboe, Castle, and Ranavaya, that claimant has a moderate pulmonary impairment, sufficient to demonstrate total disability. Decision and Order at 11-15. However, the administrative law judge failed to compare the exertional requirements of claimant's usual coal mine employment as a rock truck driver[7] with each

[6] Dr. Ranavaya found claimant totally disabled whereas Dr. Fino opined that claimant has a mild respiratory impairment that is neither partially nor totally disabling. Director's Exhibits 12, 28-30; Employer's Exhibit 8. Dr. Castle stated, "it is my opinion that [claimant] is probably disabled from performing his usual coal mining employment duties." Employer's Exhibit 8. Drs. Crisalli and Jarboe opined that claimant's moderate respiratory impairment would preclude heavy manual labor, however, claimant is capable of light work. Employer's Exhibits 3, 6, 8, 10.

[7] At the formal hearing, claimant testified that he drove a 250-ton electric truck hauling rock all day. The administrative law judge asked claimant whether the type of truck he drove was called a "euk," to which claimant replied, "...they're like euk's, almost the same truck, but this was an electric truck." Hearing Transcript at 10. When asked what were his other duties in addition to running the truck, claimant answered, "...They -- you know, sometimes you done different things." Hearing Transcript at 10-11.

If, on remand, the administrative law judge is unable to determine the exertional

physician's assessment of claimant's working capability. *See 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); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469, 1-471 (1984); *see also Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). Because the ultimate finding of disability is a legal determination to be made by the administrative law judge through consideration of the exertional requirements of claimant's usual coal mine work in conjunction with a physician's assessment regarding claimant's physical abilities, we vacate the administrative law judge's Section 718.204(c)(4) determination. *Ibid*; *see Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243, 19 BLR 2-1, 2-5-6 (4th Cir. 1994).

Citing *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), employer contends that the administrative law judge must consider the physicians' medical qualifications on remand when evaluating the credibility of the medical opinions under total disability. Employer's contention has merit. The United States Court of Appeals for the Fourth Circuit recently reiterated its well established holding that "experts' respective qualifications are important indicators of the reliability of their opinions." *Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *accord Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1998). Therefore, on remand, the administrative law judge should consider the respective qualifications and medical expertise of each physician when assessing the weight to accord that opinion. However, we reject employer's arguments that Dr. Ranavaya's opinion must be rejected as cursory and unexplained and that Dr. Fino's opinion must be accepted as fully explained inasmuch as the Board has consistently held that it is within the administrative law judge's discretion to determine whether a physician's report is cursory or unexplained, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-148 (1984), and, the administrative law judge is not required to accept the opinion of any particular medical expert but must weigh all the evidence and draw his own conclusions, *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190

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requirements of the miner's usual coal mine employment after examining the record and hearing transcript, the administrative law judge may take judicial notice of the *Dictionary of Occupational Titles*, provided that the administrative law judge does so in accord with principles concerning taking judicial notice. *See Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989).

(1989); Decision and Order at 13.

Finally, employer generally avers that the administrative law judge is required to weigh all contrary, probative evidence under Section 718.204(c) in determining whether total disability is demonstrated. Employer is correct. Pursuant to Section 718.204(c), the administrative law judge must consider all of the evidence of record and determine whether the record contains "contrary, probative evidence." If so, the administrative law judge must assign this evidence appropriate weight and determine whether it outweighs the evidence supportive of a finding of total respiratory disability. *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*). Although the administrative law judge rendered findings under Section 718.204(c)(1)-(4), he failed to consider all of the relevant evidence of record and weigh the contrary, probative evidence to determine whether claimant established total disability by a preponderance of the evidence under Section 718.204(c). Consequently, we remand the case for the administrative law judge to make a Section 718.204(c) finding in accordance with *Fields*, *supra*

On remand, the administrative law judge is instructed to render findings under Section 718.202(a)(4). If the administrative law judge finds the evidence of record sufficient to establish the existence of pneumoconiosis, he must then reconsider his findings under Sections 718.203(b), 718.204(c), and if reached, Section 718.204(b).

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge